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NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

Commercial and Federal Litigation Section Spring Meeting

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NYSBA

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A Message from the Outgoing Chair

Looking back on my past year as Chair of the Commercial and Federal Litigation Section, I feel both pride and satisfaction. The Section's activities had impact across the entire State of New York and its influence with the judiciary continues to increase. The Section provided extraordinary opportunities for our membership at continuing legal education programs, annual meetings and social events.

The success of any Section Chair depends entirely on the support he or she receives from the Section's officers and committee chairs. I have been privileged to work with a first-rate team, including Vincent Syracuse, Jonathan Lupkin, Susan Davies and Deborah Kaplan. The Section's Executive Committee and committee chairs were the drivers of many of our proudest accomplishments and influential reports. I thank all of them for their efforts. On a personal note, I must also thank former Section Chair, Lesley Friedman Rosenthal, for her encouragement many years ago to increase my participation in the Section and provide leadership for a Committee's activities. I did not know that her friendly suggestion would culminate in the opportunities and responsibilities of leadership.

Throughout my year as Section Chair, I have had the constant support and active assistance of our outgoing President, Bernice Leber. As a former Chair of our Section, Bernice was supportive of all our activities, large and small.

My year started during a period of economic optimism and enormous growth among law firms engaged in commercial litigation. It ended with all of us concerned about the damage caused to the legal profession by the end of the economic bubble.

Looking ahead, the biggest challenge for the Section is the changing environment for commercial litigation. Our clients are facing unprecedented economic constraints and they know litigation is often overly expensive and time-consuming. Where possible they have simply stopped initiating litigation and settled disputes only to avoid expenses. If litigation is inevitable, in-house lawyers are negotiating with the largest and smallest firms for aggressive discounts. In most instances, the client wants to emphasize faster and cheaper resolutions of disputes.

Our Section members should be concerned about this new reality. The old model of prolonged litigation and protracted discovery is being discouraged by our clients. Wasteful defense strategies are objected to. Unlimited discovery, particularly in the swamp of e-discovery, is resisted. Indeed, the billable hour, the source of many unintended incentives for outside counsel, is under great pressure too. Some clients simply want to kill hourly billing altogether.

The Section faces unprecedented opportunities to identify new methods for simplifying the process of litigation. Over 95% of all commercial litigations are settled before trial. Yet, our clients sometimes spend a fortune reaching that ultimate compromise. The current economics dictate that this model cannot be sustained. The combination of our members and our friends in the judiciary must create new, innovative procedures to simplify the process, reduce the expense and give our clients fair resolution of their disputes. This is the greatest challenge facing the Section members. We need a practical solution that will serve the needs of our clients.

I look forward to the dynamic leadership of Vincent Syracuse and wish his entire team all the best.

Peter Brown

A Message from the Incoming Chair

I am honored to be writing to you as the twenty-first Chair of the Commercial and Federal Litigation Section. Leadership of the Section is a great challenge and I hope that I will be able to build upon the excellent work of outgoing chair, Peter Brown, who accomplished a great deal during his year of service, and the many former Section Chairs that I have worked with during the fifteen years that I have been associated with the Section.

Our Section is successful because of the many dedicated people who contribute their time and talent to our Section's many activities. We all owe a great deal of gratitude to our outgoing officers who have worked so hard to make this past year one of the most successful in the Section's history. In addition to Peter Brown's many important contributions, Susan Davies kept our organization running smoothly with her outstanding work as Treasurer. With the support of a stellar team of very experienced Section leaders, 2009/2010 is shaping up to be an exceptional year and I look forward to working with each and every one of these accomplished individuals: Jonathan D. Lupkin, Chair-Elect; David H. Tennant, Vice-Chair (who brings us upstate representation); Paul D. Sarkozi, our new Treasurer; and Deborah Kaplan, who will continue as Secretary.

Our goal at the Section is to help connect New York State's leading commercial litigators with one another, as well as with the judges deciding their cases. In order to enhance the administration of justice, we strive to improve the quality of representation of clients and to provide a forum for the further development of law and procedure in the areas of commercial and federal litigation. We have over 30 active Section committees that promote research and discussion on the current issues affecting our practices. These committees produce reports that are the lifeblood of the Section, which allow us to play a crucial role in the development of commercial litigation practice to better serve our clients. We provide the bench and bar with an open, intellectually challenging environment through which changes to procedural and substantive law and court rules can be proposed, vetted and discussed. We also develop and present numerous continuing legal education programs on topics most useful and relevant to our members' practice areas.

Another integral part of the Section's mission is to provide valuable networking opportunities for commercial and federal litigators to develop relationships and share practice experiences with one another, with federal and state judges, and with arbitral, regulatory and administrative officers. Most importantly, active membership in the Section provides an opportunity to be of service to the court system and the administration of justice.

This coming year's biggest challenge is membership. While lawyers tend to lead very busy lives, often juggling the need to bill hours with family and community responsibilities, participation in Bar Association activities is an important element of our practices. I have always felt that my participation in the work of our Section has made me a better lawyer. I hope that you will continue to support the Section and that you will encourage your friends and attorneys at your firms to do so as well.

As part of our efforts to build membership, we plan on continuing an initiative introduced in 2008 when we began the process of partnering with the Young Lawyers Section. Our very successful spring meeting in Cooperstown this past May is an excellent example of our close partnership with the YLS. We began offering subsidies and discounts to those who have been admitted for less than 10 years, as well as two-track CLE programs, which allow newly admitted attorneys to earn CLE credits. Through this continued partnership, it is my hope that we can encourage YLS members to join our committees, attend meetings, and participate in the Section's myriad of activities.

Our Spring meeting attracted lawyers and judges from across the country for an outstanding weekend of eight informative CLE programs, featuring over thirty-five different speakers, as well as nightly social and networking events. The highlight of the weekend was the presentation of the 2009 Robert L. Haig Award for Distinguished Public Service. Chief Judge Jonathan Lippman presented the award to former Chief Judge Judith S. Kaye. The Haig Award is presented annually by the Section to honor a member of the legal profession who has rendered distinguished public service. This award is named in honor of Robert L. Haig, the founder of the Commercial and Federal Litigation Section and our first Section Chair. NYSBA President-Elect-Designee Stephen P. Younger introduced Chief Judge Lippman, who presented the award to Chief Judge Kaye. Because Chief Judge Kaye has been a consistent supporter of the Section and its activities, we were all privileged to honor her at the Spring meeting. Plans are already being made for the 2010 Spring meeting, which will take place at The Sagamore at Lake George on May 21-23, 2010.

The many activities that our Section hosts include our Annual Meeting at the Hilton Hotel on January 27, 2010

which this year features two outstanding MCLE programs. In the first program, former Chief Judge Judith S. Kaye will moderate "Behind The Veil: A Frank Discussion About Our Appellate Courts" and will "interview" Chief Judge Jonathan Lippman and U. S. Circuit Judge Richard Wesley about the workings of our appellate courts. The second program entitled "The Future Ain't What It Used to Be: Finding Opportunity in a Changing Economy" will be led by Prof. Gary Munneke of Pace Law School and includes a distinguished panel that will tackle a tough question: How can lawyers not just survive, but thrive in a changing economy? The panel consists of Harry P. Trueheart, Chairman, Nixon Peabody LLP; Teresa Wynn Roseborough, Senior Litigation Counsel, MetLife; Michael Rakower, Law Office of Michael C. Rakower, P.C.; and Jim Hasset, LegalBizDev. The MCLE programs will be followed by our Section's annual luncheon and the presentation of our Section's Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to Chief Judge Jonathan Lippman by former Chief Judge Kaye. I am also looking forward to the continuation of our various diversity initiatives, including the highly successful Smooth Moves program, which will be in its fourth year in 2010. This year, the program will feature a CLE program followed by a reception and the presentation of the George Bundy Smith Pioneer Award for legal excellence, community commitment and mentoring. The winner of the Section's 2010 Minority Fellowship, which is offered to a minority law student who is enrolled in a law school in the State of New York, will also be announced at the reception. The winner will work during the summer of 2010 in the Chambers of the Honorable Bernard J. Fried, Justice of the Commercial Division of the Supreme Court of the State of New York, New York County.

Another important goal for this year is the promotion of greater upstate representation on our committees and on the Section's Executive Committee. We are trying to attract upstate committee chairs and co-chairs so that we can encourage the participation of upstate lawyers at the officer level.

I look forward to working with all of you during my year as Chair and hope that you will share your thoughts with me and our other Section officers and committee chairs about the Section's activities, or any issue that may be of interest to you that can help us in the fulfillment of our mission. We all want you to get the most out of your Section membership and will do our best to make sure the Section offers programs that satisfy your needs. I hope that you will participate in the many activities that will take place this year and look forward to seeing you at Section events during the months to come.

Vincent J. Syracuse

Opening Banquet

at the Baseball Hall of Fame, Cooperstown, New York on May 1, 2009, 7:30 p.m.

Proceedings

MR. VINCENT J. SYRACUSE: Good evening, everyone. Thank you so much for being with us tonight. It is a great pleasure on behalf of the Commercial and Federal Litigation Section to welcome you all to the Baseball Hall of Fame. This is an incredible venue for a guy who grew up in Brooklyn and spent summers at Ebbets Field. This is a great place, and I am very happy that you are all here.

I also want to acknowledge the fact that we have Hudson Reporting here who has very graciously agreed to transcribe the proceedings for tonight and the weekend so let's all thank Hudson Reporting.

It is my pleasure here to thank the many judges and dignitaries from across New York State who have joined us this evening. This will be a very special weekend for our Section. We have partnered this year with the Young Lawyers Section and put together what I think is a very exciting program, which you will hear more about tomorrow. We will be presenting 35 different speakers from across the United States in eight very exciting CLE programs, but I assure you there will be plenty of time for R&R. In addition to the presentation of the Robert L. Haig Award to our distinguished guest of honor, former Chief Judge Judith S. Kaye, one of the highlights of the weekend will be the debut of the Commercials versus the Federals, in a very special softball game tomorrow afternoon.

I want to begin by introducing Mike Getnick. Mike is the incoming president of the New York State Bar Association. He adds some upstate balance to this because he is from Utica. Mike has been a strong supporter of our Section over the course of the years. He told me this evening it is probably the third or fourth Commercial and Federal Litigation Section meeting he has been to, which gives him a better attendance record than many of our members.

Let's all welcome Mike Getnick.

MR. GETNICK: Thank you, Vincent. I was told the worst time to speak is after a cocktail hour when lawyers are involved. I don't usually like sports analogies, but why are we here at the Baseball Hall of Fame? I'm not sure why this venue was selected, so excuse me if I give you some baseball anecdotes or analogies, but what comes to mind is Jackie Robinson. This is Law Day today, and Jackie Robinson has a quote, I don't know how famous it is, and I doubt that it is on any of the plaques, but it says, "There is not an American in this country free until every one of us is free."

As we all know, Jackie Robinson was the first African-American to play Major League baseball, and think about that. He was the first African-American to play Major League baseball. Many of us in this room remember seeing Jackie Robinson, but it was in 1863 that President Lincoln issued the Emancipation Proclamation. One hundred years later Jackie Robinson became the first African-American to be inducted into the Baseball Hall of Fame. I think that is important to keep in mind.

Now, tonight, we celebrate Law Day, and we have a wonderful celebration in Albany and the various counties throughout the state, and for this Law Day we have honored President Lincoln's legacy of liberty. This is his 200th bicentennial as to the date of his birth, and it might sound corny, but I don't think so, to say how could it be that his legacy paved the way for people like Jackie Robinson, Satchel Paige and Hank Aaron, but it did, and similarly his legacy opened the doors within the legal profession with people such as Macon Allen, Thurgood Marshall, and in New York our own George Bundy Smith among many others.

Lincoln's legacy to liberty gives us some guidelines today that everybody has the basic right to liberty under the law.

Now the Declaration of Independence sets forth something, which is supposed to be self-evident, and it says, "The truth is that all people are created equal," but we know that that truth is not necessarily self-fulfilled. We have only moved closer to that equality through the courageous efforts of others. Lincoln died at the age of 57 for what he believed, and then we have people like Thurgood Marshall and people who were involved in the movement to really provide the legacy of freedom, so, when we honor the life of Lincoln, we honor the life of Jackie Robinson, we honor the life of every person in America who wishes to be free.

On June 1, I become the president of the New York State Bar Association. I can tell you that is a very humbling experience. I know that these are particularly challenging times for our profession and for the public that we serve. I usually don't look at notes, but I am looking at these notes now, because I want to cover some very important topics. That is, our ability to practice law and to achieve meaningful access to justice, something that Judge Kaye has stressed throughout her career on the bench, that for there to be true liberty under the law for every person and not just for

those who can afford access, this is the challenge that we all face, and this is the challenge on Law Day.

I am confident that with our role as attorneys for the clients we serve, for trying to stand up for the rights of an independent judiciary, to stand up for the rights of the poor, that we can really encourage and enforce the public's confidence in the legal profession, the judicial system, and we can all be proud of the achievements we have to date, but I know we have to work together.

The Bar Association, we are so fortunate to have such a close relationship with the courts, the legislature, and these are the moves that we have to do for justice for all.

Now I don't think it is any surprise that this Section is honoring Judge Kaye. I don't think it is any surprise at all. Tomorrow she will receive the Haig Award, and I think this is perhaps one of the best examples of the work that can be done when the State Bar partners with the judiciary to bring about excellence.

What does this Section accomplish? You brought about the Commercial Division. I think I can say to Judge Kaye that that was a thought that you had way back when, and I think we are all so proud that this was an accomplishment, a permanent Commercial Division, and I think that this Commercial Division that has been established through the work of this Section has been emulated from my understanding throughout several other states throughout this country. It is this type of combined work by such a superb Section of your committee that will enable us to continue to address the concerns that we all face today. What are some of those concerns and how do they affect us?

Adequate funding for legal services. Access to justice means nothing unless you have lawyers that can represent people who need access to justice. It is not simply a matter of freedom. It is not simply a matter of liberty. It is the ability to partake in the justice system, and that is where lawyers have contributed so much.

And in Albany today we recognize the pro bono commitment and the pro bono services of attorneys.

This has been an interesting year. Three times in this year our mass disaster team has been called to the front. There was the terrible air disaster in Buffalo. There was the miraculous recovery, but still a terrible situation at LaGuardia when the airport situation was such that the plane was able to land in the Hudson River. And then tragically the situation in Binghamton.

I don't how many of you know this, but to me that is something I will never forget. When the situation happened in Buffalo, I was attending with many of our representatives an ABA session in Boston. Immediately, immediately the mass disaster team was on the scene. I went to Buffalo under terrible, terrible circumstances, and they provided all of these services for free, pro bono services we could all be proud of.

And the public has recognized this. While at the last meeting of the executive committee and the last meeting that I chaired of the House of Delegates, I will never forget, it is an honor to chair the House of Delegates, but what I will remember is when the news came in the day before the executive committee that this horrible, horrible tragedy happened in Binghamton, I remember Pat Butler, our executive director, stepping out; Bernice Leber, our president, stepping out, and Kate Madigan, our immediate past president who comes from Binghamton, stepped out and did all that was necessary to once again request the mass disaster team to be up in Binghamton under the worst circumstances and to represent the New York State Bar Association in providing the best of services to people under tragic, tragic circumstances.

We have many, many situations that are facing us as we go into this year, because of the economy not only in the State of New York but in the nation. We have faced the problem of inadequate funding for legal services. We still have to face the situation with the rights to marriage, to gays, equal access, equal rights, equal protection, and I don't think the Bar Association has the answer to all of these problems, but I know this and I am fully confident that by working together we can accomplish those goals. We can make a big difference.

These are very, very challenging times, and I think Law Day is a good time to remember one of Lincoln's quotes. He said, "Let us strive on to finish the work we are in," and the Bar Association has always been in the right work.

We must continue to be in that right work, and I have a tremendous feeling that we will succeed together. As Vincent said, I have to tell you that I have tremendous respect for this particular Section. You offer some of the best continuing legal education that I have been exposed to.

This is my third opportunity to take part, and it won't be my last. I know it will be four at the very least, and it is not the Kentucky Derby that attracts me to this group. I am really honored to be here. I am honored to speak to you tonight, and I thank you for that opportunity.

MR. SYRACUSE: Peter Brown, our outgoing Section Chair, will say a few words of welcome.

MR. PETER BROWN: Good evening, everyone. This is the casual and informal part of our two-and- a-half-day session. First let me thank you all for attending.

We have representatives here from New York, New Jersey, Connecticut, and Pennsylvania. We have got one lawyer who was convinced to fly in from California to be one of our speakers. So I thank you all for attending. Our group has representatives from across New York State. We have lawyers from Rochester and Utica, from Albany, from Westchester County, from Long Island, as well as a large group from the New York City area. So I thank you all for coming up and joining us at this historic time.

Further, let me thank all of the judiciary who have graced us with their presence, some of you are attending the CLE program, some of you will be speaking at the CLE program. I thank you all for your participation.

This Section has had a lot of terrific accomplishments, and I will talk about them tomorrow night,

For someone who is a sports fan and someone who really enjoys watching a ball game, the Baseball Hall of Fame is special.

In fact, to prepare for tonight I went to a Yankees game yesterday and watched the Yankees win. It was misty and cold, but we really enjoyed the game. For those of you who haven't had a chance yet, the new Yankee Stadium is a great facility.

Finally, this program really wouldn't be possible without my colleague and program chair, Vince Syracuse. He did a terrific job, and we are all enormously grateful to him. Have a wonderful evening.

MR. SYRACUSE: Our next speaker is Sherry Levin Wallach, who is from Mt. Kisco, and the chair of the Young Lawyers Section .

MS. SHERRY LEVIN WALLACH: Well, I know that you all are very, very hungry now, but I do have a few words I would like to share with you. The first is I really would like to thank the Commercial and Federal Litigation Section for beginning this co-sponsorship with the Young Lawyers Section last year, Peter, Vince, Carrie, who I saw earlier, I know she is here somewhere, who initiated this last year. This is really, I think for our Section, a really huge opportunity.

I have worked very hard with Vince to encourage our members to come and join the Section, but what is important is that the Young Lawyers Section is a Section that really brings young lawyers into the association and hopes to push them off and start their commitment to the association and involvement in the association, and what we want to do is we want to share with you, our members, and so this is I think an excellent opportunity for that to happen, and we encourage it in all aspects.

Your Section has been not only through this program, but through the boat cruise, and we are going to have another one this year, they also co-sponsored that and are the first ones on board, I might add, figuratively and realistically, but it means a great deal to our Section to have such a partnership.

I would like to say listening to Mike's words here earlier, that additionally it really, listening to what Mike had to say about the association and about today especially, it really makes you proud to be involved in such a wonderful association, and I think I would be remiss if I didn't say that, and I think that holds true for many of us in this room.

I think this is really one of those associations that we are honored to be a part of, but also proud to be a part of, and we've spent so much of our energy in the association because of that pride and dedication and commitment to see the wonderful outcomes that we have in every avenue that we take. So I would like to thank Mike for those words that really again inspire me and many, I am sure, other young lawyers and lawyers sitting in this room.

Finally, I have to add that I think this is a remarkable year to be here in the Baseball Hall of Fame, because we have two very, very significant and important stadiums closing, and, if we come back here again, I know we will for the House of Delegates meeting for those of you on the House of Delegates maybe for this Section again, we will hopefully see some remnants of those stadiums, which I have to say I am very sad to see the old Yankee Stadium go. It is quite an important part of my life coming out of the Bronx DA's office.

I actually tried cases and watched baseball games at the same time, which I would no longer be able to do if I was there. So anyhow this is really in so many ways an important year, an important day.

And I spent my earlier part of today planning the Young Lawyers Section trial techniques program first biannual, I hope to say, which is going to be held at Cornell Law School, which is Mike's alma mater, and I am looking forward to that, and I think that was a very appropriate way to spend Law Day, and I got to see a lot of the students involved in Law Day today, so, again, bringing it full circle, I thank you all for being here.

I thank all the young lawyers who are here for joining us, and I look forward to a wonderful weekend. Thank you. Enjoy your evening.

(Time noted: 8:15 p.m.)

Gala Dinner

at the Otesaga Hotel, Cooperstown, New York on May 2, 2009, 7:30 p.m.

Proceedings

MR. PETER BROWN: I will keep my remarks to a minimum. First of all, let me thank you all for joining us here. It has turned into just a lovely weekend. The educational portion was terrific this morning and I am sure will continue tomorrow. Thank you to all of our speakers who have flown in from around the country, for your time and effort, and your thoughtful insights. It has really been a pleasure to participate in the program this weekend. Our programs cannot be any higher quality than this, and I thank you all for your efforts.

One of the really nice parts about being involved with the Commercial and Federal Litigation Section is the opportunity to have a relationship with the judiciary. This year it is a particular honor to welcome the Honorable Jonathan Lippman. Of course we are delighted to have with us our beloved former Chief Judge Judith Kaye. In addition we have 18 other members of the judiciary, who I would like to thank in no particular order except alphabetical.

Let me please thank Justice Stephen Bucaria from Nassau County; John Buckley from the Appellate Division, First Department; Cheryl Chambers from the Second Department; John Curran from the Commercial Division, Erie County; Margaret Finnerty, Victoria Graffeo, Barbara Kapnick, Honorable Deborah Karalunas, the Honorable William McCarthy, Honorable Frank Maas, Honorable Andrea Masley, Honorable Karla Moskowitz, Honorable Andrew Peck, Honorable Reena Raggi, Honorable Robert Rose, Honorable Ken Rudolph, and last but not least, the Honorable Alan Scheinkman. Thank you judges.

Taking on the chairmanship of this Section is always a joy and always a challenge. Fortunately this has been a really successful and challenging year. We have tried to maintain attendance at our Section events during perhaps the most challenging economic times in the last half century. We needed the loyalty and support of all of our membership, and we got it.

The Section had some wonderful activities over the last year. We issued a number of reports, commented upon legislative initiatives and had some terrific CLE programs. I would just like to highlight two. First, one which the incoming chair, Vince Syracuse, had an instrumental role, the Ethics & Civility Program. The Ethics & Civility Program is in its tenth year. It provides legal training in ethics across New York State. Over 750 lawyers attended the program this year in five venues in New York State. It is an extraordinary program and is really one of the highlights of this Section's activity. So I thank all of the lawyers who participated, for a really stellar effort.

The other one that I would like to highlight is our Smooth Moves Program. This was created three years ago by former Section Chair Lesley Freedman Rosenthal. It is a program specifically directed at assisting minority lawyers in the profession and getting them more involved in the Section's activities and the State Bar Association's activities.

Again, we had about 250 lawyers attend this spring for the Smooth Moves Program, all of them minority lawyers. This is a real model for the entire State Bar Association.

Finally, the most festive event of the year was the 20th anniversary celebration. Those of you who picked up the *NYLitigator* magazine saw some pictures of our 20th anniversary celebration. We had it this past Fall in a fabulous venue, the Russian Tea Room. It was another event with over 200 lawyers, over 25 judges from across the state,

and we had the honor of having Bernice Leber address us.

I am reminded to acknowledge a large group of New York State Bar Association officers that I really want to honor. Our incoming president, Mike Getnick, is here. Our now president-elect Steve Younger, my former Section Chair, is here. We have innumerable former Section Chairs who are here, Carrie Cohen, Lauren Wachtler, and Mark Zanderer. I want to recognize Bob Haig, of course, a former Section chair and founder of the Section.

As Chair, I have an opportunity to lead our committee Chairs and officers who make our great achievements possible. This year we had a terrific group of officers, Vince Syracuse was my Chair-elect. Jonathan Lupkin was our Vice-Chair. Susan Davies was our Treasurer, and Deborah Kaplan was our Secretary.

Next year we are going to be adding to this great team. We are adding Paul Sarkozi as Treasurer. Dave Tennant, as the new Vice-Chair, will be assuming the responsibilities for this meeting two years from now.

Finally, as the outgoing chair, I get to select from our 2,600 members the member who has made the most significant contribution to the Section for the past year.

There is one woman who has devoted herself to this Section for the last five or six years, who has served as both secretary and treasurer, who really knows the ins and outs of this Section. She makes my job a pleasure. She basically single-handedly put together the 20th anniversary celebration. So I would like you all to honor and thank Susan Davies for her many contributions to the Section this evening.

The plaque reads, "Presented to Susan M. Davies for outstanding member service to the Commercial and Federal Litigation Section, New York State Bar Association, May 2, 2009." I am really pleased and honored to recognize one of the most important members of the Section, Susan Davies.

MS. SUSAN DAVIES: Apparently I never mentioned to Peter how much I hate speeches. Looking around this room I can see at least a dozen people who deserve this award so much more than I do, but I am so honored to be the recipient of this award, and it has been a pleasure to serve the Section and to make all the wonderful friendships that I have been able to make in this section. I thank you very much.

MR. VINCENT J. SYRACUSE: Peter, you are not going to get away so fast, so please come back up. It is my pleasure here on behalf of the Section to recognize Peter Brown's outstanding contribution to our section over the past year as Chair.

Peter, I have had the pleasure of working with you now I guess for about five years as I went up the ladder as treasurer and then Vice-Chair and then Chair-elect and really enjoyed being part of the Section's leadership. I am very pleased to present this award to you. It says: "Presented to Peter Brown in recognition of exceptional service and leadership, chair of the Commercial and Federal Litigation Section, New York State Bar Association 2008-2009."

This is a real joy for me. The success of this weekend is the result of the hard work of many people, especially our 35 guest speakers who have joined us from across New York State, and one from as far away as California. Let's thank them all.

I want to thank our friends from Hudson Reporting for transcribing our CLE programs and this evening's festivities. They have performed a real service for us.

Last but not least, I want to thank Flemming Zulack Williamson Zauderer for sponsoring this dinner. I think it is safe to say, if it wasn't for my dear friend, Mark Zauderer, I wouldn't be standing here today. I think about 15 years ago Mark called me up, and he said, "Vince, there is something I want to tell you about. It is called the Commercial and Federal Litigation Section of the New York State Bar Association." I confess that I had no idea what he was talking about.

Mark said, "you know, I would like to get you involved in this section, and I would like you to join one of these committees." Of course, he didn't tell me he was the chair of that committee and being on that committee required a lot of work and write a report, but Mark and

I have been friends for over 30 years, and usually when Mark asks me to do something, I always say yes, and, Mark, I thank you for making this all happen.

I am looking forward to my year as Section Chair, and I know I have very big shoes to fill. I have learned the ropes from Peter and some extremely talented individuals who have chaired the Section.

First, I learned the ropes from Bob Haig, who I have come to know over the course of the years. As I went up the leadership ladder, I was fortunate to work with several very able Section chairs: Steve Younger, Lauren Wachtler, Lesley Rosenthal, and Carrie Cohen, and over the years these people have really served the Section, and they taught us what makes this Section really work. I think we should all applaud those leaders of the Section, and I want to applaud this year's officers, Jon Lupkin as Vice-Chair, Susan Davies, Deborah Kaplan, all of you.

During my year as Chair I will have the help of Jon Lupkin, who is going to be my Chair-elect this year and David Tennant from Rochester, who has worked with me on the ethics and civility program and who will be our Vice-Chair. David will bring us what we need in this Section, some strong upstate representation and help me achieve a greater upstate presence, which is going to be one of my objectives as I take the role of Chair this year. I will also have the help of Paul Sarkozi, who is our Treasurer, and Debbie Kaplan, who is returning as Secretary.

Our goal in this Section is to help connect the state's leading litigators with one another and with the judges in deciding the cases in order to improve the quality of the representation of our clients and provide a forum for the development of law and procedure in areas of the commercial and federal litigation practice.

We have over 30 active committees in the Section that promote research and discussion of current issues affecting our practices. We provide the bench and the bar with a laboratory in which rule changes can be proposed, vetted and discussed. We also develop and present numerous continuing legal education programs on topics most useful and relevant to our members' practice areas.

Most importantly, our Section offers an opportunity for the judges and lawyers to sit down and talk each other. Last year, I had an eye-opener when I went to England for a series of meetings with London barristers and solicitors. I told them about our Section but they couldn't believe that it was possible for lawyers and judges to sit down and talk about how to service clients, how to make rules and how to promote the practice and development of law.

I look forward to working with all of you through the year as my year as Chair, and I hope you will always share your thoughts with me about the Section's activities and any issue that you can think of to help in the fulfillment of our mission.

There are many areas that we need to focus on, but one of my objectives is the attraction of members who will participate in the activities of our Section. I also look forward to our continued partnership with the Young Lawyers Section, because I believe working with the young lawyers in the state is a way of bringing more membership into the association and into our Section. I want to have a greater upstate representation on our executive committee and on our committees and work toward the development of more diversity among our membership, both in the membership and the leadership levels.

I want to strengthen our committee system, so we have a consistent number of committee reports, which is the historic lifeblood of our Section. I want to make great use of electronic communication, and I want to continue with our CLE programs.

I would like to use video conferencing at our meetings so we can get more upstate people at our committee meetings and our executive committee meetings.

I know you will give me your support during the year, and I look forward to working with you as I have done for the past 15 years. Enjoy your dessert. There's more to come in a little bit. Thank you.

(Recess)

MR. SYRACUSE: I have to formally thank Jeremy Feinberg, the manager of the Commercials, and Jamie Stecher, the manager of the Federals. The Commercials versus the Federals. My first thought was going to be the plaintiffs against the defendants, and then I thought it was going to be respondents versus the petitioners or something like that, but then someone brought up the Com versus the Feds, but that sounded like a Star Trek episode or something that wasn't too PC, and so it became the Commercials versus the Federals, and, since the Federals were managed by Jamie, I am sorry, Jeremy, but the Federals beat the Commercials by a score of 14 to 8, so let's give everybody a hand.

The next order of business is for me to introduce Steve Younger. Steve is the president-elect designee of the New York State Bar Association and a former Chair of our Section. Steve is a graduate of Albany Law School and Harvard University. He is a partner at Patterson Belknap and an experienced commercial litigator. It is a great pleasure for me to introduce Steve Younger.

MR. STEPHEN P. YOUNGER: Well, Mike Getnick paid this man to clarify this. Just so you know, I have been going to events for the last six months, and people have been introducing me as the president-elect. In fact, on Friday I was in Mike's hometown, and the program said that I was the president-elect. It got so bad that at last night's dinner, I don't know if anybody noticed this, Mike said that he was the president-elect of the ABA. That is how confused he was.

Well, it means a huge amount to me to be back here for the spring meeting. This Section is really like a family to me and to many others in this room. The Section has launched the State Bar presidency of now three of the last five presidents of the State Bar. When I was interviewed for the presidency, someone asked me on the nominating committee what do they put in the water in your Section? Find out.

I want to congratulate Peter Brown on a great year and also Vince Syracuse on a coming up year. It is great that he is emphasizing upstate New York. Mike, I understand he is changing his name from Vince Syracuse to Vince Utica.

My role this evening is to introduce our state's new Chief Judge, Jonathan Lippman. Let me start with Jonathan's roots, which are in the same neighborhood where I was raised, the Lower East Side of Manhattan. Judge Lippman's father was known as the mayor of the East River Houses. We know where you got your political skills from. He went to public schools in my neighborhood. He played basketball on our neighborhood courts where he gained the nickname of Huge John. I understand that that was not because of his stature but because of his accomplishments, and I think that that still holds true today.

He eventually went to my alma mater, Stuyvesant High School, which those in this room know is the best public high school in the country. Judge Peck, you don't get to respond. Following graduation, he began his legal career in the entry levels of our court system, one of the lowest levels of the system where you can start, which is as an entry level pool clerk, and he has worked his way all the way up to the top post in the system. He was named chief clerk in 1983 of the Supreme Court of New York County.

In 1989, he became the deputy chief administrator of our state running the day-to-day operations of the court system. In 1996, he became chief administrative judge, where he survived for 11 years in a very demanding job, the longest tenure of any chief administrative judge in our system.

While in court administration, he worked with our honoree this evening, Chief Judge emeritus Judith Kaye, in making a ton of innovations to our system including special-purpose courts like our Commercial Division, which we are all very proud of.

As chief administrative judge, he oversaw a system with 1,300 judges and 16,000 non-judicial employees. Just a huge system. One thing that Judge Lippman has always been known for is his hard work. As chief administrative judge, he routinely came to the office between 6 and 7 a.m. and worked late into the evening.

There is one story about Judge Lippman that I am able to confirm, which was that he worked so hard at OCA and he was so accustomed to coming into the office in the dark in the morning and leaving in the evening in the dark that one morning while he was walking to work through City Hall Park he forgot whether he was coming to work or leaving from work. I think this work ethic will hold you in good stead as our chief judge.

In 2007, he was appointed presiding judge of the First Department, and he quickly cleaned up a huge backlog in the court and was known for his collegial leadership there. Ultimately, this year Governor Paterson appointed him our chief judge, and we are very proud to have you there. He has already set a very high pace for himself taking on issues such as reforms in the Family Court, setting caseload limits for assigned counsel in criminal cases, and taking the lead from one of our former chairs, Bernice Leber, addressing the problem of wrongful convictions.

As I told Judge Lippman privately before, everyone in this room expects him like his predecessor, Judge Kaye, to become a card-carrying member of our Commercial and Federal Litigation Section. We are very pleased to have you at our spring meeting so early in your term, Judge Lippman. Thank you for coming.

Presentation of the 2009 Robert L. Haig Award for Distinguished Public Service to the Honorable Judith S. Kaye

Presented by the Honorable Jonathan Lippman, Chief Judge of the State of New York, to the Honorable Judith S. Kaye, Former Chief Judge of the State of New York, at the Otesaga Hotel, Cooperstown, New York on May 2, 2009

Proceedings

CHIEF JUDGE JONATHAN LIPPMAN: Thank you, Steve. Steve played a central role in the process by which I became Chief Judge. He is, as you know, Counsel to the Commission on Judicial Nomination. I am very partial to Lower East Side guys, but that's only one of the reasons why I know Steve Younger will be a great State Bar President, as will be Mike Getnick before him.

It is a delight to be here. This is a Section that I really feel so close to, going all the way back to the early years when so many of us in this room were present together at the birth of the Commercial Division. Before I start, I want to point out how fitting it is that this award is named for Bob Haig, who played such a critical role in the development of the Commercial Division. In fact, Judith Kaye asked me if she gets to take the "Bob Haig" home tonight. I mean that she wants to take the award home and put it on the wall.

CHIEF JUDGE JUDITH S. KAYE: That's not fair.

CHIEF JUDGE LIPPMAN: I didn't know she wanted to use that in her speech, too. Anyway, in all seriousness, I do want to say that it is a great award, one of the most meaningful awards I have ever received, and for a particular reason, aside from Bob Haig having such a central role in the birth of the Commercial Division, which I will talk about in a minute. The year that I won it the person who presented the award to me was none other than Stephen Kaye, and I remember how he drove all the way up to the Gideon Putnam in Saratoga Springs that evening to give me the award, and how he went on and on about me, about Amy, about the kids, and how he was just so over the top, but it was a fabulous night, and I will never forget it. Then he drove right back down to the City that same night. As Judith knows, he loved to drive, and it was a great night for me and one that will always live in my memory.

With regard to the Commercial Division, I do want to say that it really is a product of Judith Kaye's persona and vision. I told a little story just the other night at the Skadden firm, when they hosted a reception to welcome Judith to the firm, about the time when Leo Milonas was the Chief Administrative Judge and I was the Deputy, and the Section had approached us about creating a permanent Commercial Division. She said to Leo and myself: "Listen, how long will it take you to do this?" And we said: "Well, maybe nine months to a year," and she said, "No, three months." And Leo and I said: "Impossible, cannot be done, will not be done, no way, no how." This went on and on. She kept saying three months, and we kept saying closer to a year, and, if nothing else, I learned that the quality that most personifies Judith Kaye is persistence, persistence, persistence and, eventually, impatience. And when it finally gets to that point, we learned that the only answer when Judith Kaye wants something to happen is yes, and the impossible becomes the possible, and, in this case, the Commercial Division became the Commercial Division in three months. It was just…so Judith Kaye.

She is the greatest cheerleader for the Commercial Division. Bob Haig, I'd say, is a close second. Even though Judith has not traveled half the world to promote the Commercial Division, as Bob has — Tanzania, Zanzibar, you name it, he's been there—there is

no one who has done more than she has to foster the success of the Commercial Division and our entire court system.

For those of you who have been in another country for the last 15 years, there have been so many important accomplishments, too numerous to mention, everything from reform of the jury system to problem-solving courts, to putting families and children first in the court system, to reform of the fiduciary system, to access to justice. You name it, Judith Kaye has done it. Her name has become synonymous with reform. And I just want to mention one other thing that I think really captures who she is and what she is all about. I remind you all of 9/11 and those difficult days for this country and certainly for the court system. As you know, we lost three of our court officers and had one of our courthouses destroyed during the 9/11 attacks. In her determination to keep the court system in New York open and running under the most extreme of circumstances as a symbol of our commitment to the rule of law, Judith Kaye was a beacon of strength in this state and in this country. Her leadership during that difficult time was so typical of her strength and commitment.

I had the greatest 12 years of my life working with Judith Kaye, every day admiring her more and more. There was no one who motivated me more or inspired our court system more, including our judges, nonjudicial personnel and the bar. To put it as she would, to use her favorite word, she is just phenomenal! She is so much a part of my life and I certainly wouldn't be here today as the Chief Judge of this state without the support and inspiration of the person who will always be the Chief Judge as far as I'm concerned. And so I introduce to you the one person who really made the Commercial Division happen, the one person who has made commercial lawyers so very proud in this state, the great Judith Kaye.

CHIEF JUDGE KAYE: Thank you all. I am grateful for so many things this evening, but first and foremost, above all else, that you are having tonight's program transcribed. Hudson Reporting Service, I would now like to order ten copies of the remarks that immediately precede mine. And Peter Brown, you are right. I do have a carefully formulated message—brief I hope, and very sincere. It is simply to say thank you to all of you.

I am thrilled to be here. Peter, you without question have been a great Section chair. I loved hearing your record of accomplishments—quite a challenge for the incoming Section chair! But Vince, I have heard what your plans are too, and I am so proud of what lies ahead as well as all that this Section has done. All in all a pretty fantastic record of achievement.

I cherish a letter that I received confirming my arrival here, and this sentence is a quote: "We want to do everything possible to make it a wonderful weekend for you." And indeed you have done that—and more. This has been a wonderful weekend for me, starting with the magic chariot ride Vince arranged for me with his partner, Jamie Stecher. We explored unknown parts of our beautiful State, including a half- hour stop at the Newburgh mall, which I recommend to all of you. Don't waste your time looking for the Prada shop. At the Newburgh mall, the place to go is the BonTon—you have my word on that.

What great company gathers here, all of you, and I single out particularly my beloved Court of Appeals colleagues, the Chief Judge, of course, and Judge Victoria Graffeo, who completely surprised me with her presence this evening. Vicki, I am so grateful to you for coming, and with your niece Teresa too, a truly special treat for me. You should all know that this is the weekend between two Albany Session weeks of the Court of Appeals. It is an enormous sacrifice for these two Judges to be here, and I am truly delighted that they carved out time from those packed days to be with all of us.

In fact, I am grateful to all my former judicial colleagues and my new lawyer colleagues for being here. As I am now Judith S. Kaye, a new Esquire, you should know that I affiliate with the Young Lawyers Section. What a great idea this Section had in bringing together the Young Lawyers Section with, as someone has said, the leading lights of the commercial bar of the State of New York. There is an enormous benefit for both sides. We have so much to learn from one another, especially in this dizzying new day of commercial litigation. Each of us is in many ways both a leading light and a brand new lawyer.

One final word of thanks before proceeding a bit beyond them. I am so proud, Bob Haig, to have you (well, this beautiful, meaningful plaque) hanging on my wall. This Award means a great deal to me. And Vince, another special word of thanks to you.

You are not only the incoming Section Chair but also a forever member of the Court of Appeals family, having worked with Stanley Fuld, my predecessor Chief Judge. I know that you have hanging on your office wall a letter from Chief Judge Fuld (then retired) dated October 10, 1979. As a tangible expression of my gratitude to you, I have used one of my last pieces of "Chief Judge of the

State of New York" stationery to follow the format of Chief Judge Fuld's letter, so you can put it right alongside the letter from your cherished mentor.

Judge Fuld's first sentence reads: "Dear Vince, Receipt of the card announcing that you have become a member of the firm of Newman Tannebaum Helpern & Hirschtritt prompts me to put in more permanent form the good wishes I had already conveyed orally." My letter begins, "Dear Vince, your invitation as Chair-elect of the New York Bar Association Commercial and Federal Litigation Section to me to accept the Section's Robert Haig Award prompts me to put in more permanent from the good wishes I had already conveyed orally." And we go on, side by side, from there.

So I want now to present this to you, Vince. There is another part to the gift, and that is I want to hand to my successor, Chief Judge Lippman, a copy of Chief Judge Fuld's letter. We are all so proud of you, Jonathan, and I hope that in the future—well, you needn't wait for the retired part. I hope that you will right away send a parallel letter to Vince too. Then Vince will have three "Chief Judge" letters hanging side by side in his office.

So just a word of substance. Among the several programs I have attended this weekend was one on sport law—namely football, baseball and basketball. In the jargon of the sport I know best, three would be a hat trick. But it wasn't the unfamiliarity of the sport that left my head spinning. It was for me the global and technological magnitude of the legal problems and their solutions. You just can't imagine how particularly dramatic the change is after 25 years on the Court of Appeals.

This weekend I've heard a lot about e-filing and e-discovery and e-volution, and it is all exciting and energetic. The "e" word I have to add is: "e-gad!"

The lesson I really learned most of all at "class" today, and look forward to learning more of tomorrow, is that I have so much yet to learn. And what a joy it is to have all of you at my side as I proceed with this great new life venture.

I don't know how many of you were here last night, but we had a real treat. We heard Paul Eyre relate the reminiscences of an ex-managing partner. He inspired a really great piece of advice I now pass on to my successor, who in fact needs no advice from me or anyone else. He is spectacular. But I do pass along this bit of advice to you, Jonathan. Paul Eyre last evening told us that, as managing partner of the firm, what was most valuable to him was his stint as a student at Caroline's Comedy Club. What a great idea for a managing partner, or managing anything—a course in being a comedian! Just think about it, Jonathan. I think it could be quite a useful skill to add to your bountiful skills.

Staying with the "e" theme, I have to say, un-equivocally, that we are great together. What terrific collaborators we all are, aren't we? And for all of us, friendship and humor are wonderful additions to the mix in confronting this new day of professional issues.

Chief Judge Lippman related some of the details of the birth of the Commercial Division. Unforgettable for me is that great report, January 10, 1995, signed by co-chairs Leo Milonas and Bob Haig, with Mark Zauderer and so many others of you here too. You all participated in that wonderful event 24 years ago and four months ago, the e-emergence of the Commercial Division, when such wild-eyed, hair-raising ideas were recommended as preliminary conferences (whoever heard of such a thing?), timetables for discovery (unimaginable), enforcement of deadline (unthinkable), technology, alternative dispute resolution.

Well, you proved we can do anything and everything. We can do anything and everything as long as we do it together. So this is really, clearly an "e" weekend from start to end, with an "e" group of lawyers and judges and friends. You are the ultimate "e" word (my last word): extraordinary. Thank you so much.

What to Do When the Media Calls?

on May 2, 2009, 9:00 a.m.

Appearances by: Moderator: Honorable Barbara R. Kapnick—Justice of the Supreme Court of the State of New York, New York City; Speakers: Eric Dash—*The New York Times*, New York City; Ken Sunshine—Sunshine Sachs & Associates, New York City; Aaron Lucchetti—*The Wall Street Journal*, New York City; Mark C. Zauderer, Esq.—Flemming Zulack Williamson Zauderer LLP, New York City

Proceedings

MR. PETER BROWN: Good morning, everyone.

For those of you who were unable to join us last night for dinner, I am Peter Brown, the chair of the Section. I am very pleased to welcome you all to the Commercial and Federal Litigation Section annual spring meeting. About 20 years running and counting, the Section had a substantial surplus, and, when we found out that the weather report for the weekend was rain, we paid the right people, and the weather has broken, and the Chamber of Commerce is a lot happier, and we are as well, so I thank you all for contributing to this lovely weather.

We have a terrific program for you over the next two days. As you know, we have divided it up among an A track and B track. The B track is euphemistically our Young Lawyers Section, but I have seen a bunch of little more senior people sneak down into the B track because they want to be prepared for appeals or for depositions or get the insights of some of the judges who are speaking, so, once you are here, there is no rule, you can go to either one, and please feel free to attend either one, although we would like the young lawyers—the young lawyers have to attend the other one only because they can't get credit for some of these things for CLE. We have put together a terrific program, and I have to thank our program co-chairs, Vince Syracuse and Paul Sarkozi, who have really organized all of this and brought together experts literally from across the United States to teach you and to hopefully improve your knowledge of the law a little bit, so really enjoy the day.

Please join us for the softball game, and then this evening we are going to have an unbelievably nice dinner, so make sure you join us there.

MR. VINCENT J. SYRACUSE: Good morning, everyone.

We really have planned a very exciting CLE program that Paul started telling you about and that I mentioned last night. Before we start I want to thank Bruce Ronzick of Forensic Consulting Solutions for sponsoring this morning's breakfast and Hudson Reporting for transcribing everything so that our Spring meeting programs can be printed in *NY Litigator*. So without further ado, I want to introduce Paul Sarkozi who was responsible for the planning of our Track B CLE programs and will become our Section's Treasurer on June 1st. I am also thrilled to announce that Paul will be joining Tannenbaum Helpern Syracuse & Hirschtritt as an partner in our litigation and dispute resolution group in a few weeks. Paul.

MR. PAUL SARKOZI: Thank you. You can make very meaningful contacts here as I have found out. I am here to just talk a little bit about the track B program. The track B program, which is in its second year, hopes to follow in the footsteps of last year's very successful program which Jonathan Lupkin organized. It is really designed as a way to foster the collaboration between the Young Lawyers Section and the Commercial and Federal Litigation Section, and one of the things that we have tried to do this year is we have tried to put on our panels young lawyers, to put them whether in the role of a moderator or if they have a particular experience in an area to give them the opportunity to speak, to give them leadership roles, and we are very excited about that. And we are also very excited that we have several judges and experienced prosecutors and experienced litigators on those panels.

It is a pretty practical track. It is not just for young lawyers as Peter was saying, and I do want to emphasize that. Whether it be this morning's program, which deals with the issue of when the prosecutor calls, whether it is the media or the prosecutor, we are getting lots of calls these days, so whichever you think will do best to help prepare

you and to be able to help your clients or later today where we are going to have a discussion of trying non-jury cases and preparing those non-jury cases for appeal, and we are very lucky to have on the panel there someone who was a Commercial Division judge and now Appellate Division judge, so we get both sides of that perspective.

And tomorrow will be a program on ethics, and the program on ethics for the track B is not an overlap at all with the other track A ethics program, so, if you need those ethics credits, feel free to go to both of those programs, and then a very, very practical program on handling electronically stored information and how to deal with the evolving law on a very nuts and bolts practical level to how to keep your client and your firm and yourself out of trouble.

So, with that, again, if you are going to go and switch programs, which you should feel free to do, just make sure to sign in. The track B program is downstairs. Just sign in and note your time whatever you do. And with that, I am going to hand it back to Vince.

MR. SYRACUSE: I am thrilled to announce our first panel, which is entitled "What Do You Do When the Media Calls?" It is my pleasure to introduce Justice Barbara Kapnick, who is the moderator of this morning's first program. Judge Kapnick is a graduate of Barnard College and Boston University School of Law. She is an experienced jurist who was elected to the Civil Court in 1991, elected to the Supreme Court in 2001, and recently appointed to the Commercial Division of the Supreme Court of New York County. We are very lucky to have Justice Kapnick with us. Let's all welcome her.

JUDGE BARBARA R. KAPNICK: Thank you very much. I appreciate your inviting me to participate, and I can't tell you how much I have been enjoying being in the Commercial Division since September. So I am going to go right on to the program now. Our program for this morning is what to do when the media calls, and I would like to introduce our panelists, and then we will get into the discussion.

First, we have Eric Dash from *The New York Times*. He has covered banking for the business section of *The New York Times* since January 2004 focusing on the players, personalities and issues shaping the industry. More recently, he has been a major contributor to the *Times'* award-winning coverage of the running financial crisis, which I guess will keep you running for a while, including the government's rescues of Citigroup, Bank of America and AIG. He has also written extensively on consumer credit, data security and executive pay.

Next to Mr. Dash we have Ken Sunshine, who is the founder and president of Sunshine Sachs & Associates. This agency, which is based in New York with an LA division, is a public relations consulting firm and has established a broad-based clientele which includes prominent entertainment organizations, non-profit institutions, celebrity personalities, public figures, corporations, political personalities, labor unions and health care institutions.

Mr. Sunshine was previously chief of staff to the Mayor of the City of New York, and is active as a political consultant to national and local campaigns. He has lectured widely on politics, media relations and public relations and is frequently seen on TV.

Next to Mr. Sunshine we have Mark Zauderer, who I am sure most of you know, is a trial lawyer and partner in Fleming Zulack Williamson & Zauderer in New York City. He has served by appointment of former Chief Judge Judith Kaye as chair of New York's Commission on the Jury and a member of the chief judge's task force that originally established New York's Commercial Division. He is currently the president emeritus of the Federal Bar Council and is a former Chair of this Section. He is also a member of the Advisory Committee on Civil Practice to the chief administrative judge, which drafts revisions to the CPLR Mark is also a frequent lecturer on legal issues and comments on legal issues both in print and on television.

Finally, we have Aaron Lucchetti, who is with the *Wall Street Journal*. He writes about Wall Street, international investment banks, trading and brokerage businesses, legal issues and regulations from the *Journal's* money investing section in New York. He began with the *Journal* in 1996 and since then has covered a wide range of beats including stock and bond markets, exchanges and personal finance.

In recent months, his reporting on the financial crisis helped earn the paper awards from the Society of New York and Business Sectors and Writers and the New York Newspaper Publishers Association. He is involved in a lot of the issues that are confronting us and that we are dealing with in business today.

So this is going to be an interactive panel. We are going to be—I am going to be asking some questions to the panel, they are going to speak, and we hope that you will participate also.

So the name of our program is "What to Do When the Media Calls?" So Mark, as our practicing lawyer on this

panel, let me ask you, has the media called and what do you do when the media calls?

MR. MARK C. ZAUDERER: Yes, the media calls quite often and much more often these days than before. Let me answer that question first with a little disclaimer that you are all experienced lawyers. I am sure you have had experience with the press. I don't presume to tell you how to interact with the press, but I do want to share with you some perceptions and observations and some principles that have guided me over the years.

First and foremost, I think as lawyers we are used to being on stage. We have to remember that what is first and foremost at all times is what is best for the client's interest. Clients come in all shapes and sizes and so do reporters come in all shapes and sizes and all different perspectives. The press is not a monolith, so, when we are in what I will call for now, the reactive mode, and we will talk in more depth later, we really need to consider what the client's interests are, both in terms of the case, the client's business, the client's personality, whether it is an individual or a business, and what is its corporate personality. So all of these things have to be taken into account.

Now, as I said, the media of course is not a monolith. When a journalist calls, we have to consider a number of variables and factors. Who is the journalist? What is the journalist's perspective? What about the organ that he or she works for? Does it have a point of view? What is your sense of the level of the reporter's familiarity with the issue at hand? Is there a particular legal slant?

Now I have developed just for myself certain techniques which I think work in the client's interest and also in the reporter's interest, because I think the key to successful communication with the press is to understand their needs as well as your own client's needs. Lawyers, I think, by and large, are unfamiliar with the press, and we are very sophisticated in what we do, and in the courtroom we are used to answering very difficult questions on very sensitive matters from judges. But we freeze up when the press calls. When the press calls, in some instances, it's as though the angel of death is knocking at your door. Others just pretend the calls never came. They don't return the phone call.

I recall a situation over 20 years ago, a case involving the world's largest manufacturer of kosher hot dogs. It is a brand you know. We won't mention it. And it turns out we got a call. Channel 4, I think. In about four hours they were going to go on the 6 o'clock news and report that the rabbi from the State Agricultural Department, who was in charge of inspecting Kosher food, was going to report that there was something wrong with the production; the heat, temperature wasn't right or the timing in the production of food.

And this is something that, of course, goes to the heart of the business. What to do, when you only have a few hours to react? In that case, the decision was made that the president of the client would get out ahead of the story before the 6 o'clock news and call a news conference, so that when the story ran the client's version of the events would be out there. This raises another issue. If there is going to be a response to the media, who is going to respond? Is it the lawyer, is it the client, or is it a public relations firm? And depending on the case and depending on your judgment, it could be any one or more of those people.

Also let me talk for a moment about a few constraints that have to inform our communications with the media, which in my mind presents us with opportunities, and they are in the materials that we provided. The first is there are ethical rules. The new rules that went into effect deal with this, and I won't take your time in this segment to read them, but essentially the concern that is reflected in those rules is that statements not be made that would affect trial coverage, particularly in a jury case.

Now, there are overlapping but not congruent concerns that are reflected in the law of libel and the civil rights law. Many lawyers wonder to what extent if they make comments to the press, they are involved in a collusion. Are they exposed to libel?

And you will see that the New York Legislature in the Civil Rights Law, which is cited in the materials, has greatly widened the swath of protection that the common law provided for lawyers. And the case law is quite clear about protecting the rights of lawyers not only to report precisely what is in the pleading, but to comment on and give views on matters that may relate to the matters that are in the pleadings. And, of course, you get a double layer of protection in the traditional defense of opinion when we are talking about libel law.

So one of the things I think that we will talk about if we get the opportunity in the next hour to hour- and-a-half is how to handle those comments, when to handle them, what are the limits of comment when you go beyond and seek to talk about matters related to, but outside of the pleadings in a particular litigation, what are the client's concerns, how should those be handled, and should they be general or should they be specific.

Now, in response to Judge Kapnick's question, a couple of points have always guided my thinking there.

If it is a situation in which I cannot comment or don't feel it is right to comment, what I never say is "no comment," because I have always felt that "no comment" doesn't look good in the press. What I will try to do is turn the question into a dialogue with the reporter, thanking the reporter for calling.

The reporter has a job to do. Before responding to the question, get a sense of what is being reported on here. Reporters come in all shapes and sizes. If my friends here at the *Wall Street Journal* or *The New York Times* call me, it is a very different conversation than if a reporter from the *Daily News* or the *New York Post* calls, and someone has been assigned from the general desk for the day and really wants nothing except a response to some sensational story that is going to be in the newspaper. So, rather than "no comment," there are a number of arrows in my quiver that I find useful.

In the simplest case, I would say to the reporter, "May I speak to you off the record?" and then I will talk a little bit about why I can't talk and would hope to be able to talk to the reporter at a different time and say, "Look, if you need something for tonight, you can feel free to say on the record that I declined to comment," and that often results in a quote, which says, "Mr. Zauderer, the lawyer for so and so, declined to comment." It is a minor difference, but I think it doesn't make it look like you are not answering the phone.

I don't like the way it looks when a reporter writes, "A call to Mr. Smith was not returned." That kind of thing. The dialogue can give us an idea of what we might be able to say that meets the reporter's needs that doesn't compromise the case. Also, let me say on that in the materials I included in the outline there is a little discussion of to what extent a lawyer's comments can bind the client. The lawyer is the agent of the client, and whether or not the lawyer's statement can bind the client really turns on a demonstration of whether or not the client has knowingly waived the attorney-client privilege.

You will see the case law in the materials there. I simply highlight that to make you aware that, when you speak, you may be acting, or be found to have been acting, on behalf of the client and have, in effect, admissions created through the lawyer's statements. And on that subject, I think it is good to keep in mind that, when you do make comments or you respond to a sensitive story, it is better to stick to the general: to have a theme, to have a message and stay on message rather than address the specific facts, because as lawyers—particularly when these stories break—we often don't know what the facts are going to look like. They may turn out different. The facts are nuanced, or, heaven forbid, the client hasn't told us all the facts. So, in general comments, statements that reflect point of view rather than facts, are extremely useful.

JUDGE KAPNICK: Mark, I wonder if I could interrupt you for a moment and go to some of the reporters and see Eric or Aaron, whoever wants to start first, how do you find a story that you pick up on, that you want to write on? Do people call you? Do you do investigations and find them? Do you have people in the courts that give you some idea of what was filed in the courts today, and then how do you go about working on the story?

MR. ERIC DASH: I think there are really two types of cases. Maybe there is one or two more that I haven't thought of the categories. The first would be sort of breaking news or breaking cases that a complaint gets filed. You either learn about it sort of as it happens or perhaps before, if there is a proactive attorney involved, but those are sort of breaking things, and you are flying by the seat of your pants.

Usually these things happen at 4 p.m. and you are trying to get to all the different parties involved. Trying to get comment. You are also looking for attorneys who can help dissect the issues, people who can speak to the different laws involved to help apply sort of the facts. And the number one rule in terms of that is trying to find someone who is available. It is unbelievable at 4:30 on a Friday afternoon when something happens how hard it is to find people.

So 50 percent of the job is showing up, and, if we can get to you, it makes our life easier. And, more importantly, if we can get to you and you have read the case, that makes our job even easier, and it helps a lot. I'm surprised at how many people want to comment on cases that they haven't read.

The second sort of category is sort of the lurking stories. We will either get tips from lawyers and people that we have known for a while or also rely on our sources to point us and flag maybe an interesting thing that is happening in the law, an interesting change in the law or maybe an interesting case that illustrates a larger point. So I think that is sort of how I think about it in those two categories.

JUDGE KAPNICK: Okay. Aaron, do you want to follow up from that?

MR. AARON LUCCHETTI: Yes, I like what Eric said on the breakdown of breaking cases and sort of more proactive cases where a lawyer can help uncover something that the reporter may not have found otherwise or may not have popped up in his universe otherwise.

On the breaking cases, it is availability and distilling complex information in a quick way, which is most valuable for the reporter, especially when the call comes in or when the case comes in late. It is a 50 or 100-page complaint, and the lawyer knows so much more about the case at that point than the reporter does, and so to have a quick conversation sort of distilling what this case is about is invaluable, and, if it is going to be a case that the reporter is likely to cover over time through complaints and filings and the trial, if there is a trial, it is good to make those contacts early, to be there when the news is breaking, when there is going to have to be a very quick and accurate story.

On the other side, I think addressing a little bit of the questions—I was reading some of the pre-panel materials—there was a lot of discussion of the rules and when you can talk and when you can't talk, and obviously that is important, and the client's interests have to be first.

I think in some cases, it is not every case, it is also a good story, and what the client may want is more than just the legal victory, but they want more vindication generally for what they have done or how they have been treated, a grievance that they feel they need to have addressed.

If there is a public wrong that they feel that needs to be righted and it is a big part of what they are doing, but the public perception of what is happening is also very important, and in that case a reporter or a journalist that is looking to write a story about that topic is a great opportunity for the client to get that word out to more people. Obviously consistent with the rules that you have to follow in the case, and the rules need to be followed to keep a fair trial.

So I think those are the two main areas that I'd like to focus on. Each case is different. Each client is different. Each lawyer is different. Some return calls right away, which is great obviously for us. Others don't. It is important for us to know that the lawyer is getting the message, and one of the things that really creates angst in a newsroom is if you are writing a story about a defendant or a person who is charged with something and you feel like you haven't talked to that person or a representative of that person to let them know that this is going to be written and published and they have a chance to comment.

Even a call back where you say, look, I got the question, I know you are writing this, but I can't talk, is more helpful than no call back at all.

JUDGE KAPNICK: Now, Ken, you are a PR person, so, if you can talk to how you get involved in cases, some people may call you at the beginning to be proactive, other times you may be acting in a defensive position, and could you give us a little idea of how you get involved in some of the cases that you do.

MR. KEN SUNSHINE: We can get involved in many different ways. Most of the time in these kinds of cases we get involved in the moment of crisis, too late for us to do what we would really like to do and to have the ability to work on how to formulate the public part of what this case may be about, but, and I have got to say last night at the dinner a number of attorneys, who I won't mention, mentioned "Aren't you the guy that keeps us out of the papers?," and the answer is no. Especially today, when the media is omnipresent and anybody with a cell phone becomes a journalist and you can blog and anybody can be a blogger. The rules of the game have changed a lot, and the world of journalism is going topsy turvy in the world of the blogosphere and the decline in traditional print newspapers.

There is a big change in the way, in the amount of media and the way the media covers all kinds of cases from the most frivolous to the most serious. But to answer more directly to your question, sometimes we get called in by attorneys or by people involved in a potential case very early. We are part of the planning stage for the case.

I distributed two articles to try to formulate some discussion about the world of PR vis-à-vis the court system. One is an article from *The New York Times* from last week about a civil suit by a bunch of property owners in the New Orleans area against the Army Corps of Engineers, and it is a potential landmark case. Here is a situation where we got called very early by the attorneys and in formulating their plan of how to conduct this case, no secrets, and I have nothing to apologize for.

They wanted some press at the onset of the case, and this was one of the examples of what we were able to help them get, which was an article in *The New York Times* on the day that the case started, and there is no secret that this is the kind of case that has got lots of potential for public interest in the case. It is the core of what Katrina was about.

There is another twist to it. There is potentially a lot of money involved, and it is a sexy kind of case for the media, and it is also important legally, and it is a serious lawsuit to say the least, so we were able to get I think a very good report in *The New York Times*, who did a lot of investigation, a lot of work, and this was the result of it, so it is an example proactively of some of the things we do.

The other article probably shows the lowest end of what PR is about and what happens all too frequently in the world of the media. These days we are doing a lot of work in the financial world obviously for you know why and some of it proactive, some of it defensive, some of it trying to help people who feel they have been aggrieved in the media and getting a bad shake.

Well, we also do a lot of work in the entertainment business. Morgan Freeman is one of our clients, a great guy, one of the great actors of America, he got involved in a terrible car crash a year or so ago, and—February '09—and look, I will name names. Gloria Allred is a well-known attorney out of LA, and there is no secret that she is one of the many that tries to try her case in the press. Those are my words. Certainly is aggressively seeking press attention at any end to either get a settlement or to embarrass the individual that is being sued. And in this case one of the most—one of the craziest that I have been involved in, she, the woman, Morgan Freeman got hurt badly in the car crash, and the insurance companies are battling it out for who is responsible.

And in fact Morgan had been giving this woman money because he felt terrible for her. He didn't have to, and he had been giving her money. She sued Morgan in this incredibly frivolous lawsuit, but it seemed like the purpose of the lawsuit was to get attention to announce to the world that she was not having an affair with Morgan Freeman. There was an AP story that was picked up everywhere to draw attention. Gloria got her face all over TV and all over the press, and I'm not sure toward what end, because in the end the insurance company is going to battle this out. They are not going to get any more money out of Morgan, but I think the real purpose was to announce that they weren't having an affair.

I am just using one of the crazy things we get involved in defending Morgan but go on all the time. There are a lot of good judges here. The fact that this nonsense goes on with some frequency, and there are people that get famous and rich and big attorneys that do these kinds of things through the press is the other end of the press dynamic vis-à-vis the courts.

JUDGE KAPNICK: Once a story that is filed shows up in the newspaper, how do you go about shaping the story?

Just to respond to something Ken said, I know every time you go on the computer another story pops up, so you don't have to wait until the next morning to get *The New York Times* at your door or the *Wall Street Journal*. It is a whole different time framework now where things are popping up all the time. How does that affect your work and how do you go about creating the story once you hear about it?

MR. DASH: Again, I think it sort of breaks down into the two categories. There are some sort of known stories or trials that are so important that you have to cover them, and then there are interesting cases that sort of illuminate broader trends within the financial industry, within the legal profession, that you want to cover because you can sort of shine a light on something interesting that is happening in the world.

So that is sort of how I think about it, and I think that, as news becomes commoditized, organizations like *The New York Times* are really interested in those broader pictures, but we can't neglect the big picture, big headline-grabbing stories as well.

JUDGE KAPNICK: You say you try to get somebody that is familiar. Do you have lawyers that you call upon or legal commentators that you call upon to comment in these general trends?

MR. DASH: I think there is probably a stable of lawyers, many of whom I have met covering different cases and that I have stayed connected to and stayed in touch with that I will sort of tap their brains, "Hey, what is going on, what do you find interesting, who might be an interesting player in this matter?," and we will have conversations from time to time, not related to the current matter. Also when I am in the middle of a case, I will ask the lawyers involved what are the big issues here, what are the things that I should be paying attention to, and sometimes they will have ideas on their own case, but often they will have ideas on other things going along working their way through the court system.

JUDGE KAPNICK: Aaron, did you want to comment?

MR. LUCCHETTI: Yes, I would say that one thing I have seen more recently with a proliferation of real-time

news and blogs and publishing on the Web, and we publish a lot of our stories now on the Web before they are in the paper the next day, so the time frames have gotten a lot more immediate, and talking to a lawyer and saying we are working on the story, we are always telling you hopefully what the deadline is, because the assumption that it is the next day's paper is probably only a 50-50 chance at best. But the thing I see more now in connection with that, from lawyers and others, is that you have a statement for your client that sort of stands as a general statement about the case, and I have seen this a lot in the Madoff coverage, for instance. We have done Madoff stories for three or four months now, and there will be a development in the case. We are going to put it online.

You may or may not be able to reach the lawyer immediately, but it is good to have that statement before, so you have something that has been said on the case, which is generally their view, and obviously we will try to get the updated statement to whatever development it is, but to have a standing statement that you continue to update is useful in this day and age, because developments will pop up at 10 in the morning, and we will get something online by 10 or 10:15, and you are in court so you can't get back to us right away, so it is helpful to have those working relationships continuing with preparation like that.

MR. ZAUDERER: Just one comment on what Eric and Aaron said. There is a chasm, from the lawyer's perspective, in the quality and nature of coverage between papers such as the *Times* and the *Journal* and many other papers, particularly the tabloids. I remember Aaron called me a couple of months ago. I don't remember what the story was at this point. We chatted about it, and I don't think it was going to go to press for a week to ten days. *The Daily News* and the *Post* never make those calls.

Their calls are about the sensation of the moment. They have a job to do, legitimate reporting, but, when you get a phone call from a reporter from that paper, you have to understand it is from a different perspective.

And also, just one other thing: listening to this—and maybe the reporters want to comment to this—we often hear the terms of engagement in talking to the press: off the record, background, on the record. We should always assume, if a reporter calls, unless we agree otherwise and we have a basis to trust the agreement, that we are on the record, and it is naive of us to say to a reporter, "Well, let me tell you something; please don't print this." I think a reporter would expect that at least a sophisticated person such as a lawyer should not expect that. My understanding, maybe it is useful for the audience, if you comment, if you have any view on this, please, the levels that are on the record is self-explanatory. It means whatever you say may be reported.

Background, that means that we should expect that the reporters may report the information that you are providing, but without attribution. Of course, we see this in Washington all the time, and you see the report that "a highly placed source in the administration said." Many people use on background as a way of getting at the story without specific attribution. Off the record is just that in that it, if honored, means the reporter not only doesn't report the source, but doesn't provide the information that you have given them, and off the record can be very useful even when the reporter calls for an on the record statement, because you can do your cause some good and also help the reporter by giving some information about what is going on in the case, timing of the case, stay tuned for this, "I will send you the motion that we are expecting when it is coming up." It is very much appreciated.

Reporters don't have the time to track all this by themselves, and I think off the record also gives you an opportunity to give sources and areas suggested. It is very useful to give names of people that, if you are plugged in, if you are somebody who the reporter knows and someone who is involved personally in many of these issues or with people such as this Section of the State Bar, other people who you can suggest and say, look, I'm not an expert on that subject, but I will tell you the person who you ought to talk to about the derivative swaps or anything else, so do you have any—have I accurately stated your understanding of those conventions?

MR. LUCCHETTI: Yes, I think that is important to cover. From my standpoint, on the record is a comfort zone. Background is a very common place to be with the source, and there are shades of gray in between that. For instance, someone who will be very comfortable being quoted but will want to know what the quote is going to say before you use it, so a way for having a long conversation about a wide-ranging number of topics that you can come back and say, well, this is what I am planning to use, and that person might say, oh, well, in that case, I should also add A, B, C. So it is helpful to be able to go back to sources on that. It can be on the record with that kind of quote check for accuracy to make sure that there is no disagreement about what the person said.

It is better to have those conversations before the article comes out than after the article comes out, so that is something that happens too.

Off the record is something we try to do as little as possible, because it does tie the newspaper's hands or

the journalist's hands in some ways. If it is going to be off the record, we will want to know why. Is it just off the record until the filing comes out in two hours or four hours, or is it off the record or sometimes what we call deep background, no attribution at all, but, if I hear it somewhere else, I can use it. So, if Mark says something is off the record and then tells me that the Dow Jones was up 20 points yesterday, I will say, wait a second, that is something other people know. How can I take that off the record?

A lot of times you will make a decision on whether it is background or off the record before you know what the information is, so you try not to tie his hands too much, and the usual way to do that is, if the reporter accepts it off the record, you say, well, if I get it somewhere else, then we can use it.

VOICE: I just wanted to follow up on a point that Mr. Lucchetti made, which I think is a worthy tip. I was a prosecutor in a lot of high-profile cases and dealt with the press on calls on those, and we have some now too, and one thing that I found is very useful is to try and get up-front a sense from the reporter whether they are looking just for information or a direct quote, and, if they are looking for a direct quote, I usually ask that, if they would be willing to just give me a read-back on the quote for accuracy's sake, and most of the very, very good news outlets will do that. Some will be hesitant, but may or may not do it, depending on the individual reporter. Some will flat out say we don't do that, but that gives me a sense before I have given the information as to whether or not I know ahead of time if I am going to be quoted with quotation marks around what I say and then who I am dealing with, because if the reporter is from a news outlet that won't specify whether they are looking for a direct quote or just background information, but nevertheless subscribes to me and they have a flat-out policy of not giving out read-backs, that may make me less willing than a different newspaper or a different reporter who will say, sure, I am going to use a direct quote. I am happy to give you a call back, and usually they do.

So just asking that question I think avoids some surprises down the road when you see quotation marks around a thought when it was just general, helpful information, and it also gives you some intel on who you are dealing with, and I don't know if that is something that the panelists found.

MR. DASH: I think from a reporter's perspective, I think, Aaron, it is better to have that conversation before the story comes out. I think it is better to have a conversation about what the ground rules are. It should be the first sort of item of business that you discuss, because then there are no misunderstandings, and you say this is on the record.

If we can sort of, if you need to go off the record or on background, why don't you let me know, and then we can agree to that as we do it.

I think what becomes more difficult and complex and what leads to misunderstandings is when you don't have that conversation up front and there is not a lot of clarity on the ground rules, so I actually prefer that.

MR. LUCCHETTI: I think that is a good point. In terms of handling that up front, that is a great way to handle it to know the reporter a lot of times will just want information. They won't need a quote. You're not a major player in the case, there may be other players that he wants information about, and so we will make that clear right up front that that is the best way to handle it.

Of course, stories change. Editors ask questions later in the day. Maybe we should get a quote from this person. So there are times when events change as the story proceeds.

MR. SUNSHINE: One thing, just a point of advice, when we get involved in these situations where I can't remember if I am on or off or deep background in the same conversation, it is in your interest as somebody trying to do what is right for your client, or for somebody you are representing, to be on the record as much as possible, and often clients are so scared or lawyers are so scared of anything having to do with the press, like I said last night, I just wanted to keep them away. They are the enemy.

It is the biggest mistake that people can make is to treat all press people, all press inquiries, as the enemy. Even if you know that it can't be good for you to be in the press, the fact is it is going to be in the press, if it is that big a case. You try to make the most of it, even if you are running scared or demanding that everything be off the record or deep background, because from the reporter's point of view you are tying their hands.

MR. DASH: The story is going to get written, so you might as well get your point of view or your client's point of view into it.

MR. ZAUDERER: One area maybe you could comment on; it might be useful. I remember that you were very aggressive in following the Grasso case and dealt with a lot of people there including some that didn't want to speak and some who were speaking behind the scenes, and I wonder what your impression was of the communication with counsel and what you did to try to do your job, Aaron, and how did the lawyers react?

MR. LUCCHETTI: It was a case that went on for several years. In fact, I didn't start covering it until after the initial claim was filed by Spitzer's office in '03 or '04. I can't remember. That was a case where there was constantly new filings coming up, and there was a lot of opportunity to go to lawyers and say, okay, what does this mean, what does this mean as far as in the fight here over compensation for the former NYSE chairman, Dick Grasso.

And it was also a great example of how I think Grasso wanted more than a legal victory. He wanted to be vindicated in the business community, and more broadly for the public to think that he did a good job and didn't get overpaid. So it was a case where some people were willing to go on the record in any story, other people wanted to pick their spots, but the important thing is to keep pretty constant dialogue with all the different players in the case from government to the stock exchange to the various defendants.

JUDGE KAPNICK: Now you mentioned, Mark, in some of your opening remarks about the issues of libel and the limits of comment, and I am wondering from the reporters how familiar are you, not being lawyers, I presume, with these laws, what the limits of comment and how sensitive are you to them, and are you really trying to push the lawyers to the limit or pass the limit or how I am concerned about that, I think a lot of lawyers are, that you kind of understand the parameters and try to work within them, so I wonder if you could comment on that at all.

MR. DASH: I think as a matter of practice we don't encourage anyone to break the law, but we also want people to provide us with as much information as they possibly can. We are there to serve the interests of our reader, you are there to serve the interests of your client, and we have to have some sort of meeting in the middle.

JUDGE KAPNICK: Mark, do you want to speak about that at all from the lawyer's point of view?

MR. ZAUDERER: Yes, I have rarely had a problem with it, maybe because I have been mindful and respectful of those limits, and I think for us as commercial litigators, there is a broad comfort zone that allows us to speak about matters that are either in our pleadings or related to it.

If you look at some of the cases in the materials, the outer limits are maybe beyond that sort of gray line. If it would be found that you started a lawsuit for a malicious reason, such as only to provide a springboard for making a defamatory comment, you could have exposure, but I think that both as a matter of avoiding liability for libel and as a matter of good taste and consistent with the dignity of our profession, you should avoid the kind of extreme statements.

That doesn't mean you can't make hard-hitting statements, and they are going to be supported by what is in the pleading. If you have a pleading which charges somebody with fraud, there is nothing wrong with your saying this defendant defrauded my client in an outrageous way.

The fraud is what is in the pleading and the statement that it is outrageous or maybe more extreme terms that you can think of are matters of characterization and opinion. And some of the cases where libel has been asserted and the defense has been dispositive, the courts have discussed those distinctions.

So I'm not terribly concerned about it, but I think you all have to be aware of it.

JUDGE KAPNICK: Yes.

VOICE: Bad news story, page 1, the bad news turns out to have been wrong, maybe using Mark's example, outrageous fraud, page 1, business section, it turns out the defendant is successful. How do you attempt to recover the business's credibility, and does the newspaper cover it in the same place and prominence where the defendant wins, because it is not exactly a big news day, fraud not proved.

MR. ZAUDERER: I would roll that question to Ken. I think he would be the one to address that, because that is a typical situation where a client might come to Ken to address it.

MR. SUNSHINE: I mean it is very complicated. You know, life isn't fair, and the old axiom is "good news is no news." Often the outrageous, or in the case you are talking about, maybe untrue accusations make great headlines, and the fact that it gets dismissed or it is defeated in court makes it less newsworthy very, very often.

Obviously to answer directly your question, there are a lot of things you can try and do. One is to try to get attention to what happened legally, that it was dismissed, and, if it is a juicy enough case, there is more of a chance for that to happen.

Two is to try and prevail on fair-minded reporters and editors. Look, you took a real shot at us coming in. Give us a shot coming out, and try to make, try to work with the reporter to try to make the story as colorful and newsworthy as possible, so he or she can sell it to their editors or sell it to the papers.

There is no secret. There are PR techniques that are helpful to getting stories covered, to getting them in the papers and getting them, making them newsworthy, but nobody should masquerade the fact that a big, juicy headline one day that may be totally unfair or proved untruthful isn't going to be counteracted by similar coverage on the way out. It just doesn't happen.

MR. ZAUDERER: Ken, how do you get a story out if a client comes to you—let's say it is not the juiciest case in the world—but the client's goal is to get his story out? What are the different tools you have generally, and what are the different —

MR. SUNSHINE: One of the ways is to try to find something that makes it newsworthy. Some quirk in the case. The personality, the background. The context within the bigger picture. Financial fraud is a big deal these days. People hate people on Wall Street these days. They are the enemy. You play to that. Second only to lawyers, who are always number one. It is a joke.

From a press point of view, given as an exclusive, it is no secret, making it an exclusive to one newspaper, one media outlet is a way to make it more—make the odds greater that it will get that kind of coverage. The disadvantage is you are going to not get coverage in the other outlets or you may, frankly, piss them off. Why are you going to bed with one of them?

Let me just segue to something else that Mark said. Here, of all people, I am going to defend the New York tabloids now. You get a call from *The New York Times* or the *Wall Street Journal*. It is different from one of the New York tabloids, and obviously I would agree in many cases, and battling with the New York tabloids, and tabloids I mean the *Daily News*, the *Post*, *Newsday*. They're not the *Enquirer* or those kinds of tabloids.

You know, the New York tabloids are what they are. They are very important in terms of determining public opinion in New York. They drive news coverage in television and on many blogs. They are wildly influential on certain kinds of cases when it comes to scandal, fraud, sex, and celebrities doing bad things. There is no doubt that Page 6 in the *Post* is very influential, and people like me who do a lot of business with Page 6 spend a lot of time trying to appeal to the best of them trying to get our licks in.

It is very common among attorneys and people who don't want to read the New York tabloids for all good reasons and don't want to deal with them and just read the *Times* and the *Wall Street Journal* and the *Financial Times* that they make them go away. Well, they are not going away, and they do cover these kinds of stories, and you have got to be able to deal with them.

There are also some terrific editors and reporters at these papers. Some of them are a joke, and some of them make things up and some of them do outrageous things, but many of them don't. I guess my point is they are there. I wish there were like ten newspapers in New York. I wish there were 20 of them now with all different stripes, but to ignore them or dismiss them is a big mistake, particularly in the kind of cases that I think many of you have.

MR. LUCCHETTI: One thing I wanted to add to that last question about bad news getting front page billing and later when it comes out that the prosecution overreached or they didn't win the case, how do you get headlines for that. I think that you tend to find that there are bigger headlines when it is one person or a Bernie Ebbers or a CFO of a big company who has got a lot of press and there is a trial, guilty or not guilty, jail time or no jail time. That is always going to be dramatic. That's always going to get a lot of press.

What is harder is if there is sort of a generalized misconduct alleged, a civil type of fraud. For instance, when I covered the New York Stock Exchange, there were two cases that kind of highlight the difference. One was the Grasso case where they were very personally called out for conduct that the Attorney General found egregious, and they fought back, and in fact one of the things they did toward the end that was reported in the press was pulling out the cost of fighting the cases and raising the public policy question whether all this spending on whether Dick Grasso made too much money is the right way to spend the Attorney General's resources.

That is sort of going on the offensive. It is a complicated step with risk in a lot of ways and maybe you don't want to do it, maybe your client doesn't want to do it, but that is a way to kind of get a little bit more sizzle out of the story beyond, well, "the prosecution didn't prove its case."

For example, where it didn't happen as much is the case of the New York Stock Exchange specialists, which dominated the courts for nearly a decade. In 2003/2004 a U.S. attorney came out with a case against 12 or 15 or 20 specialists that they interfered improperly and were basically ripping off the public. None of those people were really household names. There were about 15 or 20 that got—probably ruined their lives basically. They had to quit. Their jobs were over. They were tied up with legal costs and legal procedures for years, and in large part that case didn't go well for the prosecution, and there wasn't, besides the one or two-day story of "the prosecution lost

the case," there wasn't quite as much coverage of the specialists even though there were a lot of personal costs.

JUDGE KAPNICK: Have either of you ever covered cases that are ongoing in the courts, and do you ever sit in on the courtroom procedures, or do you rely on speaking to other people about what goes on? As a judge sometimes people say, "What did you think about that case?" and I will say, "I wasn't sitting in that judge's courtroom. I really can't comment on it." I don't think people get the whole story by just reading snippets in the paper. I was wondering if you have been involved and how you go about covering those kinds of cases?

MR. LUCCHETTI: We rely a lot on the court reporters. We have a court reporter in the U.S. courts, and he does a lot of the legwork in working with the other beat reporters. For instance, I don't cover the courts or the legal system per se, but I deal with various cases, and I coordinate with him and try to come to as much as I can, but there are a lot of hearings and a lot of sessions that you can't get to, and we try to send someone to them, if the court reporter covering the case can't make it.

MR. DASH: I think the best example of a case that I recall sitting in on, and we tend to think of the cases that we cover as investments that, if we are going to spend time, we want to see a return on our investment, so we will usually sit in on the opening and closing arguments and then some key days of testimony.

So, for example, I covered the Ojindi case, which was this guy who posted factually correct but illegally obtained confidential information on a web site and then proceeded to short the stock, and it was this big case in the Eastern District, and so I attended the opening statements, listened to both sides. I attended the closing arguments, and then I would keep in touch with the lawyers throughout the trial to try to figure out what are the key days that I needed to be there and when would certain facts be presented or when would a certain scene or instance in the case be that I wanted to go there, and that was a way in which they sort of provided some guidance. The lawyers on both sides can provide some guidance on what the key moments were for me.

MR. ZAUDERER: There is a question.

JUDGE JUDITH S. KAYE: Is there room anymore in journalism, newspapers, for educational, informative things about the legal system? Does everything have to be sizzle, zap, juice, ripping down, tearing down?

MR. SUNSHINE: No.

JUDGE KAYE: I thought that was the answer.

JUDGE KAPNICK: Would you like to say more than no?

MR. DASH: Look, I think that we have a limited number of resources, and so we have to pay attention to the biggest and most important issues and things that sort of illuminate broader policy points, but I think within that context there are ways to give readers a sense of different things that are going on within the legal system, so I think that we do try to do that, but we do have to pay attention to what is important.

MR. ZAUDERER: I would like to comment on Judge Kaye's question, if I may for a moment, with a little vignette. I think it illustrates an important point. Let me go back. How many of you have heard about a new law that was passed in New York called the Ehrenfeld Law dealing with libel? Well, Rachel Ehrenfeld was an author who in 2003, published a book in which she identified what she believed were sources of terrorist funding, which included a wealthy Saudi, Mafoud, whom she claimed was involved in the funding of terrorism. Mr. Mafoud then brought a libel suit in the U.K. claiming this was false, and Rachel Ehrenfeld did not appear in the U.K.; she was served with papers in the U.S. but felt it would be an unfair proceeding. After an inquest, the judge in the U.K. awarded a libel judgment to the plaintiff. I will call him the libel plaintiff, Mafoud.

Now Rachel Ehrenfeld is a New Yorker. Her assets, or whatever she had, are here in New York, and she was greatly troubled and concerned because here was this judgment that was obtained in the U.K. Now what was she afraid of? Not what you experienced lawyers would think—that Mr. Mafoud would come in and enforce it in New York. Quite the opposite. But that he would *not* enforce it. He didn't care about the $250,000. He had a libel judgment, which was hanging over her head. She claimed she couldn't write another book, as the publishers wouldn't deal with her.

So a number of interest groups got involved in this and lobbied the legislature and passed this year the Ehrenfeld law, which has done two things.

First, as you know, when it comes to enforcement in the U.S. of a foreign country judgment, the courts here always acted as a gatekeeper. There is a statute that called for enforcement of a foreign country judgment and instructs the judge, among other things, to consider whether it's then the policy in the U.S. to enforce the judgment.

Well, the legislature amended that specifically to consider whether a libel judgment in another country, specifically in the U.K., which doesn't provide the same

protections, the court should enforce it. But what happened here—and I will come to Judge Kaye's point—is that Rachel Ehrenfeld, because she was concerned about this judgment hanging out there and not being enforced, commenced a declaratory judgment action in the federal district court to have that U.K. judgment declared unenforceable in the U.S.

The district court dismissed the case for lack of personal jurisdiction, because the libel claim had no connection to the U.S. The case went to the Second Circuit, and the Second Circuit certified it to the New York Court of Appeals. The New York Court of Appeals decided there was no jurisdiction for maintenance of this declaratory judgment suit. This is when the legislature became hysterical, in my opinion, and passed this law. It has now amended New York's long-arm statute to provide that in the case of a declaratory judgment to declare a foreign country libel judgment unenforceable, the courts will go to the full extent of due process.

As you know, New York's long-arm statute has traditionally not done so. After this, Congress got involved. Congress has now before it in the Senate and the House a law which would go much further. It would create a federal cause of action for treble damages for any American who is faced with a libel suit from the moment it is commenced in the U.K. or any other country, if they can prove that it was done for malicious purpose and maintain a treble damage including all legal fees incurred during the suit and damages to reputation.

Now I believe this is doomed to failure, because it is absolutely unconstitutional. It would be interference with the courts of another country. Can you imagine if, while a libel suit was pending in the U.K., somebody got a declaratory judgment in the U.S. against a U.K. libel plaintiff, and tried to enforce it in the court where the English judge is hearing the libel case?

In any event, with that background, I decided to participate in a panel of the American Enterprise Institute in Washington, D.C., a panel moderated by Richard Perle, former Bush Administration Under Secretary of Defense, and Mrs. Ehrenfeld, her lawyer, Dan Kornstein, and it was well attended by the press, and the whole theme of the discussion was how important the First Amendment is in the United States and how we are going to pass laws like New York has passed.

And the Judiciary Committee was there. There was not one moment of discussion, until I raised it, of the legal problems and the consequences for international relations if this federal bill passed.

After the panel, two of the reporters came up to me and said, "That was a very interesting discussion. We have been writing about this, and we had no idea that there were these lurking constitutional issues and policy issues." No one had ever discussed it with them. And it occurred to me after that panel that there are opportunities for us to educate the press about other sides of the story.

Can you imagine—put aside Mr. Mafoud—suppose you represented a client who lived in England, not a wealthy person, and a book was published in the U.K. by an American publisher that was libelous. Now, if he obtains and tries to enforce a libel judgment even if he doesn't enforce it, if he simply brings a libel suit, he is now subject to suit in the United States for treble damages for the legal fees incurred simply for filing the libel suit in the U.K. in the country in which he lives and in which he claims he was libeled. There is an important story there.

So I think that whole event started me thinking about how often it is that what the public sees or the press writes about is a result of our inaction in educating the press to all sides of a story. It is a long story, but I thought it was important.

JUDGE KAPNICK: Yes?

VOICE: Let me take you back to two issues we talked about before where the press gets it wrong, but in this case the press gets it wrong because it does an investigation and the facts on which the case is reported turn out to be incorrect.

Oftentimes what we see is a tiny "we got this or that fact wrong." How can we on behalf of clients who have been harmed by that inaccurate report, factually there is not going to be an acquittal, but there's not going to be a finding for the defendant, so how can we get the press to change that to say "we made a mistake?"

MR. LUCCHETTI: I think that is a great question. I think there are some things to note on the positive side about that. I think the *Journal* and the *Times* have always been among the best, if not the best, at correcting mistakes. There are different policies at different papers, and it is part of one area where Ken's point from earlier and Mark's point that each press has to be viewed differently is important.

Everyone has a different correction policy. At the *Journal*, and I think it works this way at the *Times*, but I'm not positive, if there is a correction on a story, it is usually corrected online. The correction is appended, and in databases where you will find the story, and more and more now you will find the story online in a database, not in the

actual paper, that correction will be printed at the top of the story before you even get into the story.

I think that is relatively new, but what you are saying is very important, and that is why it is important that we to come to you to have a good sort of open live communication before the story comes out, so you can tell us that this is wrong or this is out of context or this is inaccurate, and we can weigh that with the original information and come out with a more accurate story.

But one point I wanted to make on your earlier question. A lot of you may know the *Journal* has a law blog, one of the many blogs we have. We are all kind of out searching for big front page stories with a lot of readership, so people feel like they need to go out and buy the paper to read. But day in and day out we also have a lot of coverage about different industries, the markets and the economy and a law blog where a lawyer and another reporter write daily about topics in law, what is going on in the legal industry, changes, interesting trends, and there are a lot of interactive features to that site where people comment, and it is actually a pretty good area for education changes, trends in the industry.

JUDGE KAPNICK: Did you want to, Eric, comment about how *The New York Times* might respond to that question?

MR. DASH: I think we would respond very much in the same way that Aaron had mentioned. I think the one thing that I would note is that, if there is a factual inaccuracy, you should feel free to call us early as soon as possible. I think any good reporter, if there is a factual error and not a matter of interpretation, but if there is a factual thing wrong, we want to correct it as soon as we can, so if you have the reporter's cell phone, if you have a good working relationship with the reporter, I think that is where it really can come in handy.

MR. ZAUDERER: One quick comment on that, if I may, so everybody understands. Correcting an error is important not only for your client's reputation, but these are papers of record. When future writers write stories of new events, they look up the old stories, and, if that correction is not in there, they will repeat the error. I think that is the point you wanted to make.

MR. LUCCHETTI: And it probably goes without saying, but it is important to note that reporters want to get it right. Ninety-nine out of 100 or 999 out of a thousand want to get it right and want to get the right story out if that serves our readers the best.

JUDGE KAPNICK: Yes? Sir, you had your hand up.

VOICE: Ken, in advancing stories, to what extent today do you turn to blogs or social networks like Twitter or Facebook or otherwise and how has that changed your advancing stories and how do you work with lawyers with respect to informing blogs and other social networks?

MR. SUNSHINE: Often is the quick answer to that, and obviously it is evolving very quickly. Who knew what Twitter is? God knows what it is going to be like in six months or a year.

VOICE: Can you answer that in less than 100 characters?

MR. SUNSHINE: Right. I have been doing this kind of stuff for a long time, and the evolution of the distribution of news, and this is part of the distribution of news that you are talking about, is the changes are overwhelming.

A couple of facts. One is most attorneys that I found are very resistant to it. They don't know what it is. Most of them are older. They are like my age, even older than me, and it is a phenomenon that is almost geared wholly towards young people.

Now it has changed. Facebook, I have peers that are in Facebook now, but a year ago none of them were. Twittering is a very young person's thing. It is evolving too, but I think part of it is an age thing.

Two is, and I have to say my own personal bias, I would rather deal with real newspapers. I still read seven newspapers a day. I am probably the last one standing going to a newsstand buying them. Even in my office, a PR office, virtually all our people read everything online. I wish frankly your paper would charge for it. If they were smart enough, they would have put your paper, at least monetized it, because what has happened to the traditional newspaper business is crazy.

But there's no secret, again, depending on the subject or what the issue is, the world of the new media from Facebook to MySpace to Twittering is a very effective means of disseminating information.

Now to get a story like my *New York Times* story on the Katrina lawsuit, Twittering wouldn't have been a means of distribution. A real story in a real newspaper frankly would be far preferable, but there are other things. We do a lot of work in the entertainment world trying to set up people to blog a film or get something, that avenue is very important and is becoming increasingly important as the public becomes more sophisticated about it. Some of the more glamorous but less effective aspects of what this phenomenon is about should shake out.

MR. DASH: Let me just take that question in two ways. The first is that at *The New York Times*, we operate a dealbook blog, which covers mergers and acquisitions and sort of the broader role in Wall Street, and one of the things that we have as part of that is a deal professor who writes a column, which is sort of inside baseball, but very much geared to the legal profession, and I think that is one way in which blogs can provide sort of an educational mission and illuminate issues for, quote, "lay readers" and a professional audience, and I think that we are going to see more of that occur in the future.

The other thing that is important to note is that the stories that Aaron and I and our colleagues write often get picked up by the blogs and get linked to, so that makes them even more relevant, which is why you need to pay attention to blogs too.

And we also pay attention to blogs for story ideas, and just like there are good and bad newspapers and there are different types of newspapers, there are different types of blogs as well.

VOICE: I am just curious about the extent, if at all, to which reporters have contact with judges writing their stories.

MR. LUCCHETTI: I wish it were more, but frankly it has mainly been a relationship where you work with a judge's staff, and it may be different for reporters who cover the courts, our legal reporters. I don't know how often they speak to judges, but, from my experience, it is usually just making sure I know what is happening when.

The judge is sort of the central point of information for all parties. When everything is going to happen. I would be, and we were talking about this a little bit before, really eager to find a better way to talk to judges about what decisions mean, just kind of, "Am I interpreting this right? What does this mean for the defendant? How much money does he have to pay?," just the basics of a case, because sometimes they are written very crystal clear. Other times it takes a little bit of interpretation. You have to talk to both sides. What does this actually mean for the parties? And so I know it is not easy, but I would love to find ways to do it more.

JUDGE KAPNICK: Well, obviously, as you indicate from your question or suggest in your question, we are under a lot of different constraints than the lawyers are under, and I don't know if you have been called by the press before. I know I was attending a conference last year just for the judges with the press, and I think that there is some built-in hostility, which apparently there is also some built-in hostility between the papers and the lawyers at times, and we were trying to see if there was some way that maybe we could all understand each other better and not be so hostile.

One thing that was brought up by some of the press people was, if you have a really important decision, they use the term "if you release it at the end of the day, it is hard for us," because we have a deadline coming up.

Now I have to tell you that as a judge I've never really thought of my "releasing" my decision. When I sign it and send it down to the courtroom and it is ready to go out, that is when it goes—I didn't think I was releasing it, but, if it comes to my attention that maybe that was a good point on a case that I knew that there was interest or press interest that, if you put it—if you signed it at the end of the day and it got out to the lawyers, it might be a problem.

So I had one particular case, and I just asked my staff to keep an eye on the computers to see how long it was going to take from the time we called the lawyers to say there is a decision on this case, and of course with the commercial part, we have a lot of e-filing, which I know you have in the federal courts, so we can just put the decision right into the e-filing, and then all the lawyers get it immediately.

Not all the cases are e-filed, and it took about 45 minutes before we saw it on the computer that I had issued a decision in that case. So it was an interesting thing.

Look, we are certainly not going to comment on pending cases. We are never going to do that no matter how much you try. You can call the courts and find out what time the hearing is, and there are calendars, and those are available to anybody, and that is public knowledge, and we certainly want to let you know about that, but I think sitting down and explaining to the press what my decision means, I can't really see that happening. It says what it says.

Now, if you want to go to one of the attorneys and say, "Well, I'm not sure, there is obviously a previous history in this case that might help us understand it," that is one thing, but it is a difficult situation to try to sit down and say, "This is what I wrote," and you say, well, "What does it mean?" Well, that is what it means.

Judge Maas, did you have any other experience that led to that question?

JUDGE MAAS: Well, I think it varies. Certainly there are a lot of judges who say, I take no calls from reporters about anything. When I went on the bench, I knew a fair number of the reporters based on things I had done in

prior life, and, if a reporter called up and simply wanted to know a fact and that fact was of record, I would sometimes take the call and not for attribution and off the record tell them, A, the fact and, B, where they could find it in a way that they could report it, and they had the latest decision, but not the decision before. And the *Law Journal*, for example, when I was a law clerk, would call up and say, you know, "We have read the decision. We don't understand this, precisely the question you've asked or suggested shouldn't be answered," and sometimes as a law clerk I would answer it, because it's better to get it right than to get it wrong.

My favorite occurrence with them was they published a decision from a judge I clerked for, and the judge asked me to call and say that they just misunderstood it completely, please reread it, and they published a retraction the next day, which as near as both of us could figure out essentially repeated the misstatement.

I will say I think the *Law Journal* has gotten better in its coverage, but I think there is a simple answer, well, "I am a judge, I take no calls," but I think sometimes just in terms of the public being served by understanding what the judiciary does, there is a more nuanced response that is possible.

JUDGE KAPNICK: Jonathan?

VOICE: This is a question directed to Mark and to Ken. When lawyers work with PR firms in an attempt to put a, I don't want to give it a pejorative connotation, but a spin on a story, that creates risk in terms of discovery during the case, and by that I mean, to the extent that the public relations firm is communicating either with the lawyer or with the client or both, they are bandying about ways in which to present the story.

What steps can be taken to ensure that that public relations firm does not become a deponent in the case for potentially damaging admissions?

MR. SUNSHINE: It is very simple. We do these kinds of cases often. I like to think that in most cases nobody knows we are doing it because we are not the kind of PR firm that does PR for ourselves. We are always retained by the attorney. We become part of the attorney, and good attorneys will want that, because otherwise we could be sued for all kinds of things, and so that is the obvious one.

VOICE: Is there—I assume you are talking about creating a Kovel privilege with the firm like you do with an accounting firm. Is that right?

MR. ZAUDERER: I think you are asking a legal question.

MR. SUNSHINE: That is why I have a lawyer.

VOICE: To the extent you have experience, I mean I understand that with respect to a consulting expert, you frequently bring them within the parameters of the privilege. Is that something that has actually been litigated with respect to public relations firms?

MR. ZAUDERER: The answer is yes, we do that, and then there is very little that is sensitive there. I actually have a case right now where we have produced and listed on the privilege log communications between me and the public relations firm in a high profile case where we have claimed privilege. It hasn't been litigated, but, like everything, the factual answer is you don't have to pour your heart and soul out in a written communication, so we discuss things orally. That is basically where it is going to end.

JUDGE KAPNICK: Judge Kaye?

JUDGE KAYE: I just wanted to add to the last exchange that on the state side, I'm not familiar with the federal side, we have a public information officer for the courts generally. We have the Court of Appeals public information office. I think that is a very safe response, because, for example, if the reporter wants to know about bail, the public information officer can explain that. The judge doesn't have to get into the position of "should it be the law clerk, should it be me, should I be explaining my decision," and the public information officer can do the little advance work, so that often a conversation with the judge would be desirable, but at least you know what you are getting into a little bit anyway, so I don't know if the federal courts do that.

VOICE: The Second Circuit had such a person for about a half an hour. He started to collect biographies of the judges, which is the only reason I know that he existed, and it literally was about six months.

JUDGE KAYE: That is really unfortunate, because I think it is a very good intermediary in the sense that there should be some opportunity for judges to speak to reporters, and yet obviously it shouldn't be just picking up the phone and answering, "What I meant to say in my decision." That would be so foolish.

JUDGE KAPNICK: Mark?

MR. ZAUDERER: I did want to just bring to your attention something that is relevant to our practice in the dissemination of information. Of course, as many of you know, e-filing has really changed the landscape with respect to availability to the press of information.

A reporter in a small office in Iowa can get hold of a pleading that is filed at 60 Centre Street in a nanosecond. Or an affidavit. There are all kinds of information online, and it is something that has changed our practice in many respects and makes us think more carefully about what we have put in papers, knowing that there may be immediate national dissemination.

The other thing that has happened—and I think for commercial litigators this is long overdue—the Advisory Committee on Civil Practice has recommended to our Chief Administrative Judge revision to our existing rule on sealing of information. We have had a policy in New York State which has made New York a somewhat disfavored venue for plaintiffs who have had an opportunity to choose different forums. Notwithstanding the widespread success of the Commercial Division, it is a little area of our practice that has been troublesome, and that is that in state court, sealing has been much more difficult than in federal court for commercial data of all kinds. Coupled with the fact that not only do we have a standard in the existing rule—I think it is 212—which has a good cause requirement for sealing, we have traditionally not had in state court a mechanism for this as in federal court for sealing just parts of a case.

In other words, the judge is left with an all-or-nothing decision of whether or not to seal the whole file or not to seal anything at all. This proposed revision will add a second consideration to make clear, among the factors that courts should consider in sealing, whether there is trade secret information or other commercially sensitive data which would prejudice a party if not sealed.

I think the judges want this guidance. The commercial litigators would be very happy with it, and I think it would restore balance in this area.

JUDGE KAPNICK: Well, I think that is a good point, and I know actually the mechanics of sealing parts of files are very, very difficult and are being worked on, so I guess that is a point for another time.

Well, are there any other questions? Judge Crane.

JUDGE CRANE: I had one for Aaron and Mark. What if the Grasso case had taken place after AIG and after the Merrill Lynch bonuses were paid out, how would you have taken care of the situation, and would it have affected the legal result do you think?

MR. ZAUDERER: I will let Aaron answer that.

MR. LUCCHETTI: It is a really good question. Timing is a big part of that case. Compensation in 2004, 2005 looked a lot different than it did a few years later. In fact, that was one of the arguments that Grasso and some of the other people who were in that case made in various ways, that "look at the compensation that is there and look what private equity people, hedge fund managers are making today," so it is a fair argument.

I don't really know how the case would have proceeded. Really that is a question for Eliot Spitzer or someone who brought the case, I think. A lot of that case was subjective. What is excessive pay? There is no number in the books that says, okay, for this job it is X and for that job it is Y.

So I think it is a very interesting question, and, as the case went on, it was like four or five years, I think that is one of the things that the Grassos indeed perhaps did well, or perhaps it was just fortuitous that, as the case wore on, the compensation perhaps looked less excessive compared to the contemporaneous money that was being made on the Street.

JUDGE KAPNICK: I think one of the things that we have learned here today is there is certainly going to be a continued interrelationship between the press and the legal community, and it seems to me it is going to be continually more so, because of the easy access to e-filing and papers in the court, so anybody can get it almost immediately.

I only heard of Twitter two weeks ago or three weeks ago. The development of the press and the blogs and the electronic news. So this is going to be a continually developing story, and I guess what we have to know is, since it is not going to go away, it is important for all of us to learn how to get along with the press so they are not our enemies, but together try to put out the best stories that we can, and that is really going to have to be the lawyers and I guess the legal community's job to work with the press, and I hope that is one of the things that you got from the panel today. So I want to thank all of the panelists for being here and all of you for participating this morning.

MR. SYRACUSE: We will take our break and resume at a quarter of. Thank you.

(Recess)

Trying Your First Non-Jury Case and Preserving Issues for Appeal: The Mechanics for Success

at the Otesaga Hotel, Cooperstown, New York on May 2, 2009, 10:45 a.m.

Appearances by: Moderator: Dana V. Syracuse, Esq.—Hartman & Craven LLP, New York City; Speakers: Honorable Karla Moskowitz, Associate Justice Appellate Division, First Department, New York City; Jonathan D. Lupkin, Esq.—Flemming Zulack Williamson Zauderer LLP, New York City; Robert N. Holtzman, Esq.—Kramer Levin Naftalis & Frankel LLP, New York City

Proceedings

MR. DANA SYRACUSE: Good morning, everyone. My name is Dana Syracuse. I'm an associate at Hartman & Craven. The name of this program is "Trying Your First Non-Jury Case and Preserving Issues for Appeal: The Mechanics for Success," the idea being I would be the junior associate on the team starting a trial and what kind of questions would an associate, the junior member, ask. Before I begin, I'll ask my fellow panelists to introduce themselves.

MR. JONATHAN D. LUPKIN: Hi. Good morning, everyone. My name is Jonathan Lupkin. I am a partner at Flemming Zulack Williamson Zauderer, and I am the vice chair of the Section, and it is a delight and honor to participate in this program now for the second year, particularly under the auspices of my good friend Paul Sarkozi who did a terrific job, as always, in preparing the program.

JUDGE KARLA MOSKOWITZ: I'm Karla Moskowitz, sitting in the Appellate Division, First Department. Before that—actually, my bio is here. Before that, I was in the Commercial Division of New York County.

MR. ROBERT N. HOLTZMAN: I am Robert Holtzman. I am a partner at Kramer Levin.

MR. D. SYRACUSE: Well, given that the topic of the CLE is trying a case that is going to be a bench trial, not a jury trial, my first question will be, assuming I've got the choice between a jury trial and a bench trial, when do I want to select a bench trial?

MR. LUPKIN: Well, the first question presupposes that in most instances you will have a choice. In some instances, you do not have a choice as to whether or not you have a bench trial, and let me be a little bit more specific. A jury trial is something you are only entitled to in a case for money damages, so, if you have commenced a lawsuit, take a very simple case, a negligence case, and you are asking for damages in some amount, you have a right under the New York State constitution to have a jury trial.

If the case seeks equitable relief, for example, an injunction, then, as much as you want a jury trial, you are not entitled to it. And the questions become a little bit more murky when your complaint seeks both legal and equitable claims.

And on this point, and I know that we have a distinguished federal jurist in our midst, Judge Raggi, there is a point of difference between federal and state practice.

In state court, by pleading a mixture of legal and equitable claims, there is a substantial body of authority that holds that you have waived your jury trial right for all of your claims even for those that would have otherwise been tried before a jury absent the joinder of those claims. And there is even some case law that says that, if you had at one point pled equitable claims and then abandoned it, you've abandoned it for all times, even if all you are left with is a claim for monetary damages.

This is different from the way it works in federal court, where, if you plead a mixture of legal and equitable claims, the equitable claims are tried to the judge. It is a non-jury trial. And the legal claims are teased out and tried to the jury.

MR. D. SYRACUSE: Also one thing I wanted to note, this program was initially designed with the younger attorneys in mind, but I note that we have several judges in the room and several very experienced attorneys in the room, so, if you have any questions, please feel free as we're going through the program, to ask them.

MR. LUPKIN: Or if we screw up.

MR. D. SYRACUSE: Yes.

JUDGE MOSKOWITZ: I was going to add that, but I was going to be much more diplomatic.

MR. HOLTZMAN: Let me just add to Jonathan's comment. A very basic thing is you need to know the rules of the court that you are practicing in, because it is different whether you are in state court or federal court as to when you're going to make a jury demand.

In federal court, you need to make it in your initial complaint, and in state court you need to make it at the time you file your note of issue.

MR. LUPKIN: And the consequence of that is, if you don't know the rules and you are used to practicing in federal court and you say in your complaint jury trial demanded, you may well presume that you preserved your right to a jury trial in state court and not even think about what happens next, when, in fact, you have not. Unless you make your jury demand selection in the note of issue, whatever you've demanded in your complaint, you are out of luck.

JUDGE MOSKOWITZ: And it becomes more interesting if you make that demand and you are not entitled to it and the other side doesn't want the jury trial, that ability that the other side is going to make a motion, and, if that motion isn't made within the time constraints of the CPLR, you may get your jury trial, so, unless the judge says, "Wait a minute, you are not entitled to a jury trial."

MR. D. SYRACUSE: Moving on to the pre-trial conference, I have received a notice that there is a pre-trial conference scheduled, and I have checked the rules, and I have realized that there are a whole bunch of things that I have to do. I have to select my witnesses. I have to premark exhibits. I have to identify deposition testimony. And I have to give my estimated length of trial date.

There are a large number of things starting with the selection of witnesses. Who do I identify as my potential witnesses? Do I go overbroad and identify everybody, or do I go through and select these are the key people that I need? How do I handle that?

MR. HOLTZMAN: Well, you need to be careful, because you want to list on your witness list witnesses that you need to prove your case. Necessarily you are going to end up with people on your witness list that you're not going to end up calling, because as things play out in the actual trial, you end up discovering that you have another witness cover that. This is a minor witness. I don't ultimately need to call him. So you are going to approach it being somewhat overbroad. Somewhat overbroad, not preposterously overbroad is what you're looking for here.

I practice employment law, so often I have a discrimination case. There are a relatively limited number of people who really have relevant testimony to give, but sometimes what I find is on the other side the plaintiff is going to list 50 witnesses. They are all the people who worked with the plaintiff, who worked in the facility, who met them once, who they spoke to once, and they are not going to call all those people. They know they are not going to call all those people.

My goal is to have the people that I am definitely going to call, that I am almost certain to call, and there is a good chance I am not going to call. But you have to be careful, because if you don't place someone on the list, you are going to need permission from the judge later, if you suddenly decide you need to put them on the stand. You may not get that permission.

MR. LUPKIN: Judge Moskowitz, I have a question for you. Plaintiff frequently has the right to put on a rebuttal case. You are not going to know what you are going to need by way of rebuttal until the other side has put on its case. Under what circumstances do you require, or when you were in the Commercial Division did you require the plaintiff, for example, to list the witnesses that it would intend to call in rebuttal, or is that something that could be made during the trial?

JUDGE MOSKOWITZ: Well, I think that is really a judgment call by the judge. Every judge is different. It seems to me it is just as you have to identify let's say your EBT readings that you want to make and any witnesses and any evidence you want to put in, and we will discuss pre-marking of exhibits.

On rebuttal, you don't have to even disclose that you are going to need rebuttal, because that is the purpose of rebuttal. You don't know what is going to happen on the other side.

So, as a judge, that is something discretionary. You can always make an offer of proof and say, "I didn't anticipate this, and this is who I need."

MR. LUPKIN: What is an offer of proof, just to make sure we're all talking in the same parlance?

JUDGE MOSKOWITZ: An offer of proof is that, if you allow me to ask this question, Judge, this is what the witness would say, or if you allow me to put this expert on, these are the credentials of the expert and this is what the expert would say, but you do that, to protect yourself, you either need to do that in a document, which is for a motion in limine or something like that, or you do that on the record.

One of the things you really have to be careful about, when you are a new lawyer, is not to have these little conferences at the bench and then think that you have got something that you can raise on appeal, because there is no record, and so always keep that in mind, even if a judge is very informal. If you really think there is going to be a problem, just say, Judge, can we just make a record of that.

MR. D. SYRACUSE: If I get a list from my adversary and it is incredibly overbroad back to the identification of witnesses, what would the court do?

JUDGE MOSKOWITZ: Judges are interested in shorter trials, not longer trials, so one of the methods of doing that is to make a motion in limine, make that returnable to the pre-trial conference so the other side has those papers ahead.

You don't have to make a formal motion. You are just making a motion in limine which is considered part of the trial. The other side has time to respond, can list why they need the 50 witnesses and what the witnesses are. In other words, the offer of proof and then the judge hopefully has those papers before the pre-trial conference to look at, can mark that and then on the record take argument if you need additional argument and rule on the number of witnesses.

MR. D. SYRACUSE: What happens if I forget to put a witness on that list, am I precluded? How late in the process do I have if I have forgotten to put them on—identify them? How late is too late for identifying them?

JUDGE MOSKOWITZ: It depends really. If you have known about a witness for four years, just like an expert, if you have known about an expert for four years and what an expert is going to testify about and you spring that on the other side, the other side is going to jump up and say, "Judge, I want to prepare my case differently." You're going to see what the other side is going to say about it, and that is going to be a factor in how the judge is going to rule whether there is any prejudice to the other side.

MR. HOLTZMAN: On the other hand, if something just happened that brought this witness to light or you haven't been able to locate them and you just found them and you have been doing diligent efforts before, which you're able to show to the judge, and suddenly they are available, something like that is pretty telling.

MR. LUPKIN: Let me say something about expert witnesses, and here there is a dramatic departure between the state practice and the federal practice. In the federal practice, there is extensive discovery of experts with long, detailed reports and depositions. In state court it is very much trial by ambush, at least traditionally. All you're entitled to receive from the other side upon request is something called a 3101D disclosure, which sets forth in the most basic perfunctory way what this witness is going to testify about and what the witness's qualifications are, and there is interestingly enough no time limit in the CPLR for serving the disclosure.

I have been involved in jury cases where I received in a morning of jury selection a 3101D disclosure about a key expert in the case. It is not particularly comforting and of course you jump up and down and the judge has available to him or her a variety of remedial suggestions. It could be up to preclusion of the witness. In this particular case, the quote unquote "sanction" that was applied was requiring the adversary to put in a federal-style disclosure report to counteract the fact that we were not given notice of this witness or even the witness's existence until the morning of jury selection, so experts are a whole different kettle of fish, but it is definitely something to watch out for, because state court is a little bit less—it provides a little bit less disclosure with respect to the experts.

JUDGE MOSKOWITZ: On the other hand, if you are in New York County, the commercial part, some of us were requiring any expert disclosure much earlier, and also if it is an important witness for the case requiring an EBT, even though it is not in the CPLR, so you have to see what court you are in actually.

MR. HOLTZMAN: And I think it depends what kind of trial you are having as well, because in a bench trial the judge may well deal with it differently. I had a similar experience to Jon's, but, because it was a bench trial, the judge said we will hear from the expert on direct, but you don't have to cross-examine today. When we come back next week, you can cross-examine at that time.

MR. D. SYRACUSE: So do I have to make an application to the court to depose the expert witness?

MR. HOLTZMAN: In state court—the technical answer is—

MR. LUPKIN:—a deposition of an expert. You have to show special circumstances. The appellate courts have held as a strict matter that special circumstances are extraordinary like the witness is going to die or something.

In the Commercial Division, as Judge Moskowitz referred to, the justices for the most part have recognized the reality that a complex commercial case in many instances turns on the expert's testimony and will in essence require federal-type discovery or something like it, notwithstanding the fact that the CPLR doesn't provide for it. Judge Crane?

JUDGE STEPHEN CRANE: Not that I agree with this, but, in the Appellate Division, Second Department, there is a rule on motions for summary judgment that if a 3101D notice has not been satisfied identifying an expert witness, the affidavit of such an expert witness either in favor of or in opposition to a motion for summary judgment will not be considered, which pushes the envelope way far back. I don't know about the First Department. I don't think you follow that rule.

JUDGE MOSKOWITZ: No.

MR. PAUL SARKOZI: In the Commercial Division, New York County, because of the complex nature of the cases, there have been a lot of rules, procedures, practices along the lines of what you discussed, Justice Moskowitz, and part of the issue of the panel is preserving the record, dealing with the issue on appeal.

Have there been instances, were there instances that you are familiar with, where the practice procedure that the Commercial Division court recommended or required was not in the CPLR and it was challenged on appeal, and how have those unfolded?

JUDGE MOSKOWITZ: I don't know the answer to that. Has anybody experienced that?

JUDGE CRANE: When I was the administrative judge, we adopted a rule that reversed the default position on stays pending depositions—pending motions for summary judgment.

JUDGE MOSKOWITZ: That is different. Right.

VOICE: We got reversed there.

JUDGE MOSKOWITZ: Well, the rule has been written differently now, and now the default position is what the CPLR says, but, if there is special—if the judge orders otherwise, the judge can order it, but, so, to get around that, because in many instances in the commercial parts the summary judgment motion is really the end of the case, unfortunately for one side or the other, and it is really dispositive of the case. So that it doesn't make sense at that point to say, well, we still need the EBT of X or Y or whatever, so the judges have to say, well, I am going to stay it, because we see that this may be dispositive or part of the case, some of the causes of the action have been dismissed and other causes have actually gone forward, but it may be more economical for everybody, the lawyers and the clients, to wait and see what happens on appeal.

MR. D. SYRACUSE: Moving along to the pre-marking of exhibits, which exhibits do I want to pre-mark, and how does that process work?

MR. LUPKIN: Well, the decision of which exhibits you are going to mark is similar to the decisions you will make about what witnesses you are going to put on. All of those decisions should be made as you are going through discovery. This is not something that you should wake up one morning and say, "Gee, I really have to identify the exhibits I am going to use at trial," because it is very difficult sort of after years, in some cases, years of discovery, to select those, because it is not really fresh in your mind.

And one tool that at least I found useful in identifying which documents and which exhibits to use is something that the tool called the order of proof. An order of proof is not something that is submitted to the court, it is something for your own use, and we have a couple of examples of it in the book. You can find it at page 399 in the materials.

Essentially what it does is it outlines the theory of your case, the themes of your case and the issues that you know you are going to have to prove. So again, take a very simple case involving a negligence claim. You know there are four elements. You have to identify what those four elements are, what points you are going to make in order to establish those elements, and then as importantly you have to put next to it either the document or the testimony or the audiotape or the EBT or deposition that you are going to use to substantiate that point.

If you were doing that religiously throughout the case, it is very easy to determine which documents to identify and pre-mark and what depositions you are going to need, because you have been doing it all along. So I guess this is sort of a long, roundabout way of saying that trial preparation, preparing for that pre-trial conference, begins at the moment the complaint is filed or at the moment you are hit with the complaint, because if you don't

do it as the process evolves, it becomes very difficult to reconstruct what it is that you have done over the course of a very lengthy litigation.

The order of proof also provides—it is a useful technique, because it forces you to think about, okay, I have this document. I have this deposition testimony. Is it admissible? Because these are issues you have to think about at trial, and you might want—if it is a party admission, it is sort of simple enough, but, if it is another type of document, you have to say to yourself, well, "How am I going to get this in at trial? Do I have to have somebody authenticate it as a business record, to qualify as something that is an exception to the hearsay role? Is there some other basis to get the document in? Oh, I have this document. I may need to call somebody, and that somebody is out of state."

Well, what do you do? How do you get the authenticating witness to identify that document? Well, you are going to have to take a deposition out of state. How do you do that? There is a whole process for that, which is beyond the scope of today, but the bottom line is you have to be able to not only identify the documents, Dana, but you have to also be able to identify why that particular document is admissible and think about what particular arguments will be made by the adversary to keep out the document.

MR. HOLTZMAN: I actually start my trial outline much, much earlier in the process before I am actually seriously thinking about trial. I will start it as I am approaching depositions. You have now completed written discovery. We are starting to prepare for depositions. That is the time that I like to have a master outline in place.

I'm outlining the case, what I think I am going to hear from the other side, what I think I need to prove, what I think we know from the documents to date, and what I'm looking to determine as we go through discovery. It is a living document at that point. It is constantly being updated, and I use that to draw from in order to develop my outlines for each deposition that I am taking, and eventually that will grow to be my master trial outline which will cover all the things that Jon has spoken about.

As we go through, documents will be added, cites to testimony, EBT testimony will be added as well, and then again, when we get to trial, I will use that as the guide for the entire trial, and then I will select the portions that will apply to each witness, each direct examination, each cross-examination, so that I have made sure I have covered everything that I think I need to do in order to prove my case both in terms of convincing the fact-finder and in terms of meeting all the legal requirements.

JUDGE MOSKOWITZ: Just so we know, if you look at the books, if you can lift it, book 1, I'm not sure of the pages, but most of that book is material that the lawyers here have used in previous trials.

MR. LUPKIN: Correct.

JUDGE MOSKOWITZ: To show you how they prepare for trial and what they submit to court, so I think it is very valuable what they have done for you. They have given up some of their work product, a lot of their work product, and that actually should be helpful to you because it has got all the documents they give to us.

To answer your question on pre-marking of exhibits, another part of that is that, if you are in the commercial part, what you are going to have to do when you get to the point of, well, "these are the exhibits I am going to put in," you are going to have to sit down with your adversary and confer before the pre-trial conference with the judge, and go through a process where first you exchange the documents. You will put on tentative markings and go through with each other those documents you have no objection to and those documents that you do and why you object, because we don't want to fool around with foundation in a commercial part trying a case on a document that there is no reason to have to fight about the foundation, so, if there are problems within a document, you are going to have to let the other side know, and that is going to be done before—way before the pre-trial conference before us, because when you get to us, we are going to then rule on those objections, and you are going to have to have, of course, a book that is going to have all the documents in it, both what is in evidence, what is objected to, for me, for the trial, for each of us and for the witnesses, which we will just have of course what is in evidence.

So that is a procedure that don't be surprised about, which is what happened when we first started. Lawyers would come in and say, "Well, here is our pre-trial conference and, Judge, I have 150 documents that I haven't shown to my colleague that I haven't done anything yet, but I'm going to put them in evidence." So just be forewarned that that is not acceptable, because you're going to end up with another pre-trial conference after you've gotten together with the other side to go through every single one of those documents.

MR. LUPKIN: May I just ask Judge Raggi, there is a different type of pre-trial preparation slightly in federal courts called the pre-trial order, and it encompasses I think some of the areas that we have been talking about here. Would you care to comment on what way in which—the way in which the pre-trial order in federal court differs from the types of things that we are talking about here? Any types of things that would be added?

JUDGE RAGGI: Well, the federal pre-trial order is really used at the discretion of individual judges, so the first way in which they differ it is not necessarily bound by rules that—by formally promulgated rules, it is developed a little more informally, and most judges use it, I think, first to make the parties work hard enough to commit themselves to the trial of this case rather than to just be going forward without a sense that they are really going to trial, and then, second, to serve as the road map for the court.

Now the topic today is non-jury trials, but these are used in jury trials and indeed may even be more important there for the court to have a sense of what exhibits there are, what facts are in dispute, what facts are not, what witnesses are going to testify, and usually the parties sign off on it and the court signs off on it, and so a judge could be pretty persnickety about holding you to it.

On the other hand, judges, as you know, are always flexible where that is in the interests of justice, so I'm not saying that you will have it come down like a hammer.

But, as I listen to all of this, what strikes me from my experience on the district court trying non-jury trials is that, when the judge is the fact-finder, often the judge is going to be asking you to provide a lot of materials in advance of the starting date of trial, and the judge will read all those materials with the idea that you don't have to put any of that in.

The judge may want all of your documentary exhibits in advance and review them before trial. A judge may want a statement of—a proffer of what your experts are going to testify about.

Now some judges will limit that too, when all they want to hear is cross-examination. I wasn't like that, but, again, knowing your judge is a theme that you have heard already this morning, but a judge in order to minimize how much time everybody has to spend in the courtroom will probably be pushing you to give through a pre-trial order, through other devices, as much as possible in advance of the morning of trial when it is a non-jury trial.

MR. LUPKIN: Thank you.

MR. D. SYRACUSE: Where the parties are supposed to agree on pre-marking exhibits and stipulating the facts, if the parties can't agree, how much of that does the court want to hear, and —

JUDGE MOSKOWITZ: Can or cannot?

MR. D. SYRACUSE: Cannot agree. How much of that does the court want to hear? How much argument does the court want to hear on that point, and, as the attorney handling that, how do you figure out what you are going to bring to the court or not?

MR. LUPKIN: Well, like anything else in litigation, my own view is you have to choose your battles. If you go to the judge in a pre-trial conference and say we have 500 exhibits and we don't agree on any of them, you are going to be in a lot of trouble, because the judge will not want to hear it, and even if the judge has an enormous amount of patience and a very light docket, which is simply nonexistent in the commercial parts or the federal courts, the key issues, the key disputes that you have will get lost in the muck, and you want to be able to pick those evidentiary battles that you think are important, so that you can focus on those, and you will have more credibility with the court in advancing those arguments.

If you throw everybody up against the wall and hope it sticks, your arguments, you as a litigator will start to lose credibility, so I guess it is like anything else. You have to pick the arguments that you are going to make and then make them well.

When we get into objections at trial, it is the same sort of thing. It is not like a law school exercise where you can say, oh, I have the hearsay rule. There are times you might very well want to have a piece of hearsay in either because it is totally innocuous or because it might even help you, but again these are all tactical decisions, and what makes trial different in my view is that all of these decisions have to be made on the fly.

MR. HOLTZMAN: You mentioned credibility. That is such a critical thing. Every time that you are appearing before a judge, every piece of paper you are preparing that will be seen by a judge, every objection you make is an opportunity for that judge to assess your credibility, whether you know what you are doing, whether you are trying to enhance and make efficient the process that is happening or whether you are being obstructive and trying to make things more difficult. I think it makes a big difference.

You want to be careful about that. You have to pick your battles, obviously. You have to determine, if you are in a situation where you are objecting to all 500 exhibits

that your adversary wants to put in, you are doing something wrong. So they can't establish the particular foundation on something, but it is an innocuous document, don't pick that as the battle to fight.

JUDGE MOSKOWITZ: You go back to what your plan is and what you are trying to accomplish and just let the other stuff go. Because, if there are 500 exhibits that are meaningless, some judges will just say, okay, we will mark them into evidence as 1 to whatever, 500, and then you will tell me which ones you really think are important, and I will look at those, because no one is going to look at them, and so you pick your issues, because remember, on a bench trial you are not trying to a jury, you are trying a case to the judge, and, even though the judge is there to evaluate the credibility of your witnesses, you really take on the face of your client, especially if it is a corporation, so that you don't want to be antagonistic. You know, sometimes you might say you are trying a case before the appellate court, because you can't get along with the judge, but you really don't want to do that, because the appeals court really wants to sustain the findings of the trial judge as much as possible unless there is a clear error of law or something like that.

If you think that the best thing to do in a case is to try to the appellate authority, I think you are not serving your client.

MR. HOLTZMAN: There is a question on a related issue that is stipulating to facts, which that might be one of the least useful processes that you go through in preparing for trial, because in my world you don't stipulate that the alleged harasser harassed the plaintiff. It is not going to happen. So I find that there is often a lot of effort that goes in on each side, and, because there is so much wordsmithing that is happening between lawyers, there is a lot of effort that happens and very little agreement at the end of the day.

Does anybody have a different experience, and how do judges react to that?

JUDGE MOSKOWITZ: I am going back to something else, which is actually not for the trial, but, if you have already done summary judgment motions and the judge has required what we call 19(a) rule, Rule 19(a) stipulations of facts in your summary judgment motion, you will have already gone through that awful process of stipulating facts that, well, you've put down facts, you are going to list the facts you think are not in dispute.

The other side has to—if they are going to disagree—has to point to evidence in the summary judgment motion. It is the same kind of process except now you are in a different stage that you would have gone through in a summary judgment motion, and as a judge I found that a valuable tool in summary judgment motions, and I think that, if you go through that process, there are facts that are going to be stipulated to, and it will end up shortening what you have to do when you get into the courtroom. And you have to be very careful, of course, in your stipulation, because you don't want to stipulate away your case.

MR. LUPKIN: There is another point and sometimes stipulating to facts can be tactically advantageous even when the facts are bad. So let's say I mean obviously you're not going to stipulate away the whole case, but, if you have a particularly bad fact and you know that it is basically undisputed and you have to deal with it, there are several ways to do it.

One way is to on your direct case with the witness discuss the bad fact or at least put your own spin on it so it comes in the way you want to and it doesn't look like you are hiding the ball, but, in terms of stipulating to facts, if you have a particularly bad fact that is not a case-breaker, but the testimony on it is just going to be very persuasive, very gut-wrenching and very emotional, for example, you may well want to stipulate to that fact because you know it is going to be proved up anyway, and it is much better because the judge, after all, is a person and is going to be the finder of fact here, it may very well be better to stipulate to the fact where there is a cold line on a stipulation, it is hereby stipulated that XYZ, than to have a witness get on the stand and testify, well, yes, and they did this and they did that, and ultimately you are going to wind up in the same place, but it takes some of the emotional sting out of it, because a stipulation is really nothing more than words on the paper, and sometimes the words on the paper are a little less damaging psychologically than the witness testifying about those very same facts.

VOICE: How do you deal with a conflict between your client's expectations of what is picking your battles, to use your words, versus what they may think the battle is this, and you don't think that battle is a worthwhile battle to battle. How do you deal with that client's expectation that that's important or what is not important as far as witnesses, exhibits, putting on the facts, *et cetera*?

MR. LUPKIN: Well, I mean different lawyers have different ways of dealing with that. I generally like to keep my clients informed about what is going on. I generally like to have, particularly in the case of a corporation, which is sort of an ephemeral body, to have a person, a human being, sitting in the courtroom, so that the judge realizes it is not just XYZ corporation. There are people that are implicated or affected, and this corporation has a face.

Well, what happens when you have somebody sitting there is you have people passing you notes all the time, do this, do this, do this, do this, right? Well, you have to collect those notes. Some of them are actually useful. And sometimes you have time to explain to the client, yes, I am going to do it. Sometimes you have to explain to the client you are not, and sometimes you are not going to have time to explain to the client why it is you didn't do something, and you might have to explain it to them after the fact.

And it is just a reality of client relations. You might want to go over the general strategy for the day the night before, so that the client has a basic understanding of the tactic you are trying to take, so that you don't wind up in a situation where there are 150 post-its flying all over the place, but it invariably happens anyway.

MR. HOLTZMAN: I think a lot of it is just having a discussion in advance to the extent you can anticipate those issues, and it depends how sophisticated your client is in trial practice, so, if you are dealing with a corporation and you have sophisticated in-house counsel who has been down this road before, who has sat through trials before, you are likely to be engaged in a very legal argument about is this the best way to prove our case and those sorts of discussions. If you are dealing with, I am thinking of a recent case I had, a sexual harassment case, where the business owner, not a lawyer, a sophisticated businessman, but not sophisticated in what he was going through at that time, and he was having a very emotional reaction, and his order of proof would have looked very different from mine. You get those questions not just at trial, but they're going to start back at the depositions when they hear questions you are not asking during a deposition that they want you to.

So I think it is a long process to get to a point where your client and you are both comfortable.

JUDGE MOSKOWITZ: Be careful, because you don't want the judge to say in the middle of your testimony your client is doing all sorts of waving of the hand. "Counsel, can't you control your client." Well, take a break and go outside and talk to your client. So that is something you want to try, if you know your client is like that, talk about it before.

MR. LUPKIN: Sometimes you have to be firm. Sometimes these cases are emotionally charged. I had a case, not at the trial stage, but at the deposition stage, where I had a particularly meddlesome witness and a very emotional client, and it became clear after about ten minutes of this deposition that there was going to be a fistfight that broke out in this deposition room, and the parties started to get up and they started to face off, so I pulled my client by the sleeve and I ripped him into the other room, and I said, "Look, you have an absolute right to sit in this deposition, but I am not going to tolerate any of that, because it is going to hurt our credibility, you may get physically hurt, because this other guy is a black belt in karate, and you're just not thinking clearly, so sit on your hands, if you have to, take a Valium, if you have to, whatever it is you need to do, but you had better calm down, because that sort of emotion is not helpful." It's not helpful at the deposition, and it is surely not helpful at the trial.

One of the things that you must do as a trial lawyer in my view is you have to—it is like playing poker. You can have the most devastating testimony come in, and from a facial reaction point, from a body language point, as far as you are concerned, it is all part of the day's work. Oh, the witness testified to that? I knew the witness was going to testify about that. Now let's move on to something else, because the judge and the jury look at you, because you know the case, and, if you are reacting surprised or angry or despondent, the finder of fact is going to pick up on that, and they are going to pick up on it if your client is doing it too, so you have to issue the same instruction to your client and you have got to make sure that that client is following it, because otherwise you can really hurt yourself.

MR. D. SYRACUSE: Moving on to motions in limine, Judge, you had expressed that you wanted them well in advance of the pre-judge conference.

JUDGE MOSKOWITZ: That's right.

MR. D. SYRACUSE: But what happens if an issue concerning the appropriateness of a piece of evidence doesn't come up until a trial is under way. What do you do?

JUDGE MOSKOWITZ: What do I do? What do you do?

MR. D. SYRACUSE: What does anyone do? What does an attorney do and how does the court handle it?

MR. HOLTZMAN: You want me to handle this one? Sure. There are clearly things that come up in advance. Your client has a sexual harassment case, and there is a prior complaint against my client, the alleged harasser, 15 years ago. I am going to make that motion in limine in advance.

I know this is an issue. I have been asked for discovery on it. I had to produce the discovery, because I didn't

have a basis not to. But that's certainly something I want to fess up on and be reasonable.

On the other hand, things inevitably will come up in the course of testimony and you make an objection at that point. Are there newly discovered things, yes, there are, but that I think will be dealt with on the fly then, and judges are willing to deal with those matters.

JUDGE MOSKOWITZ: This is something we do all the time. Just remember, don't go off the record. Always keep everything on the record and always make clear as much as you can to the judge specifically what it is about that document or testimony that you are objecting to and make sure you have the proper grounds, because if you don't and you get, you know, the judge says, overruled, it is coming in, you are stuck with that objection, even if you go to the appellate court.

VOICE: How do you know when something is off the record? I would assume at a bench trial everything will be on the record.

JUDGE MOSKOWITZ: I would assume that too, but there are some judges that will just go off the record, so you just want to make sure.

MR. LUPKIN: You can actually ask. It would not be inappropriate to say, listen, your Honor, with all respect, I would like to have this on the record, and I can't imagine a judge that would not do that. The very fact of not putting it on the record is something to put on the record.

VOICE: How do the advocates feel about making a motion in limine to the trial judge, who is going to be the trier of the facts, to suppress the fact that they don't want the trier of the facts to know about it? How confident are you that the trial judge is going to be able to block that out of her thinking?

JUDGE MOSKOWITZ: That is really a judge question. It is a similar question actually, if you are before a judge who will try and settle the case, because as a judge, if I am going to get too involved in settling the case, let's say I talk to the parties directly, I'm not going to try that case, because I have gotten—I have inadvertently probably made credibility findings in talking to the clients, of course, never alone, but talking to clients with a lawyer, so I will then recuse myself and send that to another judge, or I will have someone else do that.

And it is the same thing with a piece of evidence. If you feel that there is some evidence that is so prejudicial to your client and you really don't want that judge to hear this, you can ask the judge, say to the judge, "Look, I have a piece of evidence that I don't think is going to come in." This is like a make-it-or- break-it. Could we ask, could we send this to another judge to rule on, because we don't want you to hear it, and there are a lot of judges in the courthouse, and, if the judge feels that way, the judge will send that, or, if the judge says, "Well, look, I can separate," then the judge is going to say, "I can separate and disregard that."

And we are supposed to do that. We are supposed to make all along in the trial rulings of what is or is not admissible and do that and go ahead and make findings just on what is in evidence.

MR. D. SYRACUSE: If the court says, "I can separate, I can look at this piece of evidence and put it aside," disregard it, as an attorney, if you feel that that actually isn't the case, that this piece of evidence, that, once the court sees it, it is probably going to come in, once the court sees it, it is going to stick in their brains, how much are you going to push the court to ask that to go to another judge?

MR. LUPKIN: It is a balancing act. I mean you want to obviously have to advocate on behalf of your clients. You don't want to anger the judge unduly, and it might well be that the decision, well, look, if that piece of evidence is going to, say, make the case, and there is no other piece of evidence that would make the case, you might want to just try to go for broke and make an enormous record about it. If it is damaging, but you have other things that could rehabilitate it, I would try to do it less so, so you don't alienate the judge for the balance of your case.

MR. HOLTZMAN: I would be reticent to ask the judge to send it out to another part. In most circumstances, most judges are not going to view that as something that is going to enhance the process or move the case along.

I think the only other advantage of a motion in limine is that it can be an opportunity for me, even if I am going to ultimately lose, to put the evidence in the light that I want the judge to see it, spin, and so I am going to have more of an opportunity in a written motion in limine than I would during a trial.

VOICE: Something I think that is very important, this is easy to be talking about these things here, but, when you are in a trial, things develop differently when you are under pressure and you react differently.

At the end of the day, you lost and you are ready now for appeal. It shouldn't be because of something you wish was on the record and a request that should have been made which you didn't make.

So you have to use your own discretion in that regard, because it shouldn't be at the end, "This is an important point. You didn't put it on the record." That happens, because a lot of times things happen in chambers, and, unlike Judge Moskowitz and some of the judges in this room who may be treating you cordially, judges can be bullies, too, just the same. It is not going to happen. Don't go there. If you think it is important, you'd better make a record and say, "I want that on the record" very simply, very politely.

Like I said, when it is over, it is over. That would be a bad thing to say, "I made the right decision. I didn't push the judge, but now I have to write the appeal, and I missed the point."

MR. LUPKIN: Judge Moskowitz, I think I saw something in your outline that dealt with this. What happens if the judge refuses to allow you to make a record?

JUDGE MOSKOWITZ: Then I never --

MR. LUPKIN: Can the refusal to allow you to put something on the record itself be appealable?

JUDGE MOSKOWITZ: I don't know. I have never done that. I suppose what you do then is make a written motion and put it in papers, that is what you are going to have to do, so that your papers become an exhibit. You want to make a record of it, then, or say, "I want to make an offer of proof. I would like to make an offer of proof on the record" as to this exhibit or to this testimony or to this expert, and here are my papers. Here are my three pages or five pages or whatever, two pages, the judge sometimes has limits on that, and can you mark that as a court exhibit, and I will give the other side an opportunity to respond, so then you have that as a paper that becomes part of the trial.

JUDGE RAGGI: I was going to say that I think that is good advice in so many contexts. Just as trials are dynamic processes for lawyers, they are dynamic processes for judges, too, who remembered no less about your case, that are being bombarded with all these applications. So I think, when a judge tells you no on something or doesn't want to hear something or whatever in the heat of the moment, if it is very important to you, going home that night and writing something, whether it is a motion for reconsideration or however you frame it in as polite and diplomatic a way as possible, one, you may get the judge to reconsider, which is the first and best thing that can happen to you, because it is always better to win with the trial court than anywhere else, but, two, if you don't, then you do have the record.

And we started with what if the judge doesn't let you make a record, but on so many areas it lets you too flesh out your thoughts better than perhaps you were able to do in the heat of the argument, and that may persuade the judge to give it a second look, so I think it is definitely the route to do, the overnight memo.

JUDGE MOSKOWITZ: And, if you have done your preparation way ahead, you may even have a two-page memo on the law. If the judge doesn't let you make a record, say, "Judge, I would like to make a motion in limine. Here is the law." If you have done a really good preparation on that, and then you say, well, "I will give the other side some time on that," and that gives the judge the time also, but you have got it right there, and I have had that with lawyers that are very prepared and have anticipated the problems in their case. They are going without a memo on it. So that is the way to do it.

MR. LUPKIN: That is a good suggestion.

MR. D. SYRACUSE: Moving along, because time is getting short, so we have had the pre-trial conference, and we have done everything that we are supposed to do.

JUDGE MOSKOWITZ: You know, we didn't talk about the pre-trial memorandum of law, which is very important, or the pre-trial sheet of what you'll be preparing, and there is some in the materials. That is something you will have also in your pre-trial conference.

MR. LUPKIN: You can find that at page 263 of your outline.

JUDGE MOSKOWITZ: Right.

MR. D. SYRACUSE: Moving to the trial, so the case hasn't settled, and we are going to trial, and we have to prepare an opening statement. What is the best way to gather together my themes and develop my themes and put that into the opening statement?

JUDGE MOSKOWITZ: Judges are going to want to move the case, and they are going to say to you, "Counsel, do you want to make an opening statement now?" In state court, it is in there. The judge is required to let you make an opening statement, but some judges are very busy, and they may say, oh, I don't need an opening statement, you don't have to do that, and he may want to get to the testimony.

If you think that this is important to frame your case, then say, "Thank you, Judge, but I think just a few words

will help us focus on it." So take advantage of that opening statement.

MR. LUPKIN: Remember at the end of the day, a good trial lawyer is the one that can tell stories. Every case has a story. Even the most mundane contract case has a story behind it. There is some personal interaction that caused the breakdown of communications between the two parties to the contract, and at the end of the day it is not simply getting in transcripts of EBTs or the testimony of a witness about X, Y or Z. The story has got to make sense at the end of the day. And the key to trying the case is figuring out what that story is. What is the story that I would like to tell the fact-finder? Does it make sense? Does it have weaknesses? Can I deal with those weaknesses?

And then, once I come up with the theme, figure out how am I going to prove that theme, so that on closing statements, which we haven't gotten to yet, I can tie together all of the disparate pieces of evidence and establish this story.

Look, I told you this was the story, and I showed you this was the story. The evidence establishes it, and you should find for us, Judge.

MR. HOLTZMAN: This is not the time to repeat your entire order of proof. Don't try to outline the whole case. What John is saying is so critical. It is a story. Pick out where you want to tell it. This is the time to put that 60-page outline to the side and just think about it. Think creatively, and, whether you are trying to a jury or to a judge, you want to be able to catch their attention and tell them enough so that they understand where you're trying to go without trying to tell all the details.

And, critically, as obvious as it is, don't overpromise. If you start making promises during your opening and you don't deliver on those promises in the testimony and evidence that you introduce, you should be assured, unless your adversaries slept through the trial, they are going to call you on it at the closing, and suddenly having to switch strategies because you proposed something else halfway through is not going to make a good presentation of the case.

MR. D. SYRACUSE: This is the next question. If I have some facts that are key facts and I really want to go through them in front of the court, but I'm on the fence as to whether or not something is definitely a benefit. Do I want to raise those in my opening statement? Do I want to get it out there, or do I want to —

JUDGE MOSKOWITZ: You should have made your motion in limine way earlier. Right?

MR. LUPKIN: Right. Absolutely. I think that, if you have three witnesses that are going to testify on a particular subject that is really important for your theme and you are not sure about two of them and you are pretty sure about the other one, don't mention the witnesses by name. You mention the essence of the testimony, so that way, if witnesses one and two go by the wayside for whatever reason, you still have something that you can point to in your closing statements.

You have to remember that you get yourself into trouble if you say in your opening statement that witness A is going to testify about something and then doesn't testify as you expected.

MR. HOLTZMAN: And, look, you are relying on the discovery that you have done and the conversations you have had with witnesses and sometimes people suddenly change their stories. When they were sitting in the conference room, it was one story, and sitting on the bench it is another story.

There is not a lot you can do about that, and you can't be so careful that you make it so bland that there is no story left, because you are afraid to commit to that.

MR. LUPKIN: That actually raises a very interesting issue, and that is in civil cases, as opposed to criminal cases, you have a tremendous advantage in every trial, and that is the deposition. Once you have taken the deposition of the key witnesses in the case, the witness really has no place to go with the story.

If they decide to change the story five years after the fact, well, they are certainly free to do that, but they are not going to be credible because every time they go against the testimony they gave in the deposition, you are going to impeach them with that, and it is going to, A, hurt their credibility, and, if it is a party, the testimony itself that you impeach them with will come in as a party admission.

MR. D. SYRACUSE: This ties into preparing a witness for direct testimony. How do I make sure my witness, whom I am going to call, is familiar with the deposition that he gave and is prepared to testify? How do I prepare him?

MR. LUPKIN: I mean different people do it different ways. The first thing I do is I will send the witness the transcript. Frequently, if you are representing a corporation, the corporate executives, the last thing they want to do is read a deposition transcript, so you have to nudge them a little bit and you have to push them to read it and say it is going to make things go much quicker in preparation, because if they don't read it, when you have pre-

pared your direct examination, what I do is, if I know that the witness has given an answer at a deposition, I will put in the exact words of the witness, exactly what the guy testified to at his deposition, so that, if the guy deviates from that testimony, I will say, look, I just want you to be aware of the fact that two years ago you testified to Y. Did you forget something? Do you want to talk about something? What happened?

So that in that way it sort of subtly reminds the client that maybe you should have read the deposition testimony for himself, but it also provides you with a valuable tool, so that you can make the witness aware of what the witness has testified about and minimize the chance that the witness is going to get up and testify about something that is only going to come back and bite him when he is cross-examined with his deposition testimony.

MR. HOLTZMAN: Look, I think it is a question of sitting down with your witness and his deposition testimony. There are also documents they might be seeing during the course of their testimony, whether it is on direct. Obviously, you should have a good sense of what you are going to cover on direct, but also cross-examination. What are the documents that are likely to be brought up? Talking through the issues.

Remember, often you are many years after the fact by the time you are preparing for trial, so, even if the case was filed quickly and depositions happened quickly, you are probably two years down the road, and it could be three, four, five years down the road, so they need to refamiliarize themselves with the events.

VOICE: Let me be the devil's advocate. If Jon was doing that on direct, and I say, Judge, objection, he is leading the witness, maybe he is trying to help him get back on target, how would you rule on that?

JUDGE MOSKOWITZ: Me, I would say sustained.

MR. LUPKIN: I am only on prepping.

JUDGE MOSKOWITZ: He hasn't gone to the trial.

VOICE: I thought you started out advancing to trial.

MR. LUPKIN: I regressed a little bit. Obviously you can't do that at trial, but at the prep session —

VOICE: I misunderstood.

JUDGE MOSKOWITZ: Actually, there are some trial transcripts here in the book on a direct examination of your own witness, and you see there isn't leading in there and how you get people to focus during the trial to testify.

MR. HOLTZMAN: On direct, to take it to the trial, the key on direct testimony is you want the person to tell the story, and that is what I always tell my witnesses. I want you to tell the story. I am going to ask you a question, and please go with it. Be fulsome. Tell the story that is the theme of our case.

JUDGE MOSKOWITZ: Because what you want to do is avoid having the other side objecting to the way the question is framed, because what you are doing, what will happen is your story is going to get interrupted by rulings that have to be made, and even if it is a judge as opposed to a jury, you don't want that for your direct examination.

MR. HOLTZMAN: Is it also much more credible I think if the witness is just telling their story without me very carefully asking them a question pointing them down the road. I think on direct examination they just come off as this is my story. I am telling what happened.

MR. LUPKIN: There is a problem that comes up in anything, but the most simple case where it comes up is a car accident, most simple. The victim is in one car, and the other car, in most commercial cases there are going to be many witnesses. In most cases, no one witness is going to know the complete story, they have little snippets of the story, and only you as the trial lawyer know how those pieces fit together.

So I think it is important when you prepare your witnesses to testify to clue them in on what the theory is of the case, what your theme is, which is not to say that you have to make them familiar with every document or every bit of testimony in the case, because if you do that too much, that also could be the subject of cross-examination under the theory that your testimony was tailored.

But you have to make sure that the witness that is going to be testifying is clued in on what the theory is, because if they are not, it is going to be a little disjointed.

MR. HOLTZMAN: That raises another issue, which is what order do I present my witnesses in during my case, and it can be a challenge particularly in a complex case like that where different witnesses have different pieces of it and necessarily sometimes get kind of out of order, because this person A tells the first part of the story and person B tells the second part of the story with respect to one piece of the case, but it is reversed on the other piece of the case, so you need to think about the presentation so it comes through in a sensible way.

MR. D. SYRACUSE: If on direct testimony, opposing counsel's objection is sustained and my witness I am trying to get a key piece of evidence, what do I do?

MR. HOLTZMAN: Well, I am going to, once it is sustained, I am going to move on in all likelihood, but in my mind I am going to be thinking about how am I going to get this evidence in. I'm not going to give up yet. There's another way around it, maybe I can ask it. I was trying for a document. I can't get the document in. Can I get it in through testimony? Is there another way? Did I not make an argument, and I might be able to convince the judge the second time around once I filled in more background information, so now I have got a foundation so that the judge can understand why I think this is critical.

JUDGE MOSKOWITZ: Again, if this is really critical and you are not sure of any other way to get it in, what you can do is make an offer of proof at that time and try another argument, because the judge sometimes, sometimes there will be an objection, and the judge will sustain it, and the objection is just a general objection, and maybe the judge's basis for it could be changed. You can try again.

MR. D. SYRACUSE: And again you want to make sure it is all on the record.

JUDGE MOSKOWITZ: Usually in a trial, as pointed out, usually everything is on the record, and once you are in the trial itself, although I don't know about going in the back of the room.

MR. LUPKIN: Even in instances where you go into the back room, I have been taken into the back room, and they will bring the court reporter in.

MR. D. SYRACUSE: If there is no court reporter there, is it as simple as saying, "Can I have a reporter?"

MR. LUPKIN: Yes.

JUDGE MOSKOWITZ: Or you can ask, "Can I have the court reporter be here with us?"

MR. LUPKIN: Judge Crane?

JUDGE CRANE: One of the most effective defense lawyers I have ever seen in a criminal case had asked a question, and the prosecutor objected, and it was sustained. He asked it a different way. Sustained. He finally said, "May I approach the bench, your Honor, to solicit your advice?," and on the record he came up, and he said, "I have tried every which way to get this question posited. What is wrong with it?" And I said, well, "You have got in there a fact that you haven't proven yet. It is a foundation." "Oh, my God."

JUDGE MOSKOWITZ: Right. I was just going to say you can always throw yourself on the mercy of the court. Even experienced lawyers. You can do that as a new lawyer saying, look, this is my first case, whatever it is, trial, and look innocent, and say what do I do there? Lawyers do that too.

MR. D. SYRACUSE: Moving on to cross-examination, how do I best prepare my own witness for cross-examination? Is it as simple as going through what came up in the deposition? Is my witness going to be cross-examined on something other than what occurred in deposition?

MR. HOLTZMAN: They sure might be, so you need to know the case hopefully better than your adversary does. Yes, obviously anything they're asked about during a deposition is fair game and you should certainly anticipate that. But maybe there are things that happen after that. Maybe your client was the first witness deposed. Maybe there were other facts that arose after that. So you need to think about a lot more outside of the box than in the deposition.

MR. LUPKIN: It is not just the substance of the cross-examination questions. You have to prepare your witness for being cross-examined, because there are different styles that are used, and there are different styles, one lawyer can use different styles depending on the type of witness you have.

If you have a person that you can see on the stand or you could have seen at the deposition was somebody who was a little bit meek, well, then you might want to take a stronger tactic, because you think you can push him. Of course, you don't want to look like you are beating up on the witness.

If you think that the witness is somebody who is very eager to please, because many overachievers are eager to please, well, then you ask a question, and the witness almost feels compelled to answer it, because they want to get an A on the test.

So you have to clue the witness in on the different styles of cross-examination. Explaining, for example, that you have a guy who is cross-examining you and he's pushing you hard. I try to, and if you know the witness is going to be nervous, what I try to do is tell the witness to picture Judge Lance Ito on the stand with the realtime transcription coming up, and you say, look, as far as you are concerned, it is just words. Just words. The guy can raise his voice. He can stand on his head. He can do an Arabesque in the middle of the room. It doesn't matter. If the guy says "Where were you?," it doesn't matter whether he says, "Where were you? Where were you? Where were you?" It is the same question, and it should evoke the same answer.

So you have to just not only prepare your client substantively, but you have to prepare your client tactically for learning how to deal with the cross-examination. The best way that that is done in my view is to take the client through or take a witness through a mock cross-examination and see how they fare and point out, well, "Look, I asked you this question two different ways and you gave me two different answers." It should be the same answer either way. The truth is the truth. It is no less truthful if you are yelling. It is no more truthful if you are whispering.

MR. D. SYRACUSE: How do you prepare to cross-examine opposing counsel's witness?

MR. HOLTZMAN: Again, I am going to start with depositions as certainly my starting point. I know what they have said on these subjects already, and I want to know that very, very closely, because they are going to testify at trial, and they are going to testify differently. Everybody testifies differently at trial than they did at the deposition. If they don't, I am extremely suspicious. Why is it that they are answering literally and precisely in the same words that they did when I took their deposition two years ago. And I might even point that out, if they do that. But that is certainly my starting point.

When people testify differently, if the words are just a little bit different, but they are really saying the same thing, that doesn't do anything in your cross-examination. But if it is an important and substantive difference, then I need to pick and choose when those are important points that are going to help my case or whether I'm just being picky and it's not going to make a difference to the facts.

Then I am going to go beyond the deposition. What are the other facts that are out there? What did I learn after the deposition? What are things that in going back and reading the deposition afterwards I realized that I missed that question and I should have asked that question, and then you've got that question, well, do I really want to ask that question?

A lot of times you know what they are going to say or you are comfortable with the answer that is likely to come or you don't care what the answer is, because one way or the other it is useful to the case.

MR. LUPKIN: In terms of the mechanics for preparing a cross-examination in a civil case, and that is something that Mr. Zauderer in the back of the room taught me, is a cross-examination notebook, and this is a wonderful technique.

You go through the deposition of the witness that you have been cross-examining and you identify those excerpts of the transcript that are useful, and there could be many of them on different subjects, for each point that you want to make, and I am talking about each question, you write on one sheet of paper the exact question that you asked and the exact answer that was given with the appropriate page and line number. You then at the end of this exercise could wind up with 150 or 200 pieces of paper. Well, then what do you do? Well, then you do the Curley shuffle. You take them and mix them up and then you put them in some sort of order. You may weed out some of them. You may decide that certain questions that you asked at the end of the question really go at the beginning of the cross-examination, but, once you finish doing the Curley shuffle, you have different sections of the cross-examination, thematic sections to cross-examine, and you can even shuffle it in the middle of the trial.

Sometimes it will be something that comes up on the direct examination and you want to put it in this particular section, but, by the time you are up ready to cross-examine that witness, you know exactly what that witness has said, and the witness can't really go an inch, because if they deviate, if you ask the same question and they give you a completely different answer, you are immediately ready to come at them with the deposition transcript and go through the very long and for the witness very embarrassing process of having to explain how he sat in a room with his hand raised and swearing to tell the truth four years ago, infinitely closer to the facts, and why it is that he testified differently the last time than he testified now at trial.

MR. D. SYRACUSE: Judge, when a witness's credibility is attacked like that, how much of an impact does that have on the court? Does the court completely disregard it?

JUDGE MOSKOWITZ: Well, you know there is a jury charge that we give the jury. Also, you have a right, if it is a party, to disregard the entire testimony of that witness as unworthy of belief. I think that is in the charge itself, or you can just take that part and disregard it and accept the rest. It really depends on the demeanor of the witness on the stand. And I can't tell you what I am going to do. You have to look at, of course, the rest of the evidence as it comes in.

VOICE: Knowing that on cross the opposing counsel is going to ask your witness how much time they spent with you preparing the testimony, what is a reasonable time?

MR. HOLTZMAN: It varies so much depending on the case, it is a difficult question to answer. In some cases, it's only a few days, and it may be over the course of weeks that we do this.

JUDGE MOSKOWITZ: Well, I think she is asking what do you actually tell him to tell the judge.

MR. HOLTZMAN: I always tell them to tell the judge the truth.

VOICE: As a judge, what sends a shock to your system?

JUDGE MOSKOWITZ: It is really answering it honestly. If it takes a long time, it takes a long time. Some witnesses get on the stand and they are fine with you and they get in the courtroom, you have had that, and you can't believe it is the same person.

For some reason, witnesses who you think were personable and everything, they just every word that comes out appears to you as their lawyer as a lie. Right? I mean it is not necessarily a lie, it is the way they are doing it, because they are so nervous, so you as a lawyer, you are probably going to say something, I know this is the first time, have you testified before to get this in front of the judge, that your client is really nervous.

MR. LUPKIN: Right.

JUDGE MOSKOWITZ: I mean that's why your client sounds like an idiot or your client sounds like he is lying. That's one way of doing it.

MR. LUPKIN: There is actually a cautionary note in terms of preparing witnesses, and this is something that sometimes people overlook. If you have done all of these outlines and orders of proof and you've made all sorts of notes for yourself, you have got to be very careful about what you show a witness when you're preparing the witness for testimony, because if you show the witness something that would clearly be privileged under anybody's definition and the witness uses that document and that document has helped to refresh the recollection, then, irrespective of how privileged that document is, the other side gets it and can use it to cross-examine that witness.

MR. HOLTZMAN: The perfect example is your cross-examination outline. You have got that great cross-examination outline, all the points that you think the other side might cover, and sometimes the witness will say, "I don't have time for the whole prep, just send it to me, I will read it over on the plane on the way in," and now you have to hand it over to the other side.

MR. LUPKIN: That's right. I am doing a non-jury trial right now. I have had a witness who said, "Can you just send it to me. Can I have the outline?" "You cannot have the outline." "I really want the outline." "Well, I can't give you the outline. I can discuss it with you verbally, but I can't show it to you," and you have to sometimes be firm and particularly with executives who are used to getting their way all the time. They are not used to being told what to do by a lawyer or by a judge or anyone else.

MR. HOLTZMAN: Even when you have a difference with your client on strategy, as you raised before, this is non-negotiable.

JUDGE MOSKOWITZ: Can I raise something quickly, because we are running out of time, and this is something we were going to cover. If you have got a case that involves the interpretation of a contract or something that is a writing, I think it is very appropriate and you should discuss it before with a judge, of course, to have a big exhibit that is just going to have that writing on it that you can show to different witnesses, because judges like me who need glasses and it is very, very just compelling when you have that excerpt as opposed to everybody looking through the document and going to section 3, subdivision A, and every time you have to go look at it and look at that small print, if you blow that up for the witness, it really makes the trial easier for everybody.

And, you know, some people go, well, I don't like all these bells and whistles. It is just me as the attorney, but they are there to help you, and they are there to help you make a case, and you should use them.

A lot of the courtrooms now have these video machines or blowups. I forgot what they are called.

VOICE: ELMO.

JUDGE MOSKOWITZ: Thank you. All those different devices. And they can make the trial much easier, and you are a much more effective lawyer in having that.

MR. HOLTZMAN: I think the key, though, on any demonstrative is to make sure that it is actually helping.

JUDGE MOSKOWITZ: Right.

MR. HOLTZMAN: It is not just to show that you are fancy and you have got great technology and bars and graphs and everything. I think particularly with a jury that can become hopelessly confusing.

JUDGE MOSKOWITZ: Right.

MR. D. SYRACUSE: Paul?

MR. SARKOZI: As a trial court judge doing a non-jury trial, what is going through your mind about the prospect of appeal and, as a judge, wanting to make sure, mindful of the fact that it could get appealed, how does that affect in any way things that you want to make sure get covered in the trial, the way it's handled at the trial, and then as a twist, because we have so many judges here who have also gone to the appellate bench as well, to what degree, as you now look at it, those weren't the key issues you should have been focusing on. I am just interested in hearing about the process.

JUDGE MOSKOWITZ: As a trial judge, I will speak for myself. I always wanted to make sure that everything is on the record, because it not only protects you, the lawyers, but it protects the judge, because you can't—you will never have someone say, well, we had this off-the-record conference with the judge. For whatever reason, you want to make sure everything is on the record. I want to make sure every piece of evidence is marked.

If there is a dispute about it, even documents that don't go into evidence, I want them marked for identification, because if it does become an issue later, we don't see it at the time. At least it is there. The attorneys can put it in the record for the court. I'm not thinking about, well, did I make the right—it is none of that. I just want to make sure there is a clear record that can be reviewed by the Appellate Court and then the lawyers have the tools then included in that record.

Other judges may have other—

VOICE: I actually think the record makes the judge as much as moving it, and if I even have a remote thought that I don't want something on the record, that means I am doing something wrong, so that should be key for you that either you don't think you understand the issue or it is a critical issue that you want on the record, so always stay on the record.

MR. D. SYRACUSE: Moving along to the closing statement, when I am drafting that and I have got my themes together and I know it is in evidence, do I want to summarize the entire case or just the key points?

MR. HOLTZMAN: Well, particularly in a bench trial, if you try to summarize the entire case, you are going to have a very unhappy judge sitting before you, so you want to focus on the key points, and it depends on how the trial unfolded, has it been a two-day bench trial, and now you are closing at the second day, or was it ten days of trial spread out over the course of a month?

I think you want to focus on your key points, particularly items that were in dispute that you think were proved at trial, promises your adversary made in their opening statement that they weren't able to deliver on. I think those are always forceful.

MR. LUPKIN: I agree. Sometimes, in a trial, less is more. There is a limited amount of information that any human being can absorb, and, if you try to bombard the human ear with too much information, it closes down. And so with that as a guidepost you want to put in as much to sort of tie in the loose ends of the case or to tie the evidence together to show that what you have promised on your opening statement has been met through the evidence, while at the same time not overburdening the court or the jury with extraneous information and points that are not central to your theme.

MR. HOLTZMAN: I think that is actually one of the biggest challenges through an entire trial, because you have spent all that time developing that great trial outline that we talked about that had every single possible potential piece of evidence, and what you do throughout the trial from the first time you open your mouth is you are paring back on that, and you are deciding do I need all these witnesses, do I need all these documents and do I need all these facts, and, as you go through, at some point you say, enough. I have done enough on that subject, I need to move on, and I need to get to the end of this case.

MR. D. SYRACUSE: So the trial has ended, and I realize that I have to start drafting my findings of fact or conclusions of law.

JUDGE MOSKOWITZ: Well, I think you are a little late to do that. I think these attorneys will tell you that you can't do that after the trial. You have got to start even before the trial with your proposed findings and of course the law, and, if you are in front of a judge like me, I'm not even going to give you that time after the close of the evidence and your closing statement.

You are going to have it that day, because as a trial judge, I am on to something else. If I say, all right, you will have two weeks to prepare your memo of law and findings and then two weeks after and then two weeks for rebuttal, that is going to be a cold case at that point, so, if you are stuck with someone like me, you are going to have to have started it way ahead in developing it and be prepared to hand it in that day.

MR. D. SYRACUSE: So is it the kind of document that I should be revising over the course of the trial?

MR. HOLTZMAN: Absolutely. You have had it drafted before the trial started. Maybe you submitted it even to the judge before the trial even started. Certainly then you are going to continue updating it as you go through the course of the trial so that you have got a finished product, and you need again, we have said this so many times, you need to understand your judge. I need to know, if I am before Judge Moskowitz, that I've got to have that final product with me at the end of the day.

MR. LUPKIN: The other helpful thing to do is, as you are going through the trial day, where there are a lot of things going on, it is useful to reflect at night after you have had the day and you have taken whatever notes you have had, sometimes you have had daily copy of the actual transcript. It is important while the transcript is fresh in your mind to in a page summarize what happened today, what points were made today, so that, when, if you are not fortunate enough to be in front of Judge Moskowitz who requires that everything be done at the moment of the closing and you'll have to actually go back and do it, you will know very rapidly what was said, the day it was said, the witness that said it, and approximately where in the transcript I have to go to support that proposition, because otherwise you will have a 2,000-page transcript with 100 exhibits. You will be tearing your hair out.

So it is important while it is fresh in your mind and you are thinking of it with the theme of your case in mind to force yourself to sit down, take 20 minutes, a half hour, whatever it takes, it may take an hour if it is a long day to just on a sheet of paper say on day one of the trial, the following things happened, because it will also help you figure out whether there is anything that you need to follow up on the following day, because so many things happen at a trial. It is very fast and furious, and I have a trial now, and I have an associate who is working with me on his first trial.

I said, "This was a great day." Well, there are going to be great days, and there are going to be crappy days. Invariably in every trial, there are ups and there are downs, but you have to sort of focus and keep your eye on the ball, and the best way to do that is to calmly reflect at the close of each day.

MR. HOLTZMAN: We didn't mention it before, but in terms of having daily copy, if you have daily copy, you want to be going through that as well and pulling out the gems that you have extracted through testimony for use in your closing. That can be a very effective way to close by using the other side's actual words to help you prove your case.

MR. D. SYRACUSE: One of my last questions will be, if we have a trial and we lost, what is the best way to position ourselves so that we can still get a settlement in terms of saying we are going to appeal right away and moving forward with an appeal? What do we do?

MR. HOLTZMAN: I don't think threats and grandstanding about the appeal, I don't find them convincing when I am on the receiving side, and I don't think they're convincing if I try to do that. The reality is there is the availability of appeal. What you need to do is really think through those issues.

I'm not going to try to settle a case the day after I have gotten a decision either from a judge or a jury decision. I am going to think through what my arguments are going to be on appeal, so I can have a really rational conversation.

MR. D. SYRACUSE: I think that is all the time we have. If anybody has any remaining questions? Thank you very much.

(Time noted: 12:18 p.m.)

NYSBA Commercial and Federal Litigation Section in Association with the Young Lawyers Section

LITIGATION IN THE MODERN AGE

Scenes from the

Spring Meeting

May 1-3, 2009

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LITIGATION IN THE MODERN AGE

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LITIGATION IN THE MODERN AGE

Tyco: Can a Civil Discovery Statute Trump a Criminal Defendant's Constitutional Right to Subpoena, Obtain and Present Favorable Evidence?

By Alan Lewis and Michael Shapiro

"It depends on what the meaning of the word 'is' is."
—President Bill Clinton

On October 16, 2008, the New York Court of Appeals affirmed the convictions of Dennis Kozlowski and Mark Swartz, respectively, the former chief executive officer and chief financial officer of the diversified public company, Tyco International Ltd.[1] In a nutshell, the men were convicted of state grand larceny charges based on the theory that some of their bonuses had not been earned, but rather, had been stolen.

"[I]t was anticipated that the Court of Appeals might use the case as an opportunity to add a New York gloss to a topic that has been the subject of much recent interest: when does a private, internal corporate investigation begin to take on the qualities of state action?"

Earlier this year, Mr. Kozlowski challenged his conviction in federal court by filing a petition for a writ of habeas corpus in the Southern District of New York. The Petition focuses principally on Mr. Kozlowski's claim that his constitutional right to present a defense was violated when the trial court quashed a defense subpoena for the first recorded statements made by Tyco directors who became prosecution witnesses. The Petition emphasizes the New York Court of Appeals' favorable finding that the statements Mr. Kozlowski sought were "reasonably likely" to "contradict the statements of key witnesses for the People."[2] As the Petition explains, the New York high court nevertheless sustained the quashing of Mr. Kozlowski's subpoena, based on the Court's construction of a civil procedure discovery statute that it found applicable in this criminal case. Ultimately, the fashion in which the New York Court applied the civil procedure statute in a criminal context opened up a Sixth and Fourteenth Amendments Pandora's box.

Questions

At the state level, the case had been closely watched for a variety of reasons, including the prominence of the defendants and the fact that the prosecution was one of the highest profile white-collar cases to be brought under state, rather than federal, law in recent years. But most of all, it was anticipated that the Court of Appeals might use the case as an opportunity to add a New York gloss to a topic that has been the subject of much recent interest: when does a private, internal corporate investigation begin to take on the qualities of state action? The facts that fed this expectation included Tyco's entry into a "common interest agreement" with the district attorney's office and the allegation that Tyco waived its attorney-client and work-product privileges in a highly selective manner for the purpose of aiding the prosecution. Although the opinion touches upon the boundaries between public and private action, it does so only fleetingly and makes no new law there.

But the opinion is nevertheless notable for at least two reasons.

First, and as will be explained below, it has the potential to be a game-changer for a particular class of litigants—those who seek to obtain non-privileged materials prepared for litigation by another party. As this article will argue, the opinion interprets the New York statute that governs discovery of such litigation materials (CPLR 3101(d)(2)) so as to impose new and potentially insurmountable hurdles upon a party who seeks their discovery—particularly where the materials consist of recorded witness statements sought by a defendant in a criminal case.

Second, the opinion raises serious questions (which it does not directly answer) regarding the constitutionality of the statute, at least as it has now been interpreted. That is, when litigation materials are subpoenaed by a criminal defendant, can his or her failure to fulfill the requirements of CPLR 3101(d)(2), as they are described by the Court, result in a quashing of the subpoena without offending the Sixth Amendment right to compulsory process and the Fourteenth Amendment right to due process?

Facts

Before elaborating upon these issues, some facts are necessary. After the declaration of a mistrial and before the commencement of a retrial, Mr. Kozlowski and Mr. Swartz sought to subpoena the notes of interviews of certain members of Tyco's board of directors. At the just-

concluded mistrial, the directors had testified that both defendants had stolen money from Tyco that the two men later claimed entitlement to as "bonuses." The notes sought by Mr. Kozlowski and Mr. Swartz were of interviews of these directors about the bonuses, conducted by Tyco's outside counsel (the law firm Boies Schiller & Flexner) at a time when Mr. Swartz was still employed by Tyco as its chief financial officer.

In seeking disclosure of the notes, the defendants argued that there was a reasonable likelihood that the directors' statements, as memorialized in the notes, were inconsistent with a key aspect of the directors' trial testimony. They explained why: For about a month after the interviews, Mr. Swartz continued to serve as Tyco's CFO, performing such sensitive tasks as signing Tyco's regulatory filings and handling conference calls with investors and securities analysts. Mr. Kozlowski and Mr. Swartz pointed out it was unlikely the directors told Tyco's lawyers that the defendants had stolen the bonuses (as the directors testified at trial) because if they had, Tyco would probably have fired Mr. Swartz immediately and most certainly would not have permitted him to continue to sign regulatory filings and handle investor conference calls. At the very least, Mr. Kozlowski and Mr. Swartz argued, it was sufficiently likely that the notes would reflect statements by the directors regarding the all important "bonus" payments that were far more charitable to the defendants than the directors' testimony at trial.

The trial court granted Tyco's motion to quash, relying largely on the notion that the subpoena was a "fishing expedition" and that therefore the defendants did not have a constitutional right to its enforcement. As an alternate basis for its decision, the trial court opined that Mr. Kozlowski and Mr. Swartz had failed to demonstrate that they could not have obtained the "substantial equivalent" of the notes by conducting their "own interviews of these witnesses at an earlier time."[3] This requirement, a showing of inability to obtain the "substantial equivalent" of the subpoenaed material, is a condition expressly imposed by CPLR 3101(d)(2) before materials prepared in anticipation of litigation may be obtained in discovery. That statute, however, governs requests for discovery of litigation materials made by one party to a civil litigation to another party to that same litigation. Therefore, it has no apparent application to criminal cases[4] and does not appear to protect non-parties, like Tyco,[5] from discovery requests.

In the Appellate Division, the defendants challenged the trial court's quashing of the subpoena. The Appellate Division affirmed, concluding that the defendants had failed to satisfy the basic "fishing expedition" standard for enforcing any third-party subpoena *duces tecum*.[6] That standard, as set forth in *People v. Gissendanner*,[7] requires the proffer of a good-faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory.

On appeal to the Court of Appeals, both the prosecution and the defense focused their arguments on the two sub-issues they thought relevant to the quashing of the subpoena. First, they debated the correctness of the Appellate Division's holding that Mr. Swartz had failed to satisfy the requirements for enforcement of a third-party subpoena as set out in *Gissendanner*. Second, assuming the *Gissendanner* standard had been satisfied, the parties argued whether the interview notes sought in the subpoena were nevertheless not obtainable, based on the prosecution's argument that the notes were attorney-work product.[8]

The defendants won both of these arguments. First, the Court held that the defendants had satisfied the *Gissendanner* predicate by proffering facts that made it reasonably likely the notes contained "material that could contradict the statements of key witnesses" (the directors).[9] Second, the Court rejected the prosecution's argument that the notes were attorney-work product (CPLR 3101(c)). Instead, the Court held that the notes constituted trial preparation materials, discoverable upon a showing of substantial need and inability to obtain their substantial equivalent (CPLR 3101(d)(2)).

But rather than proceed to fix a remedy, the Court launched into a discussion of a subject that neither the prosecution nor defense anticipated, asking whether the defendants had made the showing described by CPLR 3101(d)(2), and concluding they had not. The Court did not explain why this civil discovery statute should be applicable to criminal cases, nor did it explain how it could protect a non-party, like Tyco, in the face of the statute's plain language that limits its protections to parties to the litigation. Although the Court did not explicitly discuss whether the defendants had met the statute's first requirement—to demonstrate a "substantial need" for the materials—it appeared to assume that they had. Indeed, it is hard to imagine how one could logically satisfy the *Gissendanner* standard of demonstrating a reasonable likelihood that subpoenaed materials are both relevant and exculpatory, and yet not establish a "substantial need" for such materials.

Instead, the Court based its affirmance on what it took to be the defendants' failure to satisfy the second requirement imposed by CPLR 3101(d)(2), that a party seeking disclosure of litigation materials show it "is unable" to obtain the "substantial equivalent" of those materials. Here, the Court opined that the defense had not shown why it "could not have sought to conduct its own interview of these witnesses *at an earlier time*" (emphasis added).[10] In other words, the Court of Appeals held that the defendants were not merely required to show, at the time they issued the subpoena for the interview notes,

that they were then, presently unable to obtain the "substantial equivalent" of the notes, but added a requirement that they show that they couldn't have ever obtained their equivalent. Is this right?

Observations

Three observations jump to mind. First, why did the Court require the defendants to show that they could have interviewed the directors at an "earlier time," by which the Court referred to the period when Mr. Swartz was still employed by Tyco? After all, when Mr. Swartz was still employed by Tyco (and neither he nor Mr. Kozlowski had been charged with larceny) it does not seem plausible that he or Mr. Kozlowski would have sought to have a lawyer try to interview the directors. And is it constitutional to quash a criminal defendant's subpoena based upon his failure to seek its equivalent at a time before he was charged with a crime?

Indeed, even putting aside questions of CPLR 3101(d)(2)'s applicability, the statute does not seem to require this. The pertinent language merely requires a party seeking disclosure to show that it "is unable" to obtain the substantial equivalent of the materials sought. The statute does not require an applicant to show that he presently is, and has always been, unable to obtain the equivalent of the materials he seeks. Thus, doesn't the use of the present tense, "is," mean that the defendants were required to show only a present, and not, as the Court imposed, a past inability to obtain the "substantial equivalent"? In other words, why should the word "is" in CPLR 3101(d)(2) be given anything other than its ordinary, plain meaning as a verb in the present tense?[11]

Second, although the defendants did not clearly document the explicit refusal of the directors to speak with their lawyers, did the Court of Appeals actually think it plausible that Tyco's counsel would have permitted the directors to be interviewed by counsel for Mr. Swartz or Mr. Kozlowski? And as the defendants noted on appeal, by the time Messrs. Kozlowski and Swartz were charged, "the directors were represented by counsel and did not speak to the defense."[12]

Third, even assuming that the defendants could have had their own lawyers conduct interviews of the directors, why should it be assumed that the two sets of interviews (those conducted by Tyco's lawyers and those conducted by defendants) would have been the "substantial equivalent" of one another? What basis can there be to presume that the directors would necessarily have given nearly identical statements about the bonus payments to both Tyco's investigators and to Mr. Kozlowski and Mr. Swartz?

To the contrary, our law assumes that witnesses often make statements when speaking to an adversary (Tyco and defendants were adverse to one another in civil litigation) that are inconsistent with statements the witness makes to a non-adversary. It is a fundamental premise of our adversarial system that witnesses often tell one side (e.g., their own side) one version of a story, and the other side a different version. This is why we have cross-examination and discovery obligations such as those imposed by the *Rosario* rule.[13]

Moreover, given that the underlying purpose of obtaining the interview notes was to confront the witnesses if their trial testimony materially differed from what was said when first interviewed, only a review by counsel, or at the very least, the trial court (which did not review the notes) would bring such a testimonial conflict to light. Without such a review, a finding of substantial equivalence is at best speculation.

New York courts have addressed the definition of "substantial equivalent" in the context of videotape and photographic evidence. In *DiMichel v. South Buffalo Railway Co.*,[14] the Court of Appeals held that a defendant in possession of surveillance videotapes of the plaintiff could not resist a subpoena for those tapes on the ground the plaintiff would have been able to obtain their substantial equivalent by earlier making its own visual recordings of itself.

As the Court explained, the subpoenaed tape was "unique because it memorialize[d] a particular set of conditions that can likely never be replicated."[15] Numerous New York courts have confirmed this rule.[16] Like videotapes and photographs, Boies Schiller's interviews with the Tyco directors recorded a unique moment in time that was not replicable following Mr. Swartz's departure from Tyco and both defendants' indictments.

A final issue presented, but not thoroughly addressed by the Tyco case, is the extent to which the requirements of CPLR 3101(d)(2), at least as they have now been interpreted by the Court of Appeals, conflict with the Sixth and Fourteenth Amendments.

What is most troubling is the notion that the defendants could be said to have waived their constitutional right to obtain compulsory process and to due process in a criminal case because of their failure to seek to obtain equivalent discovery (their own interviews of the directors) at a time *before* they were even charged with a crime. The defendants raised this constitutional issue on appeal, but the Court of Appeals discussed the issue in only cursory fashion. It may now fall to the federal district court to determine whether the application of CPLR 3101(d)(2), in criminal cases, as the statute has now been interpreted by the Court of Appeals, will bring the statute into conflict with the compulsory process and due process clauses of the United States Constitution.

Conclusion

In sum, (1) by interpreting CPLR 3101(d)(2)'s substantial equivalence test to require that a party seek to obtain substantially equivalent evidence even before the time it becomes a party in a case, and (2) by defining two adversaries' separate interviews of the same witness as the "substantial equivalent" of one another, the Court of Appeals has crafted additional requirements for a party seeking to enforce a third-party subpoena not imposed by the Legislature and which, when applied in a criminal case, may very well violate the Sixth Amendment right to compulsory process and the Fourteenth Amendment right to due process of law.

Endnotes

1. *People v. Kozlowski*, 11 N.Y.3d 223 (2008).
2. *Id.* at 243.
3. Although none of the courts articulated a definition of that "earlier time," it most certainly refers to the time before the defendants were indicted and while Swartz was still employed by Tyco as its CFO. Indeed, an interview of the directors after these events could not possibly have been considered the "substantial equivalent" of the interview notes that the defendants sought, because by then Tyco's position had clearly come to be that the defendants had stolen the bonuses—something that was clearly not its position at the time it interviewed the directors and when it continued to employ Mr. Swartz.
4. Discovery in criminal cases is governed by Article 240 of the New York Criminal Procedure Law.
5. Tyco was not a party to *People v. Kozlowski and Swartz*, the case in which defendants issued their subpoena.
6. *See People v. Kozlowski*, 47 A.D.3d 111 (1st Dep't 2007).
7. 48 N.Y.2d 543 (1979).
8. The parties also debated whether Tyco had waived its right to resist compliance with the subpoena by acts of selective disclosure.
9. *People v. Kozlowski*, 11 N.Y.3d at 243.
10. *Id.* at 237.
11. It is a fundamental rule of New York jurisprudence that words be given their ordinary meanings when interpreting a statute. *See Hudson-Harlem Valley Title & Mortgage Co. v. White,* 296 N.Y.S. 424 (1937) ("In construing a statute, ordinary words are given their common meaning."); *People v. Shakun*, 251 N.Y. 107 (1929) ("We are to give words their common and ordinary meaning."); *Stradar v. Stern Bros.,* 172 N.Y.S. 482 (1918) ("We are required to give to words in a statute their ordinary and obvious meaning."); *Neldert v. Chicago, R.I. & P.R. Co.*, 153 N.Y.S. 658 (1915) ("[T]he words of a statute, when unambiguous, should be taken at what they say and in the sense in which they will ordinarily be understood by the public in which they are to take effect.").
12. The defendants' failure to interview the directors *after* they were indicted was not mentioned by the courts and, in any event, should not have had any significance to the subpoena issue—it was the defense theory of the case that the directors had changed their story after the defendants *were indict*ed because of the directors' own potential criminal and civil exposure, and so post-indictment interviews of the directors could not have been viewed as the substantial equivalent of the pre-indictment interviews.
13. The *Rosario* Rule, codified at CPL § 240.45(1)(a), requires the prosecution to provide the defense with a witness's prior statements relating to the subject of that witness's testimony.
14. 80 N.Y. 2d 184 (1992).
15. *DiMichel*, 80 N.Y.2d at 197.
16. *See, e.g., Kaplan v. Einy*, 209 A.D.2d 248 (1st Dep't 1994) (finding that photographic and videographic evidence subject to 3101(d) is discoverable where it "can no longer be duplicated because of a change in the conditions"); *Careccia v. Enstrom,* 174 A.D.2d 48, 50 (3d Dep't 1992) (ordering disclosure of videotape because the "condition has changed so much that [the party] can no longer produce a videotape that would be a substantial equivalent"); *Kane v. Her-Pet Refrigeration Inc.,* 181 A.D.2d 257, 266 (2d Dep't 1992) (in ordering disclosure of films, explaining that "the conditions that existed at the time the films were made are almost never the same").

Alan Lewis and Michael Shapiro head the Internal Investigations and White-Collar Defense Practice Group at Carter Ledyard & Milburn. Elizabeth C. Black, an associate of the firm, assisted in the preparation of this article. Mr. Lewis can be reached at lewis@clm.com; Mr. Shapiro can be reached at mshapiro@clm.com; and Ms. Black can be reached at black@clm.com. **On November 3, 2008, an earlier version of this article appeared in the *New York Law Journal*. Subsequent to publication, the authors were retained by Mr. Kozlowski to challenge his conviction in federal court.**

New Rules for Electronic Discovery in New York Courts: What You *Must* Know Before Appearing at a Preliminary Conference

By Allison J. Schoenthal

Recently, New York state courts implemented new rules and guidelines for the discovery of electronically stored information ("ESI"). This Alert is intended to serve as a primer on ESI, and a preemptive warning to all attorneys practicing in the New York courts.

Overview

Recognizing that the CPLR does not specifically address ESI (having been created when only "hard-copy" documents existed), the New York courts have strived to establish their own rules to govern ESI and e-discovery.

The Commercial Division of the New York State courts, and particularly the Commercial Division in Nassau County, is at the forefront of fashioning such rules. Their focus has been on addressing e-discovery issues early in the case, encouraging practitioners to "meet and confer" prior to the preliminary conference with the Court (the "PC Conference"), and ensuring that counsel arrive at the PC Conference knowledgeable about ESI and e-discovery.

Practitioners risk prejudicing their clients, and possible sanctions, should they not comply with the rules discussed below.

The New Preliminary Conference Stipulation and Order

Effective February 1, 2009, the Nassau County Commercial Division implemented a new Preliminary Conference Stipulation and Order (the "PC Order") which expands the topics addressed at the PC Conference.[1] Specific to ESI, the PC Order now contains important new requirements:

(1) Parties Must "Meet and Confer" Regarding "All ESI-Related Discovery Issues"

By entering into the PC Order, the signatories to the PC Order represent to the Court that they have engaged in a good faith meet and confer before appearing for the PC Conference. This provision serves as further encouragement to counsel and parties to discuss, and try to resolve, ESI issues as early in the case as possible, and serves judicial efficiency as litigants are expected to arrive at the PC Conference prepared to address only unresolved e-discovery issues.

(2) Parties Must Confirm That They Have Entered into a "Written Plan/Stipulation" for the Preservation of ESI-Related Documents, or Agreed to Forgo the Discovery of ESI or Portions of ESI

Notably, the PC Order does not provide any guidance to litigants about the content or form of the "plan/stipulation;" rather, it is left to the discretion of the parties, as long as it is in writing.

The PC Order now specifically allows parties the option of forgoing the discovery of ESI. This provision demonstrates the Court's recognition that some parties may not wish to engage in costly electronic discovery, depending on the amount at stake or the claims and defenses at issue.

(3) Parties Must Implement Appropriate "Litigation Holds," and Can Be Sanctioned for Failure to Do So

A litigation hold is typically triggered when litigation is "reasonably foreseeable." A litigation hold therefore must be implemented at least as of the commencement of the action, and sometimes before the case is filed.

To be clear, however, a litigation hold must be in place prior to the PC Conference. If the hold is enacted after the conference, it may be too late. Because important ESI may be lost if there is a delay in issuing a litigation hold, the Court has left the door open to sanction counsel and parties who fail to timely stop document destruction policies and procedures.[2]

(4) Parties Must Identify the Format for the Production of ESI in the PC Order

The PC Order contains places to "check off" the format for production of ESI, such as TIFF format or Native format. Recognizing that some parties may wish to produce different types of documents in different formats, the PC Order contains space for the parties to write in the types of documents to be produced in each format.

(5) Parties Must Promptly Bring Issues Regarding Cost-Shifting to the Court's Attention

The Nassau justices do not state a firm rule on whether the producing or requesting party bears the cost of all e-discovery. Instead, if a party wishes to shift the cost of

e-discovery to the opposing party, or share the cost, it should be brought to the Court's attention at the PC Conference, and counsel should be prepared to explain why cost-shifting is appropriate.

* * *

As one of the more detailed PC Orders, it is reported to be "closely watched by the Office of Court Administration" for possible use in other New York courts.[3]

Counsel are cautioned that the PC Order is both a stipulation among the parties and an Order by the Court and thus breaching its provisions may lead to sanctions or other punitive actions by the Court.[4] Therefore, counsel not familiar with a client's ESI should discuss the PC Order with IT personnel prior to the PC Conference, and/or bring a person with expertise regarding the party's ESI to the PC Conference.

The New Electronic Discovery Guidelines

Effective June 1, 2009, Nassau County's Commercial Division posted detailed "Guidelines for Discovery of Electronically Stored Information" (the "Guidelines") to supplement and provide further instruction to counsel and parties regarding the new PC Order discussed above.[5] The Guidelines are the most comprehensive explanation by any New York State court of the Court's expectations for the parties as it relates to ESI, and with respect to the PC Conference. The Guidelines are intended to serve as "practical suggestions" to counsel and parties, and are not a mere "checklist."

Key issues addressed by the Guidelines are highlighted below:

(1) Preparation for and Appearance at the PC Conference

Emphasizing the requirements contained in the PC Order, the Guidelines identify three specific tasks related to ESI that should be completed prior to the PC Conference: (1) completion of the form PC Order, (2) engaging in a "meet and confer" and (3) preparing the written stipulation/plan regarding electronic data preservation.

To assist counsel and parties with the "meet and confer," the Guidelines identify various topics which counsel and parties are advised to discuss *prior to the PC Conference*, including: "implementing litigation holds; …each party's document or record retention policies; and…their respective clients' current and relevant past ESI and policies regarding ESI." Counsel are to become familiar with those policies or identify a person familiar with the client's electronic systems. If each of these topics is discussed before appearing at the PC Conference, it is expected that counsel will come to Court prepared to discuss only outstanding issues, having resolved other issues without Court intervention.

The Guidelines identify fifteen (15) topics which counsel *must* be prepared to address *at the PC Conference*, including:

(1) disagreements between the parties regarding ESI;

(2) scope of ESI requests;

(3) form of production of ESI;

(4) ESI which is not reasonably accessible;

(5) Bates-stamping ESI;

(6) Redacting ESI and redaction logs;

(7) ESI custodians;

(8) Cost-sharing and cost-shifting;

(9) Search methodologies;

(10) Depositions of IT personnel;

(11) Need for two-tiered discovery of ESI;

(12) Protective or confidentiality orders;

(13) Need for forensic experts to assist with searches for ESI;

(14) Privilege logs;

(15) Preservation of Metadata.[6]

The listed items are issues which frequently arise during discussions or debates about ESI. For example, litigants typically run into difficulty when (i) determining how to production-stamp electronic documents; (ii) evaluating the necessity versus the expense of preparing privilege logs in cases involving millions of e-mails; (iii) strategizing as to the need for a deposition of IT personnel to determine whether a search of ESI was properly performed; (iv) determining whether parties should engage in a "first tier" of discovery of accessible and less costly ESI, before deciding to perform a broader "second tier" of discovery. If counsel discuss these sorts of issues before or at the PC Conference, they should avoid or certainly narrow any subsequent e-discovery disputes.

(2) The Format of Production of ESI

The Guidelines clarify that the parties must agree upon the format of the production of ESI and that ESI need only be produced in that agreed-upon format. By way of example, parties and counsel can agree that Excel spreadsheets shall be produced in Native file format, and e-mails produced in TIFF format. Unless the parties agree, the same Excel spreadsheets need not also be produced in a second format. The Guidelines warn that counsel must not "scrub" ESI so as to intentionally make it unusable by an adversary.

Counsel should carefully consider the desired format for production of ESI before the PC Conference. If a party or counsel later decides that it requires the production of ESI in a second format, and a possibly more expensive format, there is a risk that the Court will not agree to order the producing party to produce the same documents again in the second format, and/or that the Court will require the requesting party bear the cost for producing those documents.

(3) Cost-Shifting/Sharing

Several courts have taken a stance on "cost-shifting" in the area of e-discovery. The Guidelines do not state a definitive rule on cost-shifting; rather they encourage counsel to review six decisions. While the decisions must be read in their entirety for context, the holdings are summarized as follows:

a. *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct., Nassau Co. 2007): subpoenaing party must bear "the costs incurred in producing the e-mail records."

b. *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Sup. Ct., Nassau Co. Aug. 17, 2006): requesting party must pay the cost of searching restored backup tapes for e-mail and electronic documents. ca. *Weiller v. New York Life Ins.*, 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359 (N.Y. Sup. Ct. N.Y. Co. 2005): producing party must bear cost of preserving ESI, but the court "would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein."

d. *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (N.Y. Sup. Ct., Nassau Co. 2004): the "party seeking discovery must bear the cost of production of the items for which discovery is sought."

e. *Waltzer v. Tradescape*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006): as a "general rule," the party seeking discovery bears the cost of production; however the "cost of an examination by defendants' agents to see if [ESI] should not be produced due to privilege or on relevancy grounds should be borne by" the producing party.

f. *Etzion v. Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct., Nassau Co. 2005): requesting party bears cost for the production of requested documents.

New York courts, including those in the Nassau County Commercial Division, have not reached consensus on whether the producing or receiving party must pay for the discovery of ESI. Nor is there consensus on what costs or expenses can be shifted, i.e., the cost to copy and produce the documents, the labor costs involved to gather and review the documents, or the attorneys' fees incurred in performing a privilege review.

Parties should bring any issues concerning the cost of e-discovery to the Court's attention early, e.g., at the PC Conference, and particularly before significant costs are incurred. Litigants may also wish to consider seeking a protective order pursuant to CPLR 3103 to protect from costly discovery.

(4) Sanctions Available Against Counsel and/or Parties

The Guidelines specifically state that sanctions may be imposed against counsel and/or a party when ESI is "demanded, withheld or destroyed" in bad faith or with gross negligence and when parties fail to maintain and preserve ESI as required.

Giving more "teeth" to the rules on e-discovery, the Guidelines further note that sanctions are also available under Rule 12 of the Commercial Division Rules, and under the PC Order if a party or counsel fails to maintain and preserve ESI as required by the PC Order.

Only time will tell if the Court will sanction counsel or parties who appear at the PC Conference unprepared, but in light of such rules, litigants are strongly advised to arrive at the PC Conference well-informed about ESI.

* * *

In sum, the Guidelines serve as a "free CLE" for counsel and parties on ESI, and on the expectations of the Court for parties and counsel appearing at the PC Conference. It is strongly recommended that litigants review the Guidelines at the outset of litigation, whether or not the case is pending in the Nassau County Commercial Division, as the Guidelines may serve as a model for other New York State courts.

Conclusion

While there has been some movement toward amending the CPLR to address e-discovery issues on a statewide basis, the expectation is that it will be a long time before the legislature approves any such amendments. Until then, or until the Court of Appeals addresses e-discovery issues, the above rules will continue to govern ESI.

It is therefore imperative that litigants in New York State courts be fully aware of the new rules and appear before the Court knowledgeable about their client's ESI policies and procedures.

Endnotes

1. All counsel should be aware that the Uniform Rules of New York Trial Courts was also recently amended to expressly include e-discovery as a subject for the PC Conference. Effective **March 20, 2009**, Rule 202.12(c)(3) now provides that counsel should confer regarding e-discovery issues, including data preservation plans, the format and scope of electronic production, and the anticipated costs.

   An additional rule applies to PC Conferences in Commercial Division matters. Rule 8 of Uniform Rules of the Commercial Division (22 N.Y.C.R.R. § 202.70) (2006), titled "Consultation Prior to Preliminary and Compliance Conferences," specifically requires counsel to confer regarding e-discovery issues prior to the PC Conference. The Rule lists issues which "shall be addressed with the court" at the PC Conference including the implementation of a data preservation plan, scope and form of production, anticipated costs and the proposed allocation of same, and confidentiality and privilege issues.

2. As a practical tip, counsel are reminded that they should take steps to monitor a client's implementation of a litigation hold, and revise, supplement or redistribute the hold as may be appropriate.

3. Vesselin Mitev, *Nassau Commercial Courts Adopt New E-Discovery Requirements*, *New York Law Journal* (Feb. 19, 2009). Additional Commercial Division courts currently employ PC Orders which address e-discovery, with varying levels of detail. For example, the PC Order for the Commercial Division in Onondaga County requires counsel to identify the date on which they "consulted … in a good faith effort to reach agreement on the issues identified" in Rule 8, discussed *supra*, and on "e-discovery." The Commercial Division in Queens County implemented Rule 5, titled "Consultation among counsel prior conferences." Section (b) requires that counsel confer regarding "anticipated electronic discovery issues" prior to the PC Conference, including those topics identified in Rule 8 of the Commercial Division rules. Suffolk County's PC Order contains a section addressing the preservation of electronic evidence, provides a format for production of ESI and clarifies that a demand for books, records and other writings includes audiotapes, videotapes, computer disks and e-mail. The PC Order in Westchester County contains a space for counsel to describe the extent to which they will engage in e-discovery.

4. *See also* Rule 1 of the Commercial Division Rules requiring that counsel who appear in the Commercial Division be fully familiar with the case and authorized to enter into agreements on behalf of their clients. Failure to comply with Rule 1 risks "default," among other consequences.

5. The Guidelines can be found at http://www.nycourts.gov/courts/comdiv/nassau_rules.shtml.

6. The Guidelines contain definitions of ESI-related terms, including "Metadata."

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Practice Points for Excluding Lost Profits Damages

By Michael S. Oberman

New York law has long held that "[a] limitation on liability ['LOL'] provision in a contract represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor."[1] Because parties to a contract may therefore allocate the risks associated with non-performance as they see fit, there is nothing unfair in restricting the alleged breaching party's liability at the time of the alleged breach by the scope of the liability it agreed to assume at the time of contract formation. Although the non-breaching party may later regret the limitation on liability to which it agreed, New York bluntly declares that the party must "lie on the bed" that it made.[2]

Within this environment, our colleagues who draft contracts routinely include LOL provisions intended to preclude recovery, *inter alia*, of lost profits damages, and undoubtedly many members of our Commercial and Federal Litigation Section have sought in litigations or arbitrations to enforce (or prevent the enforcement of) the exclusion of lost profits damages under a LOL provision. Given the commonness of LOL provisions, practitioners should be aware of developing case law addressing two separate lines of attack aimed at defeating the protection potentially provided by a LOL provision. First, the wording of the LOL provision on close scrutiny might not cover the kind of lost profits damages thought to be precluded. Second, public policy might intervene if the party seeking protection under the LOL provision is found to have acted in "bad faith" (as opposed to furthering a "legitimate economic self-interest").

Drafting Matters

It is a truism that the wording of a contract provision can dramatically affect how that provision is construed and applied. In the context of a LOL provision, the placement of the words "lost profits" might determine the kind of lost profits damages that are covered by the LOL provision, and more precise drafting can surely reduce the likelihood of litigation over the intended meaning of the provision.

Returning to basics, New York law classifies contract damages as "either general (direct) damages," or "special (consequential) damages."[3] "General damages are those which are the natural and probable consequence of the breach, while special damages are extraordinary in that they do not so directly flow from the breach."[4] It is the "general rule" in New York that lost profits are treated as consequential damages.[5] To the extent they are seen as a form of consequential damages, lost profits should not be recoverable when a LOL provision excludes the recovery of consequential damages (even with no mention of "lost profits").[6] But the Court of Appeals has held that lost profits can be categorized as direct, rather than consequential, damages, when the profits lost are those that the contract expressly provided that the plaintiff would collect directly from the defendant over the term of the contract.[7] In contrast, lost profits that a plaintiff would have realized from its dealings with third parties as a collateral consequence of the parties' full performance are, even if lost by virtue of the defendant's breach, consistently regarded as consequential, rather than direct, damages.[8]

"[T]he wording of a contract provision can dramatically affect how that provision is construed and applied. In the context of a LOL provision, the placement of the words 'lost profits' might determine the kind of lost profits damages that are covered by the LOL provision…"

So far, no reported decision by a New York state or federal court has expressly analyzed the issue of whether the wording of a LOL provision could permit the recovery of "direct lost profits damages" while precluding the recovery of "consequential lost profits damages."[9] By now, however, there is a body of recent and respectable cases from other states that could prove persuasive to a New York court, although some of these cases have recognized a scope of direct loss profits damages broader than has been accepted by the Court of Appeals.[10]

To frame the discussion, let us examine two typical LOL provisions. Here is the first example:

> NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR LOST PROFITS DAMAGES OF ANY KIND, WHETHER BASED IN CONTRACT, TORT OR OTHERWISE, THAT MAY ARISE IN CONNECTION WITH THIS AGREEMENT.

This LOL provision would appear to bar "any…lost profits damages…of any kind" and thereby apply to any and all types of lost profits, direct or consequential; lost profits are treated as a discrete category of excluded damages. *Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc.*,[11] a case from Georgia, supports this construction.

The clause in *Imaging* provided that "[n]either the Customer nor MRP will be liable to each other or any other party for any lost profits *or* any incidental, special, or consequential damages relating to this Agreement."[12] The word "any" preceded the words "lost profits" and the words "any lost profits" stood independent of the word "consequential." The court stated:

> The contract at issue did not distinguish between the two types [*i.e.*, direct and consequential damages]; it forbade the recovery of "ANY LOST PROFITS." No exceptions were provided for. The meaning of "any" in context is "all." Both consequential damages *and* direct damages (to the extent direct damages concern lost profits) are not recoverable under the contract.[13]

The Fifth Circuit in *Vaulting & Cash Servs. Inc. v. Diebold, Inc*. similarly concluded that a LOL provision barring recovery for "indirect, incidental, consequential or similar damages, lost profits, [sic] lost business opportunities, whether arising under contract, tort, strict liability or other form of action" precluded recovery of direct lost profits damages.[14] Beyond "grammatical parsing," the court held that, if "lost profits" is treated as applying only to "consequential" or "indirect" damages—which terms are separately listed—then the phrase "lost profits" becomes superfluous, a disfavored result under canons of interpretation. [15]

Now, here is the second example (with the changes from the first example highlighted):

> NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL…DAMAGES, *INCLUDING DAMAGES FOR LOST PROFITS*, WHETHER BASED IN CONTRACT, TORT OR OTHERWISE, THAT MAY ARISE IN CONNECTION WITH THIS AGREEMENT.

Courts are divided over whether this type of formulation connotes that the excluded lost profits are only those lost profits that are a subset of consequential damages such that the provision would not bar lost profits that are properly classified as direct lost profits. To some extent, the different outcomes turn on the sequence of words in the LOL provision. In *Penncro Assocs.*, the LOL provision included a definition of consequential damages: "Consequential damages include, but are not limited to, lost profits, lost revenues and lost business opportunities… ."[16] The Tenth Circuit said that the "syntax alone propels" the conclusion that the provision precludes only consequential lost profits; "it simply does not speak to direct damages, or to lost profit recoverable under such a theory."[17] *Spinal Concepts, Inc. v. Curasan, AG* allowed the plaintiff to pursue direct lost profits damages where the LOL provision precluded recovery of "lost profits *or any other special, consequential, incidental, or indirect damages*."[18] Here, too, the court found that the words "lost profits" were tied to "*any other* special, consequential, incidental, or indirect damages."[19] *Coremetrics, Inc. v. Atomic Park.com, LLC* also held that a LOL provision barred only recovery of indirect damages when it excluded "consequential damages including without limitation damages for loss of profits.…"[20]

Other courts have held that a clause "including damages for lost profits" following the words "consequential damages" should be read as an expression by the parties to exclude "all damages for lost profits." *Quicksilver Res., Inc. v. Eagle Drilling, L.L.C.* distinguished *Penncro* because the clause in *Quicksilver* read: "the parties agree that special, indirect or consequential damages shall be deemed to include, *without limitation*, the following: loss of profit or revenue…;" the court (reaching a different conclusion than *Coremetrics*) found that the words "without limitation" brought direct lost profits damages within the exclusion.[21] In *Telespectrum Worldwide, Inc. v. Grace Marie Enters.*, the court concluded that "[d]efendant's attempt to characterize her lost profits as 'direct' damages, while creative, does not square with [the] clearly stated intention to limit the parties' liability" based on contract provision precluding recovery for "any incidental or consequential damages, including loss of profit…which may be caused, directly or indirectly, by the vendor's or client's breach of this agreement with the exception for non-payment of services."[22] Similarly, *Continental Holdings, Ltd. v. Leahy*,[23] precluded recovery of "direct lost profits" because the proper interpretation of phrase "loss of profits" in limitation of liability provision "includes 'direct' damages and 'indirect' damages," where the LOL provision stated that neither party "shall bear any liability to the other for… loss of profits…or any other indirect or consequential damages."

Construction battles of the type seen in other states are likely to be decided soon by New York courts, given the out-of-town "tryouts" of the arguments in recent decisions. Yet, practitioners seeking to moot this issue can do so by expressly and unambiguously excluding "any kind of lost profits damages (including without limitation both direct and consequential lost profits damages)" as an independent clause in a LOL provision.

Conduct Matters

If a court determines that the language of a LOL provision precludes the recovery of the lost profits damages sought by a plaintiff, the enforcement of the LOL provision might still be challenged if the alleged breaching party acted in "bad faith." In 1983, the Court of Appeals in *Kalisch-Jarcho, Inc. v. City of New York* altered the land-

scape for LOL provisions by holding that, under New York public policy, exculpatory clauses "will not exonerate a party from liability under all circumstances."[24] *Kalisch-Jarcho* recognized a narrow exception to the general enforceability of exculpatory clauses for "bad faith" conduct transcending an intentional breach of contract. As the Court stated:

> More pointedly, an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.[25]

The Court of Appeals elaborated on the high level of culpability required to avoid enforcement of an exculpatory clause by including a definition of "malice" ("a state of mind intent on perpetrating a wrongful act to the injury of another without justification") and of "bad faith" ("the mirror image of good faith, connotes a dishonest purpose").[26]

Twenty-five years later, it is now well settled under New York law that conduct in furtherance of a "legitimate economic self-interest" does not rise to the level of bad faith necessary to defeat a LOL provision. The Court of Appeals in 1994 introduced the basic "economic self-interest" concept in *Metropolitan Life*; construing the term "willful" as used in a LOL provision, the Court held that a defendant's breach was not willful where the "defendant's repudiation of the Agreement was motivated exclusively by its own economic self-interest in divesting itself of a highly unprofitable business undertaking in order to promote the sale of its computer software division to a competitor company."[27] Then in 2003, Judge Marrero of the Southern District of New York, in a frequently cited decision, synchronized this concept from *Metropolitan Life* with the *Kalisch-Jarcho* rule and found—on the summary judgment record before him—that "this economically motivated decision cannot, as a matter of law, rise to the level of malice or intentional wrongdoing necessary to invalidate" a LOL provision.[28] In 2007, the First Department in *Banc of America Sec. LLC v. Solow Bldg. Co. II, L.L.C.* clarified that an economic interest must be "legitimate" to avoid a finding of "bad faith" and defined "legitimate economic self-interest" as an interest that is not motivated by an "intent to inflict economic harm."[29] This formulation is the reciprocal of *Kalisch-Jarcho*'s definition of malice ("a state of mind intent on perpetrating a wrongful act to the injury of another *without justification*"). Recently, the First Department provided more guidance, describing its decision in *Banc of America* as an inquiry "limited to whether…the landlord's alleged acts constituted the type of intentional wrongdoing, unrelated to any legitimate economic self-interest, that could render an exculpatory clause in the lease unenforceable as a matter of public policy." [30]

In *Banc of America*, landlord Solow Building Co. ("Solow") refused to permit tenant Banc of America Securities ("BAS") to make reasonable nonstructural changes to its leased premises unless BAS paid a $6 million "fee," where (i) the lease made no provision for any such "fee," (ii) the withholding of consent allegedly impaired BAS's ability to operate its business despite having already put over $200 million toward improvements in the space, and (iii) the lease specifically required Solow "not to unreasonably withhold its consent" to proposed nonstructural changes.[31] The motion court had denied summary judgment, holding that "the trier of fact could reasonably conclude that Solow's actions were extortionary [sic]."[32] The First Department affirmed, stating that "[w]ithout any lawful basis to demand payment for reviewing the alteration plans, Solow's attempt to exact a multi-million dollar sum from BAS might reasonably be perceived by a trier of fact as an intention to inflict monetary harm, which is tortious as a matter of law."[33] The First Department instructed that economically motivated conduct that is criminal or tortious and not motivated by a legitimate economic self-interest could result in the non-enforcement of a LOL provision.[34] In contrast, the court stated that "[t]he option to breach a contract and pay damages is always available, even where the breaching party had no intention of performing its obligations when it entered into the agreement."[35]

Tradex Europe SPRL v. Conair Corp. is also instructive.[36] There, plaintiff Tradex entered into a consulting agreement with Scunci International, Inc., under which Tradex could potentially earn a 4% commission on net sales revenues derived from Tradex's efforts. After the agreement was entered, Conair Corp. purchased the assets of Scunci and decided not to work with Tradex. Tradex alleged that Conair suspended Tradex's negotiations with a number of potential distributors and retailers of Scunci products, actively interfered with Tradex's efforts to secure a distributorship with an Asian firm, and "generally expressed a lack of interest in expanding Scunci's business internationally," including by refusing to discuss Tradex's plans at two meetings between the parties.[37] The district court granted summary judgment enforcing the LOL provision, because Conair was motivated by a legitimate economic self-interest (a new business strategy)—even if that caused Conair to repudiate the agreement and denied Tradex the fruits of its agreement.

In re Delphi Corp. highlights the level of conduct that might be found to be "bad faith" and not "legitimate."[38] In *Delphi*, plaintiffs alleged that defendants engaged in "efforts to denigrate the value of Delphi and its securities, including [] short selling of Delphi's stock, so as to

surreptitiously increase the likelihood that Delphi would not obtain the third-party debt financing."[39] Plaintiffs also alleged that defendants abused the court system by having "counsel assert a specious claim that Delphi not only had breached [the agreement at issue] but also was liable for an $82.5 million Alternate Transaction Fee," to further their aim of frustrating Delphi's debtors.[40] The Bankruptcy Court—in denying a motion to dismiss—found that this illicit manipulation of the courts and the securities markets constituted "truly jaw-dropping conduct" that rose to "the level of a tort and/or potentially a bankruptcy crime."[41] Although *Delphi* denied a motion to dismiss, other courts have found the absence of "bad faith" as a matter of law.[42]

While it is good to think that cautioning clients not to act in "bad faith" should be unnecessary, most clients are unlikely to know on their own that the protection expected from a LOL provision can evaporate if a client's conduct is found to be in "bad faith" and not in furtherance of a "legitimate economic self-interest." This is, therefore, one more occasion for counselors to offer good counsel.

Endnotes

1. *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436, 643 N.E.2d 504, 507, 618 N.Y.S.2d 882, 885 (1994).
2. *Id.* (quoting 5 Corbin, *Contracts*, § 1068 at 386 (1964).
3. *See Vitol Trading S.A., Inc. v. SGS Control Servs., Inc.*, 874 F.2d 76, 79 (2d Cir. 1989).
4. *American List Corp. v. U.S. News & World Report, Inc.*, 75 N.Y.2d 38, 42-43, 549 N.E.2d 1161, 1164, 550 N.Y.S.2d 590, 593 (1989) (citation omitted).
5. *EPN Ingenieria S.A. De C.V. v. General Elec. Co.*, No. 92 Civ. 1563 (KMW), 1996 WL 531867, at *2 (S.D.N.Y. Sept. 19, 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997); *see also Yenrab, Inc. v. 794 Linden Realty, LLC*, __A.D.3d __, __, __N.Y.S.2d__, __, 2009 WL 4432574, at *3 (2d Dep't Dec. 1, 2009) ("A claim for lost profits is generally a claim for special or extraordinary damages.").
6. *See Appliance Giant, Inc. v. Columbia 90 Assocs.*, 8 A.D.3d 932, 934, 779 N.Y.S.2d 611, 613 (3d Dep't 2004).
7. *See American List Corp.*, 75 N.Y.2d at 41, 549 N.E.2d at 1163, 550 N.Y.S.2d at 592; *see also Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir. 2007).
8. See *International Gateway Exch., LLC v. Western Union Fin. Servs., Inc.*, 333 F. Supp. 2d 131, 150 (S.D.N.Y. 2004).
9. *In re Arbitration Between InterCarban Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 73-74 (S.D.N.Y. 1993) approached the issue but never construed the parties' agreement *de novo*; the court held only that an arbitrator's application of a LOL provision did not amount to "misconduct."
10. *Compare American List Corp.*, 75 N.Y.2d at 41, 549 N.E.2d at 1163, 550 N.Y.S.2d at 592, *with Penncro Assocs., Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1156 (10th Cir. 2007). ("Thus, for example, if a services contract is breached and the plaintiff anticipated a profit under the contract, those profits would be recoverable as a component of direct, benefit of the bargain damages. If that same breach had the knock-on effect of causing the plaintiff to close its doors, precluding it from performing other work for which it had contracted and from which it expected to make a profit, those lost profits might be recovered as 'consequential' to the breach.").
11. 227 Ga. App. 641, 642, 490 S.E.2d 124, 126 (Ga. Ct. App. 1997), *aff'd*, 273 Ga. 525, 543 S.E.2d 32 (2001).
12. 227 Ga. App. at 642, 490 S.E.2d at 126 (emphasis added; capitalization omitted).
13. 227 Ga. App. at 644, 490 S.E.2d at 127.
14. 199 F.3d 440, No. 00-30294, 1999 WL 1068257, at *1 (5th Cir. Oct. 22, 1999). The court termed the provision "poorly drafted," *id*., at *2 & n. 5, because it omitted the word "or" after "lost profits" and did not use semi-colons to separate the listed types of damages. *See also CompuSpa, Inc. v. IBM*, 228 F. Supp. 2d 613, 626 (D. Md. 2002) (applying N.Y. law and holding that "lost profits" were "unquestionably" covered by a LOL provision that said: "[I]n no event will either party be liable to the other in contract or tort or otherwise for any lost revenues, lost profits, incidental, indirect, consequential, special or punitive damages.").
15. 1999 WL 1068257, at * 2 ("If, on the other hand, V&C's interpretation is followed, then the phrases 'lost profits' and 'lost business opportunities' become surplusage, because, if modified by 'indirect' to mean 'indirect lost profits' and 'indirect business opportunities' then each is wholly subsumed in the already stated universe of 'indirect damages.'")
16. 499 F.3d at 1155-56.
17. *Id.* at 1156. The court also emphasized that, by comparison, a provision relating to claims from third parties excluded "all… damages," which the LOL provision did not. *Id.*
18. No. 3:06-CV-0448-P, 2006 WL 2577820, at *5 (N.D. Tex. Sept. 7, 2006) (emphasis in original). While the court was reviewing an arbitration award, its decision expressly offered a construction of the LOL provision.
19. *Id*. at * 6 ("In other words, [the LOL provision] states that to the extent that lost profits are considered direct damages and not special, consequential, incidental or indirect damages, they are excepted from this provision. To interpret the Agreement otherwise would defy logic.").
20. No. C-04-0222 EMC, 2005 WL 3310093, at **1, 4 (N.D. Cal. Dec. 7, 2005) (applying New York and California law) ("A reasonable jury, after having read this clause, could only conclude that Coremetrics and AtomicPark intended to bar recovery of indirect damages, of which lost profits is just one of several possible measures. Under the plain reading of this provision, 'loss of profits' is referenced only as a subset or species of indirect damages.") *See also Tennessee Gas Pipeline Co. v. Technip USA Corp.*, No. 01-06-00535-CV, 2007 WL 4465555, at *6 (Tex. Ct. App. Dec. 21, 2007) (holding that recovery of direct lost profits damages was not precluded by a LOL provision that excluded "consequential loss or damage including, but not limited to, loss of profits"). A party confronted with a LOL provision like the one in *Coremetrics* or *Tennessee Gas Pipeline* might still cite to *Vaulting & Cash Servs.* for the proposition that if "lost profits" were treated as applying only to "consequential" damages, then the words "lost profits" become superfluous.
21. No. H-08-868, 2009 WL 1312598, at **5-7 (S.D. Tex. May 8, 2009) (emphasis added) ("Thus, the agreement manifests a clear intent by the parties to modify the legal meaning and breadth of the term 'consequential damages.'"). The court did not mention *Coremetrics*.
22. No. Civ. A. 99-549, 2000 WL 1796414, at *2 (E.D. Pa. Nov. 14, 2000). The court, at the same time, found "defendant's calculations of damages [on its counterclaims] due to 'lost business' to be speculative."
23. 132 S.W. 3d 471, 475-76 (Tex. Ct. App. 2003). The court also reasoned that recovery of direct lost profits damages would be inconsistent with the contract's early termination remedy.
24. 58 N.Y.2d 377, 384, 448 N.E.2d 413, 416, 461 N.Y.S.2d 746, 749 (1983).
25. 58 N.Y.2d at 385, 448 N.E.2d at 416-17, 461 N.Y.S.2d at 750 (footnote and citations omitted). *See also Smith-Hoy v. AMC Prop. Evaluations, Inc.*, 52 A.D.3d 809, 810, 862 N.Y.S.2d 513, 515-16 (2d

Dep't 2008) ("A clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an over-riding public policy."). Although *Kalisch-Jarcho* addressed an exculpatory clause (*i.e.*, a clause that immunizes a party from all liability for its own conduct, later cases (whether rightly or wrongly) have applied the "bad faith" rule to LOL provisions (*i.e.*, clauses that limit the scope of damages but do not immunize the party from all liability).

26. 58 N.Y.S.2d at 385, 448 N.E.2d at 417, 461 N.Y.S.2d at 750, nn. 4, 5.

27. 84 N.Y.2d at 439, 643 N.E.2d at 509, 618 N.Y.S. 2d at 887.

28. *Net2Globe Int'l, Inc. v. Time Warner Telecom*, 273 F. Supp. 2d 436, 451 (S.D.N.Y. 2003).

29. 47 A.D.3d 239, 250, 847 N.Y.S. 2d 49, 57 (1st Dep't 2007). This phrase "legitimate economic self-interest" was likely adopted from the Court of Appeals decision in *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 195-96, 818 N.E.2d 1000, 1107, 785 N.Y.S.2d 359, 366 (2004), in which the Court held that a legitimate economic self-interest might serve as a justification in defense of an alleged tortious interference with a prospective business relationship claim.

30. *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co.*, 60 A.D.3d 434, 434, 874 N.Y.S.2d 440, 441 (1st Dep't 2009).

31. 47 A.D.3d at 248, 847 N.Y.S.2d at 56.

32. *Id*. at 242, 847 N.Y.S.2d at 51.

33. *Id*. at 250, 847 N.Y.S.2d at 57. In a sharply worded dissent, two justices (on a panel of five justices) urged a grant of summary judgment on these facts, finding that plaintiff "could not establish the kind of misconduct 'smack[ing] of intentional wrongdoing,'" *id*. at 252, 847 N.Y.S.2d at 59 (quoting *Kalisch-Jarcho*), because the lease left plaintiff with the recourse of suing the defendant for specific performance and because the Court of Appeals in *Metropolitan Life* had held that conduct in a defendant's own economic interest would not vitiate a limitation of liability clause.

34. *See id*. at 247-48, 847 N.Y.S.2d at 55-56 ("Economic self-interest is the motivation for fraud, self-dealing and breach of fiduciary duty; it does not excuse such misconduct nor preclude an injured party from seeking redress in the courts.") (internal citations omitted).

35. *Id*. at 248, 847 N.Y.S.2d at 56.

36. No. Civ. 1760 (KMW) (FM), 2008 WL 1990464 (S.D.N.Y. May 7, 2008). *See also Deutsche Lufthansa AG v. Boeing Co.*, No. 06 CV 7667 (LBS), 2007 WL 403301, at **3-4 (S.D.N.Y. Feb. 2, 2007) (plaintiff's claim that defendant acted in bad faith by permitting plaintiff to expend substantial funds while defendant was secretly considering exiting the business fell "well below the levels required by the New York courts to invalidate a mutually agreed upon limitation of liability," where plaintiff "concede[d] that Boeing is entitled to walk away (and pay damages for its breach) pursuant to the terms of the Service Agreement").

37. 2008 WL 1990464, at **3, 5.

38. No. 05-4481 (RDD), 2008 WL 3486615, at *25 (Bankr. S.D.N.Y. Aug. 11, 2008).

39. *Id*. at *6.

40. *Id*.

41. *Id*. at **7, 17. *Apache Bohai Corp., v. Texaco China B.V.*, No. H-0102019, 2005 WL 6112664, at *19 (S.D. Tex. Feb. 28, 2005), *aff'd*, 480 F.3d 397 (5th Cir. 2007) (applying New York law) offers a more expansive view of "bad faith" and a narrower view of "legitimate economic self-interest than *Banc of America* or *Tradex* but (in the author's opinion) is not a persuasive precedent (particularly because it ruled only on an arbitrator's award).

42. *See, e.g., Deutsche Lufthansa A.G.*, No. 06 CV 7667 (LBS), 2007 WL 403301, at *4 (dismissing complaint under Fed. R. Civ. P. 12(b)(6); *Net2Globe*, 273 F. Supp. 2d at 450 (granting summary judgment and collecting cases); *DynCorp. v. GTE Corp.*, 215 F. Supp. 2d 308, 317-18 (S.D.N.Y. 2002) (rejecting on Fed. R. Civ. P. 12(b)(6) motion plaintiff's contention that "the limitation of liability provisions should not be enforced if the breach was fraudulent, willful or grossly negligent…[because] the decision of the New York Court of Appeals in *Metropolitan Life* is authoritative, and it holds that an allegation that a breach of contract was willful rather than involuntary does not allow a court to disregard an unambiguous limitation of liability provision agreed to by parties of equal bargaining power").

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The Ethics of Recording Witness Statements: An Overview of the Applicable Rules

By Rebecca Adams and the Committee on Ethics and Professionalism

The secret taping of conversations with witnesses during the course of a litigation is not specifically prohibited by law in the state of New York. However, bar associations throughout the country generally have opposed lawyers' participation in secret recordings on the grounds that such conduct involves "dishonesty, fraud, deceit, or misrepresentation" within the meaning of DR 1-102(A)(4).[1] Similarly, bar associations in New York generally have disapproved of secret tape recording, whether by audio or video tape, finding that while some circumstances may warrant non-disclosed recordings, as a general practice it is ethically impermissible.

I. The Ethics of Recording Witness Statements: A Survey

A. The American Bar Association

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility first established that it is not ethically permissible for lawyers to secretly tape conversations in Formal Opinion 337 (1974). This opinion stated that, with the exception of lawyers involved in law enforcement activities, it is unethical for lawyers to secretly record conversations without the consent of all participants.[2]

In 2001, the ABA revisited the issue and withdrew this earlier opinion. They concluded as follows:

1. Where nonconsensual recording of private conversations is permitted by the law of a jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.
2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rules 8.4, and if the purpose of the recording is to obtain evidence, may violate Model Rules 4.4.[3]
3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.
4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at least, inadvisable.

In short, the ABA concluded that the "mere act of secretly but lawfully recording a conversation inherently is not deceitful."[4] The Committee specifically declined to address the application of the Model Rules to deceitful, but lawful, conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversation in investigations of criminal activity, discriminatory practices, and trademark infringement.[5]

"[B]ar associations in New York generally have disapproved of secret tape recording, whether by audio or video tape, finding that while some circumstances may warrant non-disclosed recordings, as a general practice it is ethically impermissible."

The reasoning behind this opinion was the fact that the earlier Opinion 337 was based on the Code of Professional Responsibility, which included the principle that a lawyer "should avoid even the appearance of impropriety."[6] The Committee reasoned that it was no longer generally accepted that the nonconsensual recording of conversations was inherently deceitful and that there may be legitimate reasons for recording such conversations, such as to guard against later perjury, or for the self-protection of the lawyer.[7]

B. State Bar Opinions

Following ABA Opinion 01-422, state bar opinions have taken varied approaches regarding the practice of undisclosed recording. States including Alaska, Texas, and Minnesota explicitly withdrew earlier ethics opinions which found the undisclosed recording of witness statements inherently deceitful.[8] The Tennessee Supreme Court even went so far as to amend the commentary to the Tennessee Rules of Professional Conduct Rules 4.4 and 8.4, to clarify that the secret recording of witness statements is not unethical *per se*.[9]

Some states, however, have declined to adopt the reasoning underlying ABA Opinion 01-422, either addressing the issue of surreptitious recording on a very fact-specific basis or finding that, as a general rule, the secret recording of witness statements remains unethical. For instance, New Mexico State Bar Opinion 2005-03 (2005) concluded:

> The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer's control, if such a recording would involve deceiving the witness either by commission or omission… Despite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will be hesitant to record conversations without the party's knowledge…[T]he Committee does not mean to opine that under no circumstances would the practice be permissible. Rather, the analysis remains a very fact specific one.[10]

Ohio has found surreptitious recording to be generally unethical. The Ohio Board of Commissioners on Grievances and Discipline Opinion 97-3 (1997) states that "[a]n attorney in the courts of legal representation should not make surreptitious recordings of his or her conversations with clients, witnesses, opposing parties, opposing counsel, or others without their notification or consent." The opinion goes on to recognize exceptions, including the prosecution and law enforcement attorney exception and the extraordinary circumstances exception.

Bar opinions in New York State, while declining to follow the reasoning underlying ABA Opinion 01-422, have taken a hybrid approach to the analysis of the issue.

II. The Ethics of Recording Witness Statements in New York State

A. Bar Opinions

The New York State Bar Association Committee on Professional Ethics adopted a stance generally condemning secret tape recording early on. Applying the New York Code of Professional Responsibility DR 1-102(A)(4), 7-102(A)(8), and EC 1-5 and 9-6,[11] the Committee concluded that:

> *Except in special situations*, it is improper for an attorney engaged in private practice to electronically record a conversation with another attorney or another person without first advising the other party. (emphasis added).

Notably, this opinion does not address the recording of conversations by public attorneys and prosecutors. It explicitly states that, in general, secret recording of a conversation with a prospective witness is forbidden.[12] In contrast to the American Bar Association' Opinion 01-422, which concluded that secret but lawful recording is not inherently deceitful, the New York State Bar noted that "[p]rofessional standards adopted in the public interest often condemn the doing of what the law has not forbidden."[13]

Similarly, the Association of the Bar of the City of New York (ABCNY) Committee on Professional and Judicial Ethics first condemned the use of a concealed tape recorder in 1956:

> The practice is unethical and should not be countenanced. [Former] Canon 22 requires that the "conduct of a lawyer… with other lawyers should be characterized by candor and fairness." The employment of a concealed tape recorder…is not consistent with candor and fairness.[14]

For many years, ABCNY ethics opinions found the undisclosed taping of conversations to be prohibited under any circumstances.[15] In NY City Opinion 2003-02, post-ABA Opinion 01-422, the ABCNY modified its position, but only slightly. The Committee specifically stated that it "remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice."[16] However, it conceded that exceptions may exist to this general rule.

This Opinion specifically rejected the reasoning followed by the ABA in Opinion 01-422, stating that none of the reasons for abandoning the general prohibition against undisclosed taping, as listed in the ABA Opinion, "provides persuasive support for the conclusion that undisclosed taping, as a routine practice, should be permissible for attorneys."[17] While the Committee found "[u]ndisclosed taping smacks of trickery no less today than it did twenty years ago…emerged over the years is an increasing recognition of the variety of circumstances in which the practice of undisclosed taping can be said to further a generally accepted societal good and thus be regarded as consistent with the standards of fair play and candor applicable to lawyers."[18]

Essentially, in NY City 2003-02, the ABCNY adopted a case-by-case approach to the ethics of recording witness statements. Its conclusion was that: while "[a] lawyer may not, as a matter of routine practice, tape record conversations without first disclosing that conversation as being taped," a lawyer may "engage in undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good."[19]

While emphasizing the general prohibition, the Committee also recognized that "it would be difficult, if not impossible, to anticipate and catalogue all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist."[20] Specifically mentioned as exceptions to the general rule were investigations of ongoing criminal conduct or other misconduct, or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury.[21]

Even prior to ABA Opinion 01-422, the New York County Lawyers' Association (NYCLA) was somewhat more permissive of the undisclosed taping of a telephone conversation, provided that one party to the conversation has consented. In NYCLA Opinion 696 (1993), the NYCLA Committee on Professional Ethics found secret tape recording cannot be deceitful because the fact that taping is legal means that the party should reasonably expect to be taped, as long as the lawyer does not "falsely assert" that the conversation is not being recorded," the consent of one party to the conversation is sufficient to make the practice ethically permissible.

The same ethics rules which apply in the context of secret taping of conversations also would encompass the secret taping of a witness by video, such as by a surveillance tape. In fact, in the case law discussed below, the secret taping of witnesses was addressed within the context of surveillance videos rather than tape recordings.

In short, the overall trend of New York ethics opinions is to warn against the secret taping of witnesses, by audio or by video tape, unless an "exception" to the general prohibition exists. Such exceptions would encompass, together with those specifically listed in NY City 2003-02, taping in the context of a civil rights investigation, criminal investigation, or securities and anti-trust investigations.[22] However, as a general practice, such "secret" taping is considered unethical.

B. Case Law—The Issue of Privilege

Regardless of whether or not the "secret" taping of a witness falls under an exception to the general prohibition cited by New York State ethics opinions, if the taping is of a party witness, New York law limits its evidentiary value. In *Tran v. New Rochelle Hospital Medical Center*,[23] the Court of Appeals held that pursuant to CPLR 3101(i), where a party is secretly taped, the party who did the taping must disclose the tape prior to the taped party's deposition. While this opinion specifically addresses the use of surveillance videos, the holding here would apply to the undisclosed taping of conversations as well.

Prior to 2003, the Court of Appeals had held that secretly recorded tapes, even of party witnesses, were "prepared in anticipation of litigation," and therefore subject to a qualified privilege pursuant to CPLR 3101(d)(2).[24] Accordingly, these materials were only discoverable if the taped party was able to "overcome (the privilege) by a factual showing of substantial need and undue hardship."[25] Recognizing the need for withholding such evidence until trial in order to prevent parties from tailoring their deposition testimony to conform to the tapes, the Court balanced that need with the "undue hardship" that taped parties would face if denied pre-trial access to such tapes.[26] Therefore, under CPLR 3101(d)(2), the taped parties were entitled to access the tapes before trial, but not prior to their deposition.

However, the Legislature altered the Court's analysis through the passage of CPLR 3101(i), enacted only a year after *DiMichel*. This provision provides in pertinent part:

> In addition to any other matter which may be subject to disclosure, *there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party].* There shall be disclosure of all portions of such material…rather than only the portion a party intends to use. (emphasis added).[27]

When called upon in 2003 to revisit the issue of whether such materials were privileged, the Court of Appeals noted "at the outset" that the plain language of CPLR 3101(i) "eliminates any qualified privilege that previously attached," and that therefore, secret tapings of parties were subject to "full disclosure."[28] Recognizing the danger that such full disclosure posed to "tailored testimony," the Court held that, nonetheless, CPLR 3101(i) required "full disclosure with no limitations to timing."[29]

The Court specifically noted, however, that a party is still free to seek a protective order to restrict disclosure "based on the grounds that justify the issuance of such an order."[30] Perhaps, if undisclosed taping is undertaken pursuant to an exception to the general ethical prohibition on secret taping, such as for civil rights, anti-trust, securities or criminal investigations, the disclosure of such material would be protected under this provision.

CPLR 3101(i) does not, however, apply to taped material involving non-party witnesses. Instead, the disclosure of recordings involving non-party witnesses falls under CPLR 3101(d)(2), and thus, a non-party still is required to demonstrate a "substantial need" for the material and the inability to obtain its equivalent without "undue hardship."[31] Accordingly, non-party statements generally remain cloaked by a qualified privilege.

However, there is a notable exception to this general rule. Where a non-party's recorded statement is "inconsistent in a material respect with his or her testimony at a deposition, the statement should be disclosed pursuant to CPLR 3101(d)(2)."[32] Even so, such disclosure would not be required until after a non-party has testified during his or her deposition in contradiction to an earlier, taped statement, therefore preserving the impeachment value of a recording of a non-party witness's statement.

In general, the policy behind CPLR 3101(i) seems to reflect a legislative policy that is in sync with the consensus of ethics opinions in New York State by limiting the evidentiary value of such tapings given that, as a general practice, such taping is not ethically permissible. However, just as exceptions exist to the prohibition against secret taping, under certain circumstances a protective order

may be available to preserve the evidentiary value of the same by preventing its disclosure.

C. The Secret Taping of Witness Statements Under the New Rules

When the new Rules of Professional Conduct took the place of the New York Code of Professional Responsibility on April 1, 2009, the above analysis, and New York's stance on the issue of secret taping of witnesses, did not change. In fact, the language of one of the applicable rules, Rule 8.4, includes language identical to both DR 1-102(A) and DR 7-102(A)(8). Rule 8.4 provides, in essential part:

> A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct…(or) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Two of the other new Rules applicable to the analysis include Rule 4.4, Respect for the Rights of Third Persons, which prohibits a lawyer, in representing a client, from using methods to obtain evidence that "violate the legal rights of such person," and Rule 5.3, which imputes the conduct over third parties which the lawyer supervises onto the lawyer. Rule 5.3 is especially pertinent in the context of the supervision of the activities of agents and investigators, in that:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer if: The lawyer orders or directs the specific conduct, or with knowledge of the specific conduct ratifies it; or the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility…(or) supervisory authority over the nonlawyer; and knows of such conduct at a time when it could have been prevented…but fails to take remedial action; or in the exercise of reasonable…supervisory authority should have known of the conduct… at a time when the consequences of the conduct could have been avoided or mitigated. Rule 5.3(b).

The rule is particularly strict, in that if the lawyer knew or should have known of unethical conduct and failed to stop the same, the lawyer is in violation of the Rules. The application of Rule 5.3 to the ethics of secretly recording witnesses expands the responsibility of the lawyer, in a litigation, to prevent or decline to condone such conduct, if it does not fall under the above-mentioned exceptions, even when undertaken by nonlawyers (e.g., private investigators) under the lawyer's employ.

Conclusion

Clearly, secretly recording witnesses within the context of a litigation, whether by audio or video tape, is not conduct which should be engaged in casually. Under certain circumstances, such as in a criminal or quasi-criminal investigation, or when it is likely the witness will commit perjury and the lawyer reasonably believes this to be a danger, such practices may be permissible. Even if an exception applies, however, a lawyer should be mindful of the legality of secretly tape recording in the jurisdiction where the conduct will take place.

In any event, a lawyer must use his or her best ethical judgment when choosing to undertake such means of gathering evidence, especially in a civil litigation. The same analysis applies in the context of conduct undertaken by individuals over which the lawyer has a supervisory role, and therefore lawyers should be aware of the undertakings of nonlawyers under their supervision, and should check into the common practices and reputation of any private investigators and agents that they choose to utilize for the gathering of evidence during a litigation.

Further, if a lawyer decides that, under the circumstances, undisclosed taping is warranted and ethical, the lawyer nevertheless must be aware that such recordings may not be covered by qualified privilege. This fact also may factor into the decision whether or not such a practice is worth pursuing.

Endnotes

1. The substance of this rule is carried over into Rule 8.4(c) of the new New York Rules of Professional Conduct, which went into effect as of April 1, 2009.
2. ABA Formal Opinion 337 (August 10, 1974).
3. Model Rule 8.4, *Misconduct*, provides, in pertinent part: "It is misconduct for a lawyer to…(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rule 4.4, *Respect for Rights of Third Persons,* provides, in pertinent part: "(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person…."
4. ABA Opinion 01-422.
5. *Id.*
6. *See, e.g.*, NY Code of Professional Responsibility, Canon 9, A Lawyer Should Avoid Even the Appearance of Impropriety.
7. *Id*.
8. *See* Alaska Opinion 2003-1; Texas Opinion 575 (2006); *Opinion Barring Secret Recording of Conversations is Repealed*, Minnesota Lawyer, June 3, 2002.
9. *See also* Arizona Opinion 00-04 (2000) ("An attorney may ethically advise a client that the client may tape record a conversation in which one party…has not given consent…(provided) such taping is not prohibited by state or federal law.).

10. New Mexico State Bar Opinion 2005-03 (2005).
11. DR 1-102(A)(4) provides: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(8) provides: "In the representation of a client, a lawyer shall not knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule. EC 1-5 provides: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise. A lawyer should be temperate and dignified, and should refrain from all illegal and morally reprehensible conduct…." EC 9-6 provides: "Every lawyer owes a solemn duty to uphold the integrity and honor of the profession…to observe the Code of Professional Responsibility…to act so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of clients and of the public; *and to strive to avoid not only professional impropriety but also the appearance of impropriety*." (emphasis added).
12. NY State 328 (1974).
13. *Id.* (*citing* NY State 323 (1974)).
14. NY City Opinion 813 (1956).
15. *See* NY City Opinion 1980-95 (undisclosed taping smacks of trickery and is improper as a routine practice); 1995-10 (A lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped and citing ABA Opinion 347).
16. NY City Opinion 2003-02 (2003).
17. NY City 2003-02.
18. *Id.* (*citing* NY City 1980-95).
19. *Id.*
20. NY City 2003-02, *modifying* 1980-95 and 1995-10.
21. *Id.*
22. *See* NY City Opinion 2003-02; *see also* NYS Bar Opinion 328 (1974).
23. 99 NY2d 383 (2003).
24. *DiMichel v. South Buffalo Ry. Co.*, 80 NY2d 184, 196 (1992), *superseded by statute*, CPLR 3101(i), as recognized in *Tran*, 99 N.Y.2d at 389.
25. *Id.* at 196.
26. *Id.* at 197.
27. CPLR 3101(i).
28. *Tran*, 99 NY2d at 388, n. 2.
29. *Id.* at 389. Following this decision, the Supreme Court, Appellate Division, Second Judicial Department, required the disclosure of a surveillance tape of the plaintiff *prior* to her deposition, and denied defendant's protective order, which would condition the production of the tape upon the completion of the plaintiff's deposition. *Huesca v. New York City Fire Dept.*, 303 AD2d 729 (2d Dep't 2003).
30. *Id.* at 388, n. 2; *see also* CPLR 3103 (providing that the court may at any time on its own initiative, or on motion of any party or witness, make a protective order which shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts).
31. *See Rojas v. New York City Tr. Auth.*, 276 AD2d 684 (2d Dep't 2000).
32. *Yasnogordsky v. New York City Tr. Auth.*, 281 AD2d 541 (2d Dep't 2001).

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Are Off-the-Record Communications with Counsel During a Deposition Recess Discoverable?

By Michael A.H. Schoenberg and Jennifer C. Koehler

The scenario is common—during a recess in a deposition, the attorney and his or her client discuss the deposition and the witness's answers to particularly troublesome questions. This seemingly innocuous discussion, however, presents potential problems, as the substance of those conversations may not be protected by the attorney-client privilege and, thus, discoverable during the course of the deposition.

In general, a deponent and his or her attorney have no right to confer during a deposition, except to determine whether a privilege should be asserted.[1] In the U.S. District Court for the Eastern District of New York, the court's local rule states that "an attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of the deposition, except for the purpose of determining whether a privilege should be asserted."[2] This rule—which may raise more questions than it answers[3]—does not, however, address the discoverability of the contents of such a conference, as it only prohibits the attorney from initiating the conference.[4]

The questions, thus, remains: Are the attorney's conversations with his client during a deposition recess discoverable, or are they protected from disclosure by the attorney-client privilege?

I. The Attorney-Client Privilege and Refreshing the Witness's Memory

The attorney-client privilege protects from discovery "confidential disclosures by a client to an attorney made in order to obtain legal advice."[5] The privilege is designed "to encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'"[6]

Of course, the attorney-client privilege is not absolute and may, under certain circumstances, be waived. Further, because it "renders relevant information undiscoverable," it will be "narrowly construed; and its application must be consistent with the purposes underlying the immunity."[7] This is particularly true in the context of depositions and trial, where the privilege is sometimes asserted, impermissibly, as both a sword and a shield.[8]

For example, Federal Rule of Evidence 612 expressly authorizes the disclosure of privileged documents used by a witness to refresh his or her memory either "(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice."[9] This rule highlights the importance of allowing discovery of documents used to refresh a witness's memory "while testifying," as the "in the interests of justice" limitation is specifically omitted from that clause. So too, attorney-client communications when the attorney refreshes the witness's memory with facts are not privileged from disclosure.[10]

But what about communications between the attorney and client, while the client is testifying, that are not about refreshing the witness's memory, but instead are about issues raised during the deposition itself, such as how to phrase an answer to a particular question or discussions about how the questioner failed to ask certain key questions? It is well settled that it is inappropriate for an attorney to influence or coach a witness during a deposition,[11] but is the content of such a communication privileged from disclosure?

A. *Hall v. Clifton Precision*

In 1993, in *Hall v. Clifton Precision*, the U.S. District Court for the Eastern District of Pennsylvania addressed the situation where, during the plaintiff's deposition, the plaintiff's attorney interrupted the questioning to confer privately with his client and to review a document before the client answered any further questions.[12] The issue in *Hall* was not whether the attorney was refreshing the witness's recollection, but rather, whether the attorney was coaching his client.

Relying upon Eastern District Local Rule 30.6, the court in *Hall* found that such private conferences are prohibited, both during the deposition and during recesses in the deposition, finding that "[o]nce the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel."[13] The court held that "to the extent that such a conference does occur …these conferences are not covered by the attorney-client privilege [and] any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what."[14]

II. A Split Among the District Courts in New York

District Courts in New York do not apply the holding in *Hall* uniformly.

A. The Southern and Western Districts of New York Accept *Hall*

In *Wade Williams Distribution v. American Broadcasting Companies, Inc.*, the plaintiff sought an order reopening the deposition of a witness to inquire about a three-and-one-half hour conversation the witness had with his

attorney in preparation for the deposition.[15] The plaintiff specifically wanted to inquire about what the attorney "told the witness to say, or, not to say, since plaintiff should be afforded access to the witness' own testimony, free from counsel's influence or direction, if any."[16] In opposition, the defendant argued that the attorney's conversation with the witness was protected from disclosure by the attorney-client privilege.

The court relied exclusively on a 1999 decision from the District of Connecticut to find that conversations between the deponent and his attorney, during which the witness was informed of "'facts developed during the litigation, such as testimony of other witnesses'" or the witness was instructed "as to how a question should be handled," were not privileged.[17] Thus, the court held, the examining attorney had the right to ask about those conversations to ascertain whether they may have "affected or changed the witness's testimony."

Similarly, a court in the Western District of New York has held that "off-the-record" conferences between an attorney and his client during a deposition are not privileged and, accordingly, are the proper subject for inquiry by the deposing attorney to ascertain whether there has been any witness coaching.[18] In that case, the court accordingly established deposition guidelines allowing the examining attorney to question the witness about private, off-the-record conversations with his or her attorney occurring during a recess in the deposition "to ascertain whether there has been any witness-coaching and, if so, what."[19]

Just as in *Hall*, these courts permit the opposing attorney to question the witness to determine if there has been any coaching during the off-the-record attorney-client communication, not just to ascertain what information was used to refresh the witness's memory, but also to determine whether the witness's testimony was influenced by his or her attorney.

B. The Northern District of New York Rejects *Hall*

A court in the Northern District of New York, however, has reached the opposite conclusion, finding that off-the-record conversations are privileged from disclosure and will not likely reveal subject matter relevant to the underlying issues.[20] In *Henry v. Champlain Enterprises, Inc.*, the attorney and the deponent-plaintiff had several private conversations during breaks in a contentious deposition.[21] Upon return from the recesses, the examining attorney questioned the witness about his conversations with his attorney. The plaintiff's attorney objected to the questions on the grounds that the answers would reveal attorney-client communications and the attorney's work product, and directed the witness not to answer. The defendants subsequently moved for an order directing the plaintiff to reveal what his attorney said to him during the breaks.[22]

The court, denying the defendant's motion, stated, without citing any authority, that the *Hall* decision, which is embraced by the Third Circuit, "seems to be highly criticized elsewhere" and "has not been followed by the Second Circuit or by any district court within the circuit."[23] The court then found, without much discussion, that gaining "this information may truly intrude upon the attorney-client and work product doctrine[s]" and could only be sought for a tactical advantage in the litigation.[24] Therefore, the off-the-record conversations between the witness and his attorney during the course of the deposition remained undiscoverable.

C. The Eastern District of New York Compromise

The Eastern District of New York, which promulgated Local Civil Rule 30.6, has taken a more compromising approach to the issue.

In *Gibbs v. City of New York*, the defendant's witness advised the plaintiff's attorney, following a break for lunch during the deposition, that he wished to clarify his testimony given before the lunch break.[25] The witness testified earlier that he had discussed his testimony with his attorney during the recess. As a result, Plaintiff's attorney asked, "Did it suddenly come to you that you made a mistake and needed to make a clarification?," to which the witness's attorney promptly objected and directed the witness not to answer the question on the basis of the attorney-client privilege.

The court, analyzing the issue under the elements and purpose of the attorney-client privilege, found that the privilege should be "confined within the narrowest possible limits" and, thus, the general subject matter of attorney-client communications is typically not privileged, absent special circumstances.[26] The court then directed the witness to answer the question posed—which required a yes or no answer—in an affidavit, rather than re-opening the deposition, as the witness's written answer would resolve the witness coaching issue by implication without disclosing what was actually communicated between the witness and his attorney during the deposition recess.[27]

Conclusion

"Once the deposition has begun, the preparation period is over.…"[28] Counsel should, therefore, refrain from speaking with his or her client during the deposition about the testimony, unless the attorney is prepared for the disclosure of that communication.

Notably, none of the cases addressing this issue arises in the context of a deposition that began and concluded over several days or weeks. Of course, an attorney cannot avoid communication about the case with his or her client for such an extended period of time.[29] However, it is unclear whether such communications would be privileged while the deposition remained open.[30]

It should be noted that even if the substance of the communication is ultimately found to be privileged, the implication of witness coaching, as a result of the witness revealing that a communication took place, may taint the witness's testimony and the attorney's credibility though trial.

Endnotes

1. *Morales v. Zondo, Inc.*, 204 F.R.D. 50 (S.D.N.Y. 2001).
2. Local Civil Rule 30.6, U.S. District Court, Eastern District of New York. There is no similar local rule for the Southern District of New York, and the Uniform Rules for the New York State Trial Courts do not discuss this particular issue. *See* 22 N.Y.C.R.R. § 221.3.
3. What happens if the attorney does not "initiate" the conference? Is a recess considered the "actual taking" of the deposition?
4. "Consultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel. 'A witness is generally free to consult with counsel at any time during a deposition.'" *Musto v. Transp. Workers Union of Am., AFL-CIO*, 03-CV-2325 (DGT) (RMC), 2009 U.S. Dist. LEXIS 3174, *4-5 (E.D.N.Y. Jan. 9, 2009) (quoting *Okoumou v. Horizon*, 03 Civ. 1606 (LAK) (HBP), 2004 U.S. Dist. LEXIS 19120, *2 (S.D.N.Y. Sept. 23, 2004)).
5. *U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 159 (E.D.N.Y. 1994) (quoting *Fisher v. U.S.*, 425 U.S. 391, 403 (1976)).
6. *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).
7. *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 08 Civ. 6131 (GEL), 2009 U.S. Dist. LEXIS 63711 (S.D.N.Y. July 22, 2009) (citations omitted).
8. *HSH Nordbank AG N.Y. Branch*, 2009 U.S. Dist. LEXIS 63711 at *23; *see also Gray v. Cleaning Sys. & Suppliers*, 143 F.R.D. 48 (S.D.N.Y. 1992) (stating that the goal of discovery and trial is truth-finding).
9. Fed. R. Evid. 612.
10. *See, e.g., Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("It is true … that the privilege guarding such discussions will not protect pre-deposition conversations that are held to refresh a deponent's memory.").
11. *See Musto*, 2009 U.S. Dist. LEXIS 3174, at *4 (collecting cases).
12. 150 F.R.D. 525, 526 (E.D. Pa. 1993).
13. *See id*. at 528 (stating that the "fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules").
14. *See id*. at 528-29 (finding that "once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth"). *See also* 7 James Wm. Moore *et al*., *Moore's Federal Practice*, ¶ 30.42[3] (3d ed.) (citing *Hall* for the proposition that off-the-record conversations during a deposition should not occur).
15. 2004 U.S. Dist. LEXIS 12152, *2 (S.D.N.Y. June 30, 2004) (quoting *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999).
16. *Id*. at *3.
17. *Id*. at *3-4. *See also Morales v. Zondo*, 204 F.R.D. at 53 (although not discussing the issue of attorney-client privilege, the court did impose sanctions upon an attorney who, among other things, conferred with his client during the deposition for reasons other than to determine whether a privilege should be asserted); *Am. Fun & Toy Creators, Inc. v. Gemmy Indus., Inc.*, 96 Civ. 0799 (AGS) (JCF), 1997 U.S. Dist. LEXIS 12419, *26 (S.D.N.Y. August 20, 1997) (stating rule that the deponent and his attorney have no right to confer during a deposition, except to determine if a privilege should be asserted).
18. *Jones v. J.C. Penney's Dept. Stores, Inc.*, 228 F.R.D. 190 (W.D.N.Y. 2005); *Fisher v. Goord*, 184 F.R.D. 45, 48-49 (W.D.N.Y. 1999).
19. *Jones*, 228 F.R.D. at 204.
20. *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 90-92 (N.D.N.Y. 2003).
21. *See id*. at 90.
22. *See id*. at 92.
23. *Id*.; *see also McKinley Infuser, Inc. v. McKinley Medical L.L.L.P.*, 200 F.R.D. 648 (D. Colo. 2001) (criticizing and rejecting the holding in *Hall*); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66 (D.C. 1997) (same).
24. *Henry*, 212 F.R.D. at 92; *but see Corporate Express Office Prods. v. Gamache*, Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, *48-49 (N.D.N.Y. Dec. 13, 2006) (stating that "[t]he client cannot be compelled to answer the question, 'What did you say or write to the Attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney").
25. CV-06-5112 (ILG) (VVP), 2008 U.S. Dist. LEXIS 22588, *5-6 (E.D.N.Y. March 21, 2008).
26. *Id.* at *6-7.
27. *Id.* at *7-8. *See also In re Stratosphere Corp. Sec. Litig.*, 183 F.R.D. 614 (D. Nev. 1998) (finding the examiner can question the witness about whether the witness's conversation with counsel affected the testimony, but he could not inquire about the substance of those conversations).
28. *Hall*, 150 F.R.D. at 529.
29. For example, in the criminal context, restrictions on the defendant's right to consult with his or her attorney during a brief a recess taken in the middle of the defendant's examination have been found constitutional, while the same prohibition when the recess is taken overnight have not. *Compare Geders v. United States*, 425 U.S. 80, 91 (1976) (holding order not to speak with counsel overnight while he was testifying was unconstitutional) *with Perry v. Leeke*, 488 U.S. 272, 283-84 (1989) (holding that order directing defendant not to consult with attorney during a fifteen minute recess at the end of direct examination of defendant was *constitutional*). *See also Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000) (characterizing *Geders* and *Perry* as supporting the view that when there is an important need to protect a countervailing interest "a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible").
30. *Cf. Musto v. Trans. Workers Union of Am., AFL-CIO*, 2009 U.S. Dist. LEXIS 3174, *2 (E.D.N.Y. Jan. 16, 2009) (finding that conversations between a former union officer and the union's general counsel, which took place during a two-week break in the deposition, were discoverable because they were not attorney-client communications. The court, citing *Hall*, further stated, however, that the local rules are "designed to insure that deposition testimony 'is completely that of the deponent, rather than a version of that testimony which has been edited or glossed by the deponent's lawyer.'"); *see also Hall*, 150 F.R.D. at 529 (stating that the "fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules").

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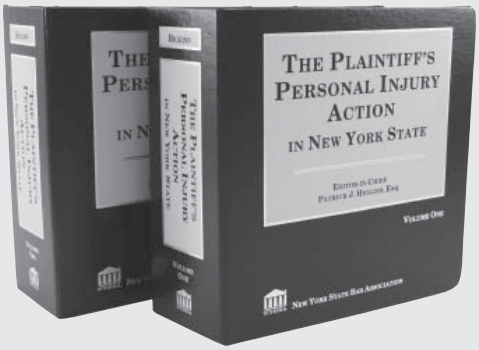

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