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The Patent Battle That Created Hollywood

By David Krell

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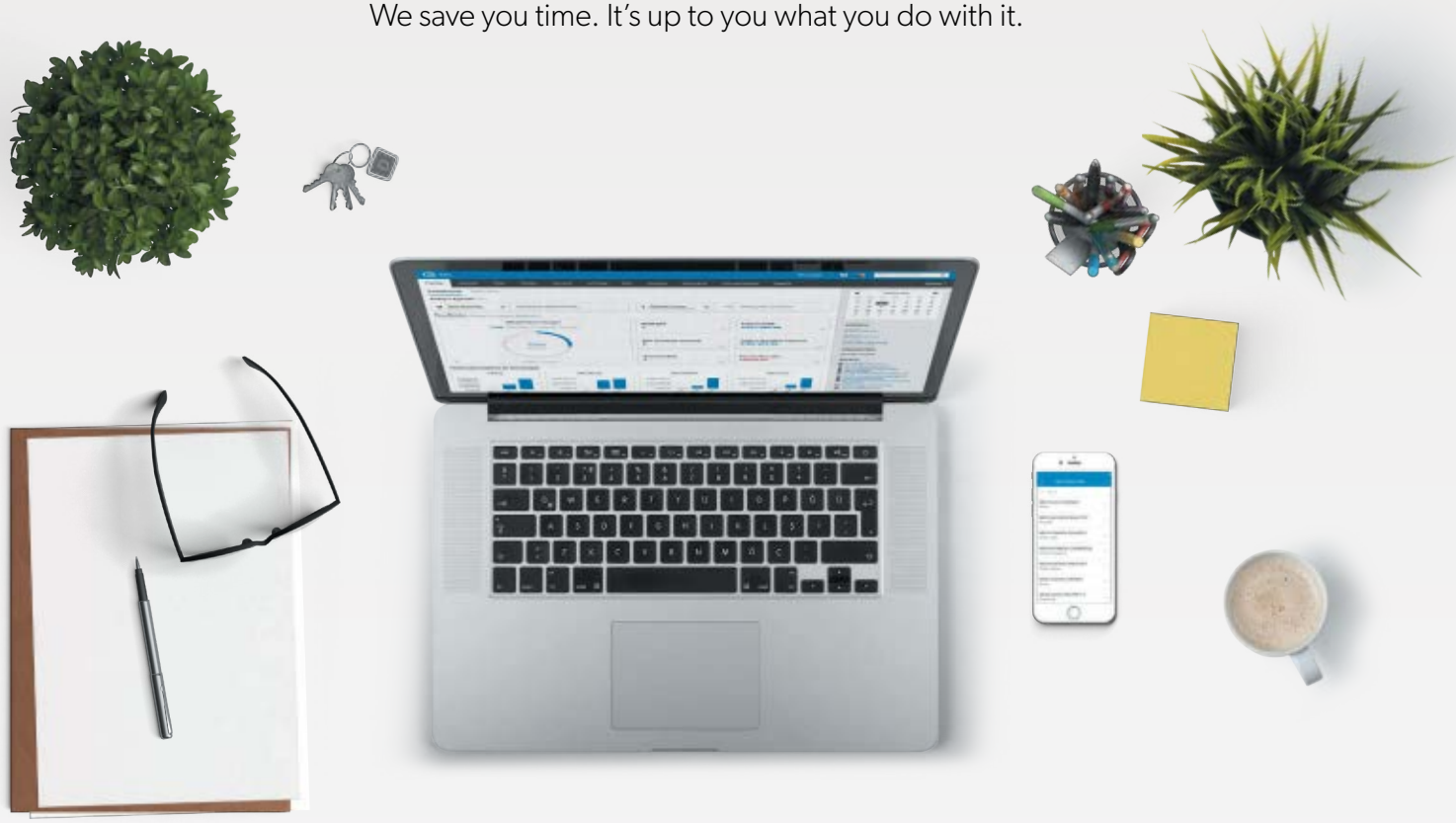

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BY DAVID KRELL

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DEPARTMENTS

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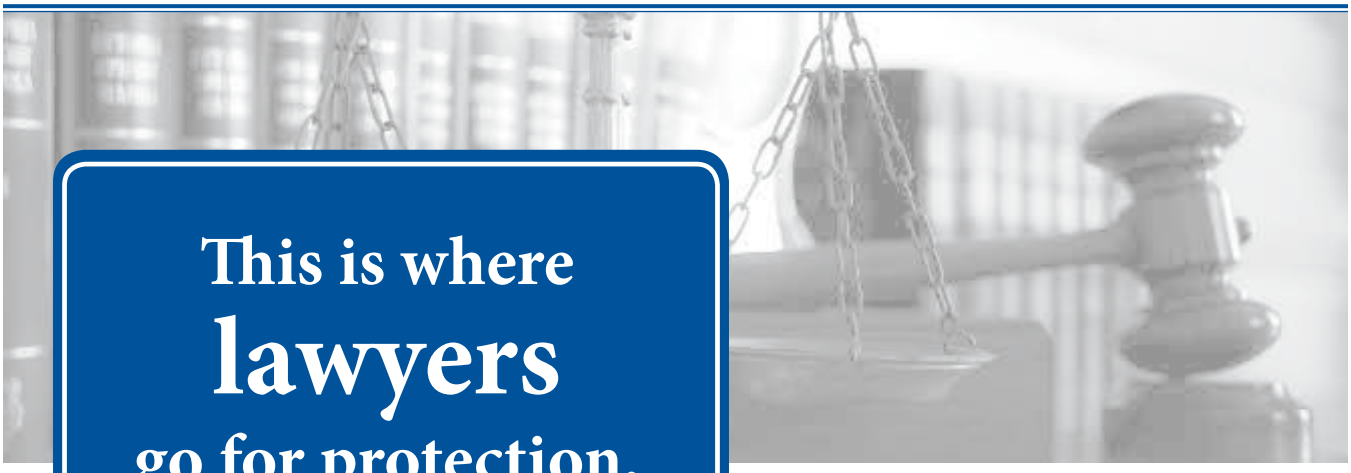

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"Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status."

Supreme Court Justice Lewis Powell, Jr.,
in an address to the ABA Annual Meeting, 1976

Critical and underfunded legal services programs across New York State are overwhelmed. The confluence of a troubled economy and insufficient funding has left the neediest among us with nowhere to turn when faced with wrongful eviction, home foreclosure, or difficulties obtaining disability, medical, or unemployment benefits. In these difficult times, when we readily open our public coffers to provide government dollars to banks and automakers, we should do no less for the most needy and helpless among us. As attorneys we have an obligation, individually and collectively, to use the strength of our voices to raise awareness of injustice in our society and, more important, to do something about it.

Attorneys Making a Difference

The Brennan Center for Justice at the New York University School of Law has estimated that 80% of low-income people nationwide have difficulty obtaining legal representation or otherwise accessing the civil court system to protect their property, their family or their livelihood. The good news is that from a peak of 2.3 million in 2010 the number of unrepresented New York civil litigants has been reduced by one-half million in 2014.

This reduction is due in no small part to the assistance of New York's network of professional civil legal services providers and volunteer lawyers. But that means that 1.8 million civil litigants entered the New York court system without the benefit of attorney representation. Many of these cases were dismissed on procedural grounds – the plaintiff or defendant failed to complete a requisite form or pleading, did not appear in a given court on time or lacked required documentation and/or information. Yet, while an impressive number of New York citizens have benefited from pro bono legal assistance, the number of those in need continues to rise.

We must redouble our efforts to support pro bono. Our profession is unique in its expectation that all attorneys dedicate a portion of their time and expertise to assisting the underprivileged. And the rewards are great. Not just in using our knowledge and skills to help others, but in working with our colleagues in the court, other bar associations and service organizations for the common good we strengthen our legal community. Through our collective efforts we can best serve the needs of the poor.

Each year thousands of New York attorneys donate their time through civil legal service and bar association programs, such as our President's Committee on Access to Justice, our annual Howard A. Levine Award, the President's Pro Bono Service Awards, and the NYSBA Empire State Counsel program. Established in 2006, our Empire State Counsel program honors those who have performed 50 hours or more of pro bono work in a year. Since the program's inception, more than 11,000 NYSBA members have collectively contributed over 1.7 million hours of pro bono service.

Since 2010, the State Bar has participated in hearings held by Chief Judge Jonathan Lippman's Task Force to Expand Access to Civil Legal Services. We have heard testimony about the importance of civil legal services from providers, government officials and other stakeholders, as well as directly from clients. These hearings have demonstrated that timely and well-trained legal assistance can make a difference.

As President, I have the privilege of sitting on the panel with Judge Lippman, and the most compelling testimony comes from the recipients of pro bono services – a woman with AIDS, a victim of domestic violence, a father about to lose his home – who speak simply and eloquently about their desperate circumstances, how access to legal services changed their lives and helped preserve their most

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basic human dignity. More than anything else, it's their stories that remind us why we do what we do. Judge Lippman should be commended for his leadership; he's used the strength of his position to shine a light on this important concern.

Necessary Resources

Our Association's charitable branch, the New York Bar Foundation, last year presented more than $830,000 in grants to law-related projects designed to address the fundamental issues of poverty, homelessness, lack of access to civil legal services and the challenges facing immigrants. Yet we must find ways to engage a larger donor pool and raise additional funds to support statewide pro bono activities.

Working in partnership with the New York Bar Foundation and its President, John Gross, we have created a joint committee with members from both the Foundation and the New York State Bar Association to raise additional resources to support these initiatives. This committee, led by Hon. Barry Kamins and Marion Hancock Fish, will seek ways to attract funding beyond that already allocated to pro bono providers, to further our efforts to bridge the justice gap in New York.

Statewide Center for Justice

Our Association is in a unique position to do more to address this problem head-on and make a real difference. We have been working on fresh ways to leverage new sources of funding, utilize technology and expand the number of pro bono volunteers from our pool of 74,000 members, to assist an even greater number of indigent New Yorkers in gaining the access to justice they desperately need – and deserve.

We have led the call for an Albany-based statewide Center for Justice to focus on coordinating, enhancing and enlarging the current statewide pro bono network of providers and resources. By providing easily accessible technology and tools to reduce some of the current obstructions that prevent potential pro bono volunteers from contributing their time and talents, we can increase the number of volunteer opportunities, assist an even greater number of indigent New Yorkers, and significantly increase the pool of pro bono volunteers across the state.

A truly statewide effort will help narrow the justice gap. Our Association can take the lead by coordinating our network of New York pro bono providers, the Office of Court Administration, and private contributors, to build a statewide database where pro bono volunteers can access and sign up for clinics and other pro bono volunteer opportunities in their local communities. Volunteers will also be able to create a personal "pro bono profile," listing their areas of legal expertise, their geographic preferences and the times they are available. Ideally, such a system would match a volunteer's profile with a potential pro bono client's needs.

In addition to helping create a statewide pro bono matching database, we must also further enhance the pro bono opportunities available to NYSBA members. We are currently working on partnering with the American Bar Association in offering to potential attorney volunteers an email-based pro bono system. Utilizing a "limited scope representation model," indigent New York clients will simply post their legal questions on a site where volunteer attorneys can review the questions, which would be posted and sorted by specific practice areas. Volunteers can then reply to the email question with their legal advice and solutions. This particular pro bono opportunity centers on volunteer lawyers simply answering questions – there is no actual courtroom representation. This system would also allow law students to work with licensed attorney mentors and to learn from real life issues and fact patterns. This provides students and mentors the chance to assist indigent New Yorkers in a controlled environment that can be easily accessed anytime and from any location. This flexibility allows pro bono volunteers to work around their schedules and connect from the comfort of their home or office, making it easier for attorneys to provide pro bono services.

Justice for All

As a profession, we must continue to find ways to provide access to justice to the thousands of indigent New Yorkers who lack meaningful access because they do not have legal representation. Our Association must find new ways to facilitate the connection between attorneys and those in need. If you are not doing so already, please consider donating your time as a pro bono volunteer. You can access a list of current New York pro bono providers and initiatives by going to our Pro Bono page, www.nysba.org/probono. If you prefer to assist our efforts by contributing funds, please contact our New York Bar Foundation, www.tnybf.org, to make your tax-deductible financial contribution.

Attorneys are held to a higher standard, and that is how it should be. Pro bono service is good for our community, good for lawyers, and good for our bar association. When justice is served for the poorest among us, we are all served for the better. ■

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November 6 Long Island (9:00 a.m. – 1:00 p.m.)
November 10 Westchester (9:00 a.m. – 1:00 p.m.)
December 3 Rochester (1:00 p.m. – 5:00 p.m.)
December 8 New York City (9:00 a.m. – 1:00 p.m.)

Basics of Elder Law Practice
November 5 Westchester
November 19 Long Island
December 1 New York City; Rochester
December 8 Albany

Fire Law 2015
(9:00 a.m. – 1:10 p.m.; live & webcast)
November 6 New York City

Attorney Escrow Accounts: What You Need to Know in New York
November 6 Syracuse (9:00 a.m. – 1:00 p.m.)
November 13 New York City (1:00 p.m. – 5:00 p.m.; live & webcast)
December 9 Albany (9:00 a.m. – 1:00 p.m.)

Overcoming Obstacles to Develop Real Estate
(9:00 a.m. – 1:00 p.m.)
November 9 Albany
November 16 New York City (live & webcast)

Introduction to Estate Planning
November 10 Rochester
November 19 Westchester
December 3 Syracuse
December 4 Albany
December 8 New York City (live & webcast)

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Securities Arbitration 2015
(live & webcast)
November 12 New York City

Risk Management 2015
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November 13 New York City (live & webcast)

So Custody Is an Issue: What Do We Do Now?
November 13 Westchester
November 20 Albany
December 4 New York City (live & webcast)

13th Annual Sophisticated Trusts and Estates Institute
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November 17 Albany
November 18 Buffalo; Long Island
December 9 New York City (live & webcast)

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The Patent Battle That Created Hollywood

By David Krell

Governed by glamour, Hollywood engineers illusion, distraction, and escape through films and television programs; it's been called a dream factory, and rightfully so.

But Hollywood's richness as a source for entertainment belies its delicate balance upon an intricate fulcrum of intellectual property, which, in Hollywood's embryonic phase, offered a tale rivaling cliffhangers for suspense, action, and dramatic import.

Hollywood: Born in New Jersey

It began in northern New Jersey, where Thomas Edison set the foundation of America's film industry with his inventions like the kinetoscope. It continued in courtrooms where Edison waged battles to protect his patents. It ended in Hollywood, after movie producers fled the grasp of Edison's patent rights in a cross-country exodus.

Edison, as every schoolkid knows, conceived the light bulb. This is partially a myth, though – Edison improved upon previous versions of an electric light bulb to create a long-lasting model that became the standard. Edison's societal contributions stagger the imagination: What would the world be like without his versions of the phonograph, the fluoroscope for X-rays, and the electric generator?

Edison v. Lubin

However, Edison's motion picture camera, though revolutionary, didn't trigger his appreciation for the possibilities of the relatively new medium of film. A 1931 obituary in *The New York Times* recalled, "Open-minded as he often was, he could not be argued into believing that [film] had any future. For a long time he opposed the idea of projecting pictures on the screen. He thought that it would ruin the nickel-in-the-slot peepshow business."[1]

When opportunities emerged for the nascent film industry at the turn of the 20th century, though, Edison guarded his intellectual property rights fiercely. In *Edison v. Lubin*,[2] a Third Circuit case on appeal from the Circuit Court for the Eastern District of Pennsylvania, the legendary inventor invoked copyright protection for a celluloid film, described by the court as "300 feet long, 4,500 pictures, each of which was a shade different from its predecessor and successor, and all of which collectively represented at different points Kaiser Wilhelm's yacht *Meteor* while being christened and launched."[3]

Somehow, about one third of the film became separated; Sigmund Lubin, unknowing of the film's copyright status, "photographed [it] on a sensitized celluloid film" and "reproduced a positive on a celluloid sheet."[4] In turn, Lubin sold "his" film of the yacht launch to film exhibitors.[5] Edison's brief to the Circuit Court noted the film, which included President Roosevelt and Prince Henry, required a marriage of art and science to be effective:

> In order to take a good photograph of this scene it was necessary to use great artistic skill in placing the camera, having due regard to the time of day, the amount of light, and the lights and shades of the yacht and figures, and also as to the time of exposures. Consideration also had to be given to the fact that as the yacht was launched it moved away from the camera.[6]

Further, he noted, the "genius of Thomas Edison"[7] was responsible for the "art of reproducing actual motion"[8] as "the first one to grasp the possibilities of the art and to devise the mechanism by which photographs such as these could be taken and reproduced at will."[9] Previous

David Krell (david@davidkrell.com) is an attorney in Jersey City, NJ. He is author of *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture* (2015) and the forthcoming *1962: Baseball, Hollywood, JFK, and the Beginning of America's Future* (2017) and *Have Yourself a Merry Legal Christmas: Holiday Movies and the Law* (2017).

On the cover, p. 3 and p. 10: Edison's Greatest Marvel – The Vitascope, 1896. Courtesy of the Library of Congress. Page 11: George Eastman (l.) and Thomas Edison (r.) at Eastman's home in Rochester, NY, where a demonstration of the new Kodacolor film was being held, 1928. Courtesy of the Library of Congress.

attempts were faint, by comparison. Edison's argument for copyright protection in the yacht film failed, however.

It was a different story in the Third Circuit, which targeted the lower court's analysis of the 1870 United States Copyright Act[10] that allows exclusive copyright protection for "any citizen of the United States . . . who shall be . . . the author proprietor of any . . . photograph or negative thereof."[11] The court used strict interpretation of the statute, ruling that it did not apply to "an aggregation of photographs . . . to acquire the monopoly it confers, it is requisite that every photograph, no matter how or for what purpose it may be conjoined with others, shall be separately registered, and that the prescribed notice of copyright shall be inserted upon each of them."[12]

Here, Edison prevailed. The Third Circuit ruled first that Lubin's "reproduction was a photograph,"[13] and thus covered by the Copyright Act. It then reasoned that the statute's construction rests on a foundation of artistic progress, hence the reason for the statute in the first place: "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[14] Under this constitutional paradigm, the court stated,

> It must have recognized there would be change and advance in making photographs, just as there has been in making books, printing chromos, and other subjects of copyright protection. While such advance has resulted in a different type of photograph, yet it is none the less a photograph – a picture produced by photographic process.[15]

More Patent Battles

Edison fought competitors in the laboratories and the courts, but no foe matched American Mutoscope – also known as Biograph. In 1902, the Second Circuit Court of Appeals analyzed a challenge to a lower court decision validating Edison's patent for a kinetographic camera and judging American Mutoscope to be an infringer.[16] Edison, the court noted, broke new ground regarding photographic instruments: "His apparatus is capable of using a single sensitized and flexible film of great length with a single-lens camera, and of producing an indefinite number of negatives on such a film with a rapidity theretofore unknown."[17]

It was not enough; the court traced film's evolution "from plates to flexible paper film, and from paper film to celluloid film, which was capable of producing negatives suitable for reproduction in exhibiting machines. No new principle was to be discovered, or essentially new form of machine invented, in order to make the improved photographic material available for that purpose."[18]

Edison's invention, while an improvement upon previous cameras, did not meet the court's test for sustainability of the patent. "Undoubtedly Mr. Edison, by utilizing this film and perfecting the first apparatus for using it, met all the conditions necessary for commercial success," ruled the Second Circuit court. "This, however, did not entitle him, under the patent laws, to a monopoly of all camera apparatus capable of utilizing the film. Nor did it entitle him to a monopoly of all apparatus employing a single camera."[19]

American Mutoscope & Biograph Co. v. Edison Manufacturing Co.

In 1905, American Mutoscope and Edison did battle in the Circuit Court of the District of New Jersey concerning depictions of a romantic scene.[20] Seeking a preliminary injunction against Edison to prevent alleged infringement, American Mutoscope argued that it had copyright protection in the "photograph" of the scene "largely at Grant's Tomb on Riverside Drive in New York City."[21] American Mutoscope's story involves a French man advertising for a wife with the hopes of meeting her at Grant's Tomb. When multiple women arrive, a chase ensues "across the country."[22]

American Mutoscope's position revolved around the uniqueness of its product, requiring "skilled artists to prepare the apparatus for taking the photographs, and for the manipulation of such apparatus skilled pantominists were drilled for the performance of the action portrayed, who were rehearsed in their parts."[23] Additionally, American Mutoscope noted the editing process necessary "to produce most perfectly the illusion sought to be made."[24] Edison's reproduction and sale of the film, therefore, amounted to infringement.

The district court emphasized the *Lubin* case, in which Edison successfully argued for copyright protection. "The camera in that case occupied but one position, though it was placed on a pivot on which it could be moved so as to keep the vessel, as it left its stays and moved into the water, within the field of the camera's lenses," observed the court.[25]

Extending its analysis to the present case, the court took an expansive view of copyright:

> I am unable to see why, if a series of pictures of a moving object taken by a pivoted camera may be copyrighted as a photograph, a series of pictures telling a single story like that of the complainant in this case, even though the camera be placed at different points, may not also be copyrighted as a photograph. Though taken at different points, the pictures express the author's ideas and conceptions embodied in the one story.[26]

Despite the same setting and the basic story of women chasing a man, Edison's version did not satisfy the court's test for infringement. The court highlighted Edison's photographer, who said, "My photograph is not a copy, but an original. It carries out my own idea or conception of how the characters, especially the French nobleman, should appear as to costume, expression, figure, bearing, posing, gestures, postures, and action."[27] Hence, the court denied a preliminary injunction.

Joining Forces

On December 21, 1908, Edison joined forces with other film titans to consolidate film production into a singular entity – Motion Picture Patents Company, comprising Edison, Biograph, Vitagraph, Essanay, Selig, Lubin, Kalem, Pathé, Méliès, and Gaumont.[28] Once foes, Edison and Biograph (American Mutoscope) conspired to create a trust that would control entertainment.

With most of the film industry patents under its aegis, the trust exercised its power by edging out producers and theater owners who refused to cut deals. William Hammerstein suffered the trust's wrath after announcing his intention to show a film of the Nelson-Wolgast fight at New York City's Victoria Theatre. The lightweight championship bout had lasted 40 rounds, earning the distinction as the most brutal example of professional pugilism. The film, however, was not put out by the MPPC, and MPPC did not allow use of the projectors it licensed to theater owners to show films it did not control. The MPPC had warned, "Licensed exhibitors are permitted to use only films licensed by the company."[29]

So, Hammerstein bought a non-trust machine to display films.[30]

While the MPPC's enforcement was seen as a strong-arm maneuver, the trust received praise from the *Hartford Courant* about its impact on filmed entertainment: "It is its purpose to see that none of the exchanges holding its licenses receives a single picture which will cause anybody to blush, even if the houses are so dark during moving picture shows that blushes are not visible, provided people do blush in the dark, which is quite a question."[31]

The MPPC's luck began to run out, however, when the United States government launched an antitrust lawsuit in the Eastern District of Pennsylvania. The government's petition declared, "Defendants through the Patents Company were enabled to and did determine whether new motion picture theaters should or should not be opened, or whether old ones should be closed, although defendants had no proprietary interest in such theaters. This power they have exercised and continue to exercise arbitrarily and unreasonably through the Patents Company."[32] Additionally, the government alleged that the MPPC controlled "from 70 to 80 percent of the film business, furnishing approximately 7,000 exhibitors."[33]

Beyond business tactics, the MPPC allegedly used the law "to harass and oppress all persons engaged in the motion picture business who have not obeyed its mandates."[34] MPPC member Philip Scheck, one-half of a partnership owning six theaters in Baltimore – including the Hippodrome, which reopened in 2004[35] – argued that non-MPPC members were at fault rather than the trust. "The most of these independent companies have to infringe on the patents to make a motion-picture film, so they themselves are violating the law. If there is a moving-picture trust, it is a lawful and a square-and-above-board one."[36]

"It is not like the Standard Oil or the Coal Trust," stated Scheck, upon the government's lawsuit. "They have a monopoly of things of nature that should be free for all. But motion pictures were invented. Why were the patent laws passed except to grant a limited monopoly to the man who invents things worth while?"[37]

The District Court for the Eastern District of Pennsylvania thought otherwise, ruling on the antitrust case on October 1, 1915, with a preamble that could easily have come from Charles Dickens's *Bleak House*, where a morass of litigation confounds the parties involved in a testator's multiple wills. "The record is of such bulk, and the discussion has taken such a wide range, and has with such thoroughness dealt with all possible phases of the case, that to even outline, with anything like adequacy, all the considerations involved in its decision, would extend an opinion beyond manageable limits."[38]

Edison et al. ran a formidable operation, forcing theater owners and film exhibitors to purchase films authorized by the MPPC and forbidding use of non-MPPC films. The court homed in on the implications of this stonewall method, allowing that the MPPC had legal justification if it conducted business with "any real relation to the assertion and protection of these patented rights, and this had been the end proposed."[39]

> Instead, the court found that the MPPC sought to monopolize the trade in all the accessories of the motion picture art so far as they are articles of commerce. A further end proposed, and which has largely been achieved, is the domination of the motion picture business itself, and it requires no prophetic vision to foresee that the ultimate result would be that no play would be written, or dramatically enacted, except by authors and artists favored by the defendant.[40]

Another loss for the MPPC occurred in 1917, when the United States Supreme Court decided *Motion Picture Patents Co. v. Universal Film Manufacturing Co. Et Al.*, a case concerning the restriction mandating that only authorized MPPC films can be projected on MPPC's patented machines. The Supreme Court rejected MPPC's monopolistic actions, stating,

> This decision proceeds upon the argument that, since the patentee may withhold his patent altogether from public use, he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute, and from failure to distinguish between the rights which are given to the inventor by the patent law, and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract, which, however, are subject to the rules of general as distinguished from those of the patent law.[41]

Further, the Court said, "Such a restriction is invalid because such a film is obviously not any part of the inven-

tion of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it."[42]

Justice Oliver Wendell Holmes, joined by Justices McKenna and Van Devanter, dissented, opining that a patent owner gained rights beyond those connected to the patent.

> I suppose that a patentee has no less property in his patented machine than any other owner, and that, in addition to keeping the machine to himself, the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event.[43]

Holmes's logic, in essence, gives the owner of a patent the ungovernable right to authorize that a licensee only use the invention with products falling under its ownership, control, or benefit. For example, a beer tap patent owner with a financial stake in a beer company could restrict bars from dispensing any beers other than those owned by its beer company.

Go West

Legend dictates that independent producers fled the eastern seaboard to escape the clutches of the MPPC's patent enforcement. After traversing the United States, early 20th century filmmakers settled in southern California. Hence, it became the de facto headquarters for the film industry. Weather problems that hampered producers back east disappeared into the sunshine.

Even the MPPC saw the climate benefits of this new geographical paradigm. No longer would filmmakers be subject to the vagaries of the weather on the Eastern seaboard. A 1911 article in the *Los Angeles Times* showcased southern California as a location for filmmakers, endorsed by D.W. Griffith and R.H. Hammer – officials of the American Biograph Company, an MPPC member. Griffith and Hammer lauded the weather, a prime attraction for shooting films, no matter the time of year. "Our productions will be of the very highest possible order, since we have discovered that people who patronize the moving-picture shows want something of the ideal, of the poetical: something with bright outdoor life where every flower and every tree stands for the best in art."[44]

Edison's journey to consolidate power into governance belonging to a few film companies seemed endless. With an unbreakable grasp, Edison and his partners could have set dictated standards of content, in addition to the dictates regarding its patented equipment. At its foundation, the Motion Picture Patents Company represented a plan based in fiscal strength rather than artistic integrity. Indeed, when the MPPC acted like a vise squeezing independent producers and theater owners, it underlined the financial realities behind the film titles on the marquees.

Show business is, after all, a business. And there's no business like it. ■

1. *Edison, at 10, Began Career as Inventor*, N.Y. Times, Oct. 18, 1931, at 35.
2. 122 F. 240 (3d Cir. 1903).
3. *Id.* at 240.
4. *Id.* at 241.
5. *Id.*
6. Brief for Complainant at 2, Edison vs. Lubin (C.C.E.D. Pa.), Rutgers University, Alexander Library, Thomas A. Edison Papers, Part III: 1887–1898 (Reel 19 of 65), Litigation Series, Motion Picture Cases, Phonograph Cases, University Publications of America, Bethesda, Maryland.
7. *Id.* at 3.
8. *Id.*
9. *Id.* at 4.
10. Copyright Act of 1870.
11. *Id.*
12. 119 F. 993, 993 (C.C.E.D. Pa. 1903).
13. 122 F. at 242.
14. U.S. Const. art. I, § 8, cl. 8.
15. *Edison*, 122 F. at 242.
16. 114 F. 926 (2d Cir. 1902).
17. *Id.* at 932.
18. *Id.* at 934.
19. *Id.*
20. *Am. Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262 (C.C. N.J. 1905).
21. *Id.* at 263.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 266.
26. *Id.*
27. *Id.* at 267.
28. http://www.britannica.com/topic/Motion-Picture-Patents-Company.
29. *Clash on Pictures of Wolgast Fight*, N.Y. Times, Mar. 23, 1910, at 11.
30. *Id.*
31. *For Clean Picture Shows*, Hartford Courant, Apr. 2, 1909, at 6.
32. *Uncle Sam*, Cincinnati Enquirer, Aug. 17, 1912, at 5.
33. *Id.*
34. *Motion Picture Men Sued as a Trust*, N.Y. Times, Aug. 17, 1912 at 6.
35. Theresa Donnelly, *Hippodrome Theatre*, http://explore.baltimoreheritage.org/items/show/125#.Vhbay_F8QF.
36. *Own Stock in "Movie" Trust*, The Sun, Aug. 18, 1912.
37. *Id.*
38. *U.S. v. Motion Pictures Patent Co.*, 225 Fed. Rptr. 800, 801 (1915).
39. *Id.* at 810.
40. *Id.* at 811.
41. 243 U.S. 502 (1917).
42. *Id.* at 518.
43. *Id.* at 519.
44. *Moving Pictures Are Aiming High*, L.A. Times, Jan. 4, 1911 at II, 9.

BY DAVID PAUL HOROWITZ

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Successfully Navigating the *Ashford/Kudisch* World

Introduction

When is it a judge's province to evaluate the credibility of sworn testimony? More than 100 years ago, the Court of Appeals held it was permissible only when "science and common knowledge may be invoked for the purposes of demonstrating that a particular statement in regard to some particular [event] must be absolutely false."[1]

In that same opinion, the Court went on to hold that in all other cases, even where a witness's "testimony upon the second trial is directly contrary to his testimony on the first trial . . . the changes and contradictions in the plaintiff's testimony, the motives for the same and the truth of the last version is a matter for the consideration of the jury."[2]

Despite this clear mandate, past columns have discussed recent decisions where appellate courts, ruling as a matter of law, have held both that deposition corrections submitted in conformity with the requirements of CPLR 3116(a) "could not properly be considered" where the witness "failed to offer an adequate reason for materially altering the substance of his deposition testimony,"[3] and that an affidavit contradicting deposition testimony "appear[s] to raise feigned issues of fact to avoid the consequences of [the prior] testimony and, thus, w[as] insufficient to defeat summary judgment."[4]

So how can practitioners avoid, or at least reduce the likelihood of, preclusion of subsequent, truthful testimony, concededly in conflict with a witness's prior testimony?[5]

Offer an "Adequate Reason" to Explain the Prior Erroneous Deposition Testimony

Notwithstanding the fact that almost every witness I have ever produced for deposition has been nervous, and many, if not most, have made mistakes in their testimony because they were nervous, post-*Ashford* (at least in the Second Department) it would represent the triumph of hope over experience to offer as the reason for a change in testimony, without more, that the witness was "nervous."

If the decision is made (and it should be a conscious decision) to wait for the *errata* sheet in order to correct the witness's testimony, it is critical to sit down with the witness and review proposed changes, and the reasons for the changes, where substantive changes to testimony are being offered. In light of *Ashford*, some attorneys have suggested offering a laundry list of boilerplate excuses for the reason for the change in testimony (akin to the general negligence paragraph in a bill of particulars). I do not recommend this course for two reasons: first, it does not (in my opinion) comply with the requirement that "a statement of the reasons [be] given by the witness for making them";[6] and second, a court is likely to find that the blunderbuss nature of the response constitutes a waiver.

Instead, I suggest the attorney engage in a conversation with the witness to ascertain the reason or reasons for the witness's mistaken answer and, I think of equal importance, the reason the witness now recalls the correct answer. This is one of those rare situations when "more is more," not "less is more."

For example, where the witness has mistakenly testified to a fact, and in reviewing with the attorney simply says "I was nervous" when asked why the mistake was made, further probing will likely reveal that because the witness was nervous, she mistakenly thought the question and answer at issue was a follow-up on the preceding question and answer, whereas, in fact, the focus of the questioning had changed. The witness will likely explain that when reading the preceding question and answer during her review of the transcript she realized she had mistakenly thought the next question flowed from the preceding one when, in fact, it did not, and therefore misunderstood the question. This is the type of question and answer that occurs at trials throughout the state every day where a witness, either on direct or cross-examination, is asked to explain a prior inconsistent answer given under oath.

However, it may not be necessary to wait for the deposition errata

sheet to offer corrected testimony and the reason for the change that must accompany the excuse. The starting point begins at the deposition, while the record is still open. The attorney defending the deposition is presumably well-acquainted with the claims and defenses in the lawsuit, has thoroughly prepped the witness for the deposition (including conducting a mock examination of the critical areas of inquiry), and knows in advance what the sum and substance of the witness's testimony will be.

When the testimony of the witness veers from what is expected during the course of the deposition, the defending attorney must, first and foremost, actually be listening carefully to both the questions and answers so that the departure from expected testimony is immediately apparent. This sounds too basic to require mention, but any seasoned practitioner will tell you it is often not the case.

The risks of attempting a correction during the deposition are real.

Assuming the defending attorney has immediately recognized the problem, the first question is whether something needs to be done at the deposition. If the subject matter is collateral or background in nature, it may be wise to await the errata sheet, since acting at the deposition is not without risk. If, however, the matter is critical to the claims or defenses in the case, it may be wise to attempt to correct the mistaken testimony at the deposition.

The risks of attempting a correction during the deposition are real. For example, assume the witness has mistakenly testified on a critical issue – that the traffic light at an intersection was red when, in fact (and as the witness has been telling you for the past two years), the light was green. It is bad enough to have that mistaken testimony in the record. How much worse is it if the defending attorney, seeking to correct the testimony, interjects and asks "Ma'am, are you saying that the light was red?" Whereupon the witness (no doubt because she is nervous) answers "yes."

Interjecting during the questioning attorney's examination would, of course, run afoul of CPLR 3113(c), since at trial one counsel is not permitted to interrupt the questioning of a witness by the other counsel, unless permission is given by the court to voir dire the witness on a particular issue:

> (c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, *except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party*. When the deponent of a party is taken at the instance of an adverse party, the deponent may be cross-examined by *his or her* own attorney. Cross-examination need not be limited to the subject matter of the examination in chief (emphasis added).

Interjecting may also run afoul of Uniform Deposition Rule 221.3 if it is considered "communicating" with the witness during the deposition:

> § 221.3 Communication with the deponent
>
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Nonetheless, attorneys at depositions not infrequently interject to ask "clarifying" questions. However, attempting to "clarify" a mistaken answer on a critical issue in a case will likely be construed as something more than mere clarification.

CPLR 3113(c) does permit the defending attorney to cross-examine his or her own witness, in turn, after the questioning by the other attorney or attorneys has been completed. The danger in waiting until the end of the deposition to correct the record is that the witness's mistaken answer will have been incorporated into numerous follow up questions, and the witness, not wanting to appear foolish, may feel locked-in to the answer even when the witness realizes it is incorrect. And let's not forget the danger of the attorney representing the witness eliciting the same mistaken answer.

The Rules of Professional Conduct (RPC) may provide a basis for both conferring with the witness during the deposition (otherwise generally prohibited by Rule 221.3 unless consent is obtained or the communication is for one of the purposes specifically permitted by Rule 221.2) and eliciting a contemporaneous corrected answer shortly after the mistaken one.

According to RPC 3.3(a)(1)–(3):

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The New York County Lawyers' Association's Committee on Professional Ethics, in Formal Opinion No. 741, addressed the obligation of an

attorney who learns that a client or witness called by the lawyer has testified falsely.[7] Opinion No. 741 should be read carefully, in its entirety, and repeatedly by any attorney seeking to cite it as justification for interrupting a deposition, unilaterally communicating with the witness being questioned, and then questioning the witness on the record in order to correct the mistaken prior answer.

The opinion makes clear that it applies to deposition testimony, that the attorney's obligation is triggered when the attorney "knows" the testimony to be false, and that it does not matter whether the witness's false testimony is intentional or the result of a mistake. Once the obligation to act is triggered, the attorney "must remonstrate with the client in an effort to correct known false testimony." Remonstrating includes exploring "whether the client may be mistakenly or intentionally offering false testimony." Opinion No. 741 continues: "If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct."

Opinion No. 741 does not discuss the situation where a witness's mistaken testimony is unhelpful to the witness's case, and it is fair to intuit that the opinion is focused on situations where a witness intentionally testifies falsely, and with the intention of bolstering his or her claims or defenses. However, there is nothing in the opinion to suggest it does not apply to the situation where the witness's testimony is mistaken, not knowingly false, and is unhelpful to the witness's case.

Clearly, opportunities for abuse are rife. However, this should not preclude its proper use in an appropriate situation.

Include an Explanation for the Change in Testimony to Avoid the Affidavit Being Labeled "Feigned" or "Tailored"

If a witness who has mistakenly testified to a fact in her deposition furnishes an affidavit in connection with a motion that contradicts her deposition testimony, the proffered affidavit may be deemed "feigned" or "tailored" and therefore be precluded under *Kudisch*.

My suggestion is to take care to acknowledge, in the affidavit, that a different answer was given at the deposition, and then offer the equivalent of the errata sheet corrections suggested above. Again, this is the type of question and answer that would occur at trial where a witness, either on direct or cross-examination, is asked to explain a prior inconsistent answer given under oath.

Conclusion

The work we litigators do is hard and seems to be growing harder with each passing year, and the issues highlighted by *Ashford* and *Kudisch* are good examples of this fact. If you are confronted with an *Ashford/Kudisch* dilemma, navigate carefully, but confidently, and trust that you will not go wrong by doing right.

I hope everyone has a wonderful holiday season, coupled with the opportunity for a well-deserved break from the day-to-day rigors of practice. ■

1. *Walters v. Syracuse R. T. R. Co.*, 16 Bedell 50, 53 (1904).
2. *Id.*
3. *Ashford v. Tannenhauser*, 108 A.D.3d 735 (2d Dep't 2013).
4. *Kudisch v. Grumpy Jack's, Inc.*, 112 A.D.3d 788 (2d Dep't 2013).
5. And these suggestions are offered only to aid in the acceptance of truthful testimony.
6. CPLR 3116(a).
7. http://www.nycla.org/siteFiles/Publications/Publications1340_0.pdf.

Eight "Chiefs"

By Joseph W. Bellacosa

Preface

In 2011, retired U.S. Supreme Court Justice John Paul Stevens published a memoir titled *Five Chiefs*, in which he described his half century in the law – as a law clerk, practicing lawyer, and Associate Justice of the Court, its third longest serving member. As the title indicates, the book's theme focuses on life at the Court under each of "his" Chief Justices, from Fred Vinson to Earl Warren to Warren Burger to William Rehnquist and, finally, to John Roberts.

In April, the Historical Society of the New York Courts hosted its annual gala at the New York Public Library on Fifth Avenue. This year's, titled "At the Helm," honored the three living Chief Judges of the N.Y. Court of Appeals – Sol Wachtler, Judith Kaye and Jonathan Lippman – each of whom I was privileged to serve in various capacities in my 25 years at the Court.

The literary conceit of Justice Stevens' book and the recent Court of Appeals-Historical Society event (with three Chiefs) got me thinking about "my" Chiefs. When I thought about it, I was somewhat surprised to find that in my career I had crossed paths with an unbroken string of eight Chiefs from 1959 to present. Of course, some of these relationships were fleeting or enhanced by hearsay, but others were more intensely personal and interactive, especially after I became Clerk in 1975 and took my seat on the Court in 1987.

My survey spans more than half a century – 56 years of New York State Court of Appeals history. Since the Court, qua its constitutional origination as such in 1849, is relatively young, my scan covers more than one-third of its history. (If I looked in a mirror, my imagination might conjure up a vision of a Dorian Gray-like figure.)

Marcus G. Christ

My memories start with a unifying value and principle, inculcated in me by an early mentor, Hon. Marcus G. Christ. My second job after graduation and admittance to the Bar was as law clerk to this extraordinary appellate judge at the Second Department courthouse in Brooklyn Heights. One lesson, among many, that Judge Christ confided in me was the awe he felt for the Office of Chief Judge, tying this to his very first meeting with one "Chief" – none other than Benjamin Nathan Cardozo. After his introduction to Judge Cardozo at a Bar Associa-

Hon. Joseph W. Bellacosa is a retired judge of the N.Y. Court of Appeals.

Thank you to Mike Spain, Associate Editor of the Albany *Times Union*, and Julianne Claydon, Law Librarian at the N.Y. Court of Appeals, for their help gathering photos.

Left to right: Court Clerk Joe Bellacosa, Chief Judge Charles Breitel and State Supreme Court Justice Lyman Smith. Photo courtesy of Joseph Bellacosa.

tion function, shortly after graduating from Harvard Law School, the Office of the Chief Judge and the occupant of the Court's center chair projected, for him, an "aura" of exceptionalism, setting each Chief Judge apart. I have dubbed this the "Cardozo-effect."

Judge Christ told me that this aura touched every Chief Judge he knew in his 60-year career in the law. That perception – and, yes, sentiment – has stayed with me as a sort of bequest throughout my own career.

I have met eight and worked closely with five occupants of the Court's center chair, and the Cardozo-effect has persisted, even under intimate working circumstances where I got to observe the humanity, personality differences, and even quirks of each Chief.

Another handoff from Judge Christ was his introducing me to one of Chief Judge Cardozo's most eloquent speeches: "Values: The Choice of Tycho Brahe," his commencement address to the Jewish Institute of Religion on May 24, 1931, available in the *Selected Writings of Benjamin Nathan Cardozo*.[1] The beauty of the story it tells and lesson it imparts cannot be justly summarized, so I highly recommend reading it in full.

Thus, I set the stage for the snapshots that follow – my personal "Chief" sightings and encounters over a five-decade professional career.[2]

Albert Conway (1955–1959)

Back in January 1959, I was a student at St. John's Law School, which was located on Schermerhorn Street in downtown Brooklyn. Chief Judge Conway's residential chambers were nearby at the Appellate Division Courthouse, at 45 Monroe Place (a workplace venue I eventually occupied as Judge Christ's law clerk). During the Court's in-chambers sessions, when he was not at Court of Appeals Hall in Albany, Chief Judge Conway often walked the downtown Brooklyn Heights streets near his brownstone home and the Supreme Court Building, off Court Street. His lunchtime strolls often took him to the Brooklyn Club to visit with friends, like then-St. John's Law School Dean Harold F. McNiece, another of my mentors. Thus, one day, as I was passing by, I saw Dean McNiece walking with the Chief. Dean McNiece introduced me to Judge Conway, and, as a first-year law student, I was thoroughly awed, much as Judge Christ would later describe his first meeting with Chief Judge Cardozo.

Judge Conway was a figure right out of Central Casting – tall and erect, with an elegant demeanor. He wore what I later learned was his customary attire of formal striped pants, dark grey suit jacket, rimless glasses and fedora, which he wore cocked ever so slightly. In the few additional times that I chanced upon him thereafter, I looked upon him from a respectable distance.

In later years, I came to know more about Chief Judge Conway through one of my good friends, the late Professor David Siegel, who clerked for the judge in the late 1950s.

One of David's anecdotes related to the fact that Albert Conway had been Superintendent of Insurance under Governor Lehman, an experience that, in David's view, informed his preliminary thinking in liability cases. Thus, the law clerks were instructed to ascertain whether the record disclosed insurance coverage as the Chief was more realist than jurisprude. Apocryphal in whole or in part, the instruction has a Siegel professorial charm and lesson to it.

Another story comes from the late Governor Mario Cuomo who clerked for Judge Adrian Burke while David Siegel was clerking for Chief Judge Conway. Fabian Palomino, also a clerk for Judge Burke, was known for his absentmindedness (sadly, he too passed away within this past year). One morning, Fabian had somehow lingered too long in the Court library stacks, when the doors were closed on what served also (and still does) as the Court's Conference Room. The confidential conferences among the Judges started, and Fabian saw no way to exit without being observed by them, so he settled in with the books. Only later, after the conferences ended, the news started circulating among the clerks that Fabian had stumbled into the confidentiality of the conferences. Mario and Fabian discussed the problem with David Siegel, and they decided they had better tell their bosses. Fortunately, both judges saw the humor and forthrightness in coughing up the backstory right away, so there were no repercussions – except as a good in-house story. Fabian laughed the heartiest, and all three never tired of spinning their versions of it.

Charles S. Desmond (1960–1966)

I first met Chief Judge Desmond when he invited Hon. Marcus G. Christ to be vouched-in as a Court of Appeals Judge for a "covenant running with the land" appeal in the mid-60s.[3] The Court of Appeals was evenly split at 3-3 because of a recusal. A special constitutional authorization allowed the Court itself to replace a judge for a particular appeal. (This authority is still used from time to time.)

The occasion was my first visit to Albany and the Court of Appeals. It was also a professional thrill to assist "my Judge" as his law clerk in the work-up of the appeal, and it gave me the chance to meet Chief Judge Desmond.

My second meeting with Judge Desmond was in 1974, when I was a Professor at St. John's Law School and he was long-retired from the bench. I was retained as co-appellate counsel in *People v. Mackell*.[4] (Thomas J. Mackell, the former District Attorney of Queens County, was lead defendant-appellant.) The third member of the appellate team (actually the lead lawyer and trial counsel) was my classmate, lifelong friend, and soon-to-be Mayor Ed Koch's Police Commissioner, Robert J. McGuire. The three of us prepared a joint appellants-defendants' brief and won a reversal of the conviction that had been obtained at trial before Judge John Mur-

Starting at top left and moving clockwise: Court Clerk David Siegel and Chief Judge Albert Conway, photo courtesy of The Historical Society of the Courts of the State of New York; Chief Judge Stanley Fuld standing on a desk, photo courtesy of The Historical Society of the Courts of the State of New York; "Did it ever occur to you that we may both be making a mistake?" photo courtesy of Joseph Bellacosa; The Court spittoons are still under the bench, photo by Lisa Bohannon; Chief Judge Adrian Burke, from the cover of his memoir, "Everything I Needed: Living and Working in New York," Golden String Press, 2004.

tagh by then-Special Prosecutor Maurice Nadjari. The case served as the last straw in a troubled period of "special prosecutorial" abuses in grand jury violations, unfounded indictments and prejudicial press/media leaks affecting criminal prosecutions. It contributed significantly to Governor Hugh Carey's ultimate decision to remove that special prosecutor. As the Second Department stated in dismissing the indictment entirely: "Although a certain number of errors must be expected in a trial which lasts several weeks, there were transgressions here of such quality and quantity as to severely prejudice the defendants."[5]

By the time the appeal reached the Court of Appeals, however, I had been appointed Chief Clerk and Counsel to the Court and, needless to say, had no involvement with that final appeal. Indeed, then-Chief Judge Charles D. Breitel explicitly directed me to "go take a walk" in a nearby Albany park during oral argument.[6]

During my tenure as Chief Clerk, Judge Desmond would also call me from time to time to ask for sets of appeal briefs, particularly useful as teaching tools, for his class at Cornell Law School.

I was still Clerk in 1982, when newly elected Governor Mario Cuomo asked former Chief Judge Desmond to perform the swearing-in at Cuomo's first inauguration ceremony. This awkward departure from standard protocol – usually that was a role for the sitting Chief Judge – was explained as follows: Judge Desmond had been a member of the Court of Appeals when Cuomo started his career as law clerk to Judge Burke; Cuomo often adverted to his formative experience under judicial models he admired and respected, so he picked a judge from that career-shaping era for the swearing-in place of honor.

Stanley H. Fuld (1967–1973)

In 1967, while I was still his clerk, the Hon. Marcus G. Christ was again vouched-in for service as an Associate Judge of the Court of Appeals, this time for the appeal in *People v. L. Judson Morhouse*.[7] This significant appeal was on the Court's criminal docket and involved the Republican State Chairman who was very close to Governor Nelson Rockefeller. Morhouse had been convicted in a bribery scheme to secure a liquor license for the then-fledgling New York Playboy Club.

As Judge Christ's law clerk on the case, I got to meet Chief Judge Stanley Fuld. Of course, while proud that my judge had again been selected to fill in at the Court, I felt I was getting the hang of this law clerking role at the Court of Appeals.

A few years later in 1970, when the time came for me to move on from my work with Judge Christ and begin the first academic phase of my career, my P.J. recommended me to Chief Judge Fuld for appointment as a charter member of the newly formed Criminal Procedure Law Advisory Committee to the Judicial Conference at the Office of Court Administration. That appointment brought me together with renowned experts in the criminal law field and ultimately led to my selection in 1974 as

Starting at top left and moving clockwise: Court Clerk Fabian Palomino after his release from the Court library stacks, photo courtesy of Joseph Bellacosa; Chief Judge Charles Desmond, photo courtesy of the N.Y. Court of Appeals; Incoming Chief Judge Jonathan Lippman and outgoing Chief Judge Judith Kaye, photo courtesy of the New York State Bar Association; Chief Judge Larry Cooke with his wife, Alice, photo courtesy of The Historical Society of the Courts of the State of New York.

the McKinney's Criminal Procedure Law Practice Commentator, an adjunct job I performed for 10 years.

Some 15 years later, after I was appointed a member of the Court, Chief Judge Wachtler invited former members of the Court to a private "Welcome Back" dinner in the courtroom with the then-present members. As the evening was concluding and photographs were being taken, Judge Wachtler invited Judge Fuld (Wachtler's first Chief when he joined the Court in 1974) to stand at the lawyer-argument lectern, as though he were presenting an appeal. Judge Fuld had expressed a desire at long last to do so because he never did as a lawyer but served only on the other side of the bench. Judge Fuld also climbed on a desk at the rear of the courtroom and posed with his arm raised at an angle, as though touching his own portrait as Chief Judge, which hangs on the upper wall of the courtroom. These two Chiefs, one with a robust sense of humor and the other a dry deadpan type, turned the second photograph into a symbol of a person touching his own past and also connecting the historical threads of institutional leadership and collegiality.

Charles D. Breitel (1974–1978)

When Chief Judge Breitel invited me to leave my academic cocoon as a Professor at St. John's University School of Law in 1974 to become Chief Clerk and Counsel to the Court, I had doubts about whether this was a good idea, as it required my family to move to Albany. The Chief was very persuasive, and he encouraged me to talk to friends. My part-time academic colleague, Mario Cuomo, had just been invited to leave his law practice and adjunct teaching post to join the newly elected Hugh Carey administration as Secretary of State. So, Mario and I met in my faculty office in December 1974 to mull over our respective summonings. The result of our conversation is evidenced by a precious hand note, in which Cuomo posed a fanciful question as to whether we were both making a mistake accepting new jobs in Albany. I read the note, from Mario to Joe, dated December 21, 1974, just 12 years later, on January 5, 1987, on my appointment to the Court. From the bench, before the six other judges and by-then-Governor Mario Cuomo, I declared I had the answer to his query: we obviously made no mistake in going blindly to Albany in 1975 as he was Governor, and I was the newest Judge of the Court.

My appointment as Chief Clerk began in January 1975 at an exciting time, as much of the day-to-day work also brought fundamental changes in the appeals case management systems. Chief Judge Breitel and the Court wanted a transformation of both the Court's philosophy and methods of operation, and I was charged to bring them about.

Equally fruitful to my professional maturity was working on statewide judicial initiatives with the Judges of the Court and leaders of the other branches of state Government, like Governor Carey, Secretary of State Cuomo, Assembly Speaker Stanley Fink and State Senate Majority Leader Warren Anderson.

From left to right: Governor Mario Cuomo, Chief Judge Sol Wachtler, Judge Judith Kaye, Judge Vito Titone and newly minted Judge Joseph Bellacosa. The Governor sits on the bench with the Court when a new judge is sworn in. Photo courtesy of Joseph Bellacosa.

Chief Judge Breitel led the reform that brought about centralized judicial administration and statewide funding of the courts, under a first Chief Administrative Judge (the renowned Richard J. Bartlett, who also passed away this year). Judge Bartlett became the head of the Office of Court Administration, officially re-dubbed the Unified Court System. As part of the trilogy of constitutional reforms in that exciting era, the independent Commission on Judicial Conduct replaced the unwieldy *ad hoc* Court on the Judiciary.

The most important reform, however, from a personal perspective, was the conversion to a state constitutional appointive system for the judges of the Court of Appeals, replacing the election system. Merit terminology and debates aside, this was transformative and eventually led me to think an otherwise unthinkable thought: the opportunity to become a Judge of the Court. Amazingly, it came to pass.

During my service under Chief Judge Breitel, one crisis stands out for comment. Simply stated, the Chief Judge determined on evidence that came to the Court's attention that judicial misconduct specifications had to be lodged against one of the Court's own members, Judge Jacob D. Fuchsberg. For context, Judge Fuchsberg had run against Judge Breitel for the chief judgeship in 1972 in a bitterly contested statewide campaign, when the Court of Appeals was still an elective office. Remarkably, Jacob Fuchsberg had rebounded and secured one of the last elected positions on the Court (he and Lawrence Cooke arrived at the Court at the same time as I did, January 1975). The elections of the first half of the 1970s had motivated Judge Breitel to press for the Commission of Judicial Nomination appointive system reform so no one would ever have to go through that experience again, so he stated.

Enough context and now back to the crisis. As Clerk, I had to execute the notifications for the convening of a Court on the Judiciary to hear the specified charges against Judge Fuchsberg. In addition to coordinating matters for the members of the Court on the Judiciary, I had to deal with organization of the prosecution team, led by former Federal Judge Harold "Ace" Tyler and his then-assistants Rudolph Giuliani and Richard Parsons of the Patterson Belknap firm. As the formal Clerk of that Court, I had to deal with (along with my regular day job at the Court of Appeals) all the lawyers and judges from time to time, including Judge Fuchsberg's chief counsel, Herbert Wachtell. The Court on the Judiciary made findings that resulted in a public censure,[8] and Judge Fuchsberg remained on the bench until his resignation in 1983.

I wish now to move to a positive, and delightful, human interest story. On my arrival at my new Clerk's Office in 1975, I found a magnificent silver filigreed cup (not unlike the America's Cup) sitting on a table in a corner of the office. On close inspection, I discovered that it was the retirement gift given to Chief Judge Willard Bartlett (1914–1916) and it bore the signatures of the members of his Court, including that of a successor "Chief" Benjamin N. Cardozo. I asked Judge Breitel what I should do with this valuable heirloom. As it happened, a former law clerk of Judge Breitel, James W.B. Benkard, was the grandson of Judge Bartlett. The "Chief's" instruction was to call Jim Benkard about the former "Chief's"

cup and return it to its rightful owners – to the enormous surprise and delight of the Bartlett and Benkard families.

Lawrence H. Cooke (1979–1984)

Upon Chief Judge Breitel's retirement at the end of 1978, Judge Cooke leap-frogged, via Governor Carey's appointment, from Junior Judge Chair # 7 to become the new "Chief" in Center Chair # 1. I was asked to continue my service as Clerk and Counsel at the Court.

Since his designation was the first under the new appointive system, I enjoyed coordinating the transition with the Governor's Chief Counsel, Richard A. Brown (now the long-serving District Attorney of Queens County). He and I choreographed the first-time ever swearing-in ceremony for an appointed Chief Judge. For the official ceremony, we arranged for the Governor to sit on the Court of Appeals bench alongside the seven judges of the Court.

During Chief Judge Cooke's tenure, the New York State Bar Association sought the establishment of a Clients' Security Fund (now the Lawyers' Fund for Client Protection). The bar leadership asked the Court to effect it by rule, but Judge Hugh R. Jones, the chairperson of the Court's Committee for such matters (and a former State Bar President), determined that legislation was necessary. When the bill started to move, as often happens in the dead of night at the end of the session, I received a call from the lead counsels of the two State Houses, asking a simple question: Should the appointing authority for the seven-member Lawyers' Fund Trustees be "Chief Judge" or "Court of Appeals"? I answered, "The Court," and it was so enacted, to the dissatisfaction of the Chief Judge who desired the personal appointment authority. Judge Jones saved my skin by explaining that I had simply carried out his specific instruction, as Chair of the Court's Committee: The Fund Trustees should be responsible to the Court *qua* institution, not the occupant of the Chair of the Chief Judge.

A second story of this period involves a case, *Morgenthau v. Cooke*.[9] Robert Morgenthau, the sitting District Attorney of New York County, had sued the Chief Judge concerning a rotation of judges plan, challenged as ultra vires. The appeal wound its way up to the Court of Appeals itself. The Chief Judge, as named party, was recused and the other six judges, though their own consultative role for rule-making was implicated, were required to rule on the constitutionality of the Chief Judge's actions. The "rule of necessity" was invoked so the Court could resolve the purely State question[10] that supported Mr. Morgenthau's challenge. I was given the uneasy duty to leave the Conference Room and report the unwelcome news to Chief Judge Cooke that his own Court had ruled against him.

I soon left the position of Clerk to return to an academic position with former Chief Administrative Judge Dick Bartlett, by then Dean at Albany Law School.

Sol Wachtler (1985–1992)

At the beginning of 1985, Governor Cuomo surprised some people by appointing Associate Judge Sol Wachtler as the next Chief Judge of the Court. A subsequent surprise stunned some others: I was selected by the new Chief Judge to be the next Chief Administrator of the State Unified Court System. Governor Cuomo soon thereafter appointed me as a Court of Claims Judge to enhance the authoritative perception among the judicial officers of the State for the more effective exercise of the powers of that Chief Administrative Judge Office. Dean Bartlett, the first to hold that office, released me from my academic duties at Albany Law School, and with the approval of the four Presiding Justices of the Appellate Division, as required, I assumed that office.

My proudest achievement during that time directly affected the Court's day-to-day work during those years. That was the negotiation, with the Court's unanimous encouragement, of a long-sought change via Chapter 300 of the Laws of 1985. It converted the Court's civil docket to virtually full certiorari. The immediate impact was a reduction, from when I arrived as Clerk of the Court in 1975, of approximately 700 argued civil and criminal appeals annually to fewer than 200 in 1986 and every year since then. The rationale was that this would allow the court of last resort to concentrate more effectively on the worthiest appeals within the finite time for judicial

consideration. I can vividly recall then-Speaker Stanley Fink smiling, gritting his negotiating teeth and commenting, "Admit it, Joe, this is just a 'less work for judges bill,' isn't it?" I assured him it wasn't that at all.

On the administrative/executive side of the total Judicial Branch trial calendar operations, many judges and OCA staff helped to effectuate Chief Judge Wachtler's commitment to move the management of the dockets of all the trial-level courts to the IAS (Individual Assignment System).

> The most important reform, however, from a personal perspective, was the conversion to a state constitutional appointive system for the judges of the Court of Appeals, replacing the election system.

After two years and some months in the role of Chief Administrative Judge, I was privileged to receive the ultimate lawyer's prize – an appointment to the Court where I had toiled before. And in 1987 I joined this "Chief" as the Junior Judge colleague (I was given the nickname "JJ").

A word about Chief Judge Wachtler's sense of humor at oral arguments is worth mentioning here. One day, William B. Kunstler was patronizing me with allusions to my published CPL Commentaries in the effort, no doubt, to secure my vote. Judge Wachtler admonished Mr. Kunstler that what I had written with academic freedom about the particular statute in question surely did not bind the rest of the Court, which operated by constitutional oath independently of commentators. Mr. Kunstler took the hint and moved on to Point 2 of his argument.

In another instance, I asked a neophyte lawyer to "step back," meaning figuratively, from the particular case facts to explore the precedential ramifications. Before I could pose my question, the chap let go of the lectern and threw himself into reverse, still facing the Court as he moved away. The Chief called him back, saying, "Pay no attention to Judge Bellacosa, the red light is not on and you still have time left for your argument." I never did get to ask my question because of the howls of laughter, unfortunately at the poor young lawyer's expense. I saw him months later and apologized, and he said that was OK as his appearance at the Court of Appeals was especially memorable.

One last story of my years with Chief Judge Wachtler: I had to introduce him so many times at Bar Association events and judicial functions that I frankly tired of the C.V. bio script (no doubt he and the audiences tired, too). So, one night at a crowded black-tie event at the Waldorf Astoria, I introduced him as *Il Grande Pappataci*, a title that I borrowed from a comic opera *L'Italiani in Algieri* by Gioachino Rossini. It is the story of enslaved Italians held in North Africa by an evil Sultan. They concoct an escape scheme. They would honor their Master by conferring a new title upon him, and when he became distracted by the revelry, they would escape to La Bella Italia. Well, the Waldorf Bar audience enjoyed the fanciful spoof – no more so than Judge Wachtler who still recalls it as the funniest honorific title he has ever worn.

In the early '90s, most unfortunately, Chief Judge Wachtler suffered a personally and institutionally painful fall from grace and from the Court he loved – for which he paid an enormous price. First, he voluntarily surrendered his cherished Office as "Chief" and ended his long and distinguished 20 years of service on the Court, and then he had to undergo a stint in two different federal prisons. I know they were awful and so was his time there because I visited him as a plain old citizen and friend. (Many of those painful details are recorded elsewhere, so there is no need for any further discussion here.)

In the aftermath, the Court proved its institutional mettle. The other six members pulled together for the good of the institution and carried out their judicial responsibilities with dignity and efficiency. Sol Wachtler survived, too, and still bears the "aura" of the "Chiefs," so far as I am concerned, with the added luster of *Il Grande Pappataci*!

Judith S. Kaye (1993–2008)

I was Clerk when Governor Mario Cuomo made history under the relatively new appointive system by selecting the first woman, Judith Kaye, for a seat on the Court. I had known her from a few years earlier when she was selected as a charter member of the Board of Trustees of the Clients' Security Fund. She immediately and comfortably settled in during that 1983 year as the newest Judge of the Court. Despite having no prior judicial service, she did not miss a beat because of her prodigious preparation and the superlative execution of her work.

In that summer of 1983, Judith Kaye came to visit the Court with her beloved husband, Stephen. This was right after the Governor had announced her appointment – which then had to undergo the process of Senate confirmation. The Governor called me in advance of the visit to tell me to give her the "royal court treatment," even though it was summertime and the Court was not in session. I walked her and Stephen through the inner sanctum of the Conference and Robing Rooms. We entered the dark courtroom from the bench side – an awesome first experience for anyone – and her observation skills, always acute, picked up the polished bronze spittoons under the bench, interesting artifacts of a distant era, and hidden from public view, of course. I smiled and spontaneously quipped that as the newest Judge of the Court she would, of course, be expected to learn to "chew and spit." Stephen almost fell off the bench laughing. Judge-designate Kaye's quick response was, "Maybe after you

arrange for a woman's bathroom in the Robing Room, or at least a lock on the door of the existing one."

Only a few years later, in 1987, I was fortunate to become one of Judge Kaye's colleagues on the Court, and afterwards, I proudly sat alongside her when Governor Cuomo appointed her Chief Judge in 1993.

Not very long afterward, a somber Chief Judge Kaye walked into my Chambers across the corridor to utter a different end-of-session goodbye, saying that she might not be coming back to Albany. I was stunned, as she confided that she had been summoned to Little Rock to talk to President Clinton about both a vacancy on the Supreme Court and the office of Attorney General. We hugged and I wished her well. Fortunately for the Court of Appeals, she said, "No thanks, Mr. President" to whatever he was contemplating, and she remained as our Chief for a long and successful tenure. She, of course, had a Cardozean "aura" of her own unique distinction.

I left the Court at the virtual completion of my full term in September 2000, at age 61, to return to family needs downstate (my career and family sojourn in Guilderland had lasted 25 years) and to my long-interrupted academic life at St. John's Law School, this time as Dean.

Jonathan Lippman (2009–2015)

I got to know this present "Chief" quite well in the mid-1980s when I was Chief Administrative Judge. Jonathan Lippman was head of the Law Department of the Manhattan Supreme Court, and Chief Judge Wachtler and I recognized that his talent and experience would greatly assist in the planning and implementation of the Individual Assignment System, and his contribution to the project was essential to its success. He performed so well throughout the years in all of his assignments that he kept getting promoted. He, too, attained the role of Chief Administrative Judge and served for many years under Chief Judge Kaye's leadership as Chief Judge of the State. Judge Lippman served a record number of years in that tough, grinding post. As fate would have it, one (or many) good turn(s) led to another, and he came to be appointed as the Presiding Justice of the Appellate Division of the First Judicial Department. That served as the final launch pad to his present position of Chief Judge, which he must vacate by reason of constitutional age requirement at the end of 2015.

Conclusion

Writing this survey has allowed me to "step back," as well as to share some of the details and textures of my experiences with my eight Chiefs. I conclude that each, in his and her own special way, has lived up to Judge Christ's early characterization to me that the occupant of that High Office has an aura, that mystical and magical "Cardozo-effect."

Each Chief Judge brought distinctive leadership qualities and fresh ideas that built upon the strong tradition and bright history of the Court of Appeals, giving New York's highest Court its preeminent place in the jurisprudence of the nation. Each Chief Judge also stood on the shoulders of his or her predecessors and served not for personal aggrandizement or Ozymandean fame but for the higher value and purpose of advancing the cause and administration of justice for all people.

That observation draws back to mind Judge Christ's oft-quoted invocation of that extraordinary speech by Chief Judge Cardozo, the "Values" commencement address to the Jewish Institute of Religion in 1931. There, Judge Cardozo described to the graduates the story of the 15th-century Danish astronomer Tycho Brahe. In it he quotes Alfred Noyes's poem about the astronomer:

> Yet, I still hope in some more generous land
> To make my thousand up {counting stars} before I die.
> Little enough, I know – a midget's work.
>
> The men that follow me with more delicate art
> May add their tens of thousands; yet my sum
> Will save them just that five and twenty years
> Of patience, bring them sooner to their goal,
> That Kingdom of Law that I shall not see.

Then, this Cardozean peroration and plea to the graduates:

> *If you are true to your mission as sons of this Institute of religion, summoned from this day forth to live its deepest verities, your choice will be the same. The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why.*

That awe-inspiring sample puts the exclamation point on this survey covering 1959 to present. Anyone entering the magnificent Court of Appeals Courtroom should gaze up, as I did during my gifted 25 years of varying services there, and look up to the Cardozo portrait on the top front left wall. There, the "Chief of Chiefs" still presides and benevolently peers down on his successor judges with that majestic "aura" – the model of a Chief for all times. ■

1. Margaret E. Hall, ed., Selected Writings of Benjamin Nathan Cardozo (Bender & Co. 1947).
2. Albert M. Rosenblatt, ed., The Judges of the New York Court of Appeals (Fordham Univ. Press 2007).
3. *Steinmann v. Silverman*, 14 N.Y.2d 243 (1964).
4. 47 A.D.2d 209 (2d Dep't 1975).
5. *Id.* at 220
6. *People v. Mackell*, 40 N.Y.2d 59 (1976); *see also* Criminal Procedure Law § 450.90(2).
7. 21 N.Y.2d 66 (1967).
8. 426 N.Y.S.2d 639 (1978).
9. 56 N.Y.2d 24 (1982).
10. *Id.* at 29, n.3.

New Criminal Justice Legislation

By Barry Kamins

This article discusses new criminal justice legislation, signed or to be signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law (CPL), and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws; the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

Two substantive pieces of criminal justice legislation were enacted in the last session.

Trafficking Victims Protection and Justice Act

The first, titled the Trafficking Victims Protection and Justice Act, significantly enhances protection to victims of human trafficking, and in particular addresses the commercial sexual exploitation of children. In addition, it increases the accountability of traffickers.[1]

One provision of the new legislation conforms the penalties for patronizing a prostitute when the person being patronized is under 17 years of age, with the penalties for rape when the victim is under 17. It accomplishes this by creating a new crime, Aggravated Patronizing a Minor for Prostitution in the 1st, 2nd and 3rd Degree. The crime both prohibits specific sexual conduct not covered by existing patronizing statutes and aligns the penalties for these new crimes with the penalties for Rape in the 1st, 2nd and 3rd Degree.

The new legislation also aligns the age of the victims in each degree of Patronizing a Prostitute with the age of the victim in the corresponding degree of rape offenses. In addition, it increases the age at which a person can be charged with Promoting Prostitution in the 1st and 2nd degree. Finally, the new legislation increases both the age at which a person can be charged with Compelling Prostitution as well as the age limit of the victim.

Other provisions of the legislation increase penalties for certain forms of sex and labor trafficking. Those crimes have now been designated violent felonies where the defendant causes physical injury, serious physical injury, death or property damage.[2] In addition, the legislation creates a new offense, Aggravated Labor Trafficking, a class C felony. A person can be convicted of this crime when he or she compels another person to engage in labor by intentionally providing a controlled substance to such person for the purpose of impairing his or her judgment.

In response to concerns about patronizers who frequent school zones, a new crime was enacted: Patronizing a Person for Prostitution in a School Zone, a class E felony. Under this provision it is unlawful for a person who is 21 years or older to patronize a person under 18 years of age, in a place that the patronizer knows or reasonably should know is a school zone.

In 2010, the CPL was amended to enable a person to vacate a conviction of prostitution when his or her participation in the crime was a result of having been the victim of human trafficking. The new legislation complements

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that amendment by establishing an affirmative defense at trial to Prostitution or Loitering for the Purpose of Engaging in a Prostitution Offense. A defendant can now assert the defense by arguing that his or her participation in the crime was a result of having been the victim of Sex Trafficking, Compelling Prostitution or trafficking under the federal Trafficking Victims Protection Act.[3]

A victim of Sex and Labor Trafficking and Compelling Prostitution may now commence a civil action for damages against his or her trafficker within 10 years after the victim is no longer subject to the victimization. Finally, all references in the Penal Law to "prostitute" have been replaced with the phrase "person for prostitution," a gender-neutral term. Legislators noted that nowhere else does the Penal Law designate a defendant by the crime charged – that is, "murderer" or "robber" – and this change will eliminate the stigma created by the term "prostitute."

College Campus Sexual Assault Prevention and Response Bill

The second substantive piece of legislation is the college campus sexual assault prevention and response bill.[4] This law is intended to change the manner in which colleges and universities in New York State address reports of sexual assaults, dating violence, domestic violence and stalking.

The law requires schools to amend their codes of conduct to enhance a student's ability to report incidents of sexual assault to local law enforcement officials and to give students more control over the process that unfolds once an incident occurs. Schools must adopt a student's bill of rights as part of its conduct code. In addition, educational institutions must adopt procedural guidelines for student violations including due process requirements, appeal procedures and victim impact statements. The law also creates a definition of affirmative consent to sexual activity that requires a clear affirmative agreement between partners.

Executive Order Designating the Attorney General a Special Prosecutor

Another substantive development in the criminal justice system is the result of an executive order issued by the Governor. In response to a series of deaths of unarmed civilians at the hands of police, Governor Cuomo issued an executive order designating the Attorney General a special prosecutor to investigate and, if warranted, prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer.[5] The order has a one-year term and does not apply retroactively.

The executive order empowers the Attorney General, who supersedes all District Attorneys in these matters, to conduct an investigation by, among other things, gathering evidence, conducting witness interviews, reviewing scientific reports, and reviewing video recordings. Where the Attorney General, acting as special prosecutor, declines to prosecute or where a Grand Jury declines to vote any charges, he must file a report with the Governor explaining the outcome and offering any recommendation for systemic reform arising from the investigation.

Expanded Crimes; Increased Penalties

Each year the Legislature has expanded the definitions of certain crimes and increased penalties for others, and this year was no exception. First, the Legislature closed what some believed to be loopholes in the definition of two sex crimes. It expanded the definition of Forcible Touching by making it unlawful to subject another person to sexual contact for the purpose of gratifying the actor's sexual desire when the other person is a passenger on a bus, train or subway. This amendment was in response to reports of individuals using public transportation who rub their genitals on fellow passengers while masturbating.[6] Second, the definition of Public Lewdness was expanded to include individuals who engage in lewd acts while trespassing in a dwelling. This amendment followed an incident in which a Westchester homeowner discovered her neighbor masturbating while in the homeowner's dining room.[7]

The Legislature has increased the penalty for assaulting four classes of individuals: emergency medical paramedics and emergency medical service technicians; individuals who work at a secure facility and who are employees of the Office of Mental Health or the Office for People with Developmental Disabilities; health care workers who are not nurses but who provide direct patient care at various health care facilities; and public heath sanitarians (those who conduct environmental health inspections). Simple assaults against these individuals will now elevate a misdemeanor charge to a class D felony.[8]

A person who performs services as a private investigator without a license can now be charged with a class A misdemeanor.[9] An individual who uses an unauthorized sticker or label on an official election ballot can now be charged with a class E felony.[10]

The Legislature enacted a series of new crimes in the last session. In response to the widespread use of new synthetic drugs, the Legislature has added several substances to the list of hallucinogenic substances under the Penal Law. These substances, known as "N-Bomb" or "Smiles," are meant to mimic the effects of LSD as a hallucinogen. In many cases, however, these drugs can have devastating side effects. Possession or sale of these substances can constitute either a misdemeanor or a felony, depending upon the weight of the substance.[11]

The Legislature also enacted a new crime, Aggravated Leaving the Scene of an Incident Without Reporting, a class C felony, in response to reports of individuals who have left the scene of accidents that resulted in serious

physical injury or death. A person can be convicted of the crime if he or she engages in reckless driving, leaves the scene of an accident where more than one person has been killed or seriously injured and (1) whose driver's license has been revoked or suspended based on a conviction of Driving While Intoxicated, Driving While Impaired or Leaving the Scene of an Accident, or (2) has been convicted within the past 10 years of the above offenses.[12]

Sealing provisions have been amended to authorize a local criminal court to unseal records; previously only a superior court could do so, even where the application to unseal involved records that a local criminal court had initially sealed.[18]

In the area of drug treatment courts, the Legislature has amended the CPL to impose a uniform state policy permitting drug courts to authorize medically prescribed treatment in a judicial drug diversion program. Previously some courts had required participants to wean off medication, such as methadone, in order to continue participation in their programs. The new policy will permit courts to allow defendants needing treatment for opioid abuse or dependence to have access to medication such as methadone and buprenorphine (brand name Suboxone). The new law permits treatment under the care of a duly licensed health care professional and prohibits a court from requiring a defendant to taper off the medication in order to remain in a diversion program.[19]

The Fair Chance Act prohibits employers from inquiring about an applicant's criminal record until after they have made a conditional offer of employment.

Following a series of articles in the *New York Times* about working conditions in nail salons, it is now an unclassified misdemeanor to operate an "appearance enhancement business," for example, a nail salon, without a license. The penalty for this offense is a $2,500 fine and a maximum of six months' imprisonment.[13]

It is now a misdemeanor for any owner or manager of a residential building to discriminate against a victim of domestic violence by refusing to rent a residential unit to such person because of such person's status as a victim. The penalty carries no imprisonment, but imposes a fine of from $1,000 to $2,000.[14]

Finally, individuals who conceal a body to prevent the discovery of a person's death can now be charged with Concealment of a Human Corpse, a class E felony.[15]

Procedural Changes

A number of procedural changes were enacted in the last legislative session. One amendment affects the expiration date of orders of protection in certain cases. When the CPL was amended in 2006 to extend the permissible duration of a Final Order of Protection, the amendment did not account fully for the extended probation periods that were required for sexual assault convictions in felony and misdemeanor cases. As a result, orders of protection in these cases would expire before the defendant had completed probation. The amendment extends the expiration date on an order of protection for a felony sexual assault conviction where probation is imposed to 10 years from the date of sentencing and to six years from the date of sentencing in a misdemeanor case where probation is imposed.[16]

A new rule of evidence has been enacted. In any prosecution for Prostitution or Loitering for the Purpose of Engaging in a Prostitution Offense, a prosecutor may no longer offer evidence that a person was in possession of one or more condoms for the purpose of proving probable cause for an arrest or for the commission of the crime itself.[17]

Finally, the Legislature has taken steps to expand the use of e-filing throughout the state. The initial legislation, authorizing the use of e-filing in designated counties and courts, was set to expire on September 1, 2015. The new legislation extends the sunset date to September 1, 2019, and continues the present authorization for the use of e-filing, both consensual and mandatory, in Supreme Court and County Courts. The new law also contains a provision authorizing each Appellate Division Department to promulgate rules authorizing the e-filing of appeals in criminal cases. However, before promulgating such rules, all groups that would be affected must be given an opportunity to review and comment on the rules.[20]

New Laws Affecting Crime Victims

A number of new laws will affect crime victims. One law provides for counseling programs for victims of sex offenses and child pornography crimes[21] while another permits the grandchild of a homicide victim to be reimbursed for counseling.[22] Non-English speaking victims of domestic violence are now assured that their report to the police will be promptly translated into English in order to effectuate a swift investigation.[23] Victims of domestic violence will also benefit from an amendment allowing people who change their names to seek waivers from the requirement that notice of a name change be published in designated local newspapers; they can now obtain a

waiver without the necessity of showing a history of past abuse.[24]

Victims of violent felonies can now avail themselves of a standardized form that will require law enforcement officials to notify them if the defendant has petitioned to change his or her name.[25] Crime victims who apply for victim compensation will not need to show proof of financial difficulty if their claim is $10,000 or less.[26] Finally, a court must waive the DNA data bank fee when the defendant is the victim of human trafficking and has been convicted of certain enumerated crimes relating to prostitution.[27]

Vehicle & Traffic Law

A number of changes have been made in driver-related offenses under the Vehicle & Traffic Law (VTL). One amendment will affect sentences of probation or a conditional discharge where there is a condition that the defendant install and maintain an ignition interlock device (IID).

Sentencing judges will normally impose a specific time period during which the IID must be maintained. However, when a defendant is accused of violating a condition of probation and the court issues a declaration of delinquency, there is no automatic extension of the end date of the IID condition nor an express provision that would require a defendant to maintain the device during the delinquency period.

Thus, a defendant may inappropriately benefit when violating a sentencing condition if the court files a declaration of delinquency. The amendment will now require a defendant to maintain the IID device during the period of any declaration of delinquency and will authorize the court to extend the period of maintenance until the delinquency period terminates.[28]

In addition, when a motorist is charged with a violation of the VTL and the charge is dismissed, a motorist may no longer be charged with a fine or penalty of any kind.[29]

New Laws Affecting Prisoners

Several new laws will affect prisoners, and some of these relate to mental health issues. Initially, a new law provides that a parole hearing shall not proceed if the parole violator appears to be mentally incapacitated. In such cases, Article 730 of the CPL will be triggered to determine whether the parolee is mentally fit to proceed.[30] In addition, inmates will now have more opportunities for their families to communicate with the Department of Corrections and Community Supervision about the inmate's medical condition.[31]

The Department of Corrections and Community Supervision will now make the final determination regarding the medical release of inmates who are convicted of non-violent crimes.[32] Incarcerated women who are pregnant or who have delivered within the preceding eight weeks will no longer be subjected to shackling unless extraordinary circumstances exist.[33]

Finally, the Commissioner now has the discretion to advance an inmate's scheduled parole release date from a Friday to a Thursday in order to ensure that the parolee reports the next day to a community supervision program. In the past, when parolees were released on a Friday and, as a result, did not report until Monday, there was a risk that the parolee might violate a parole condition during the two-day period prior to his or her reporting.[34]

Numerous laws have had their expiration dates extended. The following statutes have been extended until September 1, 2017: determinate sentencing; the ignition interlock program; inmate work release program; electronic court appearances in designated counties; and the use of closed-circuit television for certain child witnesses.[35]

The Legislature has extended the process by which a driver's license will be suspended if the motorist fails to pay child support; the law was extended until August 31, 2017.[36] Finally, the expiration date of a statute regulating the resale of tickets to places of entertainment within certain buffer zones has been extended until May 14, 2016.[37]

Miscellaneous Laws

Various miscellaneous laws were passed this session. One bill would provide the Wyoming County District Attorney's office with a more flexible recruiting process by permitting assistant district attorneys to be hired from adjoining counties. Wyoming County has the eighth smallest population in the state and other small counties, such as Putnam, Fulton and Essex, have in the past been afforded an exception to the requirement that prosecutors reside in the county.[38]

One new law expedites the availability of medical marijuana to certain patients whose serious health conditions warrant immediate use even before implementation of the 2014 medical marijuana law.[39]

The Fair Chance Act will affect all New York City employers, both public and private. The law prohibits employers from inquiring about an applicant's criminal record until after they have made a conditional offer of employment. New York City joins other localities that have adopted this policy, including the cities of Buffalo, Rochester, Syracuse and Yonkers, and Ulster County.

If, after receiving information regarding the applicant's record, the employer no longer wishes to employ the applicant, the employer must give a reason and provide a copy of the record to the applicant. The position must then be held open for at least seven business days during which time the applicant can respond, question any inaccuracies in the record and offer explanations regarding the criminal record. The employer need not wait for a response beyond seven days.[40] The law provides exemptions for public and private employers who

are required by law to conduct criminal background checks and for several city agencies including the Police Department, Fire Department and Department of Corrections.

Finally, a new law prohibits the sale or manufacture in New York City of synthetic marijuana, commonly known as K2.[41] Possession of 10 or more packets, individual containers or separate units of this substance would be presumptive evidence that an individual possessed the items with intent to sell. A violation of this section constitutes a misdemeanor punishable by a fine of up to $5,000 or imprisonment of up to one year, or both. An individual would also be liable for a civil penalty. First-time violators who have not been previously convicted of a felony or a serious offense as defined in Penal Law § 265.00(17) would be liable for a civil penalty of between $500 and $5,000 per violation. In addition, the law permits the sealing of a business when there are two violations of these provisions in a three-year period. ■

1. 2015 N.Y. Laws ch. 368, eff. Jan. 19, 2016.
2. The statute has an error that will need to be corrected. It referenced Penal Law § 135.35(3) rather than § 135.35(4).
3. 22 U.S.C. ch. 78.
4. 2015 N.Y. Laws ch. 76 (adding Education Law art. 129-B), eff. Oct. 5, 2015; *see also* S. 1316 (awaiting the Governor's signature).
5. Executive Order 147, eff. July 8, 2015.
6. 2015 N.Y. Laws ch. 250 (amending Penal Law § 130.52), eff. Nov. 1, 2015.
7. 2015 N.Y. Laws ch. 373 (signed by the Governor Oct. 26, 2015).
8. S. 4839, S. 3913, A. 1034, and A. 7542 (all awaiting the Governor's signature).
9. 2015 N.Y. Laws ch. 115 (amending General Business Law § 70), eff. Aug. 13, 2016.
10. 2015 N.Y. Laws ch. 395 (signed by the Governor Oct. 26, 2015).
11. 2015 N.Y. Laws ch. 370 (signed by the Governor Oct. 26, 2015).
12. A. 5266 (awaiting the Governor's signature).
13. 2015 N.Y. Laws ch. 80 (signed by the Governor July 16, 2015).
14. 2015 N.Y. Laws ch. 366 (adding Real Property Law § 227-d), eff. Jan. 19, 2016.
15. 2015 N.Y. Laws ch. 242 (adding Penal Law § 195.02), eff. Nov. 22, 2015.
16. 2015 N.Y. Laws ch. 240 (amending CPL § 530.12(5)), eff. Oct. 22, 2015.
17. 2015 N.Y. Laws ch. 57 (adding Penal Law § 60.47), eff. Apr. 13, 2015.
18. A. 7319 (awaiting the Governor's signature).
19. 2015 N.Y. Laws ch. 258 (amending CPL § 216.05(5), (9)(a)), eff. Sept. 25, 2015.
20. 2015 N.Y. Laws ch. 237 (amending CPL § 10.40; Judiciary Law § 212), eff. Aug. 31, 2015.
21. A. 86 (awaiting the Governor's signature).
22. 2015 N.Y. Laws ch. 104 (amending Executive Law § 626), eff. Aug. 13, 2015.
23. A. 4347 (awaiting the Governor's signature).
24. 2015 N.Y. Laws ch. 241 (amending Civil Rights Law § 64-a), eff. Sept. 22, 2015.
25. 2015 N.Y. Laws ch. 394 (signed by the Governor Oct. 26, 2015).
26. 2015 N.Y. Laws ch. 263 (amending Executive Law § 631), eff. Sept. 25, 2015.
27. A. 2469 (awaiting the Governor's signature).
28. A. 6222 (awaiting the Governor's signature).
29. A. 7230 (awaiting the Governor's signature).
30. S. 4780 (awaiting the Governor's signature).
31. A. 7501 (awaiting the Governor's signature).
32. 2015 N.Y. Laws ch. 55 (amending Executive Law § 259(r), eff. Apr. 13, 2015.
33. A. 6430 (awaiting the Governor's signature).
34. 2015 N.Y. Laws ch. 270 (amending Correction Law § 74), eff. Oct. 25, 2015.
35. 2015 N.Y. Laws ch. 55, eff. Apr. 13, 2015.
36. 2015 N.Y. Laws ch. 29, eff. June 30, 2015.
37. 2015 N.Y. Laws ch. 15, eff. May 14, 2015.
38. 2015 N.Y. Laws ch. 139 (adding Public Officers Law § 64), eff. Aug. 13, 2015.
39. A. 8258, A. 7060 (awaiting the Governor's signature).
40. Local Law 63, eff. Oct. 27, 2015.
41. Local Law 95, eff. Dec. 20, 2015.

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"Loss of Chance" Doctrine in Medical Malpractice Cases

By John M. Curran

The "loss of chance" doctrine (LOC doctrine) is premised on the theory that the plaintiff should be compensated for the loss of achieving a more favorable outcome when a defendant's negligence destroys or reduces that prospect.[1] Application of the doctrine assumes that the plaintiff suffered from some preexisting condition or disease that the defendant did not cause.[2] The defendant is held liable if the negligence deprives the plaintiff of the chance of survival or a more favorable outcome.[3] Damages under the LOC doctrine, in its purest form, are awarded "based on the extent to which the defendant's tortious conduct reduced the plaintiff's likelihood of receiving a better outcome."[4]

The LOC doctrine was a reaction to "dissatisfaction with the prevailing 'all or nothing' rule of tort recovery."[5] Under that rule, plaintiffs recover 100% of their damages only if they prove that a defendant's negligence more likely than not caused the ultimate harm. "So long as the patient's chance of survival before the physician's negligence was less than even, it is logically impossible for her to show that the physician's negligence was the but-for cause of her death, so she can recover nothing."[6]

One of the earliest decisions on this subject opines that the "all or nothing" rule provides a "blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence."[7] Another more recent decision notes that the "all or nothing" approach "fails to recognize the common sense proposition that a loss of chance of survival or recovery *does* injure a person."[8]

While the LOC doctrine is theoretically applicable to a multitude of cases,[9] its widest application is in the area of medical malpractice.[10] The courts have given various reasons for applying the doctrine to that subject matter.[11]

This article will explore the history of the doctrine in the medical malpractice context, describe its evolution across the country, and analyze the extent to which New York courts have dealt with the doctrine. Because New York law is not fully developed on the topic, answers to some of the questions raised cannot be provided.

History of the Doctrine

The history of the LOC doctrine goes back somewhere between 60 and 160 years. One author traces it back to an

1867 Ohio Supreme Court decision in a medical malpractice action.[12] There, a physician mistreated a patient with a dislocated shoulder but argued that he was not liable because the patient was already injured. The court disagreed, indicating that negligence, when it "diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury."[13]

Another author has written that "one case credited with a new way of thinking about lost opportunities was the 1911 British contract case of *Chaplin v. Hicks*."[14] The court held that the plaintiff was entitled to recover because she lost the "opportunity of competition" with respect to a talent competition the defendant theatrical manager conducted.

Most authors regard *Hicks v. United States*[15] as the preeminent case giving rise to the LOC doctrine in the United States. In that case, decided in 1966, the decedent died of a bowel obstruction shortly after being diagnosed with gastroenteritis. The court stated:

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was *any substantial possibility* of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly.[16]

The First Department's 1974 decision in *Kallenberg v. Beth Israel Hospital*[17] is frequently cited as the next LOC case because the court affirmed a verdict based on a 20% to 40% loss of chance of survival.[18] The Court's language does not suggest that it perceived it was charting new legal territory. The verdict was affirmed based on a jury charge using the language "substantial possibility" of survival and the usual "substantial factor" language for proximate cause.[19]

In 1978, the Supreme Court of Pennsylvania became one of the first courts to rely on Section 323 of the Restatement (Second) of Torts "to expand the increased risk of harm to instances of loss of chance."[20] In that case, *Hamil v. Bashline*, the court vacated the decision below because the jury had been incorrectly charged that the loss of chance could not be considered a proximate cause of the patient's death.[21] The *Hamil* court relied upon Section 323(a) providing that one who is negligent and "increases the risk of harm" is liable. The decision observed that the effect of Section 323(a) is

> to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries: Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm . . .[22]

The *Hamil* court also cited to *Hicks*, including the language "any substantial possibility of survival."[23] The phrase "substantial possibility" and the language in *Hamil* expressing a relaxation of "the degree of certitude normally required of plaintiff's evidence" permeate the academic literature and judicial decisions in connection with the LOC doctrine. *Hamil* appears to be the foundation for the concept that the LOC doctrine is a relaxation of the burden of proof for proximate cause while *Hicks'* "substantial possibility" language is repeated in connection with both causation and harm.

In 1981, Professor Joseph H. King, Jr., published a landmark article on the LOC doctrine most often associated with the modern commencement of the doctrine. Professor King's thesis was

> that the loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.[24]

Professor King's "proportional approach" treats the "loss of chance" as a compensable injury, permits the jury to value the ultimate harm, and then discounts that valuation according to the percentage loss of chance determined by the jury.[25]

Seventeen years later, Professor King published another article wherein he discussed the development of the "loss-of-a-chance" theory. He recognized that, as of 1998, "most cases to address the loss-of-a-chance issue have arisen in the torts context and have involved medical malpractice claims alleging delayed diagnosis."[26] The article distinguishes between a loss of a chance of achieving a better outcome in the past entailing a retrospective focus, and a loss of chance of averting an adverse outcome in the future entailing a prospective focus.[27] Thus, cases may be differentiated based on whether the ultimate harm has already occurred or has yet to fully occur.

Professor King also draws a distinction between cases involving failures to take appropriate measures in a timely fashion (omissions) from cases involving injuries that have been actively inflicted (commissions). He recognized that "the loss-of-a-chance issue has received the most explicit judicial attention in cases arising from passively destroyed or reduced chances."[28] However, he

does not advise limiting the doctrine to only omission theories.

Professor King recommends that valuation be based on a percentage of a reduced loss of chance, irrespective of whether it is greater than 50%, and in situations where the likelihood of a loss of chance is unsubstantial.[29] He does not suggest a certain percentage threshold for recovery.

Professor King severely criticizes the "relaxed proof variations," which characterize the issue solely in causation terms and refuse to recognize the "loss of chance" as a discrete injury. He argues that this view continues the "all or nothing" rule by allowing the plaintiff to recover undiscounted damages based on the ultimate harm while increasing the likelihood of awards because the standard of proof on causation has been relaxed. He concludes that "the relaxed proof approach represents the worst of both worlds."[30]

The relaxed standard of causation approach employing the "substantial factor" or "substantial possibility" terminology also has been criticized by the Restatement (Third) of Torts. The Restatement asserts that reliance on Restatement (Second) of Torts, Section 323, is misplaced because that section pertains to duty, not causation or harm.[31]

The National Scene

The LOC doctrine in medical malpractice cases has garnered a great deal of attention in judicial opinions and in law review articles.[32] The highest courts in 22 states have adopted some form of the doctrine.[33] However, the highest courts of nine states have rejected the doctrine.[34] The legislatures in five states have addressed the issue in some respect, including two states that have enacted legislation repudiating the "loss of chance" cause of action.[35]

Judicial opinions have categorized the LOC doctrine under different theories and approaches.[36] Authors of law review articles regarding the doctrine have identified "approaches," "trends," and "rules," which serve to differentiate the various views of the doctrine.[37]

The most current edition of *Dobb's Law of Torts* delineates the ways in which the states approach the doctrine.[38] The first category consists of states that deny all liability for loss of chance. When the highest courts of these states have done so, they have typically considered policy matters such as the effect on the tort judicial system, the effect on physicians and their malpractice costs, and the legal considerations necessary to either relax the standard of causation for medical malpractice cases or to recognize a new form of harm or injury.[39] For example, in *Smith v. Parrott*,[40] the Supreme Court of Vermont balanced the "policy arguments" in ultimately choosing not to adopt the doctrine finding that such "significant and far-reaching policy concerns" should be left to the legislature.[41]

The second category consists of states allowing liability for all harm under a relaxed standard of causation. Under this category, "if the doctor's negligence was a substantial factor in producing harm, the doctor is liable for the entire harm unless (the doctor) can show a basis for apportionment."[42] Some courts allow recovery for any loss of chance while others require a substantial possibility of a loss of chance. One author describes this as a theory of "probabilistic causation."[43]

The third category comprises states authorizing liability for the value of the lost chance. Plaintiffs recover under this approach "only an amount representing the value of the chance destroyed by the defendant's negligence."[44] According to *Dobb's Law of Torts*, this is the view developed by Professor King, and the number of states adopting this view is growing.[45] It appears to be well-established that the plaintiff cannot recover both traditional "all or nothing" damages and compensation for the loss of chance injury.[46] Within this category, some courts apply proportional damages on a percentage basis while others entrust the issue to the jury on a subjective basis.[47]

In addition to the debate over whether the doctrine is conceived as a relaxation of the burden of proof on causation or as a compensable injury, state courts have analyzed whether there may be recovery for only greater than the 50% probability of survival or a better outcome[48] and whether the probability must at least be substantial.[49] There also are questions of whether the doctrine is consistent with a state's wrongful death statute,[50] and whether the plaintiff must have experienced the ultimate harm before a "loss of chance" occurs.[51]

A 2014 law review article on the LOC doctrine describes it as "a well-established tort doctrine, and yet it remains something of a mystery."[52] The "mystery" of the doctrine is rooted in the differing terminology used to describe it, the categories or approaches used to identify its forms, and the combinations of ways in which the states apply it.

Where New York Fits

Has New York Adopted the Doctrine?

New York is routinely listed among the states that have adopted some form of the LOC doctrine. However, it has been identified as within both the relaxed burden of proof and proportional approaches.[53] New York's highest court, the Court of Appeals, has yet to accept or reject the doctrine.

In *Kallenberg*,[54] the Court of Appeals affirmed the First Department's decision which, as noted above, is widely regarded as one of the first cases in the country to apply the LOC doctrine.[55] However, the decision in *Kallenberg* was affirmed without opinion, indicating that the Court of Appeals concurs only in the result reached by the First Department and not for the reasons given in the opinion of the lower court.[56] *Kallenberg* therefore cannot be viewed as a Court of Appeals decision adopting the doctrine.

In *Wild v. Catholic Health System*,[57] the one case where the Court of Appeals recently could have addressed it, and was urged to do so, the Court concluded that "defendants' broad challenge to the 'loss of chance' doctrine" was unpreserved for appeal. The Court referred to the issue as "the loss-of-chance theory of liability."[58] In a footnote, the Court quoted two California cases to define the theory as granting "recovery to patients for deprivation of the opportunity of more beneficial treatment and the resulting gain in life expectancy or comfort, although the evidence fails to establish a reasonable probability that without defendant's negligence, a cure was achievable."[59]

The loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately.

The Court's language in *Wild* may provide some clues that it viewed the LOC doctrine as one involving the relaxed burden of proof on causation. First, it referred to the doctrine as a "theory of *liability*," as opposed one involving harm or damages. Second, it referenced decisions from California where the courts have rejected the doctrine to avoid relaxing the standard of proof. Lastly, the Court focused on the burden of proof issue raised by the defendants, as opposed to the injuries or harm.

The Court also addressed the defendants' contentions, to the extent preserved, that the jury instructions "improperly reduced plaintiffs' burden of proof."[60] The Court found that, as a whole, the jury charge did not improperly alter "the causation standard or plaintiffs' burden of proof."[61] In reaching this conclusion, the Court was careful to note that the trial court included within its charge both the usual burden of proof and proximate cause charges.[62]

Because the court in *Wild* affirmed the charge as a whole, including use of the usual burden of proof and proximate cause instructions, it appears that, as of 2013, the Court had no intention of changing the burden of proof or proximate cause standards in medical malpractice "loss of chance" cases. But this is largely speculation as the Court did not express any opinion on the doctrine.

The Appellate Division has never expressly adopted the LOC doctrine. Still, it appears well understood that the Appellate Division has embraced the "loss of chance" concept.[63]

The Committee on Pattern Jury (Civil) Instructions (PJI Committee) has a section on the LOC doctrine following its pattern medical malpractice charge.[64] The PJI Committee places that discussion under its "proximate cause" heading. It observes that "applying the doctrine is troublesome because its parameters are unclear."[65]

Kallenberg

The PJI Committee's discussion of the issue starts with *Kallenberg*.[66] There, the First Department affirmed a verdict in favor of the plaintiff for wrongful death in the amount of $55,000. The plaintiff claimed that the defendant failed to administer a medication to the decedent who had suffered a hemorrhage from a cerebral aneurism. The court in *Kallenberg* found that the testimony supported the conclusion that the failure to administer the medication was a "producing, contributing factor" of the death.[67] The court noted that the "question of proximate cause is a jury question" and that the jury could find that, if the medication had been given, the decedent's blood pressure "*could have* been kept under control" and "*might have* improved sufficiently" to undergo the surgery and "make a recovery."[68]

With respect to the loss of a chance, the testimony from plaintiff's expert was that the decedent had a 20% to 40% chance of survival with the medication and the surgery, and a 2% chance of survival with the medication only. It is this testimony that is most often cited, together with the "could have" and "might have" language quoted above, which has caused this case to be categorized under the LOC doctrine.[69] However, the *Kallenberg* court never used that term and never analyzed the appropriateness of the doctrine.

The record in *Kallenberg* reveals that the court charged proximate cause by instructing the jury to decide "whether there was a substantial possibility that Mrs. Kallenberg would have survived if she received proper treatment."[70] The record also indicates that the jury was instructed that "if Mrs. Kallenberg would have died regardless of the negligence, you must find for the defendants" and that "if you find there was a substantial possibility that Mrs. Kallenberg would have survived but for (the) negligence, you should find for the plaintiff." Additionally, the record shows that the court charged the typical burden of proof standard (i.e., more likely than not) and the standard proximate cause language (i.e., the negligence must be a "substantial factor in bringing about" the death).

The negligence found by the jury in *Kallenberg* was in not administering the medication. This was found to be the proximate cause of the death. The harm was therefore

the death, not the loss of chance of survival or a better outcome. It appears the plaintiff was awarded the full value of the ultimate harm (i.e., death) even though there was a 60% to 80% chance the decedent would have died irrespective of negligence. This would seem to conflict with Professor King's concept of the doctrine and might fall within his "worst of both worlds."

"Substantial" vs. "Any"/"Some"

The record in *Kallenberg* reflects that the plaintiff unsuccessfully sought a jury instruction that the deprivation of *any* chance of survival would be enough for a recovery. Three years later in *Kimball v. Scors*,[71] the Third Department rejected the plaintiff's argument that *Kallenberg* required a jury charge authorizing recovery when the decedent is deprived of "a chance of survival . . . regardless of how small that chance might be."[72] Instead, the court adopted the standard of whether there was a "substantial possibility" of survival but for the malpractice.

Ten years after *Kallenberg*, in *Mortensen v. Memorial Hospital*,[73] the First Department endorsed the "substantial possibility" charge recognizing that it had been approved in Pennsylvania and that the *Hicks* decision had employed it as well.[74] The court rejected a jury charge allowing recovery for the "deprivation of any possibility."[75] The Fourth Department also has employed the "substantial possibility" charge,[76] although it may only be applicable to "omission theories" of malpractice.[77] As pointed out by the PJI Committee, it appears that the First, Third and Fourth Departments have endorsed the "substantial possibility" concept which, by *Mortensen's* reference to Pennsylvania law, is linked to the relaxed burden of proof on causation approach.

The Second Department, however, has routinely adhered to language allowing recovery when there is "a diminished chance of survival,"[78] a diminution of a substantial chance,[79] and when the negligence "diminished the plaintiff's chance of a better outcome."[80] The "some diminution" or "a diminution" language from the Second Department appears more in line with Professor King's approach treating the LOC doctrine as an independently compensable claim and without any requirement of a substantial loss. It also is different, however, because damages are not proportional or otherwise targeted to the loss of chance.

The Court of Appeals has not been presented with the Second Department's language, but *Wild* involved the use of the "substantial possibility" language. Perhaps because the "broad challenge" to the LOC doctrine was unpreserved, the Court did not reject the "substantial possibility" standard. Nevertheless, because the "substantial possibility" language was in the charge in *Wild* and the verdict was affirmed, it would seem that the "substantial possibility" language is acceptable, provided the usual burden of proof and proximate cause charges also are given.[81]

The PJI Committee discusses the difference between the Second Department and the other departments.[82] While it appears to be a conflict, recent decisions from the First and Fourth Departments suggest that the Second Department language is gaining acceptance.[83]

"Hastening"/"Speeding Up" and "Aggravation"/"Precipitation"

The record in *Kallenberg* shows that the trial court and counsel discussed whether the court should charge that the jury could award damages if the negligence caused the decedent's death to be hastened. The trial court did not deliver such a charge, at least in part due to the late hour in which the discussion occurred.

Seven years after *Kallenberg*, the Fourth Department decided *Monahan v. St. Joseph's Hospital and Health Care Center*,[84] wherein the court relied on *Kallenberg* and *Kimball* to conclude that the "defendant would not be free from liability because his conduct merely speeded up the happening of a result that was inevitable in any event."[85] The decision in *Monahan* illustrates a common theme between the LOC doctrine and the well-established concepts underlying the PJI Committee's "aggravation" (2:282) and "precipitation" (2:283) charges. The plaintiff's argument in *Kallenberg* was premised on some of the same Court of Appeals cases supporting those pattern charges.[86] *Monahan* is cited in the comment following both charges, and within the PJI Committee's "loss of chance" discussion.

According to the comment following PJI 2:282, the charge applies to situations "where the defendant's wrongful act does not cause the condition, injury or illness."[87] This is certainly the context of "loss of chance" cases involving medical malpractice, if not every medical malpractice case. The "aggravation" charge instructs the jury that the plaintiffs "should be compensated only to the extent that (plaintiff's) condition was made worse by the defendant's negligence."[88] Interestingly, the "aggravation" and "precipitation" charges are categorized by the PJI Committee as a damages concept, not as a causation concept.

The "aggravation" charge may be conceptually consistent with the LOC doctrine as it seeks to limit a plaintiff's compensation to the "damage caused by aggravation of the preexisting condition" and "to the extent that you find [the plaintiff's] condition was made worse by the defendant's negligence."[89] This similarity is supported by the discussion in *Monahan* wherein the Appellate Division granted the plaintiff a new trial and focused on distinguishing between the preexisting condition and the aggravation of that condition by the defendant's alleged negligence. The court phrased it as an issue of proximate cause:

> Proximate cause, a troublesome concept of the law of negligence generally, poses special problems in the field of medical malpractice. The problem is described

> in one treatise as follows: "Almost every person who receives the services of a physician is sick or disabled when he first goes to the physician. Thus there lurks the ever present possibility that it was the patient's original affliction rather than the physician's negligence which caused the ultimate damage."[90]

Assuming the conceptual similarity between "loss of chance" and "aggravation/precipitation," a number of questions arise in the event a LOC theory is supported by the evidence, a LOC charge is sought, and the court agrees to deliver one to the jury: (1) must the "aggravation" and/or "precipitation" charge be given to limit the award to exclude the plaintiff's pre-existing condition and/or an inevitable result; (2) must the verdict sheet incorporate language to that effect; and (3) must the LOC theory be alleged in the pleadings such as is required by some courts for the "aggravation" charge?[91]

The LOC doctrine in medical malpractice cases has garnered a great deal of attention in judicial opinions and in law review articles.

New York courts have yet to grapple with these issues in the LOC context. But, if New York has adopted the doctrine, one would expect these questions to arise.

Compensation: Proportional vs. Full vs. Subjective

Professor King's proportional approach directs the jury to compute the full amount of damages and have that amount discounted by the value of the plaintiff's percentage loss of chance.[92] As mentioned before, Professor King severely criticizes the second approach, which allows so-called full damages under a relaxed burden of proof for causation.[93] A third approach allows the jury to award a subjective amount targeted to the loss of chance but without use of a percentage discount.[94]

No appellate court in New York, and only one trial court, has adopted Professor King's proportional approach.[95] Without discussion of the issue, appellate courts have allowed full damages apparently under the relaxed standard of causation approach (i.e., "substantial possibility").[96] Some appellate courts have reduced apparent "loss of chance" awards on the more subjective basis of whether the award represents reasonable compensation.[97]

The use of a proportional or a subjective approach would largely be dictated by the evidence presented at trial.[98] If the expert evidence employs percentages, a proportional approach becomes possible. Otherwise, the only option would seem to be to allow the jury to follow the subjective approach.[99] Still, there is no support in the academic literature or judicial decisions permitting full damages for the ultimate harm suffered when at least some of that harm was inevitable or attributable to a pre-existing condition.

The subjective approach would appear to be most consistent with New York's existing law incorporated in the "aggravation" charge. The jury is instructed to award damages only for the harm caused by the defendant's negligence and not for plaintiff's preexisting condition.[100] If this conclusion is accurate, it may not be necessary for the Court of Appeals to adopt the doctrine because existing New York law already embodies it.[101]

"Substantial Factor" and "Substantial Possibility"

In *Mortensen*, the First Department upheld the jury charge instructing only "substantial possibility" on the issue of proximate cause concluding that the "concepts of 'substantial factor in bringing about an injury' and 'substantial possibility of avoiding the injury . . .' are virtually indistinguishable."[102] However, in view of the Court of Appeals discussion in *Wild*, which seems to require the standard burden of proof and proximate cause instructions when "substantial possibility" is charged, is the statement in *Mortensen* accurate? In other words, if "substantial factor" must be charged when "substantial possibility" is charged, there must be a difference between the two concepts. Does the difference lie in "substantial," the word common between the two, or in the words "factor" and "possibility?" Logic would seem to dictate that the difference between "substantial factor" and "substantial possibility" must be in the difference between "factor" and "possibility."

The law appears clear that proximate cause cannot be measured by percentages or probabilities.[103] Of course, the burden of proof is measured by probabilities (i.e., more likely than not).[104] But in *Wild*, the Court of Appeals seems to indicate that the burden of proof should not be changed when "substantial possibility" is charged. Thus, probabilities are necessitated by the burden of proof but prohibited from causation.

The First Department's decision in *Stewart v. New York City Hospital Corp.*[105] helps to illustrate the point. The jury awarded the plaintiff $500,000 for the plaintiff's loss of "natural" childbearing capacity following an ectopic pregnancy causing destruction of the right fallopian tube. The trial court granted the defendant's post-trial motion in part, finding that a 10% chance was not a "substantial" possibility of having children naturally, and reduced the damages for loss of the fallopian tube to $100,000. The First Department reversed, stating that the jury would be justified in concluding that the loss of a "5 to 10 percent" chance of having a child naturally was "substantial." The court increased the award to $300,000.[106]

The First Department applied the usual requirement that a plaintiff show that the negligence "was a substan-

tial factor in bringing about the injury." The court did not address whether the "5 to 10 percent" chance applied to "substantial factor" or to "the injury." But, if proximate cause cannot be discounted by percentages, the "5 to 10 percent" would seem to apply to "the injury."

Assuming this to be true, on what basis did the First Department increase the award to $300,000 (halfway between the trial court and the jury awards)? Does this mean that the injury must be "substantial" before any award of damages may be made by a jury? Under what principles of tort law do we limit compensation only for "substantial" harm, whatever that may mean under the law? At a minimum, it would seem that using "substantial" for both causation and harm is confusing.

Speculative Harm vs. Compensable Harm

One of the common criticisms of the LOC doctrine is that it permits recovery for harm that is speculative,[107] contrary to settled law prohibiting such a result.[108] A related criticism is that the doctrine allows compensation based on ultimate harm that has not fully occurred and may never occur.[109]

Using *Stewart* as an example again, is an award based on a "5 to 10 percent" loss of chance necessarily speculative because that form of harm does not meet the burden of proof by more likely than not? Additionally, the decision does not indicate whether the plaintiff had suffered the ultimate harm of being unable to conceive naturally. What if the plaintiff was still of childbearing age and bore a child naturally later? Was the plaintiff compensated for an ultimate harm that did not occur?

Cases involving the delayed diagnosis of cancer are typical subjects for the LOC doctrine.[110] Assertions by plaintiffs that medical malpractice deprived them of a probability of a cure or for a better outcome are frequently met with defense complaints that the claims are speculative. The courts have nevertheless ordinarily allowed them to be weighed by a jury because, as one court has observed, "[w]e can then only deal in probabilities since it can never be known with certainty whether a different course of treatment would have avoided the adverse consequences."[111]

A recent Second Department case highlights some of the troublesome issues that arise in these types of cases with respect to damages. In *Luna v. Spadofora*,[112] the jury returned a verdict of $6.8 million that the trial court set aside, concluding that there was no rational basis upon which the jury could find that the 13-month delayed diagnosis of the plaintiff's thyroid cancer was a proximate cause of the plaintiff's injuries. Plaintiff alleged that the delayed diagnosis worsened her prognosis, increased her harm due to metastasis of her cancer, and significantly decreased her 10-year survival rate. Plaintiff's expert testified that, when the plaintiff first saw the defendant, there was an 85% to 90% 10-year survival rate but that the delayed diagnosis reduced that to 40% to 50%. The Appellate Division reversed the trial court and reinstated the verdict, finding that there was a rational basis for the jury to conclude that the defendant's negligence proximately caused the plaintiff to have a worsened or decreased 10-year survival rate.[113]

The decision in *Luna* indicates that the initial diagnosis was in November of 2003 and that the trial occurred in 2011 or 2012. The plaintiff appears to have been alive when the appeal was decided in April of 2015. This suggests that the Appellate Division reinstated a $6.8 million verdict based at least in part on a reduction of 50% in the 10-year survival rate when in fact the plaintiff was still alive more than 10 years after the diagnosis.

One of the common criticisms of the LOC doctrine is that it permits recovery for harm that is speculative.

Critics of the LOC theory would point to *Luna* as an example of the courts authorizing compensation based on speculative harm and on ultimate harm that did not occur. To address this critique, Professor King and one other author have recommended that "loss of chance" awards be made only after the ultimate harm has occurred.[114] However, both authors acknowledge that the statute of limitations would have to be changed to allow time for the ultimate harm to occur.[115]

"Loss of Chance" and "Wrongful Death"

Wrongful death actions are typical applications of the LOC doctrine upon allegations that negligence "hastened" or "speeded up" the death or deprived the decedent of a chance of survival. There has been substantial debate outside New York about whether the doctrine is compatible with state wrongful death statutes.[116] No New York court has addressed the question.

New York appears to be one of the jurisdictions strictly construing its wrongful death statute[117] and otherwise adheres to the common law that an action for personal injury abates upon death.[118] It has yet to be seen whether a New York court will authorize "loss of chance" in a wrongful death action under either: (1) the relaxed burden of proof on causation despite the language of the wrongful death statute limiting recovery to negligence "which caused the decedent's death" or (2) the independent compensable harm method, which is a form of injury separate from the death.

Omission and Commission

At least in the Fourth Department, the *Wild* decision seems to limit the LOC doctrine to theories of omission.

While this is consistent with Professor King's observation that most "loss of chance" claims have involved delays in diagnosis,[119] the doctrine has not been expressly limited to such cases. The Fourth Department did not cite to any cases supporting its conclusion.

Conclusion

It appears that New York is not applying the LOC doctrine in any coherent or consistent fashion. In three of the four departments, New York has apparently adopted the doctrine, but only if the loss of chance is a "substantial possibility." In the Second Department, it appears that awards are made for any loss of chance and even when the ultimate harm has not occurred. In the Fourth Department, it appears that the doctrine is only applicable to "omission" theories and not "commission" theories. Further, it appears that New York courts must charge both "substantial factor" and "substantial possibility" even though the First Department has previously stated that those concepts are "virtually indistinguishable." Some New York courts also award full damages for the ultimate harm based solely on a loss of chance.

All of this has occurred under New York law with virtually no discussion of the issues or the policy considerations underlying the imposition of the relaxed standard of causation or the recognition of a new form of harm. Until there is clarification from the Court of Appeals, it will be up to the trial courts and counsel to craft the application of the LOC doctrine, if at all. In the meantime, it appears that plaintiffs and defendants will take their chances with the LOC doctrine. ■

1. Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. Mem. L. Rev. 492 (1998) (King II).
2. *Id.* at 493; *Dickhoff v. Green*, 836 N.W.2d 321, 333 (Minn. 2013).
3. *Id.*
4. King II, *supra* note 1, pp. 492–93.
5. *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E.2d 819, 829–30 (Mass. 2008); Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1365–66 (1981) (King I).
6. *Matsuyama*, 452 Mass. at 12.
7. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wn. 2d 609, 614 (Wash. 1983).
8. *Dickhoff*, 836 N.W.2d at 333 (emphasis in original).
9. Restatement (Third) of Torts § 26 cmt. (2005); *Matsuyama*, 452 Mass. at 19–20; Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L. Rev. 591, 592 (2013) (Férot); David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 Wake Forest L. Rev. 605, 606 (2001) (Fischer).
10. Restatement (Third) of Torts § 26.
11. *See, e.g.*, *Matsuyama*, 452 Mass. at 19–20; *Smith v. Parrott*, 175 Vt. 375, 378 (2003).
12. Brian Casaceli, *Losing a Chance to Survive: An Examination of the Loss of Chance Doctrine Within the Context of a Wrongful Death Action*, 9 J. Health & Biomed. L. 521, 525 (2014) (Casaceli).
13. *Id.*; *Craig v. Chambers*, 17 Ohio St. 253, 261 (1867).
14. King II, *supra* note 1, p. 500; *see also* Fischer, *supra* note 9, p. 609.
15. 368 F.2d 626 (4th Cir. 1966).
16. *Id.* at 632 (emphasis added); *see also* Casaceli, *supra* note 12, pp. 525–26.
17. 45 A.D.2d 177 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 719 (1975).
18. Férot, *supra* note 9, at 592–93; Casaceli, *supra* note 12, p. 527, n. 27.
19. *See Hicks*, 368 F.2d at 632; *Kallenberg*, 45 A.D.2d at 178.
20. *Hamil v. Bashline*, 481 Pa. 256, 271 (1978); Férot, *supra* note 9, p. 593.
21. *Hamil*, 481 Pa. at 256.
22. *Id.* at 269.
23. *Id.* at 271–72.
24. King I, *supra* note 5, at 1354.
25. *Id.*, pp. 1382–87.
26. King II, *supra* note 1, p. 501.
27. *Id.*, p. 502.
28. *Id.*, p. 503.
29. *Id.*, pp. 556–58.
30. *Id.*, p. 508.
31. Restatement (Third) of Torts § 26.
32. *See, e.g.*, *Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2013); Matthew Wurdeman, *Loss-of-Chance Doctrine in Washington: From Herskovits to Mohr and the Need for Clarification*, 89 Wash. L. Rev. 603 (2014) (Wurdeman); John D. Hodson, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10 (1987); Zaven T. Saroyan, *The Current Injustice of the Loss of Chance Doctrine: An Argument for a New Approach to Damages*, 33 Cumb. L. Rev. 15 (2002–2003).
33. *Dickhoff*, 836 N.W.2d at 334, n.12.
34. *Id.*
35. Wurdeman, *supra* note 32, pp. 612–13.
36. *See, e.g.*, *Dickhoff*, 836 N.W.2d at 333–35; *Matsuyama*, 452 Mass. at 10–18.
37. Wurdeman, *supra* note 32; Casaceli, *supra* note 12; Férot, *supra* note 9; Ralph Frasca, *Short Paper and Note: Loss of Chance Rules and the Valuation of Loss of Chance Damages*, 15 J. Legal Econ. 91 (2009) (identifying the traditional rule and the incremental loss of chance rule); King II, *supra* note 1.
38. Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 196 (2d ed. 2010) (Dobbs).
39. *Id.*, p. 662.
40. 175 Vt. 375 (2003).
41. *Id.* at 381.
42. Dobbs, *supra* note 38, p. 663.
43. Fischer, *supra* note 9, p. 605.
44. *Id.*, p. 665.
45. *Id.*, pp. 662–65.
46. *Id.*, p. 666; King I, *supra* note 5, p. 1365; *see, e.g.*, *Mead v. Adrian*, 670 N.W.2d 174, 179–80 (Iowa 2003).
47. Fischer, *supra* note 9, p. 619, n. 65.
48. *See, e.g.*, *Boone v. William W. Backus Hosp.*, 272 Conn. 551 (2005).
49. Casaceli, *supra* note 12, pp. 531–33.
50. *Id.*, pp. 547–52.
51. *Matsuyama*, 452 Mass. at 20, n.33; *Mead*, 670 N.W.2d at 182–83 (Cady, J., concurring); *Alexander v. Scheid*, 726 N.E.2d 272, 277 (Ind. 2000); King II, *supra* note 1, p. 544; Wurdeman, *supra* note 32, pp. 642–43.
52. Wurdeman, *supra* note 32, p. 604.
53. *Compare* Casaceli, *supra* note 12, p. 531, n.5 *and* Férot, *supra* note 9, p. 610, n. 178.
54. 45 A.D.2d 177 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 719 (1975).
55. King I, *supra* note 5, p. 1368, n. 53; Férot, *supra* note 9, pp. 592–93; Fischer, *supra* note 9, p. 608, n. 17; Stephen R. Koch, Comment; *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595, 607, n. 56 (2010).

56. *Rogers v. Decker*, 131 N.Y. 490, 493 (1892); *Tepper v. Tannenbaum*, 65 A.D.2d 359, 360 (1st Dep't 1978).

57. 21 N.Y.3d 951 (2013). *See* Timothy J. O'Shaughnessy, *Loss of Chance: Finally Back in the Court of Appeals*, N.Y.L.J., p. 4, col. 4, Vol. 248 No. 10 (July 16, 2012) (O'Shaughnessy).

58. *Wild*, 21 N.Y.3d at 953.

59. *Id.* at n.1.

60. *Id.* at 954.

61. *Id.* at 952–53.

62. *See also* 1B New York Pattern Jury Instructions (2d ed. 2015) (PJI), 1:23, 2:70.

63. PJI 2:150, pp. 77–79 ("[N]one of the Appellate Division cases that have addressed the situation analyze the issue in any detail."); John L.A. Lyddane & Barbara D. Goldberg, *Proof of Causation and Measure of Recovery in "Loss of Chance" Cases*, N.Y.L.J., p. 3, col. 1, Vol. 254, No. 9 (July 15, 2015).

64. *Id.*

65. *Id.*

66. PJI 2:150, pp. 77–79.

67. *Kallenberg*, 45 A.D.2d at 179.

68. *Id.*

69. *Id.*

70. PJI 2:150, p. 77.

71. 59 A.D.2d 984 (3d Dep't 1977), *lv. denied*, 43 N.Y.2d 648 (1978).

72. *Id.* at 984–85.

73. 105 A.D.2d 151 (1st Dep't 1984).

74. *Id.* at 159.

75. *Id.*

76. *Cannizzo v. Wijeyasekaran*, 259 A.D.2d 960 (4th Dep't 1999).

77. *Wild v. Catholic Health Sys.*, 85 A.D.3d 1715 (4th Dep't 2011), *aff'd*, 21 N.Y.3d 951 (2013).

78. *Hughes v. N.Y. Hosp.-Cornell Med. Ctr.*, 195 A.D.2d 442, 444 (2d Dep't 1993).

79. *Jump v. Facelle*, 275 A.D.2d 345, 346 (2d Dep't 2000); *Calvin v. N.Y. Med. Grp., P.C.*, 286 A.D.2d 469 (2d Dep't 2001).

80. *Flaherty v. Fromberg*, 46 A.D.3d 743, 745 (2d Dep't 2007); *Alicea v. Ligouri*, 54 A.D.3d 784 (2d Dep't 2008).

81. *Compare Calvin*, 286 A.D.2d 469, *and Candia v. Estepan*, 289 A.D.2d 38 (1st Dep't 2001).

82. PJI 2:150, pp. 77–79.

83. *Wolf v. Persaud*, 130 A.D.3d 1523 (4th Dep't 2015); *Hernandez v. N.Y. City Health & Hosp. Corp.*, 129 A.D.3d 532 (1st Dep't 2015).

84. 82 A.D.2d 102 (4th Dep't 1981).

85. *Id.* at 108.

86. *McCahill v. N.Y. Transp. Co.*, 201 N.Y. 221 (1911); *Dunham v. Vill. of Canisteo*, 303 N.Y. 498 (1952).

87. PJI 2:282.

88. *Id.*

89. PJI 2:282, p. 892.

90. *Monahan*, 82 A.D.2d at 107 (quoting 1 Louisell & Williams, Medical Malpractice, par. 8.07, p. 213).

91. PJI 2:282, p. 893.

92. King I, *supra* note 5, pp. 1381–87, 1397.

93. King II, *supra* note 1, p. 508.

94. Dobbs, *supra* note 38, § 196, pp. 667–68; Fischer, *supra* note 9, p. 619, n. 65.

95. *Birkbeck v. Cent. Brooklyn Med. Grp., P.C.*, 2001 N.Y. Slip Op. 33491(U) (Sup. Ct., Kings Co. 2001).

96. *Wild*, 21 N.Y.3d 951; *O'Connell v. Albany Med. Ctr. Hosp.*, 101 A.D.2d 637 (3d Dep't 1984); *Kallenberg*, 45 A.D.2d 177.

97. *Schneider v. Mem. Hosp. for Cancer & Allied Diseases*, 100 A.D.2d 583 (2d Dep't 1984); *Stewart v. N.Y. City Health & Hosps. Corp.*, 207 A.D.2d 703 (1st Dep't 1994), *lv. denied*, 85 N.Y.2d 809 (1995); *Dockery v. Sprecher*, 68 A.D.3d 1043 (2d Dep't 2009), *lv. denied*, 17 N.Y.3d 704 (2011).

98. Dobbs, *supra* note 38, § 196.

99. *Id.*

100. PJI 2:282.

101. *See, e.g.*, *Ortega v. City of N.Y.*, 9 N.Y.3d 69 (2007); *Madden v. Creative Servs.*, 84 N.Y.2d 738 (1995); *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1 (1986).

102. 105 A.D.2d at 159.

103. *Kimball*, 59 A.D.2d at 985; *Mortensen*, 105 A.D.2d at 157.

104. PJI 1:23.

105. 207 A.D.2d 703 (1st Dep't 1994).

106. *Id.* at 703–04.

107. *Mohr v. Grantham*, 172 Wn.2d 844, 857 (Wash. 2011); *Matsuyama*, 452 Mass. at 18.

108. *Fennell v. S. Md. Hosp. Ctr., Inc.*, 320 Md. 776 (Md. 1990); *see also Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y. 1 (1938).

109. *Kramer v. Lewisville Mem. Hosp.*, 858 S.W.2d 397 (Tex. 1993).

110. King II, *supra* note 1, p. 501.

111. *Brown v. State of N.Y.*, 192 A.D.2d 936, 938 (3d Dep't), *lv. denied*, 82 N.Y.2d 654 (1993); *see, e.g.*, *Dickhoff v. Green*, 836 N.W.2d 321, 336 (Minn. 2013) (juries are routinely delegated the duty of determining life expectancy based on probabilities and statistics).

112. 127 A.D.3d 933 (2d Dep't 2015).

113. *Id.* at 934.

114. King II, *supra* note 1, p. 560; Wurdeman, *supra* note 32, pp. 642–44.

115. *Id.*

116. Casaceli, *supra* note 12.

117. EPTL 5-4.1.

118. *Greco v. S.S. Kresge Co.*, 277 N.Y. 26 (1938).

119. King II, *supra* note 1, p. 501.

"It seems pretty easy to make partner here."

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Proving a Joint Account With Right of Survivorship or Totten Trust Account Without the Signature Card

By Brian P. Corrigan

A frequent dispute in administration of a decedent's estate concerns the interest of a surviving co-tenant in an account alleged to have been joint with right of survivorship. Similar issues arise as to the interest of a beneficiary to an alleged Totten trust account. The analysis begins with a review of the signature card establishing the account at issue. The signature card, and, specifically, the language on the signature card identifying the interests of the parties in the account, is recognized as the best evidence of the decedent's intent at the time the account was established.[1] As a consequence of mergers or otherwise, banks sometimes cannot locate the signature card when it is needed in an estate administration. However, there is other evidence courts regard as probative of whether a joint account with right of survivorship or Totten trust account has been established when the signature card is unavailable.

Joint Accounts With Right of Survivorship

With respect to joint accounts, N.Y. Banking Law § 675 provides that when a deposit is made in the name of the depositor and another person to be paid to either or the survivor of them that the

> making of such deposit . . . shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding . . . of the intention of both depositors . . . to create a joint tenancy and to vest title to such deposit or shares, and additions and accruals thereon, in such survivor. The burden of proof in refuting such prima facie evidence is upon the party or parties challenging the title of the survivor.

Thus, an executed signature card containing language complying with the statute exonerates the bank from liability and creates a rebuttable presumption[2] that the surviving co-tenant is entitled to the entire account.

In *Estate of Butta*,[3] the interest of the decedent's great nephew, Nicholas, in an account he claimed to be joint with a right of survivorship with his deceased aunt, was tried before the Surrogate without a jury. The facts established that the decedent's estate was almost $4 million and Nicholas was not a beneficiary of her will or lifetime trust. The subject bank account was opened with a $240,000 deposit supplied by the decedent. On the date of the decedent's death, the balance was $151,485.75. All withdrawals from the account were made by Nicholas solely for his own benefit. All of the statements and canceled checks for the account were mailed to the decedent, and she reported all of the interest earned on the account on her income tax returns.

The bank was unable to produce the signature card. The bank representative who opened the account testified that she had probably opened between 500 and 1,000 accounts for customers. Although she did not remember any specific conversation with the decedent and Nicholas on the date the account was opened, she did recall that she told them that the account would be payable to the survivor of them upon the death of the other. Further, the bank representative testified that she knew she advised the decedent and Nicholas that the account was a survivorship account because, when the account was opened, the bank would not open an account in two names unless it was a survivorship account.

The bank was able to produce an "electronic signature card summary" containing the account number, the names of both the decedent and Nicholas under the "Account Title," the letter "J" under the "Account Type" and the electronic signatures of both the decedent and Nicholas.

The Statutory Presumption Under Banking Law § 675 and Common Law Principles

The Surrogate acknowledged the line of cases holding that survivorship language on the signature card suffices to establish a prima facie case under Banking Law § 675, but noted it does not follow from those cases, or the statute, that the statutory presumption is restricted to cases where the signature card contains survivorship language. Surrogate Holzman held that

> while survivorship language on the signature card itself is the best evidence to give rise to the statutory presumption, and, perhaps, in most cases the only practical way, it is not the exclusive way. The statutory presumption arises upon any proof that clearly establishes the deposit was made and credited in the name of both parties to be paid to either or the survivor of them.[4]

This analysis continued, noting it is well established that the surviving tenant will prevail, without the benefit of the statutory presumption, by establishing a common law joint account with right of survivorship citing, *inter alia*, *In re Antoinette*[5] and *In re Coon*.[6]

Evidence Establishing a Joint Account With Right of Survivorship

The Surrogate held, in the alternative, that Nicholas was entitled to the presumption under Banking Law § 675 *or* that he adduced sufficient proof to meet his burden of proof under common law principles. The court referred to the following facts in support of its holding:

- The redacted electronic signature card reflects that the type of account was "J," a joint account.
- The only type of account that the bank would open at the time the account was opened in the names of two depositors was a joint account with survivorship rights.
- The bank representative who opened the account told the decedent and Nicholas that the account was payable to the survivor.

> The signature card is recognized as the best evidence of the decedent's intent at the time the account was established.

Although the bank representative's recollection of the account opening was imperfect, the Surrogate found no reason to doubt her credibility. The court analogized the representative's testimony to that of an attorney who supervises the execution of numerous wills and can be positive that a particular will was executed with the required statutory formalities without necessarily being accurate as to all of the other details regarding the execution ceremony.

Having found a joint account with right of survivorship, the court next addressed, and rejected, the executor's claim that the account was a convenience account, citing the following evidence:

- The statements and canceled checks were mailed to the decedent's home and there is no reason to believe that she did not read them.
- The statements/canceled checks reflect that Nicholas made over 200 withdrawals solely for his benefit.
- Although Nicholas assisted the decedent with chores, there was no proof that she relied solely upon him or that she was in any way incompetent.
- The decedent lived by herself, consulted with her accountant without anyone else being present and, more than three years after the account was opened, she executed both a lifetime trust and a will under which her great-nephew did not receive any portion of her substantial estate.

The First Department affirmed, holding,

> The testimony of a bank employee that the signature cards used by the bank when the subject account was opened contained right of survivorship language was,

> in the face of the bank's inability to produce the actual signature card for the account, sufficient proof that such language in fact appeared on the signature card with which the account was opened. It is therefore unnecessary to determine whether the presumption of a joint account with rights of survivorship (Banking Law § 675(b)) may arise from other proof.[7]

Thus, the Appellate Division's decision leaves open, at the appellate level, whether the statutory presumption may arise from proof other than the signature card.

In *In re Slavin*,[8] although the signature card could not be produced, the Surrogate found the presumption under Banking Law § 675 had been established by other proof.

The decedent was a partner at Cantor Fitzgerald and died intestate on September 11, 2001, in the attack on the World Trade Center. He was survived by his minor son from a prior marriage (who was his sole distributee) and his fiancée, Anna, with whom he had lived for more than four years immediately prior to his death.

The decedent had $656,944.36 in three accounts and banked at the World Trade Center branch of his bank. After September 11, 2001, Anna closed the accounts. The signature cards were maintained at the World Trade Center branch and were destroyed on September 11.

The administrator of the decedent's estate (the maternal grandmother of the decedent's son) commenced a turnover proceeding against Anna and the bank. The administrator contended that because the signature cards could not be produced, the respondents could not satisfy the requirements under Banking Law § 675 and, therefore, neither the bank nor Anna was entitled to the statutory presumption.

Citing *Butta*, the bank and Anna moved for summary judgment and submitted the deposition testimony of three different bank employees that at the time the accounts were established the following language "accounts with multiple owners are joint, payable to either owner or the survivor" would have appeared on what was signed. As the administrator submitted no evidence to rebut this testimony, the Surrogate found that the statutory presumption under Banking Law § 675 applied.

The court next rejected the administrator's allegation that the accounts were merely of convenience, finding: "Decedent was a bright, educated stock trader who was in no need to have convenience accounts created on his behalf. The bank statements and cancelled checks indicated that the decedent knew that [Anna] used the accounts for her own benefit and he did not object."[9]

Totten Trust Accounts

N.Y. Estates, Powers & Trusts Law 7-5.1 *et seq*. (EPTL) governs Totten trust or "in trust for" bank accounts and provides for a financial institution's release from liability for making payment to the beneficiary in accordance with the statute.[10]

In *Estate of Posch*,[11] the bank's computer records listed Helen as beneficiary of a trust account established by the decedent. There was, however, no signature card, or any other document signed by the decedent, in the bank's possession designating a beneficiary. In the turnover proceeding commenced against Helen by the administrator of the estate, a bank employee testified that it was the bank's policy not to require a signature card when an individual account was converted to a trust account. The administrator of the estate and Helen each moved for summary judgment.

While the revocation of a trust account requires a writing, EPTL 7-5.1 makes no mention of a writing requirement for the creation of a trust account.

The Surrogate noted that EPTL 7-5.1(d) provides that a trust account is established "by the depositor describing himself as trustee for another" and, under common law, a trust of personal property can be established by parol with no particular form of words being necessary, provided the expression of intent is unequivocal. The court observed that EPTL 7-5.1 left the common law standard for establishing a trust chiefly intact.

While the revocation of a trust account requires a writing,[12] EPTL 7-5.1 makes no mention of a writing requirement for the creation of a trust account. Thus, the question of law is whether the decedent's direction to the bank met the statutory requirements, and the question of fact is what the decedent communicated to the bank.

The Surrogate concluded that the bank's computer entry was admissible as a business record, but it had no more probative value than any other evidence and, therefore, the "unsigned bank records alone are not conclusive evidence of the transaction."[13] The court denied the summary judgment motions and held that the administrator was entitled to test at trial the credibility of the bank employee who generated the computer record.

Estate of Tate[14] involved a dispute among the decedent's three children as to the beneficiary of a Totten trust account. The administrator of the decedent's estate, one of the children, petitioned to have her sister return funds

withdrawn from the account. The bank was unable to produce the signature card.

At trial, the petitioner testified that she was present with the decedent when the account was opened in 1984 with proceeds from the decedent's lottery winnings, and observed the decedent designating all three of her children as beneficiaries. She further testified that her mother never changed the designations. During the last year of her life, the decedent's health deteriorated and she could no longer handle her financial affairs. The petitioner testified that her mother gave her the checkbook for the account in question so she could pay the decedent's expenses. The court observed the records supported the petitioner's testimony as all of these checks were numbered sequentially and followed numerically from the checks signed by the decedent.

The petitioner observed that the respondent, who lived in a basement apartment at the mother's home, received shipments of new furniture and other purchases at a time when the respondent was on public assistance. The decedent was not receiving bank statements and believed the respondent was intercepting them to cover up withdrawals. The bank records revealed that the respondent wrote checks on the account, none of which was in the proper numeric sequence.

The court noted that the respondent, who claimed she accompanied the decedent to the bank in 1984 and that the decedent designated her as sole beneficiary, testified in an "evasive and reluctant manner." The respondent admitted to writing the checks, but claimed the decedent gave her authority to do so.[15]

The court credited the petitioner's testimony and concluded a Totten trust account was established for the benefit of all three of the decedent's children. The court held:

> The fact that the bank statements only list respondent's name as beneficiary, although of some relevance, is clearly outweighed by the testimony of petitioner, the circumstances surrounding the creation of the account, and the lack of original signature cards to support that this was the only name on the actual account. As such, respondent is entitled to a one-third interest in the account.[16]

In *In re Clinton*, the administrator of Carrie Clinton's estate commenced a turnover proceeding against a bank and Shirley Sidbury, who claimed to be the beneficiary of several accounts shown on the bank's records as "Carrie Clinton ITF Shirley Sidbury." All three parties moved for summary judgment. After finding issues of fact and denying the motions of the administrator and Sidbury, the court turned to the bank's motion seeking a determination that it was merely a stakeholder.

As it was unable to produce the signature card, the bank relied on an affidavit from the manager of the branch where the transaction occurred. The branch manager testified that on March 6, 1998, the account titles were changed from the decedent's name alone to Totten trust accounts payable to Sidbury. The manager further testified that the bank's computer records identified the customer service representative who handled the transaction (who was no longer employed by the bank) and that it was the bank's procedure to require proof of identification from the customer. The bank also relied on the fact that the statements thereafter listed the account title as "Carrie Clinton ITF Shirley Sidbury."

The evidence showed that a year before the Totten trust accounts were established, the decedent's doctor noted that the decedent, in her mid-80s, had early organic mental syndrome, a deterioration of mental function that occurs with aging. The doctor was concerned about the decedent's ability to administer prescribed medication. Further, the decedent told her doctor she didn't have the means to buy the medication despite, although unknown to the doctor, having more than $500,000 in the bank.

For the bank to gain the release from liability under EPTL 7-5.4, the court stated that "there must be a payment to a 'beneficiary' which is defined as a 'person who *is described by the depositor* as a person for whom a trust account is established.'"[17] The bank argued that its computer records would not reflect a Totten trust account without one having been validly established by the depositor. Surrogate Preminger rejected this argument and held that

> the best evidence of such a transaction would be a signature card signed by the decedent, or at the very least, some other admissible indication of the decedent's intent to create the Totten Trust accounts [citing *Tate and Posch*]. [The bank], however, concedes it does not have signature cards corresponding to this account change transaction, and instead offers only its computer records and the statements of an employee who has no recollection of the transaction, nor personal knowledge of it. Having put forth essentially nothing but its computer account records, [the bank's] cross motion for summary judgment seeking stakeholder status should be denied.[18]

In re Wess[19] involved a dispute between Wess, a longtime friend of the decedent who claimed to be a beneficiary of a Totten trust account, and the executor who contended it was an estate asset. The bank could not find the signature card.

The decedent was a businesswoman who wholly owned a consulting company and who died in 2009 at age 55 leaving an estate of approximately $9 million. The decedent and Wess were romantically involved, having lived together for a decade. They stopped living together around 2000, but remained friends. Indeed, in the last 10 years of the decedent's life, and up to a few months before her death, the decedent gave Wess a number of generous gifts; this was not disputed by the executor.

In August 2009, after learning that she would likely die within the year, the decedent executed a will and made arrangements to seek medical treatment in Japan. On the same day the decedent flew to Japan, she added

approximately $370,300 to the subject account, thereby increasing the balance to about $406,300. The account contained approximately $441,500 when she died.

Having to overcome hearsay issues, CPLR 4519 and the missing signature card, Wess submitted the following evidence in support of his summary judgment motion:

1. the 1099s for 11 years (1998 through 2009), showing the account as "I/T/F Frank Wess," were addressed to the decedent, which she may be presumed to have seen without protest as to their accuracy;
2. the bank records reflecting that the subject account was held "I/T/F" Wess; and
3. a bank employee's testimony that such data was, as a matter of company practice, entered into the bank's computer system at the time that the depositor supplied the information.

In opposition, the administrator argued that the account was never established, the decedent forgot about the account and intended to dispose of it by will, and/or that the account had been revoked by the decedent. Surrogate Anderson found none of these theories to be supported by anything other than bare speculation and granted Wess' summary judgment motion.

Conclusion

An attorney advising a client in a dispute over a Totten trust or joint account for which the signature card is not available should explore whether bank statements showing the interest of the other party were sent to the decedent and whether the decedent ever made an objection. A related consideration is whether there is reason to believe the decedent was not receiving this mail or that the decedent may not have been able to read or understand the statements. Furthermore, rather than relying on bank records alone, a bank employee with direct knowledge of the transaction itself or, if that is unavailable, the practice and procedure related to the transaction should be pursued in discovery. The relationship between the decedent and the other party should be examined as well as the circumstances under which the account was established. Finally, the proposed disposition of the account should be viewed in the context of any other planning the decedent made and the disposition of other estate assets. ■

1. *See Estate of Butta*, 192 Misc. 2d 614 (Sur. Ct., Bronx Co. 2002), *aff'd*, 3 A.D.3d 347 (1st Dep't 2004) (as to joint accounts); *In re Clinton*, 1 Misc. 3d 913(A) (Sur. Ct., N.Y. Co. 2004) (as to Totten trust accounts).
2. *See Fischedick v. Heitmann*, 267 A.D.2d 592 (3d Dep't 1999) (presumption rebutted); *In re McMurdo*, 56 A.D.2d 602 (2d Dep't 1977) (same).
3. 192 Misc. 2d 614.
4. *Id.* at 619.
5. 291 A.D.2d 733 (3d Dep't), *lv. to appeal denied*, 98 N.Y.2d 604 (2002).
6. 148 A.D.2d 906 (3d Dep't 1989).
7. *Estate of Butta*, 3 A.D.3d at 347.
8. 3 Misc. 3d 725 (Sur. Ct., Queens Co. 2004). Note: The author's law firm represented the bank in this case.
9. *Id.* at 728.
10. EPTL 7-5.4.
11. N.Y.L.J., Aug. 12, 2002, p. 26, col. 3 (Sur. Ct., Nassau Co.).
12. *See* EPTL 7-5.2.
13. *Posch*, N.Y.L.J., Aug. 12, 2002.
14. N.Y.L.J., Nov. 5, 2001, p. 28, col. 4 (Sur. Ct., N.Y. Co.).
15. All the parties apparently waived CPLR 4519.
16. *Tate*, N.Y.L.J., Nov. 5, 2001.
17. *Clinton*, 1 Misc. 3d 913(A), *5.
18. *Id.*
19. N.Y.L.J., Jan. 28, 2013, 1202585573297, at *1 (Sur. Ct., N.Y. Co.).

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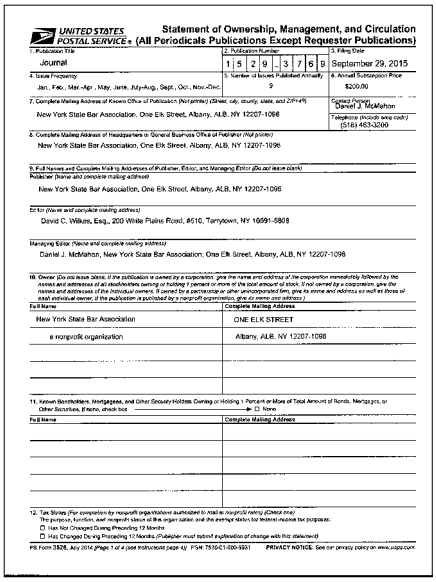

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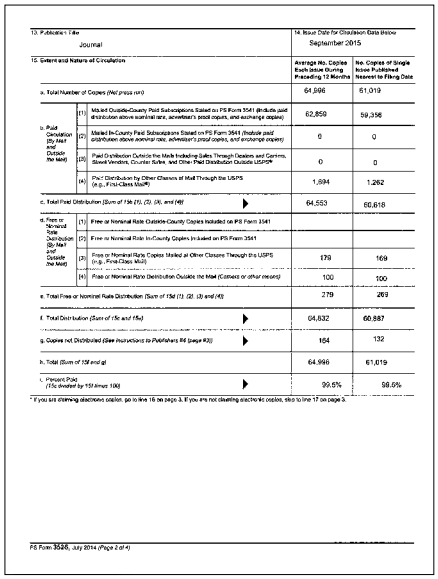

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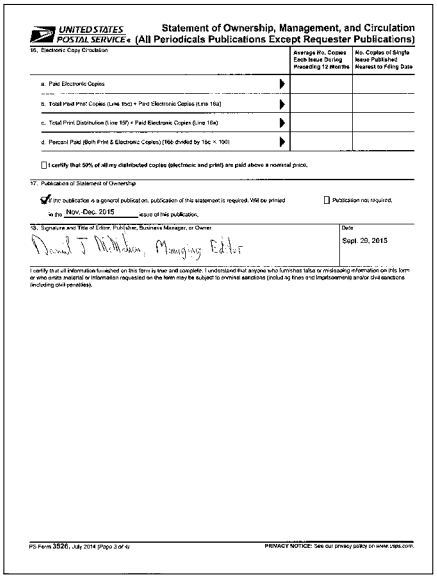

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am deeply disturbed by the events that transpired at a recent on-site visit to inspect the opposing party's books and records in compliance with a discovery order. Due to the defendants' repeated failure to comply with several discovery orders and deadlines and the parties' contentious and acrimonious relationship, I got a court order directing that the defendants produce certain documents by a specified date. The court also granted us permission to have an on-site visit and inspection of the defendants' books and records.

On the agreed-upon site-visit date, I met the defendants' counsel at the defendants' offices and was accompanied by an accountant that the plaintiff hired to assist with the litigation. Despite the fact that the defendants had several weeks to prepare the documents requested by the plaintiff for the on-site inspection, after we were placed in a conference room, we were given only two Bankers Boxes® of documents, with limited information. Although I made repeated requests for additional information, the defendants failed to produce numerous categories of documents that the court ordered them to produce. The defendants' counsel stated that they would produce these materials at a later date since they did not have them available.

That wasn't the end of the story. While we were in the conference room, I saw that there were several boxes of documents in the hallway outside the conference room. I knew right away that the boxes contained categories of documents responsive to the plaintiff's requests, which the court had ordered the defendants to produce. This was obvious from the labels that were clearly visible and in plain sight on the sides of the boxes.

I asked the defendants' counsel about the boxes in the hallway but was told that I could not see them because he did not currently have access to those materials. Since I had reason to believe that the boxes contained responsive materials and felt that I was being stonewalled, I used my smartphone camera to take pictures of the boxes from the conference room so that I would be able to present the issue to the court if necessary.

Although the defendants' counsel was nowhere in sight when I took the pictures, within two minutes he came storming into the conference room and asked whether I had taken any pictures. It was only then that I discovered that we had been under surveillance in the conference room during the entire document production. When I saw the webcam in the conference room, I confronted opposing counsel, asking whether he and his clients had been watching and listening to my communications with the plaintiff's accountant. The defendants' counsel did not deny that he and his clients had been watching and listening to our communications. Instead, he smirked and replied that my communications with the plaintiff's accountant had no expectation of confidentiality or privilege. He refused to allow me to take a picture of the webcam. Based on these circumstances, I can only assume that both opposing counsel and his clients had been secretly monitoring my private and privileged communications and work product with the plaintiff's retained expert.

I am deeply troubled by what happened and by opposing counsel's behavior, which strikes me as outrageous. Are we now at a point in the practice of law when opposing counsel can secretly videotape a document production and eavesdrop on my conversations during my inspection of the documents? What about telephone conversations? If counsel secretly put me under surveillance while I was in the conference room, it is possible that he may have also recorded our telephone conversations. I am writing to the Forum because, quite frankly, I am unfamiliar with the rules. What should I do?

Sincerely,
Ben Camed

Dear Ben Camed:

Your letter raises several important issues about what we hope is not becoming a common practice. It seems as if everyone has an iPhone, or another kind of smartphone, with the ability to surreptitiously record conversations and events at will with only the tap of a screen or the click of a button. The fact that technology may present an irresistible temptation to certain members of our profession makes your question particularly timely.

As an initial matter, what occurred may be a great example of an outrageous discovery abuse that would allow you to pursue a whole host of remedies before the court that ordered the document production. However, that is a subject for another time, and perhaps another space. Our focus here is through the lens of the ethical and professional questions that arise from the secret attorney recording that you described and its implications to the legal profession.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

It is useful to begin with a brief review of federal and state law on wiretapping. Federal law permits a non-law enforcement individual to record telephone calls and other electronic communications as long as one party to the conversation or communication has consented. *See* 18 U.S.C. § 2511(2)(d) (2008). States are allowed by 18 U.S.C. § 2516(2) to enact their own legislation on wiretapping. The result, as one might expect, has been that the laws on this issue vary widely from state to state. In some states, so-called "two-party consent" laws have been adopted, meaning that *every* party to a phone call or conversation must consent in order for the recording to be lawful. These laws have been enacted in California, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See* Robert Pelton, *Ethics and the Law: Professionalism*, Voice for the Defense Online, October 2, 2011, http://www.voiceforthedefenseonline.com/story/ethics-and-law-professionalism-robert-pelton.

The majority of states, however, have adopted "one-party" consent laws, meaning that only one party to the conversation needs to consent to the recording for it to be legal. *See id*. New York is a one-party consent state. Therefore, in New York it is not a crime to record or eavesdrop on an in-person meeting or telephone conversation if one party to the conversation consents; that one party can, in fact, be the individual recording the conversation. N.Y. Penal Law §§ 250.00, 250.05.

With the federal and state laws in mind, the next question is: even if the recording is legal, is it ethical for an attorney to engage in such conduct? Not surprisingly, there also is a wide range of differing opinions on this topic across the United States. Twelve states and the District of Columbia hold that secret attorney recording is not unethical. The 12 states include Alabama, Alaska, Kansas, Maine, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Utah, as well as the District of Columbia. *See* Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 St. Mary's L.J. 661, 684–85. Nine states hold that secret attorney recording is unethical, except in certain situations. The nine states are Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, South Carolina, and Virginia. *Id*. at p. 688. Five states hold that secret attorney recording should be evaluated on a case-by-case basis. These states are Hawaii, Michigan, New Mexico, Ohio, and Wisconsin. *Id*. at p. 694. And 13 states have not yet reached a consensus on this issue. The remaining states are Arkansas, Delaware, Georgia, Louisiana, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *Id*. at pp. 683, 695. New York is one of the nine states that hold that secret attorney recordings are generally unethical, but under certain circumstances recordings may be permissible. *Id*. at p. 688.

Various New York bar associations and ethics committees have examined the topic and provided guidance. In 1979, the New York State Bar Association Committee on Professional Ethics issued a formal opinion on this subject stating that "lawyers engaged in a criminal matter, representing the prosecution or a defendant, may ethically record a conversation with the consent of one party except where the purpose is to commit a criminal, tortious or injurious act." N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 515 (1979). In addition, the 1979 opinion stated that a lawyer may counsel a client about the legality of the client secretly recording a conversation with a third party. *Id*.

In 1993, the New York County Lawyers' Association (NYCLA) also issued an opinion on the subject. The NYCLA reasoned that while "[p]erhaps, in the past, secret recordings were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings [because] [t]oday, recording a telephone conversation may be accomplished by the touch of a button [therefore . . .] we do not believe that such an act, in and of itself, is unethical." N.Y. County Lawyers' Ass'n Ethics Op. 696 (1993). However, the NYCLA's opinion also advised attorneys to avoid using the recording in a "misleading way," or lying about the existence of the recording at all, and stated that in these circumstances, the attorney's behavior would be considered to be "ethically improper." *Id*.

In 2004, the Association of the Bar of the City of New York issued an opinion stating that while a secret recording is improper as a routine practice, there are circumstances where undisclosed tapings should be permitted. *See* Ass'n of the Bar of the City of N.Y. Formal Ethics Op. 2003-2 (2004). For example, where the recording "advances a generally accepted societal good" it may be proper. *Id*. However, it would be unethical for an attorney to surreptitiously record a conversation for the sole purpose of having an accurate record of the conversation. *Id*.

The Association ultimately counseled attorneys against making such recordings absent unusual circumstances, stating: "We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable." *Id*.

Our research did not uncover many New York court decisions on this issue. The one case we did locate is illustrative of when the exception rather than the general rule on secret recordings applies. In *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 403 (Sup. Ct., Kings Co. 2003), the plaintiffs, who were employees of defendant Key Food, brought suit against their employer, alleging that obscenities and racial slurs were being directed at women and African Americans in the workplace. A Key Food employee consulted with counsel, who advised her about the legality of secretly recording her employer, and subsequently, a secret recording did take place. Although the defendant

employer tried to suppress the contents of the taped telephone conversations between the employer and third parties, and tried to disqualify the employee's counsel because of his involvement in the recording, the court ultimately found that the attorney's conduct was reasonable and appropriate given the circumstances surrounding the recording. The Supreme Court reasoned that the recording was justified because

> [t]he interests a[t] stake here transcend the immediate concerns of the parties and attorneys involved . . . The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin. Weighed against this ethical imperative, the attorney's conduct . . . should not be subject to condemnation . . .

Id. at 407. Notably, privileged and/or confidential communications and information did not appear to be at stake in that case as seems to be the case here.

Other authorities, including the American Bar Association (ABA), have also weighed in on this topic. Interestingly, as technology has advanced and changed over time, so has the ABA's position on attorney recording. For instance, in 1974, in ABA Formal Opinion 337, the ABA held that an attorney should not record a conversation without full consent from all parties, the exception being that government and law enforcement attorneys could record a conversation without such consent. *See* Bast, *supra*, p. 665.

However, 27 years later, in June 2001, the ABA changed course with the adoption of Formal Opinion 01-422, which permits an attorney to secretly record conversations with non-clients in one-party consent states like New York. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001). According to the ABA, "[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn." *Id.*

ABA Opinion 01-422 is not without limitations, however. For example, an attorney should not surreptitiously record a conversation in a two-party consent state, where the consent of all the parties is necessary in order for the recording to be lawful. The Opinion also cautions that an attorney shall not falsely deny that a recording is taking place or has taken place. According to the ABA, "[t]o do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person." *Id*.

This very issue of lying about making a recording was addressed by the Mississippi Supreme Court in *The Mississippi Bar v. Attorney ST*, 621 So. 2d 229 (Miss. 1993). The Mississippi Supreme Court determined that even if the attorney did not violate any ethical rules by surreptitiously taping two telephone conversations, one with an acting city judge and one with the city police chief, it was a violation of the Mississippi Rules of Professional Conduct for the attorney to lie and deny that the recordings ever took place. The court explained:

> We find . . . that Attorney ST stepped over the line in violation of the Mississippi Rules of Professional Conduct when he blatantly denied, when asked, that he was taping the conversations. Rule 4.1 comment expressly states that "[a] lawyer is required to be truthful when dealing with others on a client's behalf." An attorney is not a private detective or a secret agent; he is not acting as an undercover police officer; rather, he is first and foremost an attorney, and his truthfulness must be above reproach. When asked point-blank whether he is mechanically reproducing a conversation, his answer must be truthful. To respond otherwise vitiates all rules of professional conduct.

Id. at 233.

Another court to examine the issue of covert recordings by an attorney is the U.S. District Court of the Northern District of Illinois in *Anderson v. Hale*, 202 F.R.D. 548 (N.D. Ill. 2001). In *Anderson*, the court found that an attorney's surreptitious tape recording of telephone conversations with plaintiff's witnesses in a civil case violated the state's local rule. The court explained that "[a]t a minimum, fairness and honesty require attorneys to disclose material facts to witnesses at the commencement of a conversation [. . . and] [w]hether a conversation is being recorded is a material fact . . ." The court further reasoned that because the attorney's conduct was inherently deceitful and involved trickery, it would injure the public's confidence in the legal profession and the legal system as a whole. *Id*. at 556. We note, however, that Illinois, unlike New York, is a two-party consent state.

In summary, in New York an attorney is not permitted to secretly record communications with opposing counsel absent some very unusual circumstances. When evaluating the ethical implications of an attorney recording, it is important to consider the context in which the secret recording was made, as well as the intent and purpose behind the recording. Additionally, practitioners should bear in mind the New York Rules of Professional Conduct (NYRPC), specifically, Rule 8.4(c), which provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Applying these principles to the situation you have described, it certainly seems as though the behavior exhibited by opposing counsel in secretly recording your private, and arguably privileged, communications and work product with the plaintiff's retained expert was made for an improper purpose. Indeed, it seems obvious that opposing counsel knew what he was doing and was trying to obtain an unfair strategic advantage by listening into the confidential conversations between you and the plaintiff's expert. Although some might suggest that you should have checked the room for the surveillance camera and/or

microphone, in our view, you had a reasonable expectation of privacy and should not have been subjected to your adversary's eavesdropping. We are at a loss at how counsel could say with a straight face that you had no expectation of confidentiality during the periods you were alone with plaintiff's expert in the conference room, or how this secret recording of the document inspection "advances a generally accepted societal good," or in any way was an exercise conducted in good faith with the principles of fairness and honesty in mind. Moreover, although your adversary did not deny recording your conversations when you confronted him with the question, it is unclear from the facts whether he has actually acknowledged the recording or will later deny doing so. As discussed *supra*, both bar associations and courts have taken a strong position against lying about the occurrence of an attorney recording.

Either way, we believe that opposing counsel's behavior runs contrary to the standards of fairness and candor, and we echo your sentiment that it is quite outrageous. Indeed, we believe that you would be on solid ground to notify the court and seek, *inter alia*, the disqualification of the defendants' counsel and the preclusion of any recording or transcription of the document inspection, as well as to inform the state bar authorities of your adversary's actions.

That leads us to our last point. Putting aside the legal and ethical ramifications in New York, is this really the direction that we want to be taking the legal profession in – covertly recording or eavesdropping on our adversaries – simply because in the age of smartphones it is just so easy to do so. We think not. George Orwell warned us about Big Brother, but perhaps he should have said something about opposing counsel! We know that the technology exists and facilitates such recordings or eavesdropping, but that does not mean that it should be used. In this world of mass social media and technology, we should take the high road as attorneys and resist the constant temptation to use technology to gain what is, in our opinion, an improper advantage over our adversaries.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am an income partner at a 100-lawyer firm. I was made partner just two years ago. Six months after making partner, I became pregnant with my third child. After making it through my first trimester, I started to share the happy news with my colleagues. When I told a senior partner in my group that I was expecting, he remarked, "Wow! Haven't you already done your fair share of overpopulating the earth?" I didn't know how to respond. I felt both defensive and uncomfortable, but I chuckled along anyway, hoping to dissolve the awkwardness. In the months and weeks leading up to my maternity leave, I made sure to communicate effectively both internally at the firm with my colleagues, and externally with my clients, about my anticipated three-month leave and made sure that all my cases would be accounted for and covered during my absence.

Upon returning to work three months later, I was greeted with further offensive comments. On my first day back to work, the managing partner casually strolled into my office asking, "How was your vacation?" I responded that I was not on vacation, but on maternity leave for the birth of my son. The managing partner laughed and stated, "Same difference!" and walked out.

The following week, I attended a meeting with a client at opposing counsel's office on a case that I had been working on before my maternity leave. When I made a suggestion about a possible resolution of the matter that I felt would achieve the client's goals, my adversary's snide response was, "Did it take you nine months to come up with that idea?" I honestly did not know what to say and did my best to ignore the comment.

I have also noticed that the quality and quantity of my work has changed since I've returned from maternity leave. Not only do I have a lower volume of work, but the level of interesting work is also lower. Even though I have returned to the firm full-time, my billable hours have decreased significantly. During my first year as partner, I billed 2,500 hours. During my second year as partner, when I had my son and was on maternity leave for three months, I billed 1,800 hours. This leads me to what happened at my end-of-the-year meeting with the firm's Compensation Committee. During that meeting, one of the partners remarked that my hours were very low for the year. When I responded by reminding the Committee that I had been on maternity leave for three months, another partner said something along the lines of: "Well, if you had spent as much time billing as you did breastfeeding, you would have had more billables this year."

I cannot believe that in this day and age I should be subjected to these types of comments and behavior. I am outraged. Is the conduct described above acceptable professional behavior?

Sincerely,
Pumped Up

MEMBERSHIP TOTALS

New Regular Members	
1/1/15 - 10/14/15	**6,893**
New Law Student Members	
1/1/15 - 10/14/15	**1,580**
Total Regular Members	
as of 10/14/15	**65,061**
Total Law Student Members	
as of 10/14/15	**3,635**
Total Membership as of	
10/14/15	**68,696**

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affidavits and complaints, but don't use it in your memorandums of law.

Start each paragraph with a topic or transition sentence. A topic sentence introduces what you're going to discuss in your paragraph. Every sentence in each paragraph must relate to and amplify your topic sentence. A transition sentence links the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept.

Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Be overt, not covert: "The best way to ensure that a trial judge will understand your case is to make the organization . . . obvious. Make your organizational plan overt."[16] Use headings to organize your document. Use subheadings. Headings and subheadings "bring the judge's attention back into focus."[17] *Example:*

I. Carly Dean fails to state a cause of action against Pretty Properties for breach of contract because Dean does not allege that Pretty Property breached any contract.
II. Dean fails to state a cause of action against Pretty Properties for interfering with its contract.
    A. Dean's allegations do not rise to the level of "wrongful means": Dean does not allege that Pretty Properties used physical violence, fraud, or misrepresentation.
    B. Dean fails to allege that Pretty Properties was solely motivated by malice.

Organize your legal argument. Start with your strongest points — those on which you're most likely to win. If two points are equally strong, go first with the point that'll win the largest relief. Alter that pattern to arrange your points logically, to order the elements or factors listed in a statute or seminal case, or to begin with a threshold argument, like the statute of limitations, before discussing the merits.

Your legal arguments must flow logically.

Don't use the kitchen-sink approach: Limit your contentions to those that have a reasonable likelihood of success.

Organize your argument using the CRARC method.[18] CRARC stands for Conclusion, Rule, Application, Rebuttal and Refutation, and Conclusion. Use CRARC as a roadmap to structure an argument. CRARC guides you to begin an argument with a persuasive conclusion statement instead of a neutral issue statement. It also directs you to craft a rebuttal that acknowledges the potential weaknesses of your client's case and preemptively refutes the other side's contentions. Anticipating a rebuttal will give you credibility without undercutting an argument. A properly CRARCed argument section addresses the strongest arguments first, followed by weaker arguments and public-policy arguments. This is the best method for persuasive writing. It draws the court's attention right away to the arguments with which it might agree.

Tone It Down. Tone helps determine whether readers will accept what you write. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don't bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. Avoid excessive capitalization. Once you've found the right tone, keep it consistent. Your tone should be confident, formal, persuasive, and understated, not angry, colloquial, harsh, or pushy.

Less Is More. Make your document readable. Draft lots of short sentences. Short sentences are powerful.[19] Long sentences are hard to digest.

Create short paragraphs. A paragraph should rarely be longer than six sentences. It shouldn't exceed one thought and two-thirds of a double-spaced page or 250 words, whichever is less. Intersperse short sentences with a few long sentences, but make sure your long sentences aren't confusing. Complicated and convoluted sentences will confuse your reader. They suggest that you can't explain your case easily. They might even suggest that you don't understand your own case.

Varying sentence and paragraph length makes your writing spicy and more readable. When in doubt, shorter is better.

> To persuade, you'll need to personalize your client.

Leave white space on the page. The white space is the space in the margins and between words, sentences, and paragraphs. The more words you put on a page, the greater your chances of losing. Your goal is to make sure that the judge reads your document.

Just because you might have a 25-page limit doesn't mean you should exhaust your limit to make your point. Make your point and stop. As one scholar pointed out, "In the Book of Genesis, God created the world in 400 words . . . . [This] writing[] get[s] to the point."[20]

Put Some Emotion Into It. The facts of your case will dictate whether you should use emotional facts, without writing emotionally, to persuade. A story infused with emotion will "impact the outcome of a case."[21]

Use the right amount of emotion for your case. Use more emotion if your client lost a leg than if your client suffered a black eye. If you're moving to dismiss on the basis of subject-matter jurisdiction, it's probably best not to use emotion to persuade.

If you use emotion to persuade, don't overdo it. Relying on too much emotion to persuade, instead of relying on the law, will make you lose credibility.

Let's Get Personal. Paint a picture of your client for your reader. To persuade, you'll need to personalize your client. Whether your client is a big corporation, a convicted felon, or a sweet grandmother, you need to help your reader understand and get to know

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your client. Put your client in the best possible light.

The way you refer to your client will help personalize your client. Avoid using "plaintiff" or "defendant." Personalize by using your client's name or corporate name.

Creating an "impersonal acronym" won't persuade.[22] If your client's corporate name is Beautiful Artistic Dentistry, don't use the acronym "BAD" throughout your document. Doing so would put your client in a bad light. Instead consider using "Beautiful Dentistry" to refer to your client.

Know the weakness in your own case.

Personalize your client, but depersonalize your adversary's client. If you represent Mabel James and you're suing Taylor Corporation, refer to your adversary as "the Corporation" and refer to your own client as "Mabel James."

Focus on the Facts. Your case is only as good as your facts: "Cases are won on the facts — the nitty-gritty details that the parties cull from each other during discovery."[23]

Be honest about your facts: "Don't fudge" the facts.[24] If a fact is unfavorable for your client, deal with the fact honestly. Address unfavorable facts before your adversary raises them. If you wait, your adversary will use those facts against your client. If you wait until your adversary interprets the unfavorable facts, you're one step away from losing the case.

Minimize the impact of unfavorable facts — the "bad facts" — by weaving them in with favorable facts — the good facts.[25] To deemphasize a bad fact, place it in the middle of a paragraph; weave the good facts around the bad fact. If you use this method to deemphasize, readers might not notice the bad facts: The reader will "perceive[] [the bad facts] as another part of the story."[26] *Example:*

> John was an Assistant Vice-President at Primrose Donavan Inc. John was fired from his job despite all his successes and achievements. On his way home from work on April 1, 2015, John had an accident. Even though John was drunk when he was arrested, he didn't injure anyone or damage anyone's property. Within two weeks of the accident, John found another job. John has always supported his daughter, Penelope. John spends all his free time with Penelope. John is a good father.

To deemphasize bad facts, place bad facts in the beginning of a sentence.[27] *Example:* "John drinks, but he's a good father."

To deemphasize bad facts, place them in a subordinate clause.[28] A subordinate clause — also known as a dependent clause — can't stand on its own as a sentence; a subordinate clause doesn't express a complete thought. *Example:* "Even though John was drunk when he was arrested, he neither injured Tom nor damaged Tom's car."

If possible, make unfavorable facts appear favorable for your client.

Don't exaggerate the facts.[29]

Don't omit key facts.

Analogize the facts: If you're relying on cases to support your argument, analogize your facts to the facts in those cases.

Distinguish the facts: If you're distinguishing your adversary's leading cases, distinguish your facts from the facts in those cases.

The Law

Know the Law. Don't rely on your adversary or the court to know the law. Find the law and use it to persuade. Explain the law in your own words.

Assume that your jurisdiction defines a cause of action for conversion as follows:

> Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.[30]

Create a rule that favors your client. *Example:*

> A defendant is liable for conversion when a defendant assumes and exercises ownership rights, without authority, over goods belonging to the plaintiff excluding plaintiff's ownership rights. A plaintiff may sue for the defendant's conversion of money if the money is specifically identifiable. Plaintiffs may not maintain a cause of action for conversion if their damages are merely for a breach of contract.

In this example, the law is clear, readable, and favors the plaintiff: The focus of the paragraph is whether the defendant is liable.

Don't rely for the law on headnotes, case summaries, or "statements in case syllabi."[31]

Holding Versus Dictum. When you're relying on a case for support, rely on the court's holding instead of the court's dictum, unless no usable holding supports your case. Know the difference between holding and dictum: "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"[32] Dictum might be persuasive and a prediction of how an appellate court might rule in the future, but it's not binding.

Framing Issues. In your motion, frame the issues for the court.[33] Create deep issues: "[A] deep issue is the ultimate, concrete question that a court needs to answer to decide a point your way. . . . The deep issue is the final question you pose when you can no longer usefully ask the follow-up question, 'And what does that issue turn on?'"[34]

Be Honest. Don't fudge the law.[35] Interpret the law, but don't lie about what the law provides.

Don't omit unfavorable aspects of the law to help your client.

Don't ignore law unfavorable to your client. Your adversary and the

court will find it. If you hide the law, you'll never have the opportunity to use it to persuade. Bringing up, and then rebutting, unfavorable law makes you look credible. Bringing up unfavorable law helps "take away [your adversary's] thunder."[36] Besides, you're "required to advise the court of any adverse controlling authority."[37]

If you're quoting from a statute, rule, or regulation, quote verbatim. But don't quote everything from the statute, rule, or regulation. Avoid large block quotations. Using block quotations makes you look unseasoned and lazy.

Don't use a quotation "from a case to suggest the case stands for a proposition it does not."[38]

If you're quoting the law and you're altering the language, let the court know about your alterations. When you alter a quotation, make sure not to change its meaning. Also, don't create "the potential for misinterpretation, misapplication, or ambiguity."[39] Use ellipses to show that you've eliminated some of the text. Use three ellipses within a sentence if you've removed less than a sentence. Use four ellipses if you've removed a sentence or more or when you've chopped off the end of a sentence and what remains is an independent clause. Use brackets to show what you've added, deleted, or altered when it's a letter or more. *Example:*

> A defendant is liable for conversion when a defendant, without authority, "assum[es] and exercise[s] . . . the right of ownership over goods belonging to another to the exclusion of the owner's rights. . . . However, [plaintiffs may not] . . . validly maintain[] [a cause of action] where [plaintiffs'] damages are merely . . . sought for breach of contract.

Analysis. Apply the law to your facts persuasively. The outcome of your case will depend on how well you apply law to fact. Show the court "why a ruling for your client is right and just."[40] Use your theme to "tie all the pieces together."[41]

Don't forget to address any counterarguments — your adversary's main arguments.

In the Alternative. Don't assume that the court will rule for you. Have a back-up plan by creating alternative arguments — but not too many. Even if the court disagrees with your first argument, it'll have a reason to rule for you if it agrees with an alternative argument. Your alternative arguments should be as good (and as persuasive) as your main argument: "[B]ad arguments detract from good ones."[42]

Don't make "outlandish alternative arguments."[43] Don't argue anything frivolous or weak.

Make It Easy. Make it easy for the court to rule for you. If you're relying on an unreported or obscure case, attach it to your document as an exhibit.[44] Attaching it shows the court that you've got nothing to hide.

Cite Correctly. When citing to the law, do so correctly. Cite the correct reporter. Cite the correct page. Make it easy for your reader to find and re-cite your authority.

The Weakness

Know the weakness in your own case. Know what facts are unfavorable to your client. Know what aspect of the law is unfavorable for your client. Then address those weaknesses.

Address weaknesses as soon as possible. Don't wait until your adversary brings them up. If you wait until your adversary explains the law or the facts, it'll be too late.

Know when to concede. Don't concede too early or too frequently or give up an essential argument. Don't argue for the sake of arguing: "Don't vehemently stick to an unreasonable or tenuous position just for the sake of arguing — this will seriously impact credibility. Acknowledge weaknesses and address them forthrightly."[45]

The Rules

Playing by the rules could mean the difference between winning or losing. Follow court deadlines and court rules. Serve and format your papers according to the court's requirements.

Follow the individual judge's deadlines and rules. If the judge gives you a 25-page limit for your post-trial brief, stay within the page limit. If the judge tells you that your deadline is next Thursday, follow the judge's instruction. Breaking the rules means that the judges might reject your papers; at the least, you'll lose credibility. Your client will lose credibility, too.

Honesty Is the Best Practice. Judges appreciate honesty. Be honest with the facts.[46] Be honest with the law.[47]

You've learned from the last column — writing and opposing sanction motions — that lying will get you into trouble. If you lie about one thing — even if it's minor — the court will assume you've lied about other things.

The Words

Watch your language. Words have power: "[W]ords can win — or lose — the case."[48] Make sure you use the right words to say what you want to say. Limit your adjectives and adverbs.

Here's a list of things you should eliminate from your litigation documents:

- **Adverbial Excesses.** Eliminate "absolutely," "apparently," "certainly," "clearly," "completely," "indisputably," "obviously," "really," "truly," and "unmistakably" from your documents.[49] If it were clear, you wouldn't be in court. If it were indisputable, you wouldn't have an adversary to dispute your version of the facts and law.
- **Clichés.** Eliminate: "all things considered," "at first blush," "clean slate," "exercise in futility," "fall on deaf ears," "foregone conclusion," "it goes without saying," "last-ditch effort," "leave no stone unturned," "lock, stock, and barrel," "making a mountain out of a molehill," "nip in the bud," "none the wiser," "pros and cons," "search far and wide," "step up to the plate," "tip of the iceberg," "wait and see," "wheels of justice," "when the going gets tough," and "writing on a clean slate."
- **Colloquialisms.** Colloquialisms are expressions that aren't used in

formal speech or writing. *Examples:* "gonna" and "ain't nothin."

- **Conjunctive Adverbs.** The best writing doesn't rely excessively on conjunctive adverbs like "additionally," "along the same lines," "furthermore," "however," "in addition," "in conclusion," "lastly," "moreover," and "therefore." If the logic and movement of your ideas are clear, your reader will connect thoughts without needing artificial transitional devices that impose superficial logic.
- **Contractions.** Don't use contractions in your litigation documents.[50] *Examples:* "can't," "don't," "it's," "won't." Contractions might be appropriate in a magazine or newspaper article, but they have no place in your legal documents.
- **Elegant Variation.** Repeat the same word instead of using a synonym. If you create a synonym, you'll confuse your reader. If your case is about a contract, refer to it as a "contract." Don't use "agreement," "understanding," or "covenant" to refer to the same contract.[51]
- **Equivocations.** Eliminate doubtful, timid, and slippery equivocations, phrases, and words: "at least as far as I'm concerned," "generally," "probably," "more or less," and "seemingly."
- **Euphemisms.** Eliminate euphemisms. A euphemism is a word or phrase that replaces a negative, offensive, or uncomfortable word or phrase. Some euphemisms for dying: "passed away," "passed on," "checked out," "kicked the bucket," "bit the dust," "bought the farm," "cashed in their chips," and "croaked."
- **Expletives.** "Expletive" means "filled out" in Latin. Avoid: "there are," "there is," "there were," "there was," "there to be," "it is," and "it was." *Example:* "There are three issues in this case." *Becomes:* "This case has three issues." *Exceptions:* Use expletives for emphasis; for rhythm; to climax (end with emphasis); or to go from short to long or from old to new. *Emphasis examples:* "It was a machete that killed Jimmy." Here, the author emphasizes the object that killed Jimmy, not that Jimmy was killed. "It was Judge Garner who wrote the opinion." Here, the author emphasizes Judge Garner's authorship even though it would have been more concise to write "Judge Garner wrote the opinion." *Rhythm example:* "To everything there is a season." This example would have been different had the author written "To everything is a season." *Climax example:* "There is a prejudice against sentences that begin with expletives" is better than "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists."
- **Jargon.** Jargon is terminology that relates to a specific profession or group. Don't use words or phrases only you or another lawyer might know. *Examples:* "In the instant case" or "in the case at bar" *becomes* "here" or "in this case." Or, better, discuss your case without resorting to "here" or "in this case."
- **Legalese.** Eliminate all legalisms. *Incorrect:* "Enclosed herewith is my brief." *Correct:* "Enclosed is my brief." *Incorrect:* "The defendant has a prior conviction." *Correct:* "The defendant has a conviction." Eliminate these words: "aforementioned," "aforesaid," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "per" (and "as per"), "said," "same," "such," "thenceforth," "thereafter," "therein," "thereby," "to wit," "whatsoever," "whereas," "wherein," and "whereby." If you wouldn't say it, don't write it. Write "earlier" or "before," not "prior to." Write "after" or "later," not "subsequent to."
- **Metadiscourse.** Metadiscourse is discourse about discourse. It's throat clearing. Get to the point without a running start that occupies space but adds nothing. Eliminate: "After due consideration," "as a matter of fact," "bear in mind that," "for all intents and purposes," "it appears to be the case that," "it can be said with certainty that," "it goes without saying that," "it is clear that," "it is important (or helpful or interesting) to remember (or note) that," "it is significant that," "it is submitted that," "it should be emphasized that," "it should not be forgotten that," "the fact of the matter is," "the point I am trying to make is that," "it is well settled," and "it is hornbook law."
- **Mixed Metaphors.** Mixed metaphors combine two commonly used metaphors to create a nonsensical image: "He tried to nip it in the bud but made a mountain out of a molehill."
- **Negatives.** Watch out for negative words: "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." *Example:* "Good lawyers don't write in the negative." *Becomes:* "Good lawyers write in the positive." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Don't use "but," "hardly," or "scarcely" with "not." Use "but" instead of "but however," "but nevertheless," "but that," "but yet," and "not but." Eliminate negative prefixes and suffixes: "dis-," "ex-," "il-," "im-," "ir-," "-less," "mis-," "non-," "-out," and "un-." Use negatives only for negative emphasis: Abigail: "How are you?" Bob: "Not bad."
- **Nominalizations.** A nominalization is a verb turned into a noun. Nominalizations are wordy. They hide. They're abstract. Don't bury your verbs. Most buried verbs end with these suffixes: "-tion," "-sion," "-ment," "-ence," "-ance," and "-ity." Change weak nouns to powerful verbs: "allega-

tion" becomes "allege"; "conclusion" becomes "conclude"; "consideration" becomes "consider"; "installation" becomes "install"; "intention" becomes "intend"; "motion" becomes "moves"; "objection" becomes "object"; "preparation" becomes "prepare"; "provision" becomes "provide"; "requirement" becomes "require"; "resistance" becomes "resist"; and "violation" becomes "violate."[52]

- **"Of."** "Of" signals that you're wordy. Eliminate "of" by creating possessives or by inverting or rearranging the sentence. *Possessive example:* "The foregoing constitutes the decision and order of the court." *Becomes:* "This opinion is the court's decision and order." *Rearranging and inverting examples:* "I am a fan of the Doors." *Becomes:* "I am a Doors fan." "He's a justice of the Supreme Court of the State of New York." *Becomes:* "He's a New York State Supreme Court justice." "You're not the boss of me." *Becomes:* "You're not my boss." If the possessive looks awkward, keep the "of." "The Fire Department of the City of New York's (FDNY) policies." *Becomes:* "The policies of the Fire Department of the City of New York (FDNY)." Delete "as of." "The attorney has not filed the motion as of yet." *Becomes:* "The attorney has not filed the motion yet." Don't use "of" prepositional phrases: "Along the line of" *becomes* "like." "As a result of" *becomes* "because." "Concerning the matter of" *becomes* "about." "During the course of" *becomes* "during." "In advance of" *becomes* "before." "In case of" *becomes* "if." "In lieu of" *becomes* "instead of." "In the event of" *becomes* "if." "On the grounds of" *becomes* "because." "Regardless of whether or not" *becomes* "regardless whether." "With the exception of" *becomes* "except." Eliminate "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," and "nature of."
- **Passive Voice.** The passive voice comes in two forms: single passives and blank passives (sometimes called double or nonagentive passives). A single passive occurs when a sentence is converted to object, verb, subject from subject, verb, object. The double passive hides the subject. Single passive: "The motion was filed by Martin." Double passive: "The motion was filed." Prefer the active voice: "Martin filed the motion." The active voice lets readers know who did what to whom, in that order. The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest. People think in the active voice, not the passive.
- **Slang.** Eliminate slang from formal legal writing. Slang is made up of informal words or expressions not standard in the speaker's dialect or language and which are used for humorous effect. Use "absent minded" instead of "out to lunch," "drag" or "take" instead of "schlep," "marijuana" instead of "weed," "police" instead of "Five-O," "stolen goods" instead of "loot" or "stash."

Gender-Neutral Language. Eliminate sexist language. Here are four ways to create gender-neutral language. First, make the antecedent plural. *Example:* "A law clerk can't be careless. She must be meticulous and precise." Change "a law clerk" to "law clerks" and "she" to "they" to eliminate the sexist language. *Becomes:* "Law clerks can't be careless. They must be meticulous and precise." Second, rephrase the sentence to eliminate the pronoun. *Example:* "She who can't handle the work should find another job." *Becomes*: "Anyone who can't handle the work should find another job." *Example:* "A waiter likes his customers to be generous." *Becomes:* "A waiter likes generous customers." Third, repeat the noun: "A police officer will be here soon. He'll help you." *Becomes:* "A police officer will be here soon. The officer will help you." Fourth, use the second-person pronoun: "you," "your," or "yours." *Example:* "He who can write should apply for the job." *Becomes:* "If you can write, apply for the job."

Use the Right Verb. Statutes can't speak, point out, or demonstrate anything. But statutes can "apply," "dictate," "impose," "limit," "mandate," "prohibit," "provide," and "require."[53]

Courts can't argue, believe, or feel. But courts can "conclude," "decide," "declare," "determine," "examine," "find," "hold," "modify," "reason," and "rule."[54]

Don't Be Conclusory. Show, don't tell. *Example:* "Maurice is tall." Eliminate the conclusory language: "Maurice is seven feet in height."

Mind Your Manners. You might be angry with your adversary, your adversary's client, the judge, or even your client, but you should "get over your anger and use your head."[55]

Don't attack your adversary or your adversary's client. Avoid insults: "liar," "idiot," and "stupid." When you insult your adversary and your adversary's client, you lose sight of the big picture — winning the case based on the merits of your case. When you insult your adversary and your adversary's client, the court will lose sight of the merits of your case. The court won't take you seriously. The court will eventually turn against you.[56]

Avoid inflammatory language.[57]

Avoid words like "absurd" or "ridiculous."[58]

If you're an attorney, don't attack your client.

Don't insult the judge. Many litigants believe that the way to win is to attack the judge. Some litigants attack the judge by moving to disqualify the judge. Some litigants sue the judge. If you're unhappy with the judge's ruling, bring a motion to renew, reargue, or both. In your motion to reargue, you can point out that the judge misinterpreted or misapplied the law and the facts. Be diplomatic.[59] In explaining the judge's error, you don't need to make the judge feel stupid: "There are ways to show that a court's ruling

was in left field without saying the judge is an 'uninformed moron.'"[60] If you believe the court made a mistake, appeal. The best "practice is to focus on the law, not the judge."[61]

The Editing Process

Some litigators forget that the best way to produce a polished document is to edit: "Reading an error-laden brief is like listening to someone with bad hiccups — pretty soon the reader starts timing the hiccup intervals instead of listening to what the speaker is trying to say. Proofread."[62]

Check for grammar, punctuation, and spelling. Check the accuracy of your quotations. Check the accuracy of your authorities.

Don't abuse punctuation: "Some writers put semicolons and wild mushrooms in the same category: some are nice, and some are not, and since it is hard to tell the difference, they should all be avoided."[63] Eliminate exclamation points and question marks from your writing. If you want to be emphatic, do it in front of a jury. If you want to ask questions, put a witness on the stand and question the witness.

Choose one font and stick with it. Most experts reject Times New Roman, the default font in Word and WordPerfect: "Both the Supreme Court and the Solicitor General use Century. . . . Bookman and Century . . . are preferable to . . . Garamond . . . and Times [New Roman]."[64]

Eliminate excess. Cut out information that doesn't serve a purpose: The purpose is to persuade the court to rule for you.

Choose your words carefully: Choose words that say what you want to say.

Reorganize: Rearrange sentences; rearrange paragraphs.

Comply with court rules and deadlines.

Use every opportunity in your litigation documents to persuade. Don't wait until oral argument or trial to persuade. Persuade in the beginning, middle, and end of every document.

This concludes the series on writing litigation documents. In the next five issues of the *Journal*, the *Legal Writer* will discuss how to draft contracts. ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct professor of law at Columbia, Fordham, NYU, and New York Law School. He thanks court attorney Alexandra Standish for her research. *Note to readers:* The *Journal* is pleased to report that the prestigious *Scribes Journal of Legal Writing* has selected three of Judge Lebovits's *Legal Writer* columns for inclusion in its "Best of" series. *See Free at Last from Obscurity: Achieving Clarity*, 16 Scribes J. Legal Writing 127 (2014–2015); *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654480 (last visited Oct. 21, 2015); *Legal-Writing Myths*, 16 Scribes J. Legal Writing 113 (2014–2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654470 (last visited Oct. 21, 2015); and *On Terra Firma With English*, 16 Scribes J. Legal Writing 123 (2014–2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654479 (last visited Oct. 21, 2015).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLVI — Best Practices for Persuasive Writing

In the last issue of the *Journal*, we discussed sanctions motions.

In this issue, the *Legal Writer* concludes its 46-part series on civil-litigation documents with the best practices for writing litigation documents.

Throughout this series, you've learned about writing complaints, answers, bills of particulars, notices to admit, interrogatories, subpoenas, motions for disclosure, motions to dismiss, summary-judgment motions, motions to vacate default judgments, motions to reargue and renew, in limine motions, trial motions, post-trial motions, motions for attorney fees, and motions for sanctions. We've focused on the rules and mechanics of writing these documents. But at the heart of all these litigation documents is persuasion: Winning or losing your case will depend on whether you persuade. To write effective litigation documents, the *Legal Writer* offers some tips on persuasion.

The Story

Develop a Theme. Good lawyers are good storytellers.[1] The story you tell in your litigation document must persuade the court to grant your motion or deny your adversary's motion.[2] Because you're the author — the storyteller — you decide how to tell the story.[3]

You have a chance to win from the first sentence of your document: "First impressions are critically important . . . [Y]ou win at the beginning by hooking the reader into a story that ends in victory for your client."[4]

You hook the reader by developing a theme.[5] The best movies and books have memorable themes. Creating a good theme means persuading the reader that you (or your client) should win based on the applicable law and relevant facts. Creating a good theme means you're developing a "credible, compelling storyline that has (1) believable characters (the parties); (2) a persuasive plot (the facts and law); (3) a logical story arc (a beginning, middle, and end); and (4) a powerful ending (why your client must prevail)."[6]

Create a theme that makes a lasting impression on the court (and your adversary). Your theme must be "interesting, persuasive, easily understood, and supported by the facts and the law."[7]

In developing your theme, use emotion, such as sympathy or outrage.[8]

Use "logic, equitable principles, public policies, or some [other] combination."[9]

To persuade, weave your theme throughout your document.

Create an Introductory Paragraph. Great movies begin their themes with memorable opening scenes; great books have memorable opening lines.[10] Your litigation documents should likewise persuade from the opening paragraph: "Think of your strongest legal argument or a powerful fact that supports your claim and craft an introduction that immediately tilts the scales in your client's favor."[11] Don't wait until you've reached the middle or the end of your document to explain why you should win.

In your introductory paragraph, grab the reader's attention.

Tell the court what you want: State the relief you're seeking.[12]

Tell the court why you want it. Your introductory paragraph is meant to provide a roadmap for the reader. Tell the reader what's to come: "Use your introduction to lay out your case."[13] Use the relevant facts and law to tell the court why you want the relief you seek.

> Create a theme that makes a lasting impression on the court (and your adversary).

Remember that it's an introduction. Don't try to do everything in your introductory paragraph.[14]

Persuade on Page One. The expression "good things come to those who wait" doesn't apply to legal writing. In legal writing, you need to persuade right away, on page one. Get to the point quickly. If you wait until the middle or the end of your document to persuade, you might already have lost the case.

In your memorandum of law, persuade in your table of contents.[15] Create persuasive headings and sub-headings you'll copy in your text.

Get Organized. Telling a coherent story means you need to organize your story. Organize your thoughts in separate bite-sized paragraphs. Write your paragraphs in numerical order. Use this organizational technique in many of your litigation documents, such as

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