

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

Message from the Chair

Greetings to my fellow trial lawyers:

The spring weather is finally upon us, and it is my cue to fill you in on the recent activity in the Trial Lawyers Section. On April 26, 2014, the TLS Executive Committee held its quarterly meeting at CitiField. Before “The Star Spangled Banner” was played, Mets took the field and any hot dogs were consumed, the Executive Committee members met and discussed ways to reinvigorate and better serve our TLS members.

One initiative we agreed upon was to actively invite our TLS members to participate in Section Committees. Joining a committee is an excellent way to participate in the Section and make your membership meaningful. Please check the Trial Lawyers Section website at www.nysba.org/trial, and pick a committee that you are interested in and email me and Pat Johnson (pjohnson@nysba.org) to join.

We are also looking into the possibility of holding an “open” meeting of the TLS Executive Committee in October 2014, and invite all TLS members to attend. We hope to also offer some CLE sessions on trial-related topics, as well offer our members networking opportunities. We will keep you posted on this as soon as the plans are finalized.

Finally, I want to urge all Section members (and those interested in joining TLS) to attend our Summer Meeting in beautiful Northern California at the MacArthur Place



Inn and Spa in Sonoma, California, Sunday, July 27, 2014 through Wednesday morning, July 30, 2014.

In addition to the opportunity to enjoy all the treats that this magnificent wine country will offer, the program chair, Peter C. Kopff, has put together another terrific line-up. We plan to have excellent speakers on topics ranging from trial techniques in opening and closing statements, tips on effective cross-examination, and a Californian perspective on the impact of tort reform measures on medical malpractice cases. We also plan to have Professor Patrick Connors of Albany Law School join us to present CPLR updates and an ethics discussion on social media and paying for evidence.

MacArthur Place Inn and Spa is located in the heart of wine country, and in addition to lectures and networking opportunities, we plan a wine tasting tour, and golf at the Silverado Golf Club in Napa. It should be an outstanding meeting for the Trial Lawyers Section—please join us. To register or for more information, go to www.nysba.org/TrialSumMtg2014.

A. Michael Furman
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Legal Malpractice Update

By Andrew S. Kowlowitz

A. “Settler’s Remorse” and Matrimonial Actions

A common source of legal malpractice claims generally arises from underlying matrimonial actions involving the proverbial case of “settler’s remorse.” In such instances, a party to a divorce proceeding settles a matrimonial action (often during trial), only to later realize that he or she is dissatisfied with the terms of the settlement. The disgruntled party often blames the perceived inadequacy of the settlement on his or her former attorney, claiming the mistakes of counsel compelled settlement for an undervalued sum.

The Appellate Division, First Department, has addressed this precise set of facts on several occasions. The First Department has held that if the settling party’s allocation takes place on the record, and if that party testifies that he or she knowingly, voluntarily, and intelligently entered into the settlement and was satisfied with the attorney’s representation, there is no claim for legal malpractice based on the terms of the settlement.

This rule was first established in the seminal case of *Katebi v. Fink*,¹ where the Plaintiff alleged that she was forced to settle her matrimonial action during trial, since her lawyer was unprepared, committed a series of errors at trial, and otherwise failed to properly evaluate her former spouse’s assets. At the time of settlement (again, during trial), the Plaintiff’s allocation took place. The terms of the settlement were placed on the record. The Plaintiff then testified that she understood and agreed to the terms of the settlement, that settlement would be final and binding, that the settlement was voluntary and uncoerced, and that she was satisfied with her attorney’s representation.

Plaintiff later sued for legal malpractice, claiming her attorney’s acts/omissions compelled her to settle the matrimonial action, and that “but for” his conduct, she would have proceeded with trial and obtained a more favorable outcome.

Her claim for legal malpractice was dismissed under a CPLR 3211 pre-answer, pre-discovery motion to dismiss. In sum, the trial court found that the Plaintiff could not plead and prove her claim for legal malpractice. Her allocation at trial concerning the settlement barred her from collaterally attacking the settlement and establishing that her former attorney’s conduct compelled the settlement. The First Department affirmed the dismissal in its entirety.

Subsequently, the First Department upheld the “*Katebi* rule” in *Weissman v. Kessler*.² In *Weissman*, a case with similar facts as *Katebi*, the court dismissed Plaintiff’s legal malpractice claim against her former attorneys arising

from an underlying matrimonial settlement because she testified during a settlement allocation that she was satisfied with her counsel, understood the terms of the settlement, and that she voluntarily agreed to settle prior to the completion of the economic valuation of her ex-husband’s assets.

So too in *Harvey v. Greenberg*³ and *Schloss v. Steinberg*,⁴ the First Department affirmed the dismissal of a legal malpractice actions after the Plaintiff previously acknowledged on the record that she understood and agreed with the terms of the settlement, knew that it was a full and final agreement, and that she was satisfied with the services her attorney provided.

Since then, the Second Department has affirmed the rule established by *Katebi* and its progeny. In *Young v. Quatela, Morganstern & Quatela et al.*,⁵ the court held that the Plaintiff was estopped from bringing a legal malpractice claim and arguing that he was coerced into the settlement of his matrimonial action, since the Plaintiff previously stated on the record that he understood the settlement, entered into it voluntarily, and was satisfied with his attorney’s representation.

The courts have seemingly drawn a “bright line” and have only extended the “*Katebi* rule” to claims of legal malpractice arising from underlying matrimonial actions. This may be by design; given the highly charged nature of matrimonial proceedings, it is foreseeable that a large number of litigants may experience “settler’s remorse” after the fact and seek to blame their attorneys.

B. Judiciary Law § 487 Claims

New York Judiciary Law § 487 is a punitive statute that allows an injured party to recover treble damages from an attorney who has engaged in willful misconduct. Pursuant to the “strict wording” of the statute, Judiciary Law § 487 provides that an attorney who: 1) is guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party; or 2) willfully delays his client’s suit with a view to his own gain; or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, is guilty of a misdemeanor and is liable for treble damages to the aggrieved party.

Despite the plain wording of the statute, New York appellate courts have been inconsistent in its application; some courts have required proof of both elements, whereas other courts have required proof of one element. As Judiciary Law § 487 is derived from Section 273 of the Penal Law of 1909, some courts have held that in order to prevail on a Judiciary Law § 487, a plaintiff must plead

and prove that the defendant attorney engaged in a “chronic, extreme pattern of legal delinquency.”⁶ However, as the Second Circuit noted in *Amalfitano v. Rosenberg*,⁷ the “pattern of legal delinquency” requirement does not appear in the text of Judiciary Law § 487 and, as such, other courts have held that an attorney may be held liable under the statute for a single intentionally deceitful or collusive act. Thus, there appears to be ambiguity as to whether a plaintiff must show a “pattern of legal delinquency” to establish a viable Judiciary Law § 487 claim.

In *Strumwasser v. Zeiderman*,⁸ the First Department, Appellate Division, affirmed the dismissal of a Judiciary Law § 487 claim on the basis that a single alleged act of deceit was insufficient to support a claim.

This action stemmed from an underlying divorce proceeding between plaintiff and his former wife, who was represented by defendant law firm Johnson & Cohen, LLP (“J&C”). Plaintiff claims that at the time of the divorce proceedings, his business, Snow Beverages (“Snow”), was operating at a loss. In connection with the valuation of Snow, J&C, on behalf of plaintiff’s former wife, submitted a copy of Snow’s business plan, which contained financial projections for the business. However, J&C removed a page from the business plan that stated, among other things, that the business plan “is for information only.” After plaintiff settled the divorce proceeding, allegedly based on the leverage gained by J&C in connection with the valuation of Snow, he commenced an action asserting, among other things, that J&C violated Judiciary Law § 487 in deceiving the court by omitting a single page from the Snow business plan.

Notably, in dismissing the claim, both the lower court and Appellate Division found that a “single alleged act of deceit is not sufficiently egregious to support a claim under Judiciary Law § 487 (1).”⁹

Unless and until the appellate courts choose to clarify the inconsistency, the *Strumwasser* holding (in addition to several First Department decisions) will seemingly support dismissal of Judiciary Law § 487 claims on a pre-answer basis pursuant to CPLR 3211, when a plaintiff fails to allege a “pattern” of deceit.

C. Plaintiff’s Failure to List Malpractice Claim as an Asset on Bankruptcy Petition

Time and again, the New York courts have dismissed professional liability claims, including legal malpractice claims, because of lack of standing when a claimant fails to list the claim as an asset on a bankruptcy petition. The theory behind such a dismissal is grounded in the Bankruptcy Code.

Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns or subsequently acquires, including a cause of action or claim, vests in the bankruptcy estate.¹⁰ Therefore, unless the debtor/claim-

ant’s claim is listed in the schedule of assets filed with the Bankruptcy Court, the claim will be deemed abandoned and title with the claim will remain the property of the bankruptcy estate.¹¹

Simply put, a plaintiff who is aware of a claim prior to filing for bankruptcy, and fails to list it as an asset on the bankruptcy petition, loses the right to sue. Determining whether a claimant filed for bankruptcy and retrieving a copy of a bankruptcy petition is a rather simple process, as this information is available online. Acquiring this information early on may eliminate the need for discovery and provide a basis to file dispositive motion practice at the beginning of a case.

In *Potruch & Dabb, LLC v. Abraham*,¹² the Second Department affirmed the dismissal of a counter-claim for legal malpractice, finding that the claimant’s failure to list his cause of action for legal malpractice deprived the claimant of standing. The counter-claim for legal malpractice was brought in response to a law firm’s claim to recover legal fees.

In dismissing the legal malpractice counter-claim, the court reasoned that the law firm made a *prima facie* showing that the claimant knew or should have known of the existence of the cause of action at the time he filed for bankruptcy. Yet, the claimant failed to list the claim in his bankruptcy petition.

The claimant’s response was two-fold: 1) the bankruptcy petition at issue was dismissed, and the claimant never received a discharge; and 2) the claimant subsequently filed a second bankruptcy petition, which listed the cause of action for legal malpractice as an asset of the bankruptcy estate.

The Appellate Division rejected both arguments. Relying on its holding in *Nationwide Associates, Inc. v. Epstein*,¹³ the court found that the Bankruptcy Court’s dismissal of the bankruptcy petition was of no consequence—the failure to list the cause of action (regardless of the outcome) deprived the claimant of standing. As for the claimant’s second argument (i.e., that he filed a subsequent bankruptcy petition identifying the legal malpractice cause of action), the Appellate Division concluded that the claimant failed to present any proof as to the ultimate disposition of that petition. In other words, the Appellate Division found that the claimant failed to present any evidence to demonstrate he regained capacity to maintain a cause of action.

Courts have consistently dismissed causes of action for legal malpractice (and other claims), when a claimant fails to include the cause of action on the bankruptcy petition.¹⁴

Practically speaking, while it is not uncommon for individuals to file for voluntary bankruptcy, failed businesses are more often the likely candidates to file for

bankruptcy. Indeed, quite often a failed business will pursue claims against its former attorneys (or other professionals it retained), in a last ditch effort to recoup some portion of a lost investment.

Since the Bankruptcy Court's records are maintained online, accessing Bankruptcy Court filings is a relatively simple process. The Bankruptcy Court records can be accessed through the "PACER" (Public Access to Court Electronic Records) website: <http://www.pacer.gov/pasco/cgi-bin/links.pl>. The PACER website provides a portal for all federal courts, including the Bankruptcy Courts.

To check whether a specific claimant has filed for bankruptcy, one must "log in" to the PACER website and search the records of the Bankruptcy Court where the claimant is domiciled: for an individual, her place of residence; for a corporation, the place of incorporation. The party's name may be searched utilizing the user-friendly search function. If it is determined that the claimant has filed for bankruptcy, the next step is to ascertain whether the bankruptcy petition lists the claim as an asset.

To this end, the Bankruptcy Court case will include a link to the "docket sheet." The docket sheet includes links of all documents/pleadings filed in the proceeding, including the Petition. The debtor is required to file a "Schedule" of assets as an addendum to the Petition. The Schedule further requires the debtor to list all known causes of action. The Schedule should be reviewed to determine whether the claim/cause of action against the defendant is listed as an asset.

D. Insurance Coverage for Claims Unrelated to Practice of Law

When an attorney is sued for acts undertaken outside the scope of the traditional practice of law, lawyer's professional liability insurance policies often have exclusions which preclude coverage for such claims.

In *Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP v. Underwriters at Lloyd's, London*,¹⁵ Lloyd's denied coverage for claims stemming from two (2) separate actions brought against the law firm and its partners in connection with business ventures over which the law firm partners had control and/or a demonstrated personal financial interest. See *Burman v. American Gulf Management*,¹⁶ and *Morrell v. Golden Goslings*¹⁷ (together the "underlying lawsuits"). While both the *Burman* and *Morrell* Plaintiffs alleged the existence of an attorney-client relationship and legal malpractice, the thrust of both complaints alleged that the Abrams Firm partners had provided fraudulent investment advice to induce plaintiffs to make significant investments in the subject business ventures.

The Abrams Firm brought a declaratory judgment action alleging that Lloyd's was obligated to defend

and/or indemnify it for legal malpractice claims under the law firm's legal professional liability policy ("Policy"). However, Eastern District Judge Leonard Wexler looked beyond the allegations of legal malpractice when he dismissed the Abrams Firm's complaint, ruling that the claims fell within two (2) "business pursuit" exclusions, and thus, excluded from coverage.

The first "business pursuit" exclusion excluded coverage for "any" claim arising out of an Insured's activities as a director or employee of a business or organization other than that of the law firm. The second "business pursuit" exclusion excluded coverage for "any" claim made by or against in connection with any business enterprise owned or controlled by any Insured in a non-fiduciary capacity.

In rendering its decision, the court found instructive the reasoning in *Mt. Airy Ins. Co. v. Greenbaum*.¹⁸ In that case, the First Circuit ruled that a similar exclusion "precludes coverage for *any* claim which arises out of or in connection with a business venture controlled, operated or managed by *any* Insured or in which the Insured has an interest as an owner or partner. This includes all claims sounding in malpractice if the allegations charge wrongdoing in connection with a business in which the Insured has such an interest."

Judge Wexler found that the conduct alleged in the Abrams Firm matter was not undertaken on behalf of the law firm or in furtherance of the practice of law, but undertaken by the law firm partners in an individual capacity in furtherance of the subject business ventures. Accordingly, the court concluded that there was a "sufficient causal connection" between the underlying claims and the alleged conduct to properly deny coverage under the Policy, notwithstanding the allegations of legal malpractice. The court noted that "one of the recognized purposes of a business enterprise exclusion is "to avoid circumstances where an insured so intermingles his business relationships with his law practice that an insurance carrier incurs additional risk of having to cover the insured for legal malpractice claims relating to the conduct of business, rather than solely out of the professional practice."

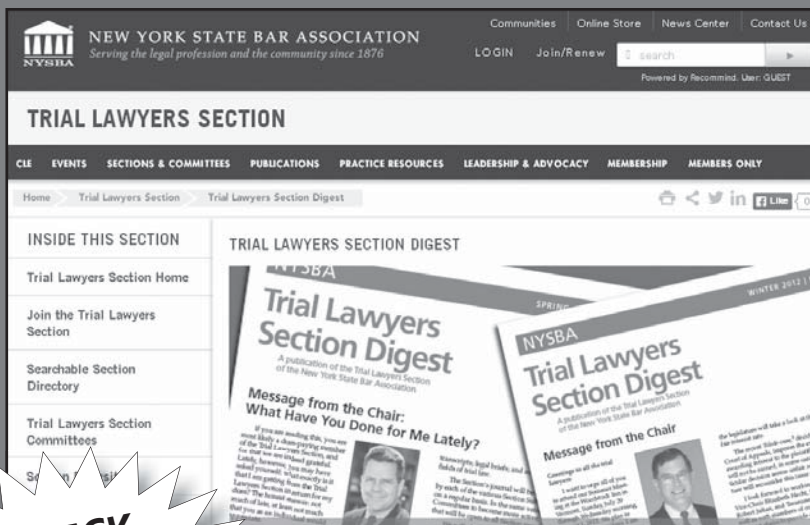
The court adopted a "form of substance" approach to evaluating the allegations pled in the Complaint, when reaching the decision that the claims asserted primarily related to conduct precluded from coverage under the "business pursuit" exclusion. In other words, despite the label of a "legal malpractice" cause of action in the pleadings, the court determined that the alleged misconduct of the insured attorneys primarily related to their role as investment advisors. Next, the court strictly interpreted the wording of the "business pursuit" exclusion (which is typically found in one form or another in most lawyers' professional liability insurance policies), when determining the exclusion precluded coverage for the claim.

Endnotes

1. 51 A.D.3d 424, 857 N.Y.S.2d 109 (1st Dept. 2008).
2. 78 A.D.3d 465, 912 N.Y.S.2d 25 (1st Dept. 2010).
3. 82 A.D.3d 683, 919 N.Y.S.2d 519 (1st Dept. 2011).
4. 100 A.D.3d 476, 954 N.Y.S.2d 37 (1st Dept. 2011).
5. 99 A.D.3d 795, 951 N.Y.S.2d 882 (2d Dept. 2012), *aff'g* 2010 NY Slip Op. 31607(U) (Sup. Ct. Nassau County, 2010).
6. *See, e.g. Galland v. Kossoff*, 824 N.Y.S.2d 630, 631, 34 A.D.3d 306, 307 (1st Dept. 2006); *Solow Management Corp. v. Seltzer*, 795 N.Y.S.2d 448, 448, 18 A.D.3d 399, 399-400 (1st Dept. 2005).
7. 533 F.3d 117, 123 (2d Cir. 2008), *citing Izko Sportswear Co. v. Flaum*, 809 N.Y.S.2d 119, 122, 25 A.D.3d 534, 537 (2d Dept. 2006) (violation of Judiciary Law § 487 may be established "either by the defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant") and *NYAT. Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman*, 741 N.Y.S.2d 385, 386, 191 Misc.2d 80, 82 (S. Ct. NY Cty. 2002) (single instance of lying under oath).
8. 102 A.D.3d 630, 958 N.Y.S.2d 395 (1st Dept. 2013).
9. *Id.*, 631.
10. *See* 11 U.S.C. § 541(a) (1), (7).
11. *See* 11 U.S.C. § 554 (d).
12. 97 A.D.3d 646, 949 N.Y.S.2d 396 (2d Dept. 2012).
13. 24 A.D.3d 738, 809 N.Y.S.2d 118 (2d Dept. 2005).
14. *See Wright v. Meyers & Spencer, LLP*, 46 A.D.3d 805, 849 N.Y.S.2d 274 (2d Dept. 2007) (dismissing a cause of action for legal malpractice, finding that "upon commencement of the plaintiff's bankruptcy proceedings, the malpractice cause of action became 'property of the estate' pursuant to the Bankruptcy Code. Accordingly, this action may not be maintained by the plaintiff in his individual capacity, and the complaint should have been dismissed...for lack of legal capacity to sue.") *See also Williams v. Stein*, 6 A.D.3d 197, 775 N.Y.S.2d 255 (1st Dept. 2004) (dismissing a claim for legal malpractice, on the basis that the claim accrued prior to the filing of plaintiff's bankruptcy petition).
15. 918 F.Supp.2d 114 (E.D.N.Y. 2013).
16. 5546-CS (Delaware Chancery Court).
17. 10-017231 (New York Supreme Court, Nassau County).
18. 127 F.3d 15 (1st Cir. 1997).

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NEW YORK
STATE BAR
ASSOCIATION

The Fox in the Henhouse: An Attorney's Experience Sitting on a Jury

By Paul F. Clark

At first glance, there's nothing special about Juror #2. He's about 50 years old with greying hair and dressed in the suburban uniform of khakis and a blue, buttoned-down shirt. He answers the questions of the court easily and seems to enjoy the banter when questioned by the judge.¹

The attorneys learn that Juror #2 has a wife with four children who are slowly moving out of the family home. He has several police officers in his family, surely an admission that will give the defense some pause before letting him remain on the panel. Yet the juror readily concedes that the testimony of police officers should not be given any undeserved weight because they can be mistaken as easily as anyone else. In sum, there are factors in his profile that appeal to both sides but his employment history concerns the attorneys and court alike: Juror #2 is a practicing attorney who litigates and tries cases himself.

"After 30 years of litigating cases in New York and New Jersey, the tables turned and I was the one questioned about my background, experience, attitudes and potential biases."

I am Juror #2 and was selected to serve on a criminal case in my home county of Union, New Jersey. After 30 years of litigating cases in New York and New Jersey, the tables turned and I was the one questioned about my background, experience, attitudes and potential biases. I was the object in the attorneys' crystal ball, engaged in their elusive exercise of predicting how I would react to the parties, claims, defenses, and anticipated evidence in the case.

After several rounds, I was left unchallenged and sworn in as a juror. I was initially a reluctant participant but, by the end of the case, I was humbled by the experience of deciding the fate of another human being and gratified by working together with 11 other complete strangers with whom I had little in common other than our residence in Union County. The experience also caused me to reconsider some of the long-held assumptions that trial attorneys hold about jurors and how trial attorneys approach their craft. Here's what I learned.

1. **Never waste the jury's time.** Although each juror approached his or her duty with differing levels of enthusiasm, everyone would have preferred to be somewhere other than the courthouse. We showed

up reluctantly but ready to fulfill our civic duty. In return, we expected—no, demanded—that the process respect the value of our time. We noticed which attorneys showed up on time, whether the witnesses were sworn in at their scheduled times and how long we waited during any breaks in the trial. So be on time, be prepared and have your witnesses lined up ready to proceed. You want the jury focused on the case, not their watches.

2. **Be aware of your surroundings.** Courthouses are notoriously cramped quarters. The attorneys, litigants and jurors frequently find themselves using the same elevators, bathrooms and lunch venues. With nothing but time on their hands, jurors focus on any attorney and litigant who cross their paths, unconsciously forming opinions based on these silent interactions. The jurors will notice how you carry yourself. So treat the court staff, the newspaper vendor, and the pizzeria counter worker with courtesy and respect. I suggest you honor the "Five Mile" rule and assume you are under the direct observation of at least one juror anytime you are within five miles of the courthouse and conduct yourself accordingly.
3. **Be careful of your leaders.** Previously, I worried about all jurors equally, debating whether to challenge the silent young man with the tattoos sleeping in the corner or the brash middle-aged woman who dominates the entire room when expressing her opinions about the litigious nature of her fellow citizens. Jury experience refined my views on this subject, now armed with personal experience about how twelve strangers arrive at a unanimous decision about the guilt or innocence of a person who they never met before. It sounds self-evident but remember that leaders lead and followers follow. Forget the lambs but take great care of the wolves that you leave on your jury because they will dominate their less confident peers.
4. **Educate and entertain the jury.** Yes, you can educate and entertain at the same time. Ask young people where they get their news and you'll find that they tune into cable TV to watch Jon Stewart or Stephen Colbert. Born entertainers, these hosts chronicle the serious news of the day using parody, satire, hyperbole and irony. They cloak serious discussions in laughter, using skits, interviews and manic, non-stop action to keep things exciting and fresh. Why not try a few blowups when try-

ing to make a point with a document or highlight a prior written inconsistency made by an adverse witness? Better still, project digital images with an ELMO or Smartboard that can be seamlessly displayed on a large screen so that the jury can visually see, with their own eyes, the point you are trying to make. If I am part of the TV generation, the younger jurors are the smartphone, Twitter, and Facebook generation for whom multitasking is a way of life. So be creative with your presentations to keep the jurors' attention while driving your most favorable points home.

5. **Be respectful.** An experienced judge gently holds the jury's hand during a foreign experience (the trial) in a foreign land (the courthouse). She tells the jury when they can sit, relax or use the restroom. She makes them feel special, dispensing badges that grant them unique access in the courthouse. Unless the court's bias is obvious, a rare thing, the jury comes to respect, admire and bond with the trial judge. Tread lightly when disagreeing with the court. You can object to an adversary's question or the court's ruling but it should be done respectfully and without a whiff of disdain, anger or bitterness. Tempers may flare but the tone of your overall presentation should reflect your respect for the court, your adversary and the judicial process. Otherwise, the juror may perceive you as someone who is breaking the rules, is rude or is trying to gain an unfair advantage.

Attorneys are a difficult lot during jury selection, a reluctant group who pre-judge themselves as unqualified for jury duty because of their prior experience as participants in the process. Like many of my colleagues, I approached jury service with dread, worried about my time, my schedule and how I would juggle the myriad demands of my practice while sitting on a jury. But the experience opened my eyes and, in addition to fulfilling an important civic duty, gave me new insights about how a jury actually functions in its decision-making process.

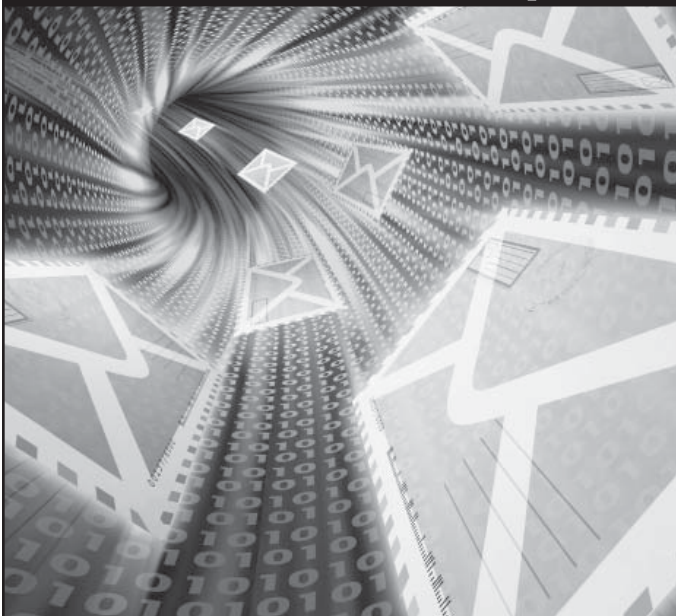
"Like many of my colleagues, I approached jury service with dread, worried about my time, my schedule and how I would juggle the myriad demands of my practice while sitting on a jury. But the experience opened my eyes..."

Endnote

1. In New Jersey, the judge conducts the *voir dire* in both civil and criminal cases.

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Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of the *Trial Lawyers Section Digest* Editors:

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Articles should be submitted in electronic document format (pdfs are not acceptable), along with biographical information.

www.nysba.org/TrialLawyersDigest

Trial Lawyers Section Sponsors New York Regional Round of the National Trial Competition

Each year, the Trial Lawyers Section of the New York State Bar Association has the privilege of sponsoring the New York Regional Round of the National Trial Competition, the oldest and most prestigious law school mock trial competition in the United States.

The National Trial Competition was established to encourage and strengthen student advocacy skills through quality competition and valuable interaction with members of the bench and bar. Two teams are crowned co-champions of each region and go on to compete in the National Finals held in Texas each year.

Unlike most traditional moot court competitions, in which an appeal or motion is argued before a panel of judges, law school students competing in the NTC must try an entire case from start to finish, including motions *in limine*, opening statements, direct and cross-examination of multiple witnesses, introduction of evidence, post-trial motions and closing arguments. Incredibly, they must try their entire case in less than two hours. Each team of students must also try both the plaintiff's case and the defendant's case in alternating rounds.

This year, the New York Regional Round of the NTC was held from February 6 through February 9, 2014. Pace Law School was the host school and the competition was held in the courtrooms of the Westchester County Supreme Court.

We are very proud that this year twenty-two teams from eleven different law schools in New York State competed in the New York Regional Round of the NTC. First-year teams from Touro and NYU joined veteran teams from Brooklyn Law, Cardozo, Buffalo, Syracuse, Hofstra, Pace, Cornell, St. John's and Fordham.

After the completion of three trials in the preliminary rounds of the competition, eight teams representing seven different law schools advanced to the Semi-Final round. Four teams then advanced to the Finals: two teams from Syracuse Law, one team from Hofstra Law and one team from St. John's Law.

In the Final Round, Syracuse Law Team S defeated Hofstra Team J in a trial that went to tie-breakers to de-

cide; and St. John's Team V defeated Syracuse Team T in a split decision.

Syracuse Law and St. John's Law, as Co-Champions of the New York Region, went on to represent the Trial Lawyer's Section and the State of New York in the National Finals that were held the last week of March. Both teams performed extremely well and the team from Syracuse advanced as far as the National Quarter-Finals.

It is therefore the pleasure of the Trial Lawyers Section to award to Syracuse School of Law the Trial Lawyer's Cup for 2014.

In addition to team honors, the Trial Lawyers Section also recognizes several individual awards for students competing in the NTC. The award winners for 2014 are:

The Travis H.D. Lewin Coaching Award:

The Coaches of Syracuse Law School

The Anthony J. Demarco Award for Best Advocate:

Morgan C. McKinney, Syracuse Law

Best Opening Argument:

Joseph Nicastro, Buffalo Law

Best Direct Examination:

Amy Cassidy, Cardozo Law

Best Cross Examination:

Aaron Spurlock, Hofstra Law

Best Closing Argument:

Eleni Aristodemou, Hofstra Law

Best Overall Advocate Through Preliminary Rounds:

Prescott Loveland, Fordham Law

Next year, the New York Regional Round of the NTC will be held in Syracuse in February 2015. We invite all members of the Trial Lawyers Section to participate in the competition as evaluators and judges. It is a very rewarding experience to work with such wonderfully talented law school students.



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NYSBA

Trial Lawyers Section Summer Meeting

MacArthur Place Inn & Spa
Sonoma, California
July 27 – July 30, 2014



Attendance at this meeting offers up to 6.0 MCLE credit hours – including 1.0 in ethics and 5.0 in professional practice for experienced attorneys only.

IMPORTANT INFORMATION

MCLE CREDIT: The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. **Under New York's MCLE rule, this program has been approved for a total of 6.0 credit hours; 1.0 hours in ethics and 5.0 hours in professional practice.** This is **NOT** a transitional program and is **NOT** suitable for MCLE credit for newly admitted attorneys.

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GETTING TO SONOMA and MacArthur Place 29 East MacArthur Street

Sonoma is located 53 miles from San Francisco Airport (www.flysfo.com), 50 miles from Oakland Airport and 80 miles from Sacramento Airport. Rental cars are available at all airports.

The Napa Airporter offers 24 Hour/7 Days a Week Door-to-Door Airport Shuttle Service from/to San Francisco International Airport (SFO), Oakland International Airport (OAK) and Sacramento International Airport (SAC). Visit www.napaairporter.com for rate information or e-mail: napaairporter@yahoo.com or call: 707-252-1900

Important Hotel Information:

Garden Spa/Pool: Reservations for Spa highly recommended. Call: 707-933-3193 prior to arrival. Bike rentals available.

Concierge: Nancy Boerum; Assistance with recommendations for independent wine tours, etc. 707-933-3189.

Babysitting Service: Nannies-on-Call, 707-933-9550.

Saddles Steakhouse: Lunch and Dinner Daily. Call 707-933-3191 for reservations.

SCHEDULE OF EVENTS

Sunday, July 27

- 2:30 – 5:30 p.m. **Registration** – Hotel Lobby
- 3:30 – 5:00 p.m. **Executive Committee Meeting** – The Tack Room, Conference Center
- 5:00 – 6:00 p.m. Complimentary Wine & Cheese in the Library for Hotel Guests
- 6:00 – 7:00 p.m. **Welcome Reception** – Veranda Garden
- 7:00 p.m. **Dinner** on your own
If you are planning on eating on-site please make reservations in advance of the meeting. Additional dining suggestions in town are located on page 16.

Monday, July 28

- 7:00 – 10:00 a.m. **Continental Breakfast** – Saddles Restaurant, Conference Center
(included in room rate for overnight hotel guests)
- 8:00 – 9:00 a.m. **Executive Committee Breakfast Meeting** – The Tack Room, Conference Center
- 8:00 a.m. **Registration** – Conference Center Foyer
- 9:05 – 11:55 a.m. **GENERAL SESSION** – Conference Center, Rodeo Room
- 9:05 – 9:15 a.m. **New York State Bar Association Welcome**
DAVID P. MIRANDA, ESQ., PRESIDENT-ELECT
- Trial Lawyers Section Welcome**
A. MICHAEL FURMAN, ESQ., SECTION CHAIR
Furman Kornfeld & Brennan LLP
New York, New York
- 9:15 – 10:05 a.m. **HOW TO GIVE EFFECTIVE OPENING AND CLOSING STATEMENTS**
NEIL KORNFELD, ESQ.
Furman Kornfeld & Brennan LLP
New York, New York
- 10:05 – 10:15 a.m. **Break**
- 10:15 – 11:05 a.m. **THE EFFECTIVE CROSS-EXAMINATION: A VIEW FROM THE BENCH**
HON. LEWIS J. LUBELL
New York State Supreme Court
Westchester County
White Plains, New York

SCHEDULE OF EVENTS

Monday, July 28 *continued*

- 11:05 – 11:55 a.m. **WHEN YOU CAN'T SETTLE: TRYING YOUR CASE TO WIN**
Topics to be discussed will include: Evaluating Trial Counsel Preparedness; Witness Selection/Preparation; Focus Groups/Jury Research; Jury Selection; Use of Visual Aids and Shadow Juries
JAMES J. YUKEVICH
Yukevich Cavanaugh
Los Angeles, California
- 12:00 p.m. **Lunch** on your own
- 12:00 p.m. Free afternoon to explore downtown Sonoma and Napa
- 12:15 p.m. **Golf at Chardonnay Golf Club, 2555 Jameson Canyon Road, Napa Valley**
The 18-hole course meanders through over 150 acres of Chardonnay vineyards and uniquely features six par fives, six par fours, six par threes and numerous lakes, creek crossings, and a wide variety of flora and fauna. **Golf shuttle departs hotel promptly at 12:15 p.m.** Contact: alexhall@chardonnaygolfclub.com for club rentals. **Soft-spikes only.** \$135 fee includes transportation to/from course, boxed lunch, greens fee and golf cart. No refunds on golf cancellations after July 10th. **Preregistration Required.**
Golf Chair: Daniel G. Ecker Esq.
Traub Lieberman Straus & Shrewsberry LLP, Hawthorne, New York
- 5:00 – 6:00 p.m. Complimentary Wine & Cheese in the Library for Hotel Guests
- 6:00 – 10:00 p.m. **Cocktail Reception & Dinner - BENZIGER WINERY, GLEN ELLEN, CA**
Named "Winery of the Year" in 2012 by *Wine & Spirits Magazine*.
Join us at Benziger Estate Ranch for a wine country dinner on the side of Sonoma Mountain. Hop on their tram for a tour of the vineyards and learn about their bio-dynamic farming practices followed by a private wine tasting. After cocktails, we will adjourn to the Estate Wine Cave for a multi-course dinner amongst the aging wine in its French oak casks.
Meet in hotel lobby for transportation to Winery at 6:00 pm sharp.
Preregistration Required.



SCHEDULE OF EVENTS

Tuesday, July 29

- 7:00 – 10:00 a.m. **Continental Breakfast** – Saddles Restaurant, Conference Center
(included in room rate for overnight hotel guests)
- 8:30 a.m. **Registration** – Conference Center Foyer
- 9:05 – 11:50 a.m. **GENERAL SESSION** – Conference Center, Rodeo Room
- 9:05 – 9:10 a.m. **Trial Lawyers Section Greeting/Announcements**
PETER C. KOPFF, ESQ., PROGRAM CHAIR
Peter C. Kopff, LLC
Garden City, New York
- 9:10 – 10:00 a.m. **NEW YORK PRACTICE AND CPLR UPDATE**
PROFESSOR PATRICK M. CONNORS
Albany Law School
Albany, New York
- 10:00 – 10:10 a.m. **Break**
- 10:10 – 11:00 a.m. **THE ETHICS OF SOCIAL MEDIA AND PAYING FOR EVIDENCE**
PROFESSOR PATRICK M. CONNORS
Albany Law School
Albany, New York
- 11:00 – 11:50 a.m. **60 CENTRE STREET TO LA LAW: NY AND CA CIVIL PRACTICE**
Trial vs Mediation – How California's Cap on Pain and Suffering Has Affected Medical Malpractice Cases and More
JOHN J. QUINN, ESQ.
Tucker Ellis LLP
Los Angeles, California
- 12:15 – 6:15 p.m. **WINERY TASTING TOUR AND ARMSTRONG WOODS VISIT**
Join us for tastings at two beautiful vineyards west of the Russian River Appellation - Lynmar Winery and DeLoach Vineyards. At Lynmar, we will sample 4 reserve wines paired with Artisan cheeses in their redwood grove, and at DeLoach, our tasting will take place in the barrel room. We will then make our way to Armstrong Woods for a guided hike through the magnificent Sequoia sempervirens known as the coast redwood.
Preregistration is required.
Tour price includes boxed lunch.



SCHEDULE OF EVENTS

Tuesday, July 29 *continued*



12:15 p.m. **Silverado Golf Club,
1600 Atlas Peak Road, Napa**

Experience an unforgettable day on the greens on the championship 18-hole North Golf Course. The Opening event of the 2014-15 PGA Tour season, The Frys.com, will take place in October on this course. Designed by renowned architect Robert Trent Jones, Jr., the course features dozens of water crossings, elevation changes and routing through oak, pine and redwood trees.

Soft-spikes only. First tee time is 1:00 p.m. Shuttle departs hotel at 12:15 p.m. promptly. Preregistration required. \$250 fee includes transportation to/from course, boxed lunch, practice balls, greens fee and golf cart. Club rental contact: bjohnson@troongolf.com to prearrange. No refunds after July 10th.

7:00 – 10:00 p.m. **Reception & Dinner** – Veranda Gardens and Veranda, MacArthur Place

Wednesday, July 30

7:00 – 10:00 a.m. **Continental Breakfast** – Saddles Restaurant, Conference Center
(included in room rate for overnight hotel guests)

12:00 noon **Check Out/Departure**

THINGS TO DO IN SONOMA

Stop by the Sonoma County Visitors Bureau, 453 First Street East, located on the east side of Sonoma Plaza, for information about the Plaza and all of Sonoma Valley. Open Monday – Saturday, 9 a.m. – 5 p.m. and Sunday 10 a.m. – 5 p.m. (866) 996-1090 or www.sonomavalley.com

Garden Spa/Pool, MacArthur Place, Sonoma

The Garden Spa and Fitness Center is located adjacent to the heated outdoor pool and whirlpool in the heart of the garden. Complimentary iced tea and water are served poolside and room service is available for poolside lunch or snacks. The Garden Spa at MacArthur Place offers over 40 different massage, facial and body treatments utilizing the elements of the historic gardens fruits, flowers, herbs, and earth. Advance reservations highly recommended. Call: 707-933-3193.

Sonoma State Historic Park, Mission San Francisco Solano, 114 Spain Street at First St., Sonoma

Unlike most parks with a single plot of land and a continuous boundary, Sonoma State Historic Park is a scattering of historical attractions consisting of six midtown locations near Sonoma's Plaza. They are: Mission San Francisco Solano, the Blue Wing Inn, Sonoma Barracks, the Toscano Hotel, the Servants Quarters (the remains of La Casa Grande) and the home of General Mariano Guadalupe Vallejo. Vallejo's home, Lachryma Montis, is less than a mile west of the Plaza. Vallejo served as Military Commander and Director of Colonization of the Northern Frontier. \$3 Admission gets you into the small museum, mission church and home of General Vallejo. An interesting part of CA history; don't miss the short video on the history of the area. Easy walk across the park down the bike trail to the house and other buildings. Open 10 a.m. to 5 p.m. daily. 707-938-9560.

Sonoma Plaza Wine Walk

Sonoma Plaza is currently home to more than 24 wine tasting rooms that offer fine wine from Sonoma County's award winning wineries. We will have copies of the WineWalk guide to 18 of these tasting rooms on the Plaza at registration or you can print your own from www.sonomaplaza.com. Buy a bottle or two to enjoy. Most tasting rooms offer shipping to New York.

Sonoma Coast State Beach, Highway 1, Between Jenner and Bodega Bay, Sonoma, CA

Sonoma Coast State Beach is actually a collection of beaches in Sonoma County; the drive on Pacific Coast Route #1 offers eye-popping vistas from both the beaches and the surrounding high hills. Stroll the beaches, stop at an overlook, have a picnic or take a hike on one of the trails. Depending on the time of year, Schoolhouse Beach has tide pools that offer an abundance of sea life, even baby octopus! Walk barefoot and wade in the water. Not all of the beaches offer swimming so check before you go. Phone: 707-875-3483. www.parks.ca.gov/?page_id=451

Armstrong Woods State Natural Reserve, 17000 Armstrong Woods Road, Guerneville

A majestic living reminder of the magnificent primeval redwood forest that covered much of this area before logging operations began during the 19th century. Armstrong Redwoods preserves stately and magnificent Sequoia sempervirens, commonly known as the coast redwood. These trees stand together as a testament to the wonders of the natural world. The grove offers solace from the hustle and bustle of daily life, offering the onlooker great inspiration and a place for quiet reflection. Open 8 a.m. to one hour following sunset. **Our guided tour on Tuesday includes a hike through Armstrong Woods.** Phone: 707-869-2015. www.parks.ca.gov/?page_id=45

Wineries on Highway 121 entering Sonoma Valley: Gloria Ferrer, Viansa & Jacuzzi Family Vineyards. Other Nearby Wineries: Buena Vista Winery, Ravenswood, Gundlach Bundschu, Imagery, Kunde, Hanzell and Cline Cellars.

For more information on Sonoma Activities, visit:

www.winecountrythisweek.com

www.sonomaplaza.com

www.sonomacounty.com

DOWNTOWN SONOMA RESTAURANTS

Depot Hotel Restaurant and Garden, 241 First Street West, Sonoma, 707-938-2980. Lunch 11 a.m. to 2 p.m. and Dinner 5 p.m. to 9 p.m. Wednesday – Sunday

Historic stone building two blocks from the Sonoma Plaza featuring Mediterranean-inspired cuisine. Served as the local hotel for 19th c. passengers arriving on the train from San Francisco. The original owners also opened an Italian restaurant and “saloon” here in 1890 to serve the townspeople of Sonoma and their visitors. Enjoy dining in the plumstone building or on the decks and terraces surrounding the garden and reflection pool. Their Wine Bar, Vinoteca, offers house-made “small plates” of antipasti consisting of salads, cheeses, and other vegetable dishes, as well as house-made cured meats. The Vinoteca is open in the afternoons when you can enjoy a casual snack at the bar, at a fireside table, or in the Garden, as well as on into the evening. www.depotsonoma.com

El Dorado Kitchen, 405 First Street West, Sonoma, Lunch 11:30 a.m. to 2:30 p.m. Daily, Dinner Sunday – Thursday 5:30 p.m. to 9:30 p.m.

Farm-driven cuisine showcasing the essence of seasonal produce with ingredients sourced from local purveyors and nearby Sonoma farms. A sophisticated bistro serving straightforward seasonal dishes. On warm evenings, the patio is a lovely place to try one of the inventive cocktails, such as the refreshing gin-based Kiwi Martini. www.eldoradosonoma.com

Fremont Diner, 2698 Fremont Drive, Sonoma, 707-938-7370, Monday – Friday 8 a.m. to 3 p.m.; Thursday – Sunday 8 a.m. to 9 p.m.

The tiny Fremont Diner off the junction of Highway 121/12 nails the look of a roadside diner from the 1940s. The roof is corrugated tin, and a badly rusted pickup truck is permanently parked outside. The menu is classic Southern comfort food with a bit of Cal-Mex thrown in, cooked with the best Napa and Sonoma ingredients with a good selection of local craft beers. www.thefremontdiner.com

The Girl & the Fig, 110 West Spain Street, Sonoma, 707-938-3634, All-Day Menu Daily 11:30 a.m. to 10 p.m. Sunday Brunch 10 a.m. to 3 p.m.

A Sonoma County favorite since 1997, this charming spot serves French-country cuisine for lunch, dinner, and Sunday brunch. It's practically de rigueur to precede a meal here with a Fig Royale (the house cocktail, made with fig syrup and sparkling wine). Should you try the slow-braised carbonade de boeuf for dinner, or the pan-roasted black cod? Extensive charcuterie offerings. www.thegirlandthefig.com

Harvest Moon Café, 487 First Street West, Sonoma, 707-933-8160. Dinner Sunday – Saturday 5:30 p.m. to 9:30 p.m. Closed Tuesday.

Farm-to-table cuisine with menus changing daily to focus on Sonoma County's bountiful, local harvests. All of their produce, meat, poultry and fish come from local farms, ranches and fisheries guided by principles of sustainability. www.harvestmooncafesonoma.com

LaSalette Restaurant, 452 First Street East, Suite H, Sonoma, 707-938-1927. Open Daily Lunch & Dinner.

Brazilian and Contemporary Portuguese cooking with a California flair - unique cuisine characterized by familiar Southern European comfort ingredients (olive oil, olives, garlic, tomatoes, onions, wine, parsley, etc.), exotic seasonings picked from around the globe during hundreds of years of Portuguese expeditionary voyages, and fresh local and seasonal California produce. www.lasalette-restaurant.com

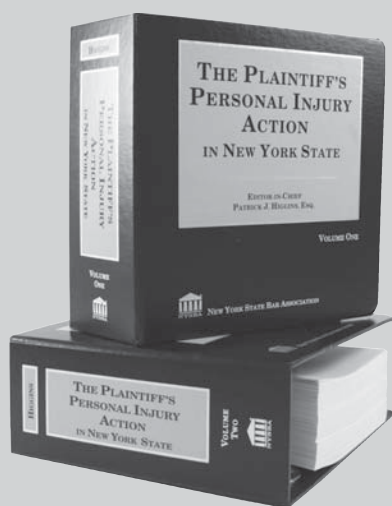
Sante at Fairmont Sonoma Mission Inn, 100 Boyes Blvd., Sonoma, 707-939-2415, Nightly 6 p.m. to 9 p.m.

AAA Four Diamond Award and Michelin designee. Wine country casual offering three dining choices: a Chef's Tasting Menu of seven courses with optional wine pairings; a Prix Fixe Menu and an A la Carte Menu.

ADDITIONAL DINING OPTIONS ABOUND IN NAPA AS WELL AS IN OTHER SURROUNDING AREAS

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Products Liability in New York, Strategy and Practice Second Edition

Editors-in-Chief

Neil A. Goldberg, Esq.

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John Freedenberg, Esq.

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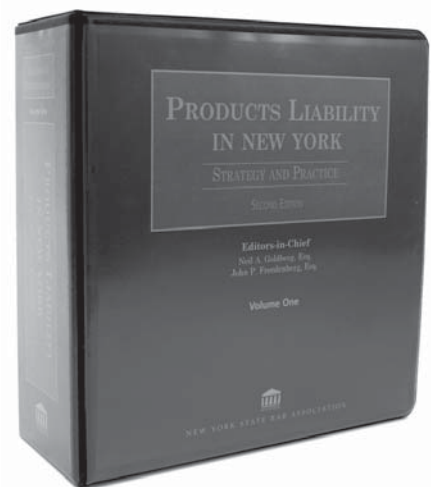
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Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted electronically (preferably in WordPerfect or Microsoft Word) along with two printed originals. Please submit articles to:

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ISSN 1530-3985 (print) ISSN 1933-8457 (online)