NEW YORK STATE BAR ASSOCIATION

TORTS, INSURANCE AND COMPENSATION LAW SECTION

Summer Meeting 2018

IRELAND

July 22-25, 2018

Powerscourt Hotel Resort & Spa
Enniskerry, Co. Wicklow

www.nysba.org/TICLSU18

Summer Meeting
NotePad

Torts, Insurance & Compensation Law Section

Ju]j 22-2&, 2018

Powerscourt Hotel

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All program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

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MCLE INFORMATION

Program Title: **Torts, Insurance & Compensation Law Section Summer Meeting**

Dates: July 22-25, 2018 Location: Powerscourt Hotel, Enniskerry, Ireland

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_8cdOiCvoavrricd

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **Up to 6.0 New York CLE credit hours**

Credit Category:
4.0 in Areas of Professional Practice; 1.0 in Ethics and 1.0 in Diversity

This course is approved for credit for experienced attorneys only. This course is not transitional and therefore will not qualify for credit for newly admitted attorneys (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

SCHEDULE OF EVENTS

Sunday, July 22

2:00 – 6:00 p.m.	**Registration** – Guest Service Desk
3:00 – 5:00 p.m.	**Executive Committee Meeting** – Glenealy Room
6:00 – 8:00 p.m.	**Welcome Cocktail Reception** – Heritage Suite and Patio
8:00 p.m.	Dinner on Your Own

Monday, July 23

7:00 – 10:00 a.m.	Breakfast for Hotel Guests at Sika Restaurant (Included in Room Rate for those booking accommodations in our Room Block)
8:30 a.m. – 12:00 p.m.	**Registration** – Heritage Suite Prefunction
9:00 a.m. – 12:00 p.m.	**General Session** – Heritage Suite
9:00 – 9:15 a.m.	**NYSBA Welcome** Michael Miller, Esq., President
	Torts, Insurance & Compensation Law Section Welcome Timothy J. Fennell, Esq., Chair
9:15 – 10:05 a.m. Speaker:	**2018 Ethics Update** Patrick Connors, Albert and Angela Farone Distinguished Professor in New York Civil Practice, Albany Law School, Albany
10:05 – 10:15 a.m.	Refreshment Break
10:15 – 11:55 a.m.	**2018 CPLR Update Including Summary Judgment in the Wake of Rodriguez vs City Of New York (2018)** Patrick Connors, Albert and Angela Farone Distinguished Professor in New York Civil Practice, Albany Law School, Albany
12:15 – 5:00 p.m.	**Golf at Powerscourt West Course, Powerscourt Golf Club, Powerscourt Estate** Designed by David McLay Kidd (Bandon Dunes in Oregon). Since opening in 2003, the course has gained a reputation as being one of the best parkland courses in Ireland. The layout is hilly with stunning views of Sugarloaf Mountain and a landscape covered with towering trees hundreds of years old. The challenging elevation changes are enhanced by strategically placed bunkering. **$150 per person.** Fees include: Greens fees, trolley, golf cart and box lunch. **Preregistration required**. First tee time is 12:30 p.m. Clubs may be booked through course at player's expense; email gareth.watkins@powerscourt.net for information.

SCHEDULE OF EVENTS

12:25 – 5:30 p.m.

Optional: **Wild Wicklow Tour: Wicklow Mountains and Glendalough**
Join us as we tour the beautiful Wicklow Mountains National Park traversing the Sally Gap stopping at Lough Bre, the Bogland and Lough Tay overlooking Guinness Lake. From there we head to Roundwood to try our hand at the traditional Irish sport of Hurling. We will explore the Monastic City of Glendalough, home to St. Kevin in the 6th c. AD and where travelers came in search of teaching from the learned monks and scholars living there between the 10th-13th c. AD. People have been drawn to this "valley of two lakes" for its scenery, history and archeology for thousands of years. **$80 per person** tour fee includes transportation and box lunch. **Preregistration required**. Tour departs hotel at 12:30 p.m. sharp.

7:00 – 10:00 p.m.

Cocktail Reception & Dinner at Powerscourt Estate Ballroom
The 13th century castle was turned into a magnificent mansion in 1731 and over the next decade the grounds were transformed into the extensive Award Winning gardens people travel cross-country to visit to this day. Estate is within walking distance from hotel.

SCHEDULE OF EVENTS

Tuesday, July 24

7:00 – 10:00 a.m.	Breakfast for Hotel Guests at Sika Restaurant (Included in Room Rate for those booking accommodations in our Room Block)
8:30 a.m. – 12:00 p.m.	**Registration** – Heritage Suite Prefunction
9:00 a.m. – 12:00 p.m.	**General Session** – Heritage Suite
9:00 – 9:10 a.m.	**Program Introduction** Timothy J. Fennell, Esq., Section Chair
9:10 – 10:00 a.m. Speaker:	**Diversity in the Profession** Mirna M. Santiago, Esq., Acacia Network, Bronx
10:00 – 10:15 a.m.	Refreshment Break
10:15 – 11:05 a.m. Panelists:	**Social Media Discovery:** **Plaintiff & Defendant Perspectives Post Forman vs Henkin, 30 NY3d 656 (2018)** Kathleen A. Barclay, Esq., Maguire Cardona, P.C., Albany Maureen E. Maney, Esq., Mackenzie Hughes LLP, Syracuse
11:05 – 11:55 a.m. Panelists:	**The Art of Storytelling: Delivering the Theme to the Jury** James E. Hacker, Esq., E. Stewart Jones Hacker Murphy LLP, Troy Patrick Speight, Irish Seanchai/Storyteller, Cork, Ireland
12:15 – 6:00 p.m.	*Optional:* **Afternoon In Dublin Exploring *or* Afternoon in Dublin with Literary Pub Crawl** Group will depart by Coach to Dublin. Explore the city on your own or join the group on a Literary Pub Crawl. Pub Crawl registrants will be dropped at Duke Street and embark upon a journey down the city streets learning about the lives of the artists while gaining insight into the turbulent history of Ireland's capital and examining the sights and sounds that inspired writers such as Oscar Wilde, Brendan Kennelly, Paula Meehan, Eavan Boland, W.B. Yeats, James Joyce and Samuel Beckett. Along the way, we'll pop into pubs with literary significance, where actors will bring the literature to life. Purchase a pint or a snack to keep your stamina up for the literary quiz at the end of the tour which concludes at 3 p.m. at Duke Street, leaving time to explore the city. **Preregistration required. $15 per person for round trip transportation. *$35 per person for round trip transportation and Literary Pub Tour. Price of tour does not include lunch, snacks or beverages, so plan ahead. Additional information on Dublin drop off and pick-up locations available at Meeting Registration Desk.***

SCHEDULE OF EVENTS

1:00 – 6:00 p.m.	**Golf at Druids Glen Course, Newtownmountkennedy** Designed by Pat Ruddy & Tom Craddock, opened in 1995. A year after opening, Druids Glen hosted the Irish Open for four years in a row. It has also hosted the prestigious Seve Trophy, a bi-annual event between the leading Tour Players of Britain & Ireland and Continental Europe. **$150 per person.** Fees include: transportation to/from course, greens fees, golf cart and box lunch. **Preregistration required**. Shuttle departs hotel at 12:30 p.m. sharp. Clubs may be booked through Druids at player's expense; email siobhan.bradley@druidsglenresort.com for information.
7:00 – 8:00 p.m.	**Cocktail Reception** – The Secret Garden
8:00 – 10:00 p.m.	**Dinner** – Salon One

Wednesday, July 25

7:00 – 10:00 a.m.	Breakfast for Hotel Guests at Sika Restaurant (Included in Room Rate for those booking accommodations in our Room Block) Checkout

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GOLD LEVEL:

SILVER LEVEL:

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Torts, Insurance and Compensation Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Torts, Insurance and Compensation Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ____________________

Address ____________________

____

City ________ State ____ Zip ________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ____________________

Address ____________________

City ________ State ____ Zip ________

Office phone (____) ____________

Home phone (____) ____________

Fax number (____) ____________

E-mail address ____________________

Date of birth ____ /____ /____

Law school ____________________

Graduation date ________

States and dates of admission to Bar: ____________

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org

Join a Torts, Insurance and Compensation Law Section Committee(s)

All active Section members are welcome and encouraged to join one or more Committees at no additional cost. Please indicate the Committee(s) you would like to join in order of preference (1, 2, 3 and so on):

___ Alternative Dispute Resolution (TICL3100)
___ Automobile Liability (TICL1100)
___ Business Torts and Employment Litigation (TICL1300)
___ Class Action (TICL1400)
___ Continuing Legal Education (TICL1020)
___ Diversity (TICL4200)
___ Ethics and Professionalism (TICL3000)
___ General Awards (TICL1600)
___ Governmental Liability (TICL1700)
___ Information Technology (TICL2900)
___ Insurance Coverage (TICL2800)
___ Laws and Practices (TICL1800)
___ Membership (TICL1040)
___ Municipal Law (TICL2100)
___ No Fault (TICL4400)
___ Premises Liability/Labor Law (TICL2700)
___ Products Liability (TICL2200)
___ Professional Liability (TICL2300)
___ Social Media (TICL4600)
___ Sponsorships (TICL4500)
___ Task Force on TICL Committees (TICL2400)
___ Toxic Tort (TICL4300)

2018 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2010 and prior	$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2010 and prior	$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2017

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2018 ETHICS UPDATE

Submitted By:

PROFESSOR PATRICK CONNORS
Albany Law School
Albany, New York

ETHICS UPDATE 2018

NYSBA TICL Meeting
Ireland, July 2018

PROFESSOR PATRICK CONNORS
ALBERT AND ANGELA FARONE DISTINGUISHED PROFESSOR IN
NEW YORK CIVIL PRACTICE

ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494

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I. Threatening Ancillary Proceedings Against an Adverse Party

Rule 3.4(e) of the New York Rules of Professional Conduct states:

"A lawyer shall not…present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Comment 5 thereto states:

The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

* * *

In Formal Opinion 2017-3, entitled "Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party," the Association of the Bar of the City of New York's Committee on Professional Ethics ("ABCNY") opined that "Rule 3.4(e) the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from threatening criminal charges solely to obtain an advantage in a civil matter, but does not apply to threats to instigate ancillary non-criminal proceedings against an adverse party, e.g., where a lawyer, on behalf of a client, threatens to report an adverse party's misconduct to an administrative or regulatory agency unless the adverse party agrees to the client's settlement demand."

Nonetheless, even though Rule 3.4(e) does not apply to threats to instigate ancillary non-criminal proceedings, that:

> does not mean that lawyers are free to make such threats with impunity. Such threats may violate criminal laws against extortion, and, if so, they will likely violate Rules 8.4(b) and Rule 3.4(a)(6). Where such threats do not violate criminal law, they may nonetheless violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. Whether such a threat violates Rule 8.4(d) will generally depend on whether the threat

> concerns matters extraneous to the parties' dispute or, conversely, would serve as an alternative means of vindicating the same alleged claim of right or of obtaining redress for the same alleged wrong. Additionally, if such a threat is made without a sufficient basis in fact and law, it may violate, inter alia, Rule 4.1 or Rule 8.4(c).

New York's Rule 3.4(e) is the same as its predecessor, New York Disciplinary Rule ("DR") 7-105(A). New York's DR 7-105(A) was identical to DR 7-105(A) of the Model Code of Professional Responsibility of the American Bar Association ("ABA"). The provision does not, however, exist in the ABA Model Rules of Professional Conduct.

ABCNY Formal Opinion 2017-3 notes:

> In 1983…the ABA Commission on Evaluation of Professional Standards decided to eliminate DR 7-105(A). The Commission's reasoning, as described in Formal Opinion 92-363 (July 6, 1992) of the ABA Standing Committee on Ethics and Professional Responsibility, was that DR 7-105 was both redundant and overbroad. The rule was redundant in that it prohibited extortionate conduct that violated criminal law and was therefore barred by other ethical rules. At the same time, the rule was overbroad because it prevented lawyers from threatening prosecution in legitimate furtherance of a client's interests.

As ABA Formal Op. 92-363 explained:

> Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b). It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." . . . .

> [A] general prohibition on threats of prosecution . . . would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to "zealously" assert the client's position under the adversary system. . . . Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent.

ABA Formal Op. 92-363 identified several additional provisions of the ABA Model Rules that addressed threats of criminal prosecution including: Model Rules 3.1 (assertion of frivolous claims); 4.1 (truthfulness in statements to others); 4.4(a) (conduct with no substantial purpose other than to embarrass, delay or burden a third person); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(e) (stating or implying ability to improperly influence government agency or official).

Despite the ABA's actions, New York and several other jurisdictions still retained the rule. *See, e.g.*, Ala. R. Prof. Cond. 3.10; Conn. R. Prof. Cond. 3.4(7); Ga. R. Prof. Cond. 3.4(h); Haw. R. Prof. Cond. 3.4(i); Idaho R. Prof. Cond. 4.4(a)(4); La. R. Prof. Cond. 8.4(g); N.J. R. Prof. Cond. 3.4(g); S.C. R. Prof. Cond. 4.5; Tenn. R. Prof. Cond. 4.4(a)(2); Vt. R. Prof. Cond. 4.5. Some states explicitly prohibit lawyers from threatening criminal, disciplinary or administrative action. *See, e.g.*, Cal. R. Prof. Cond. 5-100 (A); California Rule 3.10, Threatening Criminal, Administrative, or Disciplinary Charges (Rule Approved by the California Supreme Court, Effective November 1, 2018); Colo. R. Prof. Cond. 4.5; Me. R. Prof. Cond. 3.1(b).

California Rule 3.10, going into effect on November 1, 2018 states:

> (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
>
> (b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

> (c) As used in this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

New York Rule 3.4(e), like its predecessor DR 7-105(A), is silent as to non-criminal charges. For this reason, the New York State Bar Association (“NYSBA”) Committee on Professional Ethics declined to extend DR 7-105(A) to threats to file non-criminal complaints with regulatory agencies. NYSBA Ethics Opinion 772 (Nov. 14, 2003). The inquiry raised in Opinion 772 is as follows:

> May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

The Committee concluded that:

> the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

In Nassau County Bar Association Committee on Professional Ethics Opinion 1998-12 (Oct. 28, 1998), however, a lawyer had information indicating that opposing counsel had made a misrepresentation to the court. Opinion 1998-12 concluded that the lawyer could communicate with opposing counsel about the necessity of correcting the misrepresentation, but that "an actual threat to file a [disciplinary] grievance if [opposing counsel] would not offer a better settlement would . . . violate DR 7-105." In reaching this conclusion, Opinion 1998-12 explained that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," citing People v. Harper, 75 N.Y.2d 313 (1990). *See also* Illinois Opinion 87-7; Maryland Opinion 86-14.

NYSBA Opinion 772 rejected the reasoning of these opinions:

> in light of the specific language of DR 7-105(A), which concerns only 'criminal charges.' In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

In ABCNY Formal Op. 2015-5 (June 26, 2015), the Committee agreed with NYSBA Opinion 772 and similarly concluded that such a threat would not violate Rule 3.4(e) because that rule, by its terms, applies only to threats of criminal charges. The Committee reasoned that "the plain language of Rule 3.4(e) should govern," and "declin[ed] to extend the rule by analogy to threats of disciplinary action against attorneys." The Committee also observed that "it may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court."

In Formal Opinion 2017-3, the ABCNY Ethics Committee listed several other applicable rules and statutes that may govern such threats:

1) *Threats in Violation of Law; Extortion.*

> Whether a particular threat constitutes criminal extortion is a substantive legal issue outside the purview of this Committee. For our purposes, it is sufficient to note that under certain circumstances, threats to instigate non-

criminal proceedings in order to obtain an advantage in a civil matter may violate laws against extortion or other criminal statutes, just as certain threats to file disciplinary or criminal charges may violate such laws. See NYCBA Formal Op. 2015-5 (discussing N.Y. Penal Code § 115.05); Rule 3.4 Cmt. [5] (use of threats in negotiation may constitute crime of extortion). A threat that constitutes criminal extortion or a similar offense will likely violate Rule 3.4(a)(6), which provides that "[a] lawyer shall not . . . engage in . . . illegal conduct," and Rule 8.4(b), which provides that "[a] lawyer. . . shall not . . . engage in . . . illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer." Such a threat may also violate Rule 8.4(h), which provides that "[a] lawyer. . . shall not . . . engage in any . . . conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

2) *Threats without Sufficient Basis in Law or Fact.*

In some circumstances, a lawyer will be subject to discipline for threatening an ancillary non-criminal proceeding that the lawyer knows is legally or factually baseless. Such knowingly baseless threats, including a definitively stated threat to instigate a proceeding that the lawyer does not in fact intend to instigate, may violate Rule 4.1or Rule 8.4(c). Rule 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," while Rule 8.4(c) provides that "[a] lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." See District of Columbia Ethics Op. 339 (April 2007) (threat to report debtor to criminal authorities if debt is not paid may be impermissibly misleading if a selective and inaccurate reference is made to the applicable law).

This is not to say that all legally or factually unsupported threats are impermissibly misleading. Especially in the course of negotiations with another lawyer, a threat may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct. See Rule 4.1, cmt. [2] ("Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact."). But if a lawyer makes a threat that is baseless either because the lawyer has unequivocally stated an intention that does not exist or because the threatened proceeding would lack a sufficient legal or factual basis under Rule 3.1, it may be knowingly false or misleading to seek an

advantage by making such a threat. This is especially so if the lawyer is making the threat to a non-lawyer who might reasonably be expected to rely to his detriment on the lawyer's express or implied assertion that there is a legitimate basis for the threat.

3) *Threats for No Substantial Purpose Other Than Harassment or Harm*

Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Rule 3.1(b)(2) similarly provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if it "serves merely to harass or maliciously injure another." There could be circumstances where a threat to instigate a non-criminal proceeding against an adverse party is largely or entirely the result of a client's desire to embarrass, harm, harass or maliciously injure an adverse party, in which event these rules would be implicated. In most cases, however, a substantial purpose of the threat will be to gain advantage in the underlying civil dispute by causing the adverse party to settle or drop his claims. Where that is so, the threat would not appear to "serve[] merely to harass or maliciously injure another" or "have no substantial purpose" other than to cause embarrassment or harm.

4) *Threats Prejudicial to Administration of Justice.*

A threat that is adequately grounded in law and fact, has a substantial purpose other than harassment or harm, and is not extortionate under criminal law may nonetheless violate Rule 8.4(d), which provides: "A lawyer . . . shall not . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d), which addresses conduct that may or may not be addressed by other ethical rules, seeks to prevent substantial harm to the justice system:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court."

Rule 8.4, Cmt. 3.

Clearly, a baseless threat may be prejudicial to the administration of justice where it would tend to undermine the truth-seeking process or otherwise distort the adjudicative proceeding. See, e.g., NYCBA Formal Op. 2015-5 (opining that a threat to file disciplinary charges against opposing counsel, if not supported by a good faith belief that opposing counsel is engaged in unethical conduct, would violate Rule 8.4(d)); In re Smith, 848 P.2d 612 (Or. 1993) (finding that it was prejudicial to the administration of justice for a lawyer to baselessly threaten to sue a doctor if the doctor did not render a helpful expert opinion).

The question, then, is whether a threat that does have a sufficient basis may nonetheless violate Rule 8.4(d). Two ABA opinions, ABA Formal Op. 92-363 (July 6, 1992) and ABA Formal Op. 94-383 (July 5, 1994), recognize that it may be improper to threaten to take otherwise lawful action, such as filing criminal or disciplinary charges for which there is an adequate legal and factual basis, in order to pressure an opposing party to settle a civil case on favorable terms. These opinions suggest that the propriety of such a threat turns on whether the threatened proceeding provides an alternative means of vindicating the rights at issue in the civil case or whether the lawyer is threatening unrelated harm in order to obtain leverage or a bargaining chip for settlement.

The duty to report professional misconduct under ABA Model Rule 8.3 can also have an impact here. That rule provides:

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a)

> and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

II. Ethics Issues in Social Media and Electronic Disclosure

A. NYCLA Ethics Opinion 745 (2013)

In Formal Opinion 745, the New York County Lawyers Ethics Committee concluded that attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including Rule 3.1("Non-Meritorious Claims and Contentions"), 3.3 ("Conduct Before a Tribunal"), and 3.4 ("Fairness to Opposing Party and Counsel").

The opinion noted that:

> The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them.

The opinion observes that "[i]t is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs" and that "[d]emands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine."

The Committee opined that:

> There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media

> pages, requiring adverse counsel to request access through formal discovery channels.

Furthermore, an attorney "may advise clients as to what should or should not be posted on public and/or private pages." Finally, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed."

There are issues of substantive law in this realm, also noted in the opinion, but these are beyond the jurisdiction of an ethics committee. For example, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015) (Court of Appeals essentially adopted the standards set forth by the First Department in its *VOOM* decision); *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012-13 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

Formal Opinion 745 states "we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."

Comment 8 to New York Rule 1.1 ("Competence") now states:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

See North Carolina Bar Association: Advising A Civil Litigation Client About Social Media (July, 2015)(agreeing with New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, which concluded that "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.").

B. Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (June 9, 2015).

These Guidelines are available at: http://www.nysba.org/socialmediaguidelines/ (see pp. 15–22, citing NYCLA Op. 745). Guideline No. 5.A, entitled "Removing Existing Social Media Information," states:

> A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

Guideline No. 5.B, entitled "Adding New Social Media Content," states:

> A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

Guideline No. 5.C, entitled "False Social Media Statements," provides:

> A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.

C. Forman v. Henkin, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018)

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g.*, *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*,

102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

Moving forward, lawyers might consider requesting that their clients deactivate a social media site, as the plaintiff did in *Forman*, or remove certain postings from the site. Is such conduct ethical? In New York County Lawyers Association Ethics Opinion 745 (2013), the ethics committee concluded, among other things, that a lawyer is permitted to advise a client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from

having direct access to the contents of the site. From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. In this regard, Rule 3.4 (a)(1) of the New York Rules of Professional Conduct provides that a lawyer "shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Furthermore, under Rule 3.4 (a)(3), a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

While not addressed in *Forman*, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dep't 2012); Siegel & Connors, New York Practice §§ 362, 367 (discussing litigation holds and penalties for spoliation); McKinney's CPLR 3126 Practice Commentaries, C3126:8A ("Sanction for Spoliation of Evidence"). Once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure.

D. The Ethical Implications of Attorney Profiles on LinkedIn

1) New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (2015)

In Formal Opinion 748 (2015), the New York County Lawyers Association Professional Ethics Committee observed that "LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers… Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes."

The current version of LinkedIn allows:

> users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation

or matrimonial law—as well as write a recommendation as to the user's professional skills.

The opinion addressed three ethical issues arising from an attorney's use of LinkedIn profiles:

> 1) whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct;
>
> 2) whether an attorney may accept endorsements and recommendations from others on LinkedIn;
>
> 3) what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct

1) Whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct?

Under New York's ethics rules, an "advertisement" is defined in Rule 1.0(a) as:

> [A]ny public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

The comments to the rules make clear that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising" and the advertising rules do not encompass communications with current clients or former clients germane to the client's earlier representation. Rule 7.1, Comment 6. Similarly, communications to "other lawyers . . . are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm." *Id.*, Comment 7.

Applying the above Rules, the Committee concluded that:

> a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the

> experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing only one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.

2) Whether an attorney may accept endorsements and recommendations from others on LinkedIn?

The Committee noted that:

> additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

In Formal Opinion 972 (2013) of the New York State Bar Association, the question before the Committee was whether an individual lawyer or law firm could describe the kinds of services they provide under the LinkedIn section labeled "Specialties."

New York's Rule 7.4(a) allows lawyers and law firms to make general statements about their areas of practice, but a "lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law." Rule 7.4(c) provides an exception and "allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area" approved by the ABA or appropriate authority. *See* ABA Model Rule 7.4(d) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar

Association; and (2) the name of the certifying organization is clearly identified in the communication.").

The Committee opined that by listing areas of practice under a heading of "Specialties," a lawyer or law firm makes a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law." Thus, proper certification would be required as provided in Rule 7.4(c). *See also Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012) (striking down as unconstitutional portions of New York Rule 7.4(c)'s disclaimers including the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law"). If, however, "a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions."

The NYSBA opinion did not address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings in LinkedIn, such as "Products & Services" or "Skills and Expertise." In Formal Opinion 748, the New York County Lawyers Association Professional Ethics Committee concluded that:

> With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c)." RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

LinkedIn allows others to include endorsements and recommendations on an attorney's profile, which raises additional ethical considerations. "While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile." The Committee concluded that

> because LinkedIn gives users control over the entire content of their profiles, including 'Endorsements' and 'Recommendations' by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1.

The Committee provided certain examples:

> if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading.

3) What information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct?

If an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the Opinion concludes that the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. While not opining on the requirements for all potential content on LinkedIn, the Committee concluded that:

> If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "AttorneyAdvertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney

> should also include the disclaimer "Prior results do not guarantee a similar outcome." See RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's [] services" under Rule 7.1(d).

2) New York City Bar Association Formal Opinion Number 2015-7 (2015)

In Opinion 2017-7, the New York City Bar Association Opined that:

> An attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the primary purpose of attracting paying clients. For example, including a list of "Skills," a description of one's practice areas, or displaying ""Endorsements" or "Recommendations," without more, does not constitute attorney advertising.If an attorney's individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

The New York City Bar expressed significant disagreement with NYCLA Opinion 748:

> Given LinkedIn's many possible uses, there should be clear evidence that a lawyer's primary purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an "advertisement." In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer's Association ("NYCLA"), which concluded that "if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1." NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the content of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an ""advertisement," such as the primary purpose of the communication and the intended audience. Including a list of "Skills" or a description of one's practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer's LinkedIn profile an ""advertisement."

The City Bar did, however, "concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.")."

Furthermore, the City Bar also:

> agree[d] with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading "Skills" or "Experience" does not "constitute a claim to be a specialist under Rule 7.4." We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that "a lawyer may include information about the lawyer's experience elsewhere, such as under

another heading or in an untitled field that permits biographical information to be included." NYSBA 2015 Social Media Guidelines, at 7-8.

III. Communicating With Represented and Unrepresented Parties and Persons

New York Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] Paragraph (a) applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former

constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rules 1.13, 4.4.

[8] The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. See Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate

with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

[12A] When a lawyer is proceeding pro se in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

* * *

New York RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation,

the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

IV. ABA Formal Opinion 479: The "Generally Known" Exception to Former-Client Confidentiality (December 17, 2017)

Digest: A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

* * *

Rule 1.6(a) of the New York Rules of Professional Conduct provides:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

* * *

Comment 4A thereto provides:

Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Rule 1.8(b) of the New York Rules of Professional Conduct provides:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Rule 1.9(c) of the New York Rules of Professional Conduct provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

* * *

In *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459,707 N.E.2d 414 (N.Y. 1998), the New York Court of Appeals applied former DR 5-108(a)(2), the predecessor provision to Rule 1.9(c), and held:

> Unlike the confidentiality protections afforded a current client (see, Code of Professional Responsibility DR 4–101 [22 NYCRR 1200.19]), however, DR 5–108(A)(2) recognizes that an attorney may divulge “generally known” information about a former client. Here, we are satisfied that Samaan's first affidavit comfortably falls within that exception. Plaintiff correctly notes, and defendant does not controvert, that information regarding the interrelationship of AIG and its member companies was readily available in such public materials as trade periodicals and filings with State and Federal regulators. It was thus “generally known.”

ABA Formal Opinion 479 quoted the following passage:

> [T]he phrase “generally known” means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .[O]nly if an event gained considerable public notoriety should information about it ordinarily be considered “generally known.”

ROY D. SIMON & NICOLE HYLAND, SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017)

The Opinion also noted that:

> under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client." MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017). Confidential information, however, does not ordinarily include information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* at cmt. 3A.

Finally, Formal Opinion 479 provided what it called "A Workable Definition of Generally Known under Model Rule 1.9(c)(1)":

> Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known

within the meaning of Model Rule 1.9(c)(1).

V. ABA Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Digest: Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

ABA Formal Opinion 480 observed that:

> Lawyers comment on legal topics in various formats. The newest format is onlinepublications such as blogs, listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").
>
> Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

As to the lawyer's confidentiality obligations, the opinion notes:

> Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6. Rule 1.6(b) provides other exceptions to Rule 1.6(a). However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to

> a lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.
>
> Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.
>
> A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.
>
> The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer15 must comply with Rule 1.6(a).

As for "First Amendment Considerations," Formal Opinion 480 notes:

> While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds. Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.

VI. Attorney-Client Privilege; Common Interest Doctrine; Protecting Confidential Information

A. New York Rules of Professional Conduct: RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

* * *

B. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016)

Court of Appeals Refuses to Expand Common Interest Doctrine of Attorney-Client Privilege

One of the more important tasks for lawyers conducting disclosure is asserting the attorney client privilege in response to a CPLR 3120 document demand. CPLR 3101(b) provides absolute immunity from disclosure for any information protected by the privilege. This objection, and any other relevant one, must be timely asserted in what is generally referred to as a privilege log. *See* CPLR 3122(b);

Siegel, New York Practice § 362. The privilege log provides bare bones information regarding the document that is withheld so the party seeking it can at least mount an argument that the privilege does not apply.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*., 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), the discovery dispute centered on whether defendant Bank of America was required to produce approximately 400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger. The privilege log claimed that the documents were immune from disclosure by the attorney-client privilege because they pertained to various legal issues the two companies needed to resolve together to successfully complete the merger closing. Plaintiff made a motion to compel production of the documents under CPLR 3124, arguing that Bank of America waived the privilege by sharing the information with Countrywide before the merger.

The Court of Appeals noted that the social utility of the attorney client privilege "is in '[o]bvious tension' with the policy of this State favoring liberal discovery" and, therefore, "must be narrowly construed." *Id.* The Court quoted from its prior opinion in *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593–594 (1989), which provides a procedural blueprint for attorneys asserting the privilege in litigation. The Court again held:

> The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." The common interest doctrine has been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation."

In *Ambac*, the documents withheld from disclosure contained communications shared in anticipation of a merger. While Bank of America and Countrywide certainly had a common legal interest in successfully completing the merger, they did not reasonably anticipate litigation at the time of the communications. The Court rejected Bank of America's argument that the common interest doctrine should be expanded to include communications made in furtherance of "any common legal interest" and adhered to the litigation requirement. Therefore, the documents will need to be disclosed.

The Court's decision in *Ambac* highlights the importance of preserving privileged information at every step of the representation. This obligation requires intimate knowledge of both the elements of the privilege and the disclosure rules in Article 31 of the CPLR.

C. Amendments to Rule 1.6 Effective January 1, 2017

Rule 1.6(c): "A lawyer *make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).*"(amendment in italics).

Comments 16 and 17 to Rule 1.6 now provide:

> **Duty to Preserve Confidentiality**
>
> [16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of

disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

* * *

ABA Formal Opinion 477R: Securing Communication of Protected Client Information

Digest: A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client

information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

VII. New York State Adopts Rules Governing Multijurisdictional Practice

A. Background of Multijurisdictional Practice Issues

***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara*, 949 P2d 1 (Cal. 1998)**

A New York law firm represented a California company in an arbitration. The arbitration required lawyers in the firm to travel to California to prepare for the arbitration. These lawyers were admitted in New York, but not California.

When the New York law firm sought to enforce its written fee agreement in California state court, the court held that the fee agreement violated public policy and that the firm had engaged in the unauthorized practice of law. In *Birbrower*, the California Supreme Court "decline[d] ... to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Birbrower*, 949 P2d at 9. The court held that the unauthorized practice of law in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." A lawyer could be deemed to be engaged in the unauthorized practice of law in California "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."

The ruling in *Birbrower* was promptly overruled by the California legislature. *See* Cal.Civ.Proc.Code § 1282.4 (providing an arbitration exception to unauthorized practice rules).

B. ABA Model Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when

performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

* * *

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a

jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer

licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer,

however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to

practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

* * *

13 states have adopted a MJP Rule virtually identical to ABA Model Rule 5.5. They are: Arkansas, Arizona, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Vermont, Washington, and West Virginia.

34 states have adopted a MJP Rule that is similar to ABA Model Rule 5.5. They are, with certain distinctions noted:

Alabama – Rule 5.5 (b) permits out-of-state lawyers to practice in Alabama on a temporary basis "including transactional, counseling, or other nonlitigation services" related to the lawyer's home-state practice.

Arizona – see below

California – California Court Rule 9.47, entitled "Attorneys practicing law temporarily in California as part of litigation," states that "[f]or an attorney to practice law under this rule, the attorney must:

> (1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;
>
> (2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;
>
> (3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

An attorney who satisfies these requirements may provide services that are part of:

(1)A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

(2)A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;

(3)A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4)A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

To engage in the above activities in California, the lawyer cannot be a California resident.

Colorado – Colorado Rule of Civil Procedure 220 does not state any specific exceptions to the general prohibition against unauthorized practice. The Rule provides that if a lawyer is licensed elsewhere and in good standing, she may perform nonlitigation services in Colorado so long as the lawyer is not domiciled in Colorado and does not keep an office in Colorado from which they hold themselves out as practicing Colorado law.

Connecticut – Rule 5.5(c) contains a reciprocity requirement. Rule 5.5 (f) provides:

(f) A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4): (1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware – Rule 5.5(d) states:

> A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

District of Columbia – Rule 49 of the Rules of the District of Columbia Court of Appeals is a very detailed Rule which, among other things, allows lawyers licensed elsewhere to provide legal services in DC "on an incidental and temporary basis."

Florida

Georgia

Idaho

Kansas

Kentucky

Louisiana

Maine

Michigan

Minnesota

Missouri

Nevada

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

South Carolina

North Carolina

Tennessee

Utah

Virginia

Wisconsin

Wyoming

Texas has created a committee to study the adoption of MJP rules.

The ABA's Commission on Multijurisdictional Practice has a helpful website containing information on the adoption of MJP rules in various jurisdictions:

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

* * *

In ABA Formal Opinion 469 (2014), the Committee concluded that:

> A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).

The opinion also observes:

> The participation by a prosecutor in the conduct described in this opinion, wherein the prosecutor supplies official letterhead to a debt collection company and allows the debt collection company to use it to send threatening letters to alleged debtors without any review by the prosecutor or staff lawyers to determine whether a crime was committed and prosecution is warranted, violates Rule 5.5(a) by aiding and abetting the unauthorized practice of law.

C. ABA Model Rule 8.5: Disciplinary Authority; Choice of Law

Maintaining The Integrity Of The Profession

Rule 8.5 Disciplinary Authority; Choice Of Law

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

* * *

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22,

ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

D. Temporary Practice of Law in New York-Part 523 of Court of Appeals Rules

The unauthorized practice of law is a crime in New York. *See* Judiciary Law § 485-a (making certain violations of Judiciary Law §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

Effective December 30, 2015, 22 N.Y.C.R.R. section 523 (Section 523), permits temporary practice of law in New York by out-of-state and foreign attorneys for the first time. The Court of Appeals website states:

> The Court of Appeals has amended its rules to add a new Part 523 pertaining to the temporary practice of law in New York by out-of-state and foreign attorneys. The amendment sets forth the circumstances under which an attorney not admitted in New York may provide temporary legal services in the State. An attorney providing such temporary legal services may not establish an office or other systematic presence in the State or hold out to the public or otherwise represent that the attorney is admitted to practice here. Additionally, an attorney practicing pursuant to Part 523 is subject to the New York Rules of Professional Conduct and the disciplinary authority of this State.
>
> The Court also has amended its Rules for the Registration of In-house Counsel (Part 522). Under the newly amended rules, registration is now available to a foreign attorney who is a member in good standing of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.
>
> The rule amendments are effective December 30, 2015. A copy of the Court's orders amending the rules is below.

* * *

Rules of the Court of Appeals for the Temporary Practice of Law in New York

§ 523.1 General regulation as to lawyers admitted in another jurisdiction

A lawyer who is not admitted to practice in this State shall not:

> (a) except as authorized by other rules or law, establish an office or other systematic and continuous presence in this State for the practice of law; or
>
> (b) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this State.

§ 523.2 Scope of temporary practice

(a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.

> (1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and
>
> (2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and
>
> (3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:
>
>> (i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or
>>
>> (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or
>>
>> (iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission; or
>>
>> (iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice.

* * *

Rule 1.5(g) of the New York Rules of Professional Conduct, which addresses a lawyers' fee split with a lawyer outside her firm, states:

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, <u>*each lawyer assumes joint responsibility for the representation*</u> (emphasis added);
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services was rendered in New York." (emphasis added).

Reciprocity

There is no reciprocity requirement in section 523.

Malpractice

What standard will apply to lawyers who practice here temporarily? *See* NY PJI 2:152, jury charge for legal malpractice.

* * *

(b) A person licensed as a legal consultant pursuant to 22 N.Y.C.R.R. Part 521, or registered as in-house counsel pursuant to 22 N.Y.C.R.R. Part 522, may not practice pursuant to this Part.

§ 523.3 Disciplinary authority

A lawyer who practices law temporarily in this State pursuant to this Part shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in the State. A grievance committee may report complaints and evidence of a disciplinary violation against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

§ 523.4 Annual report

On or before the first of September of each year, the Office of Court Administration shall file an annual report with the Chief Judge reviewing the implementation of this rule and making such recommendations as it deems appropriate.

* * *

In a March 10, 2016 piece titled Connors "No License Required: Temporary Practice in New York State," the new Part 523 is examined in further detail.

* * *

E. Licensing of In-House Counsel in New York

22 N.Y.C.R.R. Part 522: Rules of the Court of Appeals for the Registration of In-House Counsel; effective December 30, 2015

22 N.Y.C.R.R. 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

(1)(i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority;

(2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within or outside the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and

(3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

22 N.Y.C.R.R. 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law;

(b) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

> (1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and
>
> (2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

22 N.Y.C.R.R. 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in section 522.1(b)(1);

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

22 N.Y.C.R.R. 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (section 1200.0 Rule 1.0[w] of this Title) or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

22 N.Y.C.R.R. 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

> (1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2) of this Part; or
>
> (2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in

this State solely and exclusively as permitted in section 522.4 of this Part. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) of this Part and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part.

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

22 N.Y.C.R.R. 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of this Title, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i) of this Title.

22 N.Y.C.R.R. 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), shall file such an application in accordance with section 522.2 within 30 days of the commencement of such employment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

22 N.Y.C.R.R. 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal

services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

* * *

Part 522 of the Rules of the Court of Appeals for the Registration of in-House Counsel allows certain foreign in-house lawyers to register to practice in New York State.

Although 46 U.S. jurisdictions have adopted a form of Model Rule 5.5, the template for Part 523, only 11 have expanded it to lawyers from other countries.

Recent amendments to Part 522 allow registration as in-house counsel not just by lawyers admitted to practice in other states and the District of Columbia, but also to those who are "member[s] in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective

regulation by a duly constituted professional body or public authority." 22 N.Y.C.R.R. § 522.1(b)(ii). This change was consistent with a recommendation by the Conference of Chief Justices, as well as with 15 other U.S. jurisdictions that have similarly expansive in-house counsel registration rules. See NYSBA Comments on Proposed Changes to the Rules of the Court of Appeals, Nov. 9, 2015 (NYSBA Comments) at 15. The language used was the same as that used to define those who can apply to be foreign legal consultants in New York. *Id.*

Nevertheless, the change was controversial, because at least some commentators felt the new rule did not go far enough. As the NYSBA Comments noted [at 16], "in-house counsel in many foreign jurisdictions, particularly in Europe, are not admitted to the bar and would apparently not qualify under this definition." The NYSBA proposed giving the Appellate Divisions discretion to allow these in-house lawyers to register, but this suggestion was rejected. Id. The ABA is also considering whether to amend its model in-house registration rule to address this issue.

VIII. Judiciary Law Section 470

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State and Second Circuit Declares Statute Constitutional

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first

enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern."

The case is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., July 2016 Supplement) and in Connors, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," where we addressed the interplay between the new Part 523 and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State.

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
>
> * * *
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital

> communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002); *cf Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 (1st Dept 2014) (finding no § 470 violation where firm leased and used New York office with telephone)."

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice. The First Department affirmed. 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909 (2018).

IX. Michael Cohen, President Trump, Stormy Daniels & Rule 1.8(e)

Rule 1.8(e) of the New York Rules of Professional Conduct provides:

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

* * *

New York Rules of Professional Conduct, Comments 9B and 10 provide:

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses,

including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

* * *

X. Issuing Subpoena to Current Client

Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

XI. Fee Agreements

A. New York Rule 1.5: FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and**

(8) whether the fee is fixed or contingent.

* * *

New York State Bar Association Committee on Professional Ethics Formal Opinion 1112 (2017), the inquirer sought to add this provision to its fee agreement:

> In the event of your failure to pay any bill for legal fees, costs and/or disbursements in excess of 20-days from the date of the bill, you hereby authorize the undersigned attorney to bill your credit card for the full amount of the unpaid balance of the bill, without further notice to you. Your credit card information is as follows: X*%###

The opinion concludes that a lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay after 20 days from the date of the lawyer's bill for such amount.

The opinion noted that the client must be expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration under Part 137 of the Uniform Rules) before the lawyer charges the credit card. Furthermore, the lawyer may not charge the client's credit card account for any disputed portion of the lawyer's bill. Cf. Rule 1.15(b)(4)(if the client disputes the lawyer's right to funds, the lawyer may not withdraw the disputed funds from the lawyer's special account until the dispute is finally resolved).

Previously, the Committee had approved the client's payment of a lawyers fee using a credit card as long as:

> (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.

* * *

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

> **(1) a contingent fee for representing a defendant in a criminal matter;**
>
> **(2) a fee prohibited by law or rule of court;**
>
> **(3) a fee based on fraudulent billing;**
>
> **(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or**

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or
(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

* * *

Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

ABA Formal Opinion 474 (2016) concludes that "[a] lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client." Therefore, "[f]ee arrangements arrangements under Model Rule 1.5(e) [New York Rule 1.5(g)] are subject to Rule 1.7" and its conflict of interest provisions. "Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter. The opinion also cautions that "[w]hen one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed in writing, must be completed be-fore or within a reasonable time after the commencement of the representation."

Court of Appeals Resolves Disputes Over Fee Splitting Agreements

In *Marin v. Constitution Realty*, LLC, 28 N.Y.3d 666, 49 N.Y.S.3d 39, 71 N.E.3d 530 (2017), the Court of Appeals resolved a fee dispute between the plaintiffs' attorney of record in a Labor Law action (L-1), and two attorneys L-1 engaged to assist her in the litigation: L-2 and L-3.

L-1 initially engaged L-2 to act as co-counsel and provide advice in the action. Their written agreement provided that L-2 would receive 20% of net attorneys' fees if the case settled before trial, and 25% once jury selection commenced. Neither L-1 nor L-2 informed the clients of L-2's involvement in the action, although L-2 believed L-1 had informed the client. The Court noted that the failure to inform the clients of L-2's involvement in the matter violated both the former Code of Professional Responsibility, DR 2–107(a), and the current Rules of Professional Conduct, Rule 1.5(g)(if lawyer is sharing fees with a lawyer outside her firm, the client must "agree[] to employment of the other lawyer after a full disclosure that a

division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing").

Six months later, L-1 wrote to L-2 "unilaterally discharging him and advising him that his portion of the fees would be determined on a quantum meruit basis." L-2 did not respond to L-1 and did no further work on the case.

L-1 ultimately obtained partial summary judgment on liability under Labor Law § 240(1) on plaintiffs' behalf and then sought the assistance of L-3 for a mediation of the matter. Under L-1's agreement with L-3, L-3 was entitled to 12% percent of all attorneys' fees whenever the case was resolved. The agreement provided that "[a]fter … mediation," L-3 "will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved."

After the one-day mediation session concluded, L-3 continued to have discussions with the mediator and, ten days after the session, accepted a settlement offer of $8 million on behalf of plaintiff, which was tendered by the mediator.

L-1 moved for an order establishing L-3's attorneys' fees at 12% of net attorneys' fees and, after L-2 intervened, L-1 also moved for an order setting his fees on a quantum meruit basis. L-2 and L-3 each cross-moved: L-2 to fix his fee at 20% of net attorneys' fees and L-3 to fix his fee at 40% of net attorneys' fees.

The Court of Appeals concluded that L-1's agreements with L-2 were enforceable, despite the failure to comply with Rule 1.5(g)'s fee splitting provisions, and entitled L-2 to 20% of net attorneys' fees. While the Court classified L-1's "failure to inform her clients of [L-2]'s retention" as "a serious ethical violation," it did "not allow her to avoid otherwise enforceable contracts under the circumstances of this case (see Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 210, 879 N.Y.S.2d 10, 906 N.E.2d 1042 [2009])." The Court stressed that "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits." The Court found this to be "particularly true here, where [L-1] and [L-2] both failed to inform the clients about [L-2]'s retention, [L-1] led [L-2] to believe that the clients were so informed, and the clients themselves were not adversely affected by the ethical breach."

Applying "general principles of contract interpretation," the Court concluded that L-3 was only entitled to 12% of the net attorneys' fees because the matter was essentially resolved through mediation.

* * *

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.
Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. See Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that

more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. See Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. See Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. See Rule 5.1. A

lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

* * *

B. 22 N.Y.C.R.R. Part 1215 Written Letter of Engagement

Section 1215.1. Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

> (1) if otherwise impractible; or
>
> (2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

> (1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

Section 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

* * *

C. Appellate Division Rules

Appellate Division Rules 22 N.Y.C.R.R. §§ 603.7, 691.20, 806.13, 1022.31 also contain provisions governing contingent fees in personal injury and wrongful death actions. The Third Department's rule is included below:

Section 806.13. Contingent fees in claims and actions for personal injury and wrongful death

(a) In any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in the schedule of fees in subdivision (b) of this section is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such schedule of fees shall constitute the exaction of unreasonable and unconscionable compensation, unless authorized by a written order of the court as provided in this section. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in Judiciary Law, section 474-a.

(b) The following is the schedule of reasonable fees referred to in subdivision (a) of this section: either,

SCHEDULE A

(1) 50 percent on the first $1,000 of the sum recovered,

(2) 40 percent on the next $2,000 of the sum recovered,

(3) 35 percent on the next $22,000 of the sum recovered,

(4) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

A percentage not exceeding 33 1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure provided in this section for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentage shall be computed by one of the following two methods to be selected by the client in the retainer agreement or letter of engagement:

(1) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

(2) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A, of subdivision (b) of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to a special term of Supreme Court in the judicial district in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A, of subdivision (b) of this section; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(e) Nothing contained in this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(f) Nothing contained in this section shall be deemed applicable to the fixing of compensation of attorneys for services rendered in connection with collection of first-party benefits as defined in article XVIII of the Insurance Law.

XII. New York State Bar Exam Replaced by Uniform Bar Exam

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

Law firms and lawyers with managerial responsibility or supervisory authority will now have additional responsibilities. They must be especially mindful of ensuring that newly admitted lawyers practicing in areas requiring knowledge of New York law are competent to do so. *See* New York Rules of Professional Conduct, Rule 5.1 ("Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"); Rule 1.1 ("Competence").

Enrollments in New York Civil Procedure courses have dropped dramatically since the change in the Bar Exam and are now less than 20% of what they were before the change.

XIII. Misconduct Under Rule 8.4

A. ABA Model Rule 8.4: Misconduct (amended August 2016)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4 Misconduct – Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious

interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] **Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.** Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. (emphasis added)

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

* * *

New York's Rule 8.4(g) provides:

> A lawyer or law firm shall not:
>
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

* * *

ABA Model Rule 8.4(g)'s reach is more expansive, as noted in Comment 4 thereto. An ABA report noted evidence of sexual harassment at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."

On April 23, 2018, the Tennessee Supreme Court rejected a proposed revision to their rules of professional conduct that would have incorporated Rule 8.4(g) of the ABA Model Rules of Professional Conduct. This is the second time in five years the Tennessee Supreme Court has rejected similar proposals. It was reported that the proposal generated numerous comments from law professors, practitioners, and religious groups. "Many commenters didn't see the need for such a rule and opposed 'big brother' looking over a lawyer's shoulder." ABA/BNA Lawyers'

Manual on Professional Conduct, Current Reports, May 02, 2018. The ABA/BNA Article also notes:

> South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers "don't forsake all of [their] free speech rights by becoming an attorney." And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool "to silence and chill people."
>
> Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and "if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like."
>
> But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that "[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process)."
>
> …To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

The South Carolina Supreme Court and Montana legislature have also rejected a proposal based on ABA Model Rule 8.4(g). The South Carolina Supreme Court received comments from 29 individual attorneys and three groups, and it was reported that a majority of the comments were in opposition to the rule.

It has been reported that 24 states already adopted an anti-discrimination provision in their rules of professional conduct before the ABA adopted 8.4(g) as part of the Model Rules in August of 2016.

Illinois Rule of Professional Conduct 8.4(j) provides that it is professional misconduct for a lawyer to "violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."

Indiana's Rule of Professional Conduct 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status or similar factors."

B. Rule 8.4(a)(1): "[A]ttempt to violate the Rules of Professional Conduct."

***Geauga County Bar Association v. Bond*, 146 Ohio St. 3d 97 (2016)**

The Supreme Court of Ohio affirmed the Board of Professional Conduct's sanctions against an attorney who loaned money to a person he believed was his client. The sanctions consisted of a public reprimand. Although the purported client was really a thief who was trying to steal money from the attorney, the Court agreed with the Board that the attorney violated Ohio Professional Conduct Rule 8.4(a) in his attempt to violate Ohio Professional Conduct Rule 1.8(e), which prohibits attorneys from loaning money to clients.

Ohio Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, with limited exceptions. Ohio Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to …(a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." *See* ABA Rule 8.4(a)("It is professional misconduct for a lawyer to…violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

New York Rule 1.8, Comment 9B states that "[e]xamples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above."

The opinion states:

> On February 18, 2014, Bond filed a report with the Chardon Police Department alleging that he had received a phone call earlier that month from Patrick Paul Heald, who stated that he had been referred to Bond to discuss his personal-injury case. Bond reported that when he met Heald at a

> diner in Willoughby, Ohio, on February 3, 2014, Heald's right arm was bandaged and he was limping. Heald claimed that he had been badly burned in an industrial accident and requested financial assistance to pay for medication and living expenses until he received his next paycheck. Later that day, Bond entered into a contingent-fee agreement to represent Heald in his personal-injury matter. He also had Heald sign a photocopy of seven $100 bills with the notation, "Temporary loan of $700.00 cash advanced 2/3/14 by Daniel E. Bond to Patrick Paul Heald" and then gave him the cash and a check for $1,300. Heald did not repay the loan as agreed and made excuses for his failure to do so.

Subsequently, the attorney received another inquiry about a personal-injury matter and this prompted him to contact the police. As a result, the fake-client Heald was arrested, sentenced to jail for 8 months and ordered to pay restitution of $2,000.

The Board found that the attorney violated Ohio Professional Conduct Rule 8.4(a). The Court, in agreeing with the Board, found that there was not an attorney-client relationship present and thus, there was not a violation Ohio Professional Conduct Rule 1.8(e). Nevertheless, the court found the attorney's attempt to violate Ohio Professional Conduct Rule 1.8(e) led to an actual violation of Ohio Professional Conduct Rule 8.4(a)(misconduct). In accordance with the Board, the Court also dismissed the complaint's allegations that included violations of Ohio Professional Conduct Rules "1.18(a) (providing that a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client to whom the attorney may owe certain duties) and 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law)."

In support of the sanction of a public reprimand, the court cited two cases where a lawyer violated the predecessor provision to Rule 1.8(e), DR 5–103(B). *See Cleveland Bar Assn. v. Nusbaum*, 93 Ohio St.3d 150, 753 N.E.2d 183 (2001) (publicly reprimanding an attorney with no prior discipline who advanced $26,000 to a personal-injury client); and *Cleveland Bar Assn. v. Mineff*, 73 Ohio St.3d 281, 652 N.E.2d 968 (1995) (publicly reprimanding an attorney who provided $5,300 to a client to cover the client's living expenses during the pendency of his workers' compensation claim).

C. "The ABA Overrules the First Amendment"

See Ron Rotunda, *The ABA Overrules the First Amendment*, THE WALL STREET JOURNAL (Aug. 16, 2016 7:00 p.m.), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418 ("Consider the following form of 'verbal' conduct when one lawyer tells another, in connection with a case, 'I abhor the idle rich. We should raise capital gains taxes.' The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.").

See also Ron Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage, (Oct. 6, 2016), http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supportingdiversity-but-not-diversity-of-thought.

D. New York State Bar Association Committee on Professional Ethics Opinion 1111 (1/7/17)

Topic: Client representation; discrimination

Digest: A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a representation amounts to unlawful discrimination.

Rules: 8.4(g)

FACTS

1. A lawyer has been requested to represent a person desiring to bring a childhood sex abuse claim against a religious institution. The lawyer is of the same religion as the institution against which the claim is to be made. Because of this religious affiliation, the lawyer is unwilling to represent the claimant against the institution.

QUESTIONS

2. Is a lawyer ethically required to accept every request for representation?

3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers* § 14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one. Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Ethics* 84 (5th ed. 1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

5. We applied this principle in N.Y. State 833 (2009), where we held that a lawyer ethically was not required to respond to an unsolicited written request for representation sent by a person in prison.

Prohibition Against Unlawful Discrimination

6. However, a lawyer's unfettered ethical right to decline a representation is subject to federal, state and local anti-discrimination statutes.

7. For example, N.Y. Exec. Law § 296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation ... because of the race, creed, color, national origin, sexual orientation, military

status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ....” In *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996), a case involving a dentist in private practice who refused to treat patients whom he suspected of being HIV positive, the Court of Appeals held that a dental practice is a “place of public accommodation” for purposes of the Executive Law. At least one scholar has argued that *Cahill v. Rosa* prohibits lawyers from discriminating as well. *See* Robert T. Begg, *The Lawyer’s License to Discriminate Revoked: How a Dentist Put Teeth in New York’s Anti-Discrimination Disciplinary Rule*, 64 Albany L. Rev 153 (2000) (discussing whether discrimination by New York lawyers is illegal after *Cahill*); *but see* G. Chin, *Do You Really Want a Lawyer Who Doesn’t Want You?*, 20 W. New Eng. L. Rev. 9 (1998) (arguing that a lawyer should not be required to undertake representation where the lawyer cannot provide zealous representation).

8. Rule 8.4(g) recognizes that anti-discrimination statutes may limit a lawyer’s freedom to decline representation, stating that a lawyer or law firm “shall not ... unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. ...” What constitutes “unlawful discrimination” within the meaning of Rule 8.4(g) is a question of law beyond the jurisdiction of this Committee. Consequently, we do not opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes “unlawful discrimination.”

CONCLUSION

9. A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination. Whether a lawyer’s refusal to represent a particular client amounts to unlawful discrimination is a question of law beyond this Committee’s jurisdiction.

E. Kellyanne Conway Complaint, February 20, 2017

GEORGETOWN LAW

Abbe Smith
Professor of Law

February 20, 2017

Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

To the Office of Disciplinary Counsel:

Please be advised that the below signed law professors, all of whom teach courses relating to legal ethics, are hereby filing a disciplinary complaint against District of Columbia bar member Kellyanne Conway, currently listed as a member of the bar under her name before marriage, Kellyanne E. Fitzpatrick,[1] under DC Rule of Professional Conduct 8.4(c) [hereinafter DC Rules].

As Rule 8.4(c) states, "It is professional misconduct for a lawyer to [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This is an admittedly broad rule, as it includes conduct outside the practice of law and, unlike 8.4(b), the conduct need not be criminal. We are mindful of the Rule's breadth and aware that disciplinary proceedings under this Rule could lead to mischief and worse. Generally speaking, we do not believe that lawyers should face discipline under this Rule for public or private dishonesty or misrepresentations unless the

[1] Ms. Conway, née Fitzpatrick, was admitted to the DC bar on January 19, 1995 and is currently suspended for nonpayment of dues. Presumably, if she resumes payment she would be readmitted.

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lawyer's conduct calls into serious question his or her "fitness for the practice of law," DC Rule 8.4, Comment 1, or indicates that the lawyer "lacks the character required for bar membership." DC Bar, Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm.

However, we believe that lawyers in public office—Ms. Conway is Counselor to the President—have a higher obligation to avoid conduct involving dishonest, fraud, deceit, or misrepresentation than other lawyers. Although the DC Rules contain no Comment specifically relating to 8.4(c), the American Bar Association's Model Rules of Professional Conduct (MR) make this point. MR 8.4(c), Comment 7 states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Cf.* DC Rule 1.11 (on the special conflict of interest rules for lawyers who have served in government).

It is not surprising that the Model Rules distinguish lawyers in public office from other lawyers. The ABA knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate.

Some of the signers of this complaint practice in the District of Columbia and/or are members of the DC Bar. We feel compelled to file such a complaint under DC Rule 8.3(a), which states that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Those of us who do not practice in DC are members of other state and federal bars. We all believe it is critically important that lawyers in public office—especially those who act as spokespersons for the highest levels of government—be truthful.

The DC Bar has issued an Ethics Opinion on lawyers working in government in a non-representational capacity that supports this complaint. *See generally* Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm. In addressing an inquiry about attorneys employed by an intelligence or national security agency who engage in clandestine activities, the Opinion distinguishes those government officials whose official duties require them to "act deceitfully" from other lawyers in government. Though the Opinion finds lawyers "whose duties require the making of misrepresentations as authorized by law as part of their official duties" do not violate Rule 8.4(c), the drafters emphasize the Opinion's narrow scope: it applies "only to misrepresentations made in the course of official conduct when the employee…reasonably believes that applicable law authorizes the misrepresentations."

Significantly, for purposes of this complaint, Ethics Opinion 323 makes plain that its conclusion in the above narrow context does not provide "*blanket permission for an attorney employed by government agencies to misrepresent themselves*." [Emphasis added] The drafters further explain:

> Nor does [the Opinion] authorize misrepresentation when a countervailing legal duty to give truthful answers applies…. And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively have a reasonable belief that applicable law authorizes the actions in question.

Ms. Conway's misconduct under DC Rule 8.4(c) is as follows:

- On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the "Bowling Green Massacre" to justify President Donald Trump's executive order banning immigrants from seven overwhelmingly Muslim countries. Not only was there no "massacre" in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: "I bet it's brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don't know that because it didn't get covered." *See generally* Clare Foran, *The Bowling Green Massacre that Wasn't*, THE ATLANTIC, February 3, 2017, at https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. *See* Aaron Blake, *The Fix: Kellyanne Conway's 'Bowling Green Massacre' wasn't a slip of the tongue. She has said it before.* WASH. POST, February 6, 2017, at https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582.

- Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had "banned" Iraqi refugees from coming into the United States for six months following the "Bowling Green Massacre." *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. *See* Glenn Kessler, *Fact Checker: Trump's facile claim that his refugee policy is similar to Obama's in 2011*, WASH. POST, January 29, 2017, at https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2.

- This was not the first time Ms. Conway had engaged in conduct involving "dishonesty, fraud, deceit, or misrepresentation." On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth "alternative facts" to what the news media reported about the size of Mr. Trump's inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump's relationship with intelligence agencies. *See* Nicholas Fandos, *White House Pushes 'Alternative Facts.' Here are the Real Ones*. N.Y. TIMES, January 22, 2017, at https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html. As many prominent commentators have pointed out, the phrase "alternative facts" is especially dangerous when offered by the President's counselor. Moreover, "alternative facts' are not facts at all; they are *lies*. Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES, January 26, 2017, at https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html.

- Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within DC Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office "for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity." The government's chief ethics watchdog denounced Conway's conduct in a letter to the White House. Richard Perez Pena, *Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products*, N.Y. TIMES, February 14, 2017, at https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html. *See also* DC Rule 1.11, Comment 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, "particular heed must be paid to the federal conflict-of interest statutes.")

We do not file this complaint lightly. In addition to being a member of the DC Bar, Ms. Conway is a graduate of the George Washington University Law School, one of the District's premier law schools. We believe that, at one time, Ms. Conway, understood her ethical responsibilities as a lawyer and abided by them. But she is currently acting in a way that brings shame upon the legal profession. As the Preamble to the Model Rules states, a lawyer plays an important role as a "public citizen" in addition to our other roles.

If Ms. Conway were not a lawyer and was "only" engaging in politics, there would be few limits on her conduct outside of the political process itself. She could say and do what she wished and still call herself a politician. But she is a lawyer. And her conduct, clearly intentionally violative of the rules that regulate her professional status, cries out for sanctioning by the DC Bar.

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F. ***In the Matter of Richard M. Nixon, an Attorney*****, 53 A.D.2d 178 (1st Dep't 1976)**

Per Curiam.

The respondent, formerly the President of the United States, is an attorney, admitted to the practice of law in the State of New York on December 5, 1963.

An investigation of allegations of professional misconduct on the part of respondent was begun by the Grievance Committee of the Association of the Bar of the City of New York in September, 1974.

A petition containing five specifications of misconduct was mailed to Mr. Nixon's attorney on January 21, 1976, which attorney ultimately informed counsel to petitioner that Mr. Nixon would not accept service of the papers.

On January 28, 1976, personal service was attempted via the Sheriff's office of Orange County, California. When this attempt was unsuccessful, an order of this court dated February 4, 1976 authorized service of the necessary papers upon Mr. Nixon by regular mail addressed to Casa Pacifica, San Clemente, California.

The material mailed included a notice that responsive papers were due before February 19, 1976. On March 18, 1976, the Appellate Division directed a reference and appointed a Justice of the Supreme Court, New York County to take testimony regarding the specifications alleged. Copies of the order of reference and notice of conference were mailed to the respondent.

Mr. Nixon has neither responded personally nor appeared by counsel. No papers have been filed with the court on his behalf, nor has he served any papers upon the petitioner.

The specifications, succinctly stated, allege that Mr. Nixon improperly obstructed an FBI investigation of the unlawful entry into the headquarters of the Democratic National Committee; improperly authorized or approved the surreptitious payment of money to E. Howard Hunt, who was indicted in connection with the Democratic National Committee break in, in order to prevent or delay Hunt's disclosure of information to Federal law enforcement authorities; improperly attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding, a psychiatrist who had treated Daniel Ellsberg; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President; and improperly engaged in conduct which he knew or should have known would interfere with the legal defense of Daniel Ellsberg.

Each of the allegations is substantiated by documentary evidence, such as the tapes of Mr. Nixon himself, excerpts of testimony of individuals given to various Congressional committees, and affidavits. This material, which is uncontested and unrebutted, forms a prima facie case and warrants our sustaining of the charges.

The failure of the respondent to answer the charges, to appear in the proceeding, or to submit any papers on his behalf must be construed by this court as an admission of the charges and an indifference to the attendant consequences (*Matter of Liesner*, 43 AD2d 223; *Matter of Schner*, 5 AD2d 599, 600).
As we have already indicated, we find the documentary evidence submitted sufficient to sustain all of the charges preferred.
At this juncture, we pause to consider the points advanced in the dissent. It is apparently critical of our procedure on two scores: first, that respondent has not been served, with process in the sense that papers have not been put into his hand; and second, that we have rushed to judgment. As to the first objection, it is elementary that the purpose of service is notice, and quite obviously that was accomplished some months ago, as is set forth early in this writing. Nothing further is to be achieved by a forceful attempt at actual personal service except, quite possibly, an ugly confrontation. Even if successful, it would add nothing to the full information as to the charges already possessed by respondent. Indeed, respondent not alone has had full notice of these proceedings for a long time, but has so acknowledged by his abortive attempts, both here and in the Second Department, to circumvent the proceedings by submitting a resignation from the Bar, but which did not contain the required admission of culpability referred to in the dissent.
As to the second objection, no reason whatever has been shown why a respondent who has chosen to reject or ignore service may by stony silence postpone judgment indefinitely. We have not ‘on the basis of alleged inability to make personal service ... proceed[ed] forthwith to judgment.’ Following the March 18 order of reference, respondent was notified of proceedings to be held before the Referee on April 13. Default was noted then. More than two months have passed since, and it is now more than four months since respondent received the petition. Charges have been ‘properly proffered with the opportunity to defend’; that opportunity has been rejected. There is neither defense nor acknowledgment except as herein before indicated. We should proceed to conclude the matter.
The petitioner has moved this court to sustain the charges preferred on default, or, in the alternative to grant additional time for the petitioner to conduct hearings before the Referee. As we have noted, the respondent has defaulted in appearance before the Referee after due notice. Furthermore, the Referee has permitted a motion to be made before this court for default judgment, which we hereby grant to the extent hereinafter set forth. The further services of the Referee previously appointed by this court are dispensed with, and the documents submitted in support of this motion are considered by this court in the manner of an inquest. Upon such inquest, we find that the conclusions of fact pleaded as specifications in the petition have been supported by those documents. We have accordingly sustained all of the charges preferred against the respondent.

The gravamen of respondent's conduct is obstruction of the due administration of justice, a most serious offense, but one which is rendered even more grievous by the fact that in this instance the perpetrator is an attorney and was at the time of the conduct in question the holder of the highest public office of this country and in a position of public trust.
We note that while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar (*Matter of Dolphin*, 240 NY 89, 92-93; Matter of Kaufman, 29 AD2d 298). We find that the evidence adduced in the case at bar warrants the imposition of the most severe sanction available to the court and, accordingly, we direct that respondent should be disbarred.
Kupferman, J.
(Dissenting in part).
My dissent is with respect to the procedural aspects and not as to the substantive aspects, except, of course, in the sense that the procedure raises questions of substance.
The respondent attempted to resign while under investigation. His resignation was rejected because he did not submit the affidavit required by the rules governing the conduct of attorneys, which in section 603.11, entitled 'Resignation of attorneys under investigation or the subject of disciplinary proceedings,' requires an acknowledgment that 'he could not successfully defend himself on the merits against such charges.' (22 NYCRR 603.11.) The purpose of the affidavit requirement is well set forth in the Report of the New York Committee on Disciplinary Enforcement (Eighteenth Annual Report of NY Judicial Conference, 1973, pp 234, 275 [Problem 12]). That report suggested for codification the specific language of this court's section 603.11. To every extent possible, matters were not to be left in limbo, but charges were either to be acknowledged or properly proffered with the opportunity to defend, and prosecuted to a conclusion. We now have a situation where, on the basis of alleged inability to make personal service, we proceed forthwith to judgment, no matter how justified it may seem to some. If this procedure is satisfactory, then a resignation in the face of the charges would have been at least as acceptable.
***In the Matter of Richard M. Nixon, an Attorney*, 53 A.D.2d 881 (2d Dep't 1976)**
The above-named attorney, formerly the President of the United States, who was admitted to the practice of law in the State of New York on December 5, 1963 at a term of the Appellate Division of the Supreme Court, First Judicial Department, has submitted his resignation from the Bar of this State after the filing of a complaint with the Joint Bar Association Grievance Committee for the Ninth

Judicial District (the Committee) by its Chief Counsel. In that complaint Mr. Nixon is charged with professional misconduct as a consequence of his refusal to co-operate with the Committee in its investigation of the conduct of an attorney who was allegedly involved with other individuals in certain monetary transactions which came to light during the "Watergate" inquiry. Specifically, Mr. Nixon declined to furnish certain affidavits requested of him indicating whether he would answer any written interrogatory concerning the attorney under investigation and certain other named individuals, and, if not, indicating his grounds for refusal to answer.

In an affidavit, sworn to on January 23, 1976, submitted to the Committee and filed by it with this court on January 26, 1976 pursuant to section 691.9 of our rules (22 NYCRR 691.9), Mr. Nixon tendered his resignation, stating therein, inter alia, that: (a) he had been made aware of the complaint by the Committee's Chief Counsel; (b) he was informed that he is the subject of an investigation based upon that complaint; and (c) he acknowledged that if a disciplinary proceeding were commenced against him upon the charge of the Committee's Chief Counsel, he could not successfully defend himself on the merits. He concluded by requesting that this court accept his resignation and enter an order striking his name from the roll of attorneys and counselors at law in the State of New York as of the date of such affidavit. Accordingly, the affidavit contained the required prerequisites for consideration of Mr. Nixon's resignation by this court which, pursuant to our rules, permitted the entry of an order either disbarring him or striking his name from the roll of attorneys.

However, on February 4, 1976, when the matter of Mr. Nixon's resignation came up for consideration by this court, it was learned that (a) since 1974, Mr. Nixon had been the subject of an investigation into allegations of misconduct by the Committee on Grievances of the Association of the Bar of the City of New York, the Departmental Disciplinary Committee for the First Judicial Department and (b) a petition, dated January 15, 1976, containing charges of professional misconduct, and a notice of petition, dated January 16, 1976, had been prepared and mailed to Mr. Nixon's attorney during the week of January 19, 1976. Predicated thereon, this court, in keeping with established principles of comity, deferred action on Mr. Nixon's attempted resignation pending the conclusion of the proceedings stemming from the foregoing investigation and action by the Departmental Disciplinary Committee for the First Judicial Department.

In a *Per Curiam* opinion the Appellate Division of the Supreme Court for the First Judicial Department sustained charges of misconduct preferred against Mr. Nixon as a respondent in a disciplinary proceeding instituted by said court, and directed that he be disbarred. An order disbarring the respondent was entered in said court on this date.

Accordingly, consideration of Mr. Nixon's offer to resign filed with this court, is rendered academic.

G. *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Jan. 19, 2001).

AGREED ORDER OF DISCIPLINE

Come now the parties hereto and agree to the following Order of this Court in settlement of the pending action:

The formal charges of misconduct upon which this Order is based arose out of information referred to the Committee on Professional Conduct ("the Committee") by the Honorable Susan Webber Wright, Chief United States District Judge for the Eastern District of Arkansas. The information pertained to William Jefferson Clinton's deposition testimony in a civil case brought by Ms. Paula Jones in which he was a defendant, *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.).

Mr. Clinton was admitted to the Arkansas bar on September 7, 1973. On June 30, 1990, he requested that his Arkansas license be placed on inactive status for continuing legal education purposes, and this request was granted. The conduct at issue here does not arise out of Mr. Clinton's practice of law. At all times material to this case, Mr. Clinton resided in Washington, D.C., but he remained subject to the Model Rules of Professional Conduct for the State of Arkansas.

On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32-page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Order, at 31. Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process .... [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Order, at 16 (footnote omitted). Judge Wright offered Mr. Clinton a hearing, which he declined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate." Order, at 32.

Mr. Clinton's actions which are the subject of this Agreed Order have subjected him to a great deal of public criticism. Twice elected President of the United States, he became only the second President ever impeached and tried by the Senate, where he was acquitted. After Ms. Jones took an appeal of the dismissal of her case, Mr. Clinton settled with her for $850,000, a sum greater than her initial *ad damnum* in her complaint. As already indicated, Mr. Clinton was held in civil contempt and fined over $90,000.

Prior to Judge Wright's referral, Mr. Clinton had no prior disciplinary record with the Committee, including any private warnings. He had been a member in good standing of the Arkansas Bar for over twenty-five years. He has cooperated fully with the Committee in its investigation of this matter and has furnished information to the Committee in a timely fashion.
Mr. Clinton's conduct, as described in the Order, caused the court and counsel for the parties to expend unnecessary time, effort, and resources. It set a poor example for other litigants, and this damaging effect was magnified by the fact that at the time of his deposition testimony, Mr. Clinton was serving as President of the United States.
Judge Wright ruled that the testimony concerning Ms. Lewinsky "was not essential to the core issues in this case and, in fact, that some of this evidence might even be inadmissible...." *Jones v. Clinton*, 993 F.Supp. 1217, 1219 (E.D.Ark.1998). Judge Wright dismissed the case on the merits by granting Mr. Clinton summary judgment, declaring that the case was "lacking in merit-a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky." Order, at 24-25 (footnote omitted). As Judge Wright also observed, as a result of Mr. Clinton's paying $850,000 in settlement, "plaintiff was made whole, having agreed to a settlement in excess of that prayed for in the complaint." Order, at 13. Mr. Clinton also paid to plaintiff $89,484 as the "reasonable expenses, including attorney's fees, caused by his willful failure to obey the Court's discovery orders." Order, at 31; *Jones v. Clinton*, 57 F.Supp.2d 719, 729 (E.D.Ark.1999).
On May 22, 2000, after receiving complaints from Judge Wright and the Southeastern Legal Foundation, the Committee voted to initiate disbarment proceedings against Mr. Clinton. On June 30, 2000, counsel for the Committee filed a complaint seeking disbarment in Pulaski County Circuit Court, *Neal v. Clinton*, Civ. No.2000-5677. Mr. Clinton filed an answer on August 29, 2000, and the case is in the early stages of discovery.
In this Agreed Order Mr. Clinton admits and acknowledges, and the Court, therefore, finds that:
A. That he knowingly gave evasive and misleading answers, in violation of Judge Wright's discovery orders, concerning his relationship with Ms. Lewinsky, in an attempt to conceal from plaintiff Jones' lawyers the true facts about his improper relationship with Ms. Lewinsky, which had ended almost a year earlier.
B. That by knowingly giving evasive and misleading answers, in violation of Judge Wright's discovery orders, he engaged in conduct that is prejudicial to the administration of justice in that his discovery responses interfered with the conduct of the Jones case by causing the court and counsel for the parties to expend unnecessary time, effort, and resources, setting a poor example for other litigants,

and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

Upon consideration of the proposed Agreed Order, the entire record before the Court, the advice of counsel, and the Arkansas Model Rules of Professional Conduct (the "Model Rules"), the Court finds:

1. That Mr. Clinton's conduct, heretofore set forth, in the Jones case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

WHEREFORE, it is the decision and order of this Court that William Jefferson Clinton, Arkansas Bar ID #73019, be, and hereby is, SUSPENDED for FIVE YEARS for his conduct in this matter, and the payment of fine in the amount of $ 25,000. The suspension shall become effective as of the date of January 19, 2001.

IT IS SO ORDERED.

2018 CPLR UPDATE INCLUDING SUMMARY JUDGMENT IN THE WAKE OF RODRIGUEZ V. CITY OF NEW YORK

Submitted By:

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I. General Municipal Law § 50-e. Notice of Claim.

Does General Municipal Law § 50-e Require That Defendant Employees of Municipal Entity Be Named in Notice of Claim?

There is currently a conflict on whether employees of a municipal entity who are named as defendants in actions against their municipal employers must also be named in the notice of claim. The Second Department has "held that the plain language of General Municipal Law § 50-e(2) does not require a notice of claim to '[list] the names of the individuals who allegedly committed the wrongdoing.'" *Williams v. City of New York*, 153 A.D.3d 1301, 1305, 62 N.Y.S.3d 401, 406 (2d Dep't 2017); *see Blake v. City of New York*, 148 A.D.3d 1101, 1105–06, 51 N.Y.S.3d 540, 545 (2d Dep't 2017). The Third and Fourth Departments agree. *See Pierce v. Hickey*, 129 A.D.3d 1287, 1289, 11 N.Y.S.3d 321, 323 (3d Dep't 2015); *Goodwin v. Pretorius*, 105 A.D.3d 207, 216, 962 N.Y.S.2d 539, 546 (4th Dep't 2013). The First Department, has held that "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim." *Tannenbaum v. City of New York*, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4, 5 (1st Dep't 2006); *see Alvarez v. City of New York*, 134 A.D.3d 599, 22 N.Y.S.3d 362 (1st Dep't 2015)(explaining the rule and its rationale); Siegel & Connors, New York Practice § 32.

II. CPLR 103. Form of civil judicial proceedings

Action Converted to a Special Proceeding under CPLR 103(c)

The bringing of a special proceeding when an action is appropriate does not require a dismissal. Rather, if the court has obtained jurisdiction over the parties, it can convert the special proceeding into an action. *See* Siegel & Connors, New York Practice § 4. CPLR 103(c) is usually invoked by a party that has mistakenly brought a special proceeding when an action was required, but it can work the other way. In *Jackson v. Bank of Am., N.A.*, 149 A.D.3d 815, 818, 53 N.Y.S.3d 71, 75 (2d Dep't 2017), for example, the plaintiffs moved pursuant to CPLR 103(c) to convert their cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR 5239 and 5240. The Second Department affirmed the order granting the motion on the authority of CPLR 103(c), noting that the fact that plaintiffs

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sought certain relief that is not available in a special proceeding under CPLR Article 52 did not require that the action be dismissed in its entirety. *See also CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462 (2d Cir. 2018)(in federal action, court cited to CPLR 103(c) in permitting plaintiffs to pursue turnover order by mere motion rather than via a special proceeding or separate action); *see* Siegel & Connors, New York Practice § 510.

III. CPLR 201. Application of article [Limitations of Time]

Court Upholds Provision Shortening Statute of Limitations to 1 Year Following Completion of Services Rendered under the Agreement

In R&B Design Concepts Inc. v. Wenger Const. Co., Inc., 2016 WL 10746770 (Sup. Ct., Nassau County 2016), *aff'd on other grounds*, 153 A.D.3d 864, 60 N.Y.S.3d 364 (2d Dep't 2017), the defendant moved to dismiss under CPLR 3211(a)(5), relying on a provision in the agreement that shortened the statute of limitations to one year after substantial completion of plaintiff's work.

The court cited to CPLR 201, which permits parties to agree to shorten the statute of limitations period prescribed in CPLR Article 2 as long as it is done by "written agreement." The court rejected plaintiff's argument that the contract was one of adhesion, noting that each page of the agreement was initialed by plaintiff's representative. Furthermore, the court found no indication that plaintiff did not have an opportunity to adequately review the agreement and there was no evidence of high pressure tactics or deceptive language contained within the agreement. Finally, the court found the one-year contractual period to be reasonable.

Although plaintiff commenced the action approximately 18 months after the work was substantially complete, well within the 6 year period generally applicable in contract actions, *see* CPLR 213(2); § 35, the court granted defendant's motion to dismiss for failure to comply with the shortened statute of limitations.

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Plaintiff Saved by the General Construction Law, On Two Counts!

When the last day of the statute of limitations falls on a Saturday, Sunday, or public holiday, the time for commencing the action is extended to "the next succeeding business day." *See* General Construction Law § 25–a; Siegel & Connors, New York Practice § 34.

In *Wilson v. Exigence of Team Health*, 151 A.D.3d 1849, 57 N.Y.S.3d 602 (4th Dep't 2017), the action was commenced via e-filing on Tuesday, October 13, 2015. Defendant moved to dismiss the complaint under CPLR 3211(a)(5), arguing that the statute of limitations expired 3 days earlier on October 10, 2015. The Fourth Department reversed supreme court's order granting the motion and reinstated the complaint. The General Construction Law needed to be turned to twice here. First, for the rule that states that when a time period expires on a Saturday, it is extended until "the next succeeding business day." Gen. Constr. Law § 25–a. Then section 24 of the law came to the rescue, as it designates the second Monday in October, known as Columbus Day, as a holiday. In 2015, Columbus Day was happily celebrated on Monday, October 12, meaning that the action was timely commenced on the next business day, Tuesday, October 13.

IV. CPLR 202. Cause of action accruing without the state.

Court of Appeals to Resolve Whether Foreign Statute of Limitations Will Govern Claim Under Contract with Broad New York Choice of Law Provision

In *2138747 Ontario, Inc. v. Samsung C & T Corp.*, 144 A.D.3d 122, 123, 39 N.Y.S.3d 10, 11 (1st Dep't 2016), the First Department ruled that "a broadly drawn contractual choice-of-law provision, that provides for the agreement to be 'governed by, construed and enforced' in accordance with New York law" does not preclude the application of CPLR 202, New York's borrowing statute. The Court of Appeals affirmed, ruling that "CPLR 202…applies when contracting parties have agreed that their contract would be 'enforced' according to New York law." _ N.Y.3d _, 2018 WL 2898710 (2018).

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V. CPLR 203. Method of computing periods of limitation generally

CPLR 203(g) Amended, in Conjunction with CPLR 214-a, to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

Effective January 31, 2018, CPLR 203(g) was amended to add a new paragraph (2), with the previously existing material now included in CPLR 203(g)(1). CPLR 203(g)(2) is part of a package of legislation that extends periods within which to serve a notice of claim and to commence an action in certain medical, dental, and podiatric malpractice actions. The amendments only apply "where the action or claim is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission." CPLR 203(g). In these actions, the time within which to commence an action or special proceeding or to serve a notice of claim, *see* Siegel & Connors, New York Practice § 32, "shall not begin to run until the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, … or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition." CPLR 203(g)(2); *see* Siegel & Connors, New York Practice § 42 (discussing continuous treatment doctrine in medical malpractice actions).

There is a maximum built into the amendment adding CPLR 203(g)(2). If relying on the first time period above, no action can be commenced beyond seven years from the date of the misdiagnosis. There is no maximum time period imposed on the application of the continuous treatment rule.

VI. CPLR 205(a). Six Month Extension.

CPLR 205(a) now provides:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall

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> demonstrate a general pattern of delay in proceeding with the litigation.

At first blush, the amendment to CPLR 205(a) might seem to be primarily a matter of concern for the plaintiff who is attempting to commence a new action within the six-month extension. However, it is actually the defendant moving to dismiss the earlier action for neglect to prosecute under one of these miscellaneous provisions who will want to ensure that the court sets forth the "specific conduct constituting the neglect" and the plaintiff's "general pattern of delay in proceeding with the litigation" so as to prevent the plaintiff from invoking CPLR 205(a) in a subsequent action.

While the new language added to CPLR 205(a) specifically refers to dismissals under CPLR 3216, which are usually based on a failure to timely serve and file a note of issue, it also applies to any dismissal "otherwise" granted for a "neglect to prosecute." Therefore, the new requirement applies to the full panoply of dismissals grounded upon a neglect to prosecute. *See* CPLR 3126 (dismissal for failure to provide disclosure); CPLR 3404 (failure to restore case to trial calendar within a year after being marked "off" constitutes a "neglect to prosecute"); CPLR 3012(b) (dismissal for failure to timely serve complaint in response to demand; caselaw holding that this dismissal is one for "neglect to prosecute"); Connors, McKinney's CPLR 3012 Practice Commentaries, C3012:13 ("Dismissal Is Neglect to Prosecute for Limitations' Purposes"); CPLR 3012-a (requiring filing of certificate of merit in medical malpractice cases); CPLR 3406 (requiring filing of notice of medical malpractice action; McKinney's Practice Commentary CPLR 3012-a, C3012-a:3 ("Commencing a New Action After Dismissal for Failure to Comply with CPLR 3012-a")).

Plaintiff in Mortgage Foreclosure Action Entitled to CPLR 205(a)'s Six Month Gift Where Prior Action, Brought by a Different Plaintiff, Was Dismissed Under CPLR 3215(c)

In *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), the court permitted a second mortgage foreclosure action to be commenced under CPLR 205(a) after first action was dismissed pursuant to CPLR 3215(c). The court determined that the requirements of CPLR 205(a) were met in that:

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> (1) there is no dispute that this action would have been timely commenced when the prior action was commenced in 2005; (2) the moving defendant, Cohan, was served within the six-month period after the prior action was dismissed; and (3) this action is based on the same occurrence as the prior action, namely the default on the payment obligations under the note and mortgage. Further, it is undisputed that the dismissal of the prior action was not based upon a voluntary discontinuance, lack of personal jurisdiction, or a final judgment on the merits (see CPLR 205[a]).

The order dismissing the first action tracked the language in CPLR 3215(c) by simply stating that the plaintiff "failed to proceed to entry of judgment within one year of default," and that "[t]ime spent prior to discharge from a mandatory settlement conference [was not] computed in calculating the one year period." "The order did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding with the litigation'."

The Second Department also ruled "that a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note."

CPLR 205(a) Only Applies Where Action #1 Was Commenced in a Court in New York State

In *Guzy v. New York City*, 129 A.D.3d 614 (1st Dep't 2015), the plaintiff commenced Action #1 against the New York City Transit Authority in the Superior Court of New Jersey in July 2013. That action was dismissed based on lack of personal jurisdiction.

Plaintiff commenced Action #2 in New York Supreme Court. The First Department ruled that plaintiff's New Jersey action was not timely commenced and was dismissed for lack of personal jurisdiction. Therefore, plaintiff could not invoke the six-month gift for Action #2. "Moreover," the court noted in dicta, "CPLR 205 [a] does not apply when the initial action was commenced in a state or federal court outside of New York (see Siegel, NY Prac § 52 at 75 [5th ed 2011]….)."

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In *Deadco Petroleum v. Trafigura AG*, 151 A.D.3d 547, 58 N.Y.S.3d 16 (1st Dep't 2017), Action #1 in a California federal court was timely commenced, but was dismissed based on a forum selection clause designating the New York courts as the exclusive forum for any litigation. After Action #2 was commenced in New York, the First Department ruled that "the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a 'prior action' within the meaning of that provision."

VII. CPLR 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions.

CPLR 214-a Amended Effective January 1, 2018 to Provide for Discovery Rule in Medical Malpractice Actions Based on Negligent Failure to Diagnose Cancer or Malignant Tumor

CPLR 214-a has long contained a discovery rule in medical malpractice actions based on a foreign object left in the body. *See* Siegel & Connors, New York Practice § 42. That exception has now been placed under a new paragraph (a) and a new discovery rule, governing a doctor's negligent failure to diagnose cancer or a malignant tumor, has been placed in new paragraph (b). Under CPLR 214-a(b):

> where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.

By its terms, it will only apply to an action based on a "negligent failure to diagnose cancer or a malignant tumor," and not to an action based on negligent treatment of cancer or a malignant tumor that has, in fact, been identified. What about the situation in which the doctor actually diagnoses the cancer, but negligently fails to communicate that diagnosis to the patient

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and treat the condition? *See Young v. New York City Health & Hospitals Corp.*, 91 N.Y.2d 291, 293, 670 N.Y.S.2d 169, 171, 693 N.E.2d 196, 198 (1998)(mammogram report revealing nodular densities in breast and recommending a biopsy to rule out malignancy never communicated to plaintiff). Many other aspects of the amendment are addressed in Siegel & Connors, New York Practice § 42 (July 2018 Supplement).

Parents' Claim for Wrongful Birth Accrued on Birth of Impaired Child, Even Though Defendants' Treatment Concluded More Than 6 Months Earlier

In *B.F. v. Reproductive Medicine Associates of New York, LLP*, _ N.Y.3d _, 2017 WL 6375833 (2017), the Court noted that in *Becker v. Schwartz*, it had "recognized a new cause of action permitting parents to recover the extraordinary expenses incurred to care for a disabled infant who, but for a physician's negligent failure to detect or advise on the risks of impairment, would not have been born (46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 386 N.E.2d 807 [1978])." In *B.F.*, the issue was "whether the statute of limitations for such an extraordinary expenses claim runs from the date of the alleged negligence or the date of birth." The Court held that the "[d]ue to its unique features, … the cause of action accrues upon, and hence the limitations period runs from, the birth of the child."

Previously, the Court held that if the child is injured by medical malpractice while in the womb, the child's malpractice claim starts at birth. *LaBello v. Albany Medical Center Hosp.*, 85 N.Y.2d 701 (1995).

Is the Plaintiff in a Derivative Action Entitled to a Continuous Treatment Toll?

Recently, in addressing derivative actions commenced by parents who alleged that they sustained injuries due to medical malpractice arising from the treatment of their children, the First and Third Departments have concluded that the continuous treatment toll is personal to the patient and does not apply to the derivative claim. *See, e.g., Baer v. Law Offices of Moran & Gottlieb*, 139 A.D.3d 1232, 1234 (3d Dep't 2016) (legal malpractice action alleging that defendants negligently failed to assert plaintiffs' derivative claims before statute of limitations expired thereon);

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Devadas v. Niksarli, 120 A.D.3d 1000, 1008 (1st Dep't 2014) (derivative claim for loss of services).

The Second Department has recently concluded that "[t]he continuous treatment toll is personal to the child and is not available to extend the time by which the plaintiff was required to assert her derivative claim." *Reeder v. Health Ins. Plan of Greater New York*, 146 A.D.3d 996, 1000 (2d Dep't 2017).

The Fourth Department, citing to a prior Second Department decision, now stands alone by adhering to the rule that if the continuous treatment doctrine applies to toll the statute of limitations with respect to the main claim, it will similarly toll the statute of limitations on the derivative claim. *See Dolce v. Powalski*, 13 A.D.3d 1200 (4th Dep't 2004)

There is another related issue under CPLR 214-a that does not seem to receive the same attention in the caselaw: whether a derivative claim should receive the benefit of a medical patient's foreign object toll?

VIII. CPLR 301. Jurisdiction over persons, property or status.

Court Holds Foreign Corporation with Principal Place of Business in Ohio to be "At Home" in New York

The standard used for decades to measure whether a corporate defendant is subject to general jurisdiction in New York, the famous "corporate presence" or "doing business" test, has been all but declared unconstitutional by the Supreme Court in its 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *See* Siegel & Connors, New York Practice § 82.

In *Aybar v. Aybar*, 2016 WL 3389889, at *1 (Sup. Ct., Queens County 2016), plaintiffs alleged that they were injured in an auto accident in Virginia while passengers in a car equipped with defendant Goodyear's defective tire. Although Goodyear is an Ohio corporation with its principal place of business in that state, it obviously has a substantial presence in New York. Plaintiff alleged, and Goodyear did not deny, that the tire company "owns and operates nearly one hundred storefront tire and auto service center stores located in every major city and throughout New York State,

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and it employs thousands of New York State residents at those stores," while distributing "its tires for sale at hundreds of additional locations throughout New York State." *Id*. Goodyear moved to dismiss the action for lack of personal jurisdiction based on the Supreme Court's decision in *Daimler*.

The court initially ruled that CPLR 302, New York's longarm statute, could not provide a basis of personal jurisdiction over Goodyear because it manufactured and sold the tire out of state and the plaintiffs' injuries were sustained in Virginia.

Turning to general jurisdiction under CPLR 301, which was the stuff of the Supreme Court's 2014 decision in *Daimler*, the court relied on plaintiffs' unrefuted allegations that Goodyear had operated numerous stores in New York since approximately 1924 and employed thousands of workers who engaged in daily activities in those stores. Based on this conduct, the *Aybar* court held that Goodyear's activities within New York were "so continuous and systematic that the company is essentially at home here," and therefore subject to general jurisdiction. *Id*. at *3.

The court also found an additional basis for personal jurisdiction over Goodyear, deeming it to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process. *Aybar*, at *3; *see* Siegel & Connors, New York Practice § 95.

The *Aybar* court issued a separate decision denying co-defendant Ford's motion to dismiss for lack of personal jurisdiction, which was based on the same reasoning. *Aybar v. Aybar*, 2016 WL 3389890, at *1 (Sup. Ct., Queens County 2016).

SCOTUS Stands by *Daimler* Holding

In *BNSF Ry. Co. v. Tyrrell*, _ U.S. _ , 137 S.Ct. 1549 (2017), the Supreme Court reaffirmed its holding in *Daimler*, once again announcing "that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere." In *BNSF*, two suits involving plaintiffs injured while working for defendant were commenced in Montana state courts, and then consolidated.

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The Court, in an opinion by Justice Ginsburg, the author of *Daimler*, observed that defendant BNSF "is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State." The Court acknowledged that BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana, yet concluded that "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts…. Rather, the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; '[a] corporation that operates in many places can scarcely be deemed at home in all of them'."

While "the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana," that in-state business "does not suffice to permit the assertion of general jurisdiction over claims like [plaintiffs'] that are unrelated to any activity occurring in Montana."

Justice Sotomayor, who concurred in part and dissented in part, observed:

> The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.

IX. CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

Longarm Jurisdiction Sustained Against Foreign Corporation

CPLR 302(a)(1)'s "transacts any business" clause played a starring role in *D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292 (2017), where plaintiff, a Spanish limited liability company, entered into an oral agreement with defendant, a winery located in Spain. Neither

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plaintiff nor defendant had offices or a permanent presence in New York, but plaintiff performed services for defendant here, which included finding a distributor to import defendant's wine into the United States. Defendant paid plaintiff commissions for wine sold through the distributor for a period of time, but then stopped, which triggered the lawsuit in New York County Supreme Court.

Addressing the first part of the jurisdictional inquiry under CPLR 302(a)(1), the Court agreed with the appellate division's determination that defendant transacted business in New York. While the oral agreement between the parties was formed in Spain, it required plaintiff to locate a United States distributor to import defendant's wine. To achieve this goal, defendant accompanied plaintiff to New York on several occasions to attend wine industry events at which plaintiff introduced defendant to a New York-based distributor.

The Court emphasized that defendant was physically present in New York on several occasions and that its activities resulted in "the purposeful creation" of the exclusive distribution agreement with the New York distributor. It is interesting to note that the Court particularly focused on defendant's transactions in New York with the distributor, rather than the plaintiff. *Compare Fischbarg v. Doucet*, 9 N.Y.3d 375, 377 (2007) (holding that "defendants' retention and subsequent communications *with plaintiff* in New York established a continuing attorney-client relationship in this state and thereby constitute the transaction of business under CPLR 302(a)(1)")(emphasis added).

Defendant's conduct also satisfied the second part of the jurisdictional inquiry under the longarm statute because plaintiff's claim arose from defendant's business activities in New York with both the plaintiff and the New York based distributor.

Business Corporation Law Section 1314

One may wonder what the *D&R Global* action was doing in the New York State court system given that the plaintiff and defendant were both foreign corporations with no offices or permanent presence in New York and their contract was formed in Spain. A statute in the Business Corporation Law, section 1314(b), governs in such situations and requires that the action

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satisfy one of five grounds set forth therein. *See* Siegel & Connors, New York Practice § 29. The fourth ground in Business Corporation Law section 1314(b) allows such suits to proceed if the foreign corporation would be subject to personal jurisdiction under CPLR 302. Having found jurisdiction under CPLR 302(a)(1) satisfied as against defendant, the *D&R Global* Court ruled that there was "subject matter jurisdiction over the parties' dispute under Business Corporation Law § 1314(b)(4)."

This quote is somewhat startling. If one of the five grounds in Business Corporation Law section 1314(b) is not met in an action between two foreign corporations, does that mean the supreme court lacks subject matter jurisdiction to entertain the matter, even if the parties have consented to New York jurisdiction in a forum selection clause? *See* Siegel & Connors, New York Practice § 28. Can this ground be raised at any time, or even sua sponte, as with most matters falling under the umbrella of subject matter jurisdiction? Could a supreme court judgment be subsequently deemed void based on the action's failure to satisfy section 1314(b), or can the parties waive the defect? These issues go hand in hand with the rigid law of subject matter jurisdiction. *See* Siegel & Connors, New York Practice § 8.

X. Commercial Division of Supreme Court.

Amendments to Commercial Division Rules

Several amendments were made to the Rules of the Commercial Division, 22 NYCRR 202.70, which are tracked in Siegel & Connors, New York Practice § 12A, a new section added to the Sixth Edition. For example, the Commercial Division recently adopted the following new measures:

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

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These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), the Federal Rules of Civil Procedure, or any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provision

> To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF."

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSEY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCMENT OR TERMINATION THEREOF."

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APPENDIX D. COMMERCIAL DIVISION SAMPLE CHOICE OF LAW PROVISION

Purpose

The purpose of this sample choice of law provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to having New York law apply to their contract, or any dispute under the contract.

This sample provision is not intended to modify governing case law or to replace any parts of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, or any other applicable rules or regulations. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties which use this sample provision must meet any requirements of applicable law.

The Sample Choice of Law Provision

To express their consent to have New York law apply to the contract between them, or any disputes under such contract, the parties may include specific language in their contract, such as: "THIS AGREEMENT AND ITS ENFORCEMENT, AND ANY CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD TO NEW YORK'S PRINCIPLES OF CONFLICTS OF LAW."

XI. Uniform Rule 202.5-bb. Electronic Filing in Supreme Court; Mandatory Program.

There continues to be frequent expansion of e-filing throughout the state. These developments are tracked in Siegel & Connors, New York Practice § 63A, entitled "Commencement of Actions by Electronic Filing ("E-Filing")," a new section added to the Sixth Edition.

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By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued mandatory e-filing in certain additional actions in the following counties:

Supreme Court, Albany County-Tax certiorari proceedings (excluding RPTL 730 proceedings).

Supreme Court, Bronx County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial matters, Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Broome County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, name change applications, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Cortland County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Essex County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Jefferson County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78

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proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Lewis County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Livingston County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Monroe County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Nassau County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Ontario County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Orange County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene

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Law matters, consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304, and RPTL 730 proceedings.

Supreme Court, Oswego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, in rem tax foreclosures, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Otsego County-"Mandatory in part" for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; "Mandatory" for all other actions except CPLR Article 70 and 78proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Putnam County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Queens County-commercial actions have been added to the list of actions in which e-filing is mandatory.

Supreme Court, Richmond County-all actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters, applications to extend mechanics liens, consumer credit actions as defined in CPLR 105(f), and residential foreclosures as defined in RPAPL 1304.

Supreme Court, Suffolk County-The categories of action for mandatory e-filing have substantially changed and are now as follows: "Mandatory in part" (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary) for consumer credit actions as defined in CPLR 105(f); "Mandatory" for all other actions except CPLR Article 70 and 78 proceedings, civil forfeiture proceedings, Election Law proceedings,

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emergency medical treatment applications, matrimonial and Mental Hygiene Law matters, and name change applications.

Supreme Court, Tompkins County-“Mandatory in part” for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; “Mandatory” for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Warren County-“Mandatory in part” for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; “Mandatory” for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Supreme Court, Washington County-“Mandatory in part” for the following actions (meaning e-filing of initiatory papers is mandatory, but e-filing of subsequent documents is voluntary): Consumer credit actions as defined in CPLR 105(f), residential foreclosures as defined in RPAPL 1304; “Mandatory” for all other actions except CPLR Article 70 and 78 proceedings, Election Law proceedings, and matrimonial and Mental Hygiene Law matters.

Surrogate’s Court-Mandatory e-filing has now been recently authorized in the Surrogate’s Court in Allegany, Cattaraugus, Genesee, Niagra, Orleans, Oswego, Suffolk, Ulster and Wyoming Counties for all probate and administration proceedings and related miscellaneous proceedings. *See* Administrative Order AO/192/18 dated May 22, 2018.

By Administrative Order AO/192/18 dated May 22, 2018, the Chief Administrative Judge established or continued consensual e-filing in certain additional counties for various types of actions including: Chenango, Delaware, Essex, Jefferson, Lewis, Madison, Monroe, New York, Oswego, Putnam, Seneca, Tioga and Wayne.

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Parties to matrimonial actions should take note of Appendix B to Administrative Order AO/192/18. The appendix sets forth additional rules and conditions for the consensual electronic filing of matrimonial actions in supreme court.

By Administrative Order AO/292/17 dated November 8, 2017, the Chief Administrative Judge authorized a pilot program for consensual e-filing in civil actions commenced by e-filing in Supreme Court, New York County and subsequently removed to the New York City Civil Court pursuant to CPLR 325(d). Any party to such action can opt out of e-filing by serving on all parties, and filing with the court, a declination of consent within 20 days of entry of the order of removal.

Effective January 27, 2017, e-filed documents in newly initiated cases in New York County will be available immediately for online public viewing through the New York State Courts Electronic Filing system ("NYSCEF"). Such filings will be available for immediate online public viewing PRIOR to any examination of the document or assignment of an index number to the matter by the Office of the New York County Clerk.

Documents available for online viewing at this early stage will contain the following annotation in the margin:

> *Header:*
>
> *CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)*
>
> *Footer:*
>
> *This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR § 202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk in the county of filing. Because court rules (22 NYCRR § 202.5[d]) authorize the County Clerk to reject filings and attempted filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.*

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These marginal annotations will be removed when the documents have been reviewed and approved for filing by the County Clerk and an index number has been assigned to the matter pursuant to 22 NYCRR § 202.5-b(d)(3).

Because these documents are available for public view prior to examination by the County Clerk, filers are advised to take special care to assure that the filings comply with State law and court rules addressing confidentiality of personal information (see, e.g., Gen. Bus. L. § 399-ddd [confidentiality of social security account number]; 22 NYCRR § 202.5[e] [omission or redaction of confidential personal information]).

The status of e-filing, including the actions to which it applies and the pitfalls associated with it, are discussed in further detail in Siegel & Connors, New York Practice § 63A.

E-filing Comes to the Appellate Division Effective March 1, 2018

Effective March 1, 2018, the Appellate Division has instituted e-filing in certain appellate matters through the New York State Courts Electronic Filing system (NYSCEF). The joint Electronic Filing Rules of the Appellate Division are contained in 22 N.Y.C.R.R. Part 1245. The actions in which e-filing in the Appellate Division is required as of March 1, 2018 differ for each Department. They are as follows:

> **First Department:** All appeals in commercial matters originating in the Supreme Court, Bronx and New York Counties.
>
> **Second Department**: All appeals in matters originating and electronically filed in Supreme and Surrogate's Courts in Westchester County.
>
> **Third Department**: All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.
>
> **Fourth Department**: All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial Department.

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Things have started off slowly, but the above listings will be supplemented in each Department as the e-filing program expands. Lawyers handling appeals must be certain to check the most current listings at the NYSCEF website: www.nycourts.gov/efile.

XII. CPLR 308. Personal service upon a natural person.

Service on the Sabbath with Knowledge That Person Served Observes the Sabbath Constitutes Malice Voiding Service

Service of process on a Saturday can be set aside and deemed a nullity if it is "maliciously procure[d]" to be served on one who "keeps Saturday as holy time." Gen. Bus. Law § 13; *see* Siegel & Connors, New York Practice § 63. In *JPMorgan Chase Bank, Nat. Ass'n v. Lilker*, 153 A.D.3d 1243 (2d Dep't 2017), supreme court denied the defendants' motion pursuant to CPLR 5015(a) and 317 to vacate a default judgment of foreclosure and sale, and to dismiss the complaint for lack of personal jurisdiction, based on a violation of General Business Law section 13.

According to the affidavits of service, after four unsuccessful attempts at personal service, the process server served the defendants by "affix and mail" service under CPLR 308(4). The affixation portion of the service was accomplished on a Saturday afternoon when the process server affixed two copies of the summons, complaint, and related documents to the door of the subject premises. In support of their motion to vacate the default judgment and dismiss the complaint, plaintiffs argued that personal jurisdiction was not secured over them because service of process was carried out in violation of General Business Law section 13, since, despite knowledge by the plaintiff's counsel that they are observant, Orthodox Jewish persons who adhere to the Sabbath, the affixation portion of service under CPLR 308(4) was improperly performed on a Saturday.

The Second Department held that General Business Law section 13 "applies not only to personal service upon a defendant, but also to the affixation portion of 'nail and mail' service pursuant to CPLR 308(4) on the door of a defendant's residence." Furthermore, under the statute, "[t]he knowledge of a plaintiff or its counsel [that the person to be served observes the Sabbath]

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is imputed to the process server by virtue of the agency relationship." In support of their motion, the defendants submitted a letter from their counsel allegedly forwarded almost 8 weeks prior to service of process advising plaintiff's counsel that the defendants are "observant, Orthodox Jews," who cannot be served on a Saturday. Plaintiff's counsel denied receiving the letter and the Second Department reversed supreme court, ruling that a hearing on the dispute was necessary to ascertain if service was made in violation of General Business Law section 13.

Delivery to Defendant's Mother at Multiple Dwelling Building Where Defendant Resided, but Not at Defendant's Apartment, Is Not Proper Service

In *Thacker v. Malloy*, 148 A.D.3d 857 (2d Dep't 2017), "the plaintiff failed to meet her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process." The evidence at the traverse hearing showed that the process server walked up to the window of the defendant's mother's ground-floor apartment to give her the summons and complaint as he stood on the sidewalk and she stood inside her apartment. The defendant resided in the same multiple-dwelling building as his mother, but "his apartment was on a higher floor, and it was separate and distinct from his mother's apartment." Therefore, the court ruled that, "in serving the defendant's mother with the summons and complaint while she was inside her own apartment, service was not made at the defendant's actual dwelling place." *See* CPLR 308(2)(requiring delivery of the summons "within the state to a person of suitable age and discretion at the actual place of business, *dwelling place or usual place of abode of the person to be served*").

XIII. Business Corporation Law § 304. Statutory designation of secretary of state as agent for service of process.

Can Corporation's Designation of Secretary of State as Agent for Service of Process Be Deemed Consent to Personal Jurisdiction in New York?

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus.

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Corp. Law § 304. In section 95 Siegel & Connors, New York Practice, we explore the issue of whether such designation constitutes the corporation's consent to personal jurisdiction in New York. The issue has become an important one in light of the Supreme Court's decision in *Daimler*. In *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the court examined "the applicable Connecticut law" and ruled "that by registering to transact business and appointing an agent under the Connecticut statutes—which do not speak clearly on this point—Lockheed did not consent to the state courts' exercise of general jurisdiction over it." The court also observed that New York's Business Corporation Law section 304 "has been definitively construed" to vest the New York courts with general jurisdiction over a corporation that designates the New York Secretary of State as its agent for service of process.

In *Famular v. Whirlpool Corp.*, 2017 WL 280821 (S.D.N.Y. 2017), nine different plaintiffs from nine different states brought suit in the Southern District of New York, alleging that the Whirlpool washing machines the plaintiffs had purchased were mislabeled. One plaintiff, Famular, was a resident of New York who bought the Whirlpool washing machine in New York. Whirlpool conceded that specific jurisdiction existed in reference to Famular, but moved to dismiss against the other eight plaintiffs due to a lack of general personal jurisdiction.

The plaintiffs argued that Whirlpool and the other defendants were "subject to general personal jurisdiction in New York on a theory of consent by registration with the State of New York." The defendants countered that "the consent-by-registration theory of general personal jurisdiction is no longer viable in light of *Daimler*." The *Famular* court held that "a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise." *See also Amelius v. Grand Imperial LLC*, 2017 WL 4158854 (Sup. Ct., New York County 2017)("For the dual reasons that the statutes do not adequately apprise foreign corporations that they will be subject to general jurisdiction in the courts of this State and that foreign corporations are required to register for conducting a lesser degree of business in this State than the Supreme Court of the United States has ruled should entail general jurisdiction, this Court finds that Yelp is not subject to general jurisdiction merely because it has registered to do business here."; *but see Aybar v. Aybar*, 2016 WL 3389889,

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at *1 (Sup. Ct., Queens County 2016)(deeming Goodyear and Ford to have consented to general jurisdiction in New York by obtaining a license to do business here and designating the secretary of state as its agent for service of process).

XIV. CPLR 312-a. Personal service by mail.

Service By First Class Mail Plus Acknowledgement Is Fraught With Danger

The Third Department's recent decision in *Komanicky v. Contractor*, 146 A.D.3d 1042 (3d Dep't 2017), contains several lessons on the subject of service of process. *Komanicky* was a medical malpractice action naming 16 defendants who plaintiff attempted to serve via first class mail pursuant to CPLR 312-a. This method of service only works if defendant sends back the acknowledgement of service within 30 days after its receipt. CPLR 312–a(b); *see* Siegel & Connors, New York Practice § 76A. The only possible penalty for failing to send back the acknowledgment is that the defendant may be required to pay "the reasonable expense of serving process by an alternative" method of service under CPLR 308. CPLR 312–a(f).

None of the 16 defendants in *Komanicky* returned the acknowledgement. Plaintiff was then required to serve process via alternative methods and elected to personally serve defendants under CPLR 308(1), but the personal service did not occur within 120 days of the filing of the initiatory papers. CPLR 306–b.

The Third Department affirmed the order granting defendants' pre-answer motion to dismiss the complaint on several grounds, including lack of personal jurisdiction due to improper service. *See* CPLR 3211(a)(8). The court noted that "[t]o the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR 306–b, such affirmative relief should have been sought by way of a cross motion on notice." *See* CPLR 2215.

While a motion to extend the 120-day period most certainly should be made before it expires, it can be made after the period has run or in response to a motion to dismiss for lack of proper service. *See* Siegel & Connors, New

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York Practice § 63 ("Extending Time for Service"). The extension can be sought via a cross motion, but should not be sought informally in answering papers served in response to a motion to dismiss. Several decisions, including *Komanicky*, have rejected that approach. *See Matter of Ontario Sq. Realty Corp. v LaPlant*, 100 A.D.3d 1469 (4th Dep't 2012)(petitioner "was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the [petition with a notice of petition or an order to show cause] upon [respondent] pursuant to CPLR 306–b").

XV. CPLR 403. Notice of petition; service; order to show cause.

Omission of Return Date in Notice of Petition Can Be Disregarded under CPLR 2001

In *Oneida Public Library Dist. v. Town Bd. of Town of Verona*, 153 A.D.3d 127 (3d Dep't 2017), petitioner brought a special proceeding to challenge respondents' separate rejections of a bonding resolution that would have financed the construction of a new library. Petitioner filed a notice of petition and verified petition on November 30, 2015 and personally served these documents on the respondents on the same day. The notice of petition did not set forth a return date as required by CPLR 403(a), which provides: "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition."

The Third Department had previously taken a somewhat strict stand in such matters, ruling that the omission of a return date was a fatal defect beyond the reach of CPLR 2001's powers of dispensation. *See, e.g., Matter of Common Council of City of Gloversville v. Town Bd. of Town of Johnstown*, 144 A.D.2d 90, 92 (3d Dep't 1989) (service of "notice of appeal," instead of "notice of petition" with return date, failed to result in acquisition of personal jurisdiction that "was a prerequisite to the exercise of a court's discretionary power to correct an irregularity or permit prosecution of a matter brought in an improper form" under CPLR 2001).

Applying a kinder, gentler interpretation of CPLR 2001, the Third Department recognized that "the primary purpose of a petition is to give notice to the respondent that the petitioner seeks a judgment against [a] respondent so that it may take such steps as may be advisable to defend the

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claim." The "return date accomplishes this purpose by notifying the responding party when responsive papers must be served and when the petition will be heard ."

The court found that the appellate record supported the contention that respondents had sufficient notice of the petition, especially because "respondents' counsel conceded at oral argument before Supreme Court that they had 'plenty of time to respond' and, on appeal, they d[id] not contend that they suffered any prejudice." *Id.* Therefore, the *Oneida Public Library* court ruled that the omission of a return date on the notice of petition should have been disregarded by supreme court as a mere technical infirmity under CPLR 2001. *See also Bender v. Lancaster Cent. School Dist.*, 155 A.D.3d 1590 (4th Dep't 2017)(holding that the omission of a return date in a notice of petition does not "deprive a court of personal jurisdiction over the respondent….[S]uch a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission"); *Kennedy v. New York State Office for People With Developmental Disabilities*, 154 A.D.3d 1346 (4th Dep't 2017) (reversing judgment dismissing petition on jurisdictional grounds because the notice of petition served and filed by petitioner omitted a return date in violation of CPLR 403(a), Fourth Department reinstated the petition and remitted the matter to supreme court "to exercise the discretion afforded to it under CPLR 2001").

XVI. CPLR 501. Contractual provisions fixing venue.

First and Second Departments Enforce Forum Selection Clauses in Resorts' Rental Agreements

In *Molino v. Sagamore*, 105 A.D.3d 922 (2d Dep't 2013), the Second Department reversed the trial court and granted the defendant's motion pursuant to CPLR 501 and 511 to change the venue of the action from Queens County to Warren County. Upon her arrival at the defendants' facility, the plaintiff signed a "Rental Agreement" which contained a provision stating that "if there is a claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County." The Second Department concluded that the supreme court erred in determining that the Rental

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Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (citation omitted) (internal quotation marks omitted).

Similarly, in *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D.3d 1015, 991 N.Y.S.2d 765 (1st Dep't 2014), the First Department affirmed supreme court's order granting defendants' motion to change the venue of the action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County. Citing to *Molino*, the court concluded that there was no basis for disregarding the venue agreement because "[p]laintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching." The action was actually "transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County"! *See also Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, 131 A.D.3d 1121 (2d Dep't 2015) (affirming order granting that branch of the defendant's motion which was pursuant to CPLR 501 and 511 to change the venue of the action from Suffolk County to Greene County).

Second Department Enforces Forum Selection Clause in Residential Health Care Facility's "Admission Agreement"

In *Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 A.D.3d 651, 17 N.Y.S.3d 501 (2d Dep't 2015), plaintiff's decedent was a resident of a residential health care facility located in Brooklyn.

Upon the decedent's admission to the facility, her daughter, the plaintiff, signed an "Admission Agreement" that contained a forum selection clause stating that "[e]ach of the parties to this Agreement irrevocably (a) submits to the exclusive jurisdiction of the courts of the State of New York in the County of Suffolk ... for purposes of any judicial proceeding that may be

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instituted in connection with any matter arising under or relating to this Agreement." The Agreement also provided that "[i]n addition to the parties signing this Agreement, the Agreement shall be binding on the heirs, executors, administrators, distributors, successors, and assigns of the parties."

After the decedent died, the plaintiff, as the administrator of the decedent's estate, commenced a medical malpractice action against the operator of the facility in Supreme Court, Kings County. Defendant moved to change venue of the action from Kings County to Suffolk County based on the Agreement's forum selection clause.

The Second Department ruled that the defendant was not required to serve the plaintiff with a written demand to change venue pursuant to CPLR 511(a) before making its motion. Relying on its prior decisions, including *Molino*, the court ruled that "the plaintiff failed to show that enforcement of the forum selection clause would be unreasonable, unjust, or in contravention of public policy, or that the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching." Furthermore, "the plaintiff failed to demonstrate that a trial in Suffolk County would be so gravely difficult that, for all practical purposes, she would be deprived of her day in court." Therefore, the Second Department reversed the supreme court and granted the motion to change venue.

Court Orders Hearing to Determine Validity of Nursing Home's Forum Selection Clause Signed by Decedent

In *Howard v. Dewitt Rehabilitation and Nursing Center, Inc.*, 2018 WL 452009 (Sup. Ct., New York County 2018), the court distinguished *Puleo* and ruled that the record raised:

> issues of fact as to whether the forum selection clause in the Agreement is invalid as the product of overreaching. In particular, while in *Medina* supra and *Puleo* supra. the nursing home admission agreement was signed, respectively, by the nursing home resident's attorney-in fact and daughter, in this case the nursing home resident signed the agreement. Moreover, contrary to Dewitt's position, the absence of medical evidence that decedent was incapacitated at the time she signed the Agreement, is not conclusive since plaintiff has

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> submitted evidence that when decedent was admitted to Dewitt, she had a tracheotomy tube, which severely limited her ability to communicate, and did not have her glasses, without which she could not read. This evidence is sufficient to warrant a hearing as to whether the forum selection clause should be invalidated as the product of overreaching.

Therefore, the court ordered a hearing to determine "the validity of the forum selection clause in the Agreement and, in particular, the circumstances surrounding decedent's execution of the Agreement, including her mental and physical condition at the time she executed the Agreement."

XVII. CPLR 503. Venue based on residence.

(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; <u>the county in which a substantial part of the events or omissions giving rise to the claim occurred</u>; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

This new amendment, which went into effect on October 23, 2017, apparently cannot be invoked in actions commenced prior to that date. See Chapter 366 of the Laws of 2017, § 2 ("This act shall take effect immediately and shall apply to actions commenced on or after such date.").

The amended provision bring New York venue practice closer to that in the federal courts, but there are still several significant distinctions. 28 U.S.C. § 1391 governs venue in federal courts and the statute was substantially amended in 2011. Section 1391(a)(1) provides that it will "govern the venue of all civil actions brought in district courts of the United States," except where a special venue provision in another law may govern. *See* 28 U.S.C. § 1400(b) (patent venue statute). The amended section 1391(b) eliminates prior distinctions between actions grounded in federal question jurisdiction and diversity jurisdiction. In both categories, venue may be laid in the district of any defendant's residence as long as all defendants reside in the

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same state. So provides section 1391(b)(1). Note that this provision does not authorize venue in the plaintiff's own district of residence, as § 1391 had done before its amendment in the Judicial Improvements Act of 1990 (Pub.L. 101-650).

Alternatively, under section 1391(b)(2), venue may be laid in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" or where "a substantial part of property that is the subject of the action is situated."

Paragraph (3) of section 1391(b) can't be invoked unless the options of paragraphs (1) and (2) prove unavailing. It permits venue in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."

Venue in federal actions with corporate parties is a bit more involved. For a discussion of venue in these instances, see Siegel & Connors, New York Practice (6th ed. 2018). Essentially, if the plaintiff is a corporation, it usually has to bring suit in the defendant's district or in the district where the claim arose. But if the defendant is a corporation, the plaintiff's choice of venue expands. For venue purposes, the corporate defendant is deemed a resident of (and may be sued in) any district in which it is amenable to personal jurisdiction with respect to the claim in question. 28 U.S.C. §§ 1391(a), (c); *see TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, _ U.S._, 137 S. Ct. 1514, 1517 (2017)(discussing 28 U.S.C. § 1391, but "hold[ing] that a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute [28 U.S.C. § 1400(b)]").

XVIII. CPLR 1003. Nonjoinder and misjoinder of parties.

Party Added Without Leave of Court Outside CPLR 1003's Time Frames Waives Defect by Failing to Promptly Assert It

The 1996 amendments to CPLR 305(a) and 1003 allow the plaintiff to add additional parties to an action without court leave if the plaintiff acts no later than the 20th day after the defendant's service of the answer. *See* Siegel & Connors, New York Practice § 65. If a party is improperly added outside the time frames in CPLR 1003, she had better raise a prompt objection. In *Wyatt*

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v. City of New York, 46 Misc. 3d 1210(A), 2015 WL 232918 (Sup. Ct., New York County 2015), the court ruled that plaintiffs added MTA Bus Company as a defendant without court leave outside the time periods in CPLR 1003. Nonetheless, the court concluded that defendants waived their right to assert the issue because they failed to plead a proper objection in either their original or amended answer to the amended complaint. *Id.* at *5.

Despite the fact that defendants' amended answer contained thirteen affirmative defenses, including lack of personal jurisdiction based on the ground that "plaintiffs have failed to properly serve defendants with the Summons in this matter," it still missed the mark.

The decision is discussed in further detail in section 65 Siegel & Connors, New York Practice.

XIX. CPLR 1601. Limited liability of persons jointly liable.

Split Decision from Third Department Permits Apportionment of State's Fault in Supreme Court Action

In *Artibee v. Home Place Corp*, 28 N.Y.3d 739 (2017), plaintiffs sued defendant for injuries sustained while driving on a state highway when a branch from defendant's tree fell and struck plaintiff's car. Plaintiff also sued the State of New York in the Court of Claims.

In the supreme court action, defendant moved in limine to have the jury apportion liability between the defendant and the state. Supreme court ruled that evidence with regard to the state's liability for plaintiffs' alleged damages would be admissible at trial, but denied defendant's request for an apportionment charge.

The Third Department ruled that defendant was entitled to an apportionment charge to permit it to establish that its share of fault was 50% or less. The Court of Appeals reversed, concluding that the factfinder in supreme court cannot apportion fault to the State under CPLR 1601(1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action.

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The Court noted that apportionment of fault against a nonparty tortfeasor is available under CPLR 1601(1), unless "the claimant proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor "in said action (or in a claim against the state, in a court of this state)" CPLR 1601(1). The statutory language permits the State to seek apportionment in the Court of Claims against a private tortfeasor subject to jurisdiction in any court in the State of New York. *See* Siegel & Connors, New York Practice § 168C at 290. "The statute does not, however, contain similar, express enabling language to allow apportionment against the State in a Supreme Court action (see id. [acknowledging that such a rule has derived from case law, rather than any "statute in point"])."

The *Artibee* Court stressed that "[m]oreover, even apart from the absence of language permitting apportionment against the State in Supreme Court, CPLR 1601(1) provides that a nonparty tortfeasor's relative culpability must not be considered in apportioning fault "if the claimant ... with due diligence ... was unable to obtain jurisdiction over such person in said action….Inasmuch as no claimant can obtain jurisdiction over the State in Supreme Court and the statute does not, by its terms, otherwise authorize the apportionment of liability against the State in that court, we agree with plaintiff that defendant was not entitled to a jury charge on apportionment in this action." In this respect, the *Artibee* Court ruled that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction.

The Court stressed that "if a defendant believes that it has been held liable in Supreme Court for what is actually the State's negligent conduct, the defendant can sue the State for contribution in the Court of Claims." It must be noted, however, that the State will not be bound by the amount of the judgment or the apportionment of fault in the supreme court action. *See* Siegel & Connors, New York Practice § 470 ("Nonjury Determinations; Court of Claims Problems").

The dissent in *Artibee* observed:

> the majority's holding creates anomalous situations that I do not believe were intended by the legislature: (1) a defendant in Supreme Court cannot shift liability to the nonparty State, but a state defendant in the Court of Claims can shift liability to a private party; and (2) a

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plaintiff in the Court of Claims will face apportionment with the State pointing to an empty chair, but a plaintiff in the Supreme Court will not face apportionment where the empty chair is the State.

In an analogous context, courts have held that where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant, the liability of the bankrupt tortfeasor can been "apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16." *See, e.g., Kharmah v. Metropolitan Chiropractic Ctr.*, 288 A.D.2d 94, 94–95 (1st Dep't 2001). Given *Artibee's* conclusion that the term "jurisdiction" in CPLR 1601(1) means both personal and subject matter jurisdiction, this area of the law needs to be reexamined. *Artibee*, 28 N.Y.3d at 747-48.

XX. CPLR 2101. Form of papers.

New Court Rule Requires Attorneys to Redact Certain Confidential Information from Papers Filed in Court

The Administrative Board of the Courts recently promulgated Uniform Rule 202.5(e), which requires the redaction of certain confidential personal information ("CPI") from court filings. Compliance with the rule—effective January 1, 2015—was voluntary through February 28, 2015, but is now mandatory. The new rule covers actions that are using the New York State Courts Electronic Filing System ("NYSCEF"), *see* Siegel & Connors, New York Practice § 63, as well as those proceeding with actual hard copy papers.

Under the rule, CPI includes "(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; (ii) the date of an individual's birth, except the year thereof; (iii) the full name of an individual known to be a minor, except the minor's initials; and (iv) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof." 22 N.Y.C.R.R. § 202.5(e)(1).

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The new rule is discussed in further detail in Siegel & Connors, New York Practice § 201.

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State, Second Circuit Declares Statute Constitutional, U.S. Supreme Court Denies Leave

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident

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attorneys, thereby eliminating a service-of-process concern." *See Connors*, "The Office: Judiciary Law § 470 Meets Temporary Practice Under Part 523," New York Law Journal, May 24, 2016, at 3 (addressing the interplay between the new Part 523 allowing temporary practice in New York State and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State).

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
>
> * * *
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as

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required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002).

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice. The First Department affirmed. *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909, 2018 WL 358301 (2018).

The decision, and its impact, is discussed in further detail in Siegel & Connors, New York Practice § 202.

XXI. CPLR 2103. Service of papers.

CPLR 2103 Amended to Allow for Service Via Regular Mail Outside New York

While CPLR 2103(b) allows for service of interlocutory papers during an action via several methods, regular mail is still the most popular. Up through 2015, service via "[m]ailing" under CPLR 2103(b)(2) required that the paper be deposited with "the United States Postal Service *within the state*." *See* CPLR 2103(f)(1) (defining "Mailing") (emphasis added).

Effective January 1, 2016, lawyers may deposit interlocutory papers in mailboxes outside New York thanks to an amendment to CPLR 2103(f)(1),

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which now defines “[m]ailing” as depositing the interlocutory paper with the “United States Postal Service *within the United States*.” (emphasis added)

CPLR 2103(b)(2) grants a five-day extension to the recipient of a paper to perform any act where: (1) the time to perform the act runs from the service of a paper, and (2) the paper is served by regular mail. The five days now become six if a party avails itself of the amendment and deposits the interlocutory paper for first class mailing with the United States Postal Service outside New York, “but within the geographic boundaries of the United States.” CPLR 2103(b)(2).

The amendment to CPLR 2103 is discussed in further detail in Siegel & Connors, New York Practice § 202.

XXII. CPLR 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist.

Affirmation of Doctor Not Authorized to Practice Medicine in New York Does Not Constitute Competent Evidence

Tomeo v. Beccia, 127 A.D.3d 1071 (2d Dep’t 2015) highlights one of the pitfalls of the statute. In *Tomeo*, the plaintiff failed to raise a triable issue of fact in opposition to defendant’s prima facie showing on its motion for summary judgment. “The affirmation of the plaintiff’s expert, Dr. Richard Quintiliani, did not constitute competent evidence, because Quintiliani was not authorized by law to practice medicine in New York State.” Therefore, defendant hospital was granted summary judgment dismissing the action against it. *See Sul-Lowe v. Hunter*, 148 A.D.3d 1326, 48 N.Y.S.3d 844 (3d Dep’t 2017)(unsworn affidavits by physicians who averred that they were licensed in Massachusetts, but did not claim to be licensed in New York, were without probative value).

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XXIII. CPLR 2215. Relief demanded by other than moving party.

Improper Cross Motion Seeking Relief Against Nonmoving Defendants Could Not Relate Back to Main Motion to Establish Timeliness

The caselaw continues to demonstrate that attorneys use the cross motion authorized by CPLR 2215 for improper purposes, and in many instances to their detriment. A recent example of the problem arose in *Sanchez v. Metro Builders Corp.*, 136 A.D.3d 783, 25 N.Y.S.3d 274 (2d Dep't 2016), where plaintiff, who had fallen from a roof, moved for summary judgment on liability against the defendant in a Labor Law action. Defendant cross moved for summary judgment dismissing the complaint insofar as asserted against it, and for partial summary judgment on liability against two codefendants for indemnification. The supreme court denied the cross-motion as untimely.

The Second Department modified the supreme court's order by concluding that the branch of defendant's cross-motion that was for summary judgment dismissing the complaint insofar as asserted against it was timely pursuant to CPLR 2215. In this portion of its cross-motion, defendant was seeking affirmative relief against the plaintiff, who was the moving party, and it therefore properly denominated the request for relief as a cross-motion. The cross-motion was, of course, subject to the shorter notice periods in CPLR 2215 and was deemed timely by the Second Department.

The remaining branches of defendant's motion seeking partial summary judgment on liability against the two codefendants could not, however, be considered as a cross motion because defendant was seeking affirmative relief against nonmoving parties. *See* CPLR 2215 ("a party may serve *upon the moving party* a notice of cross-motion demanding relief") (emphasis added). The court ruled that these branches of the motion were untimely because they were made "after the deadline to make a motion for summary judgment had passed, and failed to demonstrate good cause for the delay." *See* CPLR 3212 (a).

The *Sanchez* court did not discuss the point, but a cross-motion for summary judgment that is served after the statutory deadline in CPLR 3212(a) can be entertained if it is sufficiently related to a timely motion for summary judgment. *See* Siegel & Connors, New York Practice § 279. The close

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relationship between a timely motion for summary judgment and an untimely cross-motion can provide "good cause" for a court to entertain the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281, 824 N.Y.S.2d 244 (1st Dep't 2006). In *Sanchez*, those branches of defendant's cross-motion seeking relief against the nonmoving defendants could not rely on this doctrine to establish good cause.

More recently, in *Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603, 56 N.Y.S.3d 55 (1st Dep't 2017), a codefendant made a cross-motion for summary judgment against another codefendant to dismiss a contractual indemnification claim against it. The supreme court granted the motion, but the First Department reversed, concluding that the cross-motion should have been denied as untimely since it was made after the applicable deadline for summary judgment motions and the codefendant failed to show "good cause" for the delay. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Furthermore, the court observed that the "purported cross motion…was not a true cross motion" because it was not made against a moving party. *Rubino*, 150 A.D.3d at 604, 56 N.Y.S.3d at 57.

XXIV. CPLR 2219. Time and form of order.

Delays Ranging from Six to Eighteen Months in Issuing Orders on Four Motions Warrant Issuance of Judgment to Compel

If a judge inordinately delays in rendering an order on a motion, a party may commence an Article 78 proceeding in the nature of mandamus to compel the determination of the motion. This course of action is not highly recommended, but it was followed in *Liang v. Hart*, 132 A.D.3d 765, 17 N.Y.S.3d 771 (2d Dep't 2015), where petitioner made four separate motions that were fully submitted on June 17, 2013, July 24, 2013, November 26, 2013, and June 19, 2014. In February of 2015, the petitioner commenced an Article 78 proceeding against the judge to compel her to issue orders. Citing to CPLR 2219(a), the Second Department concluded that "the petitioner demonstrated a clear legal right to the relief sought" and directed the respondent judge to issue written orders on the four motions within 30 days.

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XXV. CPLR 2220. Entry and filing of order; service.

Appeal from Order That Was Not Filed or Entered "Must Be Dismissed"

CPLR 2220(a) provides that "[a]n order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable…." In *Merrell v. Sliwa*, 156 A.D.3d 1186 (3d Dep't 2017), the court noted that "an appeal is not properly before this Court if the order appealed from 'was not "entered and filed in the office of the clerk of the court where the action is triable" '(People v. Davis, 130 A.D.3d 1131, 1132 [3d Dep't 2015])." The order at issue in *Merrell*, which dismissed petitioner's application, was neither entered nor filed and, therefore, the appeal was dismissed.

The court noted:

> petitioner provided us with a copy of the order that reflects that it was "received" by the Albany County Clerk's office. However, there is no indication that the order was filed or entered as required by CPLR 2220. We note that Supreme Court's order explicitly stated that it was transferring the papers to the Albany County Clerk and returning the original order to counsel for respondents. Significantly, Supreme Court notified the parties that the signing of the order did not constitute entry or filing or relieve them of the obligation to do so pursuant to CPLR 2220.

XXVI. CPLR 2221. Motion affecting prior order.

Court Treats an Order Denying a Motion to Reargue as a Grant of the Motion, with the Original Determination Adhered To, and Entertains Appeal

While an order denying a motion for reargument is not appealable, in rare instances an appellate court may elect to treat a denied motion to reargue as one that was granted with the original determination adhered to, so as to preserve an appeal from the order. *See Jones v. City of New York*, 146 A.D.3d 690, 690, 46 N.Y.S.3d 57, 59 (1st Dep't 2017); *HSBC Mortg. Corp.*

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(USA) v. Johnston, 145 A.D.3d 1240, 43 N.Y.S.3d 575 (3d Dep't 2016). In *Lewis v. Rutkovsky*, ___ A.D.3d ___, --- N.Y.S.3d ----, 2017 WL 3707298 (1st Dep't 2017), the First Department ruled that while the supreme court "purported to deny the motion to reargue," it nonetheless considered the merits of the defendants' contention that inclement weather on the due date for summary judgment motions provided good cause for the delay in making the motion. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279. Therefore, the *Lewis* court ruled that supreme court, "in effect, granted reargument, then adhered to the original decision." That paved the way for the First Department to not only deem the order appealable, but to reverse supreme court's determination that the motion for summary judgment was untimely.

XXVII. CPLR 2303. Service of subpoena; payment of fees in advance.

Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates

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with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

XXVIII. CPLR 2308. Disobedience of subpoena.

Issuance of Warrant Directing Sheriff to Bring Witness Into Court Discretionary

CPLR 2308(a) lists the penalties applicable to the disobedience of a judicial subpoena. One of the penalties listed is the issuance of "a warrant directing a sheriff to bring the witness into court." CPLR 2308(a). In *Cadlerock Joint Venture, L.P. v. Forde*, 152 A.D.3d 483, 54 N.Y.S.3d 878 (2d Dep't 2017), the Second Department emphasized that the imposition of this penalty is within the discretion of the court. In *Cadlerock*, the supreme court denied the plaintiff's motion under CPLR 2308(a) for the issuance of a warrant of arrest to bring the defendant before the court based on his alleged failure to comply with a postjudgment judicial subpoena duces tecum and a prior order of contempt. The Second Department ruled that the denial of this relief was within the court's discretion, and affirmed the order of the supreme court, which declined to issue the warrant "finding that the plaintiff could avail itself of 'all other remedies pursuant to the CPLR to collect' a judgment in favor of the plaintiff and against the defendant." *Id.*

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XXIX. CPLR 2309. Oaths and affirmations.

Plaintiff Afforded Third Opportunity to Correct of Out-of-State Affidavit to Conform to CPLR 2309(c)

Lawyers continue to have problems complying with CPLR 2309(c)'s requirements when submitting affidavits signed outside New York State. In *JPMorgan Chase Bank v. Diaz,* 56 Misc.3d 1136, 57 N.Y.S.3d 358 (Sup. Ct., Suffolk County 2017), the plaintiff submitted an out-of-state affidavit of service in support of an application for a default judgment in a mortgage foreclosure action. The court denied the application because it did not contain a certificate of conformity as required by CPLR 2309(c), but allowed a second application, where the defect was still not remedied.

Rather than attempting to comply with the statute, "plaintiff argue[d] that 'it was inappropriate for the Court to, *sua sponte*, [raise the CPLR § 2309(c) issue] on the Defendants' behalf,' and that, pursuant to the provisions of CPLR 2001, a certificate of conformity is not required with an out-of-state affidavit of service." The court rejected the argument, ruling that CPLR 2001 could not be invoked to permit the court to disregard a defect in an out-of-state affidavit of service.

While acknowledging that the absence of a certificate of conformity is typically not treated as a fatal defect, the court distinguished the situation before it which involved "jurisdiction over the defendant in the first instance." In this setting, the court ruled that CPLR 2001 could not support "disregard[ing]" the defect in proof of proper service because it would prejudice a substantial right of the defendant.

Plaintiff's motion for a default judgment and order of reference in the foreclosure action was denied, but plaintiff was "afforded one final opportunity" to correct the defect. Maybe the third time will be the charm!

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XXX. CPLR 3012. Service of pleadings and demand for complaint.

Defendant Can Demand Complaint after Receiving Summons and CPLR 305(b) Notice, Even Though Service Is Not "Complete" Under CPLR 308(2)

In *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 150 A.D.3d 427, 55 N.Y.S.3d 1 (1st Dep't 2017), plaintiff commenced a securities fraud action against 26 defendants with a summons and CPLR 305(b) notice and made service pursuant to CPLR 308(2), the "deliver and mail" method of service. *See* Siegel & Connors, New York Practice § 72. Service is not "complete" under this method until 10 days after the filing of proof of service. CPLR 308(2); *see id.* A defendant in *Wimbledon* served a demand for the complaint under CPLR 3012(b) before plaintiff had filed proof of service, and plaintiff contended that the demand was a "nullity" because service was not yet complete. Risky business indeed!

Defendant called plaintiff's bluff, refused its request to allow service of the complaint late the following month, and moved to dismiss the action on the 21st day after service of its demand. Plaintiff ultimately served a complaint approximately one month later. Nonetheless, the supreme court granted the defendant's motion to dismiss the action pursuant to CPLR 3012(b) and denied plaintiff's cross motion pursuant to CPLR 3012(d) for an extension of time to serve its complaint.

The plaintiff appealed, seeking mercy from the First Department. The appellate division agreed with supreme court that CPLR 3012(b) permitted defendant to serve a demand for a complaint after being served with a summons and CPLR 305(b) notice. While service under CPLR 308(2) was not technically "complete," the court reasoned that "[t]he time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates."

The First Department did, however, reverse to the extent of granting plaintiff's cross motion under CPLR 3012(d) for an extension of time to serve the complaint.

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Conflict Between First and Second Departments on Requirements for CPLR 3012(d) Application for Extension of Time to Appear

CPLR 3012(d) addresses an "[e]xtension of time to appear or plead" and permits the court to extend "the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." While the statute does not expressly require it, the Second Department has repeatedly held that a defendant must not only provide a reasonable excuse for the delay in appearing, but also must "demonstrate a potentially meritorious defense to the action." *KI 12, LLC v. Joseph*, 137 A.D.3d 750, 26 N.Y.S.3d 573 (2d Dep't 2016); *see HSBC Bank USA, N.A. v Powell*, 148 AD3d 1123 (2d Dep't 2017). The First Department does not require a defendant to demonstrate the existence of a meritorious defense on an application under CPLR 3012(d). *See Hirsch v. New York City Dept. of Educ.*, 105 A.D.3d 522, 961 N.Y.S.2d 923 (1st Dep't 2013).

The issue is explored in further detail in Siegel & Connors, New York Practice § 231.

XXXI. CPLR 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions.

Certificate of Merit Based Upon Affidavit of Plaintiff's Physical Therapist Insufficient to Satisfy CPLR 3012-a

CPLR 3012-a generally requires that the certificate of merit demonstrate that the attorney for the plaintiff has consulted with a "physician," "dentist," or "podiatrist." In *Calcagno v. Orthopedic Assocs. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (3d Dep't 2017), defendants moved for dismissal of the action based upon the plaintiffs' failure to timely comply with the requirements in CPLR 3012-a. In response to the motion, the plaintiffs submitted a certificate of merit based upon an affidavit of plaintiff's physical therapist, who opined, "as a physical therapist," that defendants' actions were "departures from good and accepted medical practice." Plaintiffs also cross-moved for an extension of time to file and serve the certificate. The supreme court granted defendants' motion to

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dismiss the action and denied plaintiffs' cross motion, finding that plaintiffs' certificate of merit was inadequate.

The Third Department affirmed, finding the certificate defective because "by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons." The court found no merit to plaintiffs' contention that the certificate should be deemed adequate because it was also based on medical reports, plaintiff's testimony, and the pleadings.

Plaintiffs conceded that the certificate of merit was filed approximately 17 months late. On this point, the court relied upon its 1999 decision in *Horn v. Boyle*, 260 A.D.2d 76, 699 N.Y.S.2d 572 (3d Dep't 1999), in noting that the mere failure to timely file a CPLR 3012-a certificate does not support dismissal of the action. *See* Practice Commentary C3012-a:2 ("Consequence of Failing to File and Serve the Certificate"). Nonetheless, because plaintiffs failed to provide a reasonable excuse for the delay and to establish the merits of the action, the court ruled that they were not entitled to an extension of time under CPLR 2004. In other words, the action had to be dismissed because CPLR 3012-a could not be satisfied.

CPLR 3012-a Is Substantive Law That Applies in Diversity Action in Federal Court

In Finnegan v. University of Rochester Medical Center, 180 F.R.D. 247, 249 (W.D.N.Y. 1998), the court ruled that "a state statute requiring a certificate of merit is substantive law that applies in a federal diversity action." More recently, a federal district court in the Sothern District reached the same conclusion in a medical malpractice action. *Crowhurst v. Szczucki*, 2017 WL 519262, at *2–3 (S.D.N.Y. 2017). The *Crowhurst* court ruled that plaintiff's failure to submit a certificate of merit, or to excuse the submission, warranted dismissal of the medical malpractice claim. The court dismissed the complaint without prejudice to allow the plaintiff to cure this defect, and the additional failure to allege the citizenship of the parties, through the submission of an amended complaint.

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XXXII. CPLR 3015. Particularity as to specific matters.

CPLR 3015(e) Defect Permitted to be Cured by Amendment

CPLR 3015(e) imposes special pleading requirements on business plaintiffs who must be licensed by the consumer affairs departments of New York City and certain other downstate suburban counties. In 2012, the statute was amended to require the plaintiff to plead that she was duly licensed at the time the services were rendered, rather than at the time the litigation was commenced. *See* Siegel & Connors, New York Practice § 215.

In the main practice commentary to CPLR 3015, we note that if any defect connected with the statute proves to be only a pleading omission, remediable by amendment, an amendment should be the cure rather than dismissal. *See* Commentary C3015:1 ("Special Provisions for Certain Matters"); Siegel & Connors, New York Practice § 237. That was the approach taken by the court in *Best Quality Swimming Pool Serv., Inc. v. Pross*, 54 Misc. 3d 919, 43 N.Y.S.3d 867 (Sup. Ct., Nassau County 2016), where the court granted plaintiffs' cross-motion to amend the complaint to plead the license held by one of the plaintiffs and denied defendant's motion to dismiss.

XXXIII. CPLR 3016. Particularity in specific actions.

First Department Concludes That Plaintiffs' Failure to Allege Applicable Saudi Law with Particularity Warranted Dismissal of Claim

In *Edwards v. Erie Coach Lines Co.*, 17 N.Y. 3d 306, 929 N.Y.S. 2d 41 (2011), the Court observed that the failure to plead foreign law should not ordinarily prove fatal given that the court can on its own volunteer to give the foreign law judicial notice under CPLR 4511(b). In *MBI Intern. Holdings Inc. v. Barclays Bank PLC*, 151 A.D.3d 108, 57 N.Y.S.3d 119 (1st Dep't 2017), however, the First Department observed that "the motion court properly dismissed [plaintiff's breach of fiduciary duty] claims pursuant to CPLR 3211(a)(7) and CPLR 3016(e), for plaintiffs have failed to allege with particularity the applicable Saudi law and only generally discuss the Saudi concepts of 'hawalas' and 'wakalas' without citation to any law (see CPLR 3016[e])."

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XXXIV. CPLR 3019. Counterclaims and cross-claims.

Federal Courts' Compulsory Counterclaim Rule Bars Assertion of Claim in State Court Despite New York's Permissive Counterclaim Rule

All counterclaims are "permissive" in New York practice. This is in contrast with federal practice, where the defendant must plead a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim, or it is deemed waived. *See* Federal Rules of Civil Procedure ("FRCP") 13(a); Siegel & Connors, New York Practice §§ 224, 632.

What happens if the plaintiff commences an action in federal court, where counterclaims are "compulsory," and the defendant withholds a counterclaim that arises out of the same transaction or occurrence as plaintiff's claim. Can the defendant in the federal court action then turn to New York State court and commence an action to assert that claim here under our permissive counterclaim rule?

In *Paramount Pictures Corp. v. Allianz Risk Transfer AG,* 141 A.D.3d 464, 36 N.Y.S.3d 11 (1st Dep't 2016), the appellate division ruled that "the later assertion in a state court action of a contention that constituted a compulsory counterclaim (FRCP rule 13[a]) in a prior federal action between the same parties is barred under the doctrine of res judicata." *Id.* This principle of law required dismissal of the complaint in the state court action, which sought damages of $8 million, representing attorneys' fees incurred in the federal action, plus interest.

A fractured Court of Appeals affirmed, with a plurality, a concurrence, and a dissent. *Paramount Pictures Corp. v Allianz Risk Transfer AG*, _ N.Y.3d _, _N.Y.S.2d _, _ N.E.2d _, 2018 WL 942329 (2018). The plurality ruled that Paramount's state court action was barred by res judicata because the claim asserted therein should have been asserted as a compulsory counterclaim in the prior federal action.

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Failure to Raise Counterclaim for Legal Fees in State Court Malpractice Action Does Not Bar Assertion of Claim in Federal Court

What happens when we examine the problem from the opposite direction posed by *Paramount Pictures*, where a defendant in a New York State Court action does not assert a related counterclaim, and then tries to pursue relief in a federal court action? The issue arose in *In re Ridgmour Meyer Properties, LLC*, 2016 WL 5395836 (Bankr. S.D.N.Y. 2016), where a law firm represented the debtor and filed a claim for over $300,000 in the bankruptcy proceeding. The debtor and several proponents of the bankruptcy plan objected to the claim and sued the law firm in state court for legal malpractice. Following dismissal of the state court malpractice lawsuit, the law firm filed a motion in bankruptcy court seeking to reopen the chapter 11 case and to direct the debtor to pay the claim.

The debtor argued that the law firm, which did not assert a counterclaim for its fees and expenses in the state court malpractice action, was precluded from pursuing the claim in the bankruptcy court under the doctrine of res judicata. Quoting from the First Department's *Paramount Pictures* decision, the court rejected the argument and noted that "New York is a permissive counterclaim jurisdiction," which generally permits a party to bring a claim in an action that it could have injected as a counterclaim in a prior action. While such claims are not barred by the doctrine of res judicata, they can be hindered by the doctrine of collateral estoppel if a factual determination in the prior action precludes the plaintiff in the subsequent action from proving all of the elements of her claim. *See Henry Modell & Co. v. Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of New York*, 68 N.Y.2d 456, 462-63 n. 2, 510 N.Y.S.2d 63, 66 n. 2, 502 N.E.2d 978, 981 n. 2 (N.Y. 1986); Siegel & Connors, New York Practice § 224.

XXXV. CPLR 3020. Verification.

Decedent's Mother, Who Was Issued Letters of Administration Prior to Commencement, Can Verify Claim in Accordance with Court of Claims Act

In *Austin v. State*, 49 Misc.3d 282 (Ct. of Claims 2015), the State moved to dismiss the claim, which was verified by decedent's mother, on the ground

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that it did not comply with the verification requirement in section 8-b of the Court of Claims Act.

The court stated that no case had been brought to its attention involving a claimant who had died before having an opportunity to verify a claim brought under section 8-b of the Court of Claims Act. In an analogous situation, the specific verification requirements in section 8-b of the Court of Claims Act were held to govern in *Long v. State*, 7 N.Y.3d 269 (2006), to the exclusion of CPLR 3020(d)(3), resulting in the dismissal of a claim that had been verified by the claimant's attorney. *See* McKinney's Practice Commentary, CPLR 3020, C3020:8 ("Verification by Attorney").

Although the option of an attorney's verification was not available to the claimant in *Austin*, the court observed that the administrator of the estate "stands in the shoes" of the deceased for purposes of bringing a lawsuit. *See* CPLR 1004 (permitting the executor or administrator of a decedent's estate to sue on behalf of decedent).

XXXVI. CPLR 3025. Amended and supplemental pleadings.

Second Department Cites Failure to Include Proposed Amended Pleading as Basis to Affirm Denial of Motion to Amend

Several trial courts have denied motions to amend for failure to include a copy of the proposed pleading, as is required by the 2012 amendment to CPLR 3025(b). *See* Siegel & Connors, New York Practice § 237. We now have authority from the appellate division reaching the same conclusion. In *Drice v Queens County District Attorney*, 136 A.D.3d 665, 23 N.Y.S.3d 896 (2d Dep't 2016), for example, the Second Department cited several of its prior cases in concluding that "the supreme court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to serve an amended complaint, since he did not provide a copy of his proposed amended complaint, and the proposed amendments were palpably insufficient or patently devoid of merit." *See also G4 Noteholder, LLC ex rel. Wells Fargo Bank, Nat. Ass'n v....*, _ A.D.3d _, 2017 WL 4159236 (2d Dep't 2017)("Moreover, relief pursuant to CPLR 3025(b), which requires the movant to include any proposed amendment or supplemental pleading

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with the motion, was properly denied, as [defendant] failed to include any proposed amended pleadings").

XXXVII. CPLR 3101. Scope of Disclosure.

Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g.*, *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and

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accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g.*, *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the

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Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

XXXVIII. CPLR 3101(d)(1)(i). Scope of Disclosure; Trial preparation; Experts.

Plaintiff, Who Failed to Comply With Expert Disclosure Deadline in Scheduling Order, Precluded from Offering Expert Proof, Resulting in Dismissal of Action

In *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095 (3d Dep't 2018), *lv. denied*, 2018 WL 2055723, the Third Department affirmed the order granting defendant's motion for summary judgment dismissing the complaint based, in part, on plaintiff's failure to provide timely expert disclosure. After issue was joined and years of ongoing discovery, the supreme court issued a scheduling order requiring that the parties exchange expert disclosure by May 1, 2015, and that dispositive motions be filed by August 1, 2015, and set a trial date in November 2015. Defendant complied with the order by timely serving expert disclosure on plaintiffs' then-counsel, but plaintiffs failed to do so.

Defendant moved for summary judgment in July 2015 based upon, among other grounds, plaintiffs' complete lack of expert disclosure and failure to submit any expert proof that plaintiff's injures and damages were caused by defendant's actions. Defendant contended that plaintiffs should be precluded from presenting any expert proof. While plaintiff submitted several expert affidavits in response to defendant's motion, the court refused to consider them because of plaintiff's failure to comply with the expert disclosure deadlines.

The Third Department emphasized that plaintiffs failed to comply with the deadlines in the scheduling order and first identified their experts, and submitted their affidavits in opposition to defendant's summary judgment motion, over one year after the deadline for expert disclosure. Plaintiffs did not request an extension "or provide a viable excuse or good cause for failing to comply over this protracted period, and the numerous adjournments were granted at their request with the express condition that the court-ordered discovery and disclosure schedule was not being

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extended." In that the supreme court did not abuse its discretion in precluding plaintiffs from submitting the expert affidavits in opposition to the motion for summary judgment, the Third Department affirmed the order granting defendant summary judgment.

The Third Department also reaffirmed its interpretation of CPLR 3101(d)(1)(i) as "requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony." *See Schmitt*, 151 A.D.3d at 1255 (discussed below).

Conflict on Whether CPLR 3101(d)(1)(i) Requires Disclosure of Treating Doctor Who Will Act As Expert

In *Schmitt v. Oneonta City School Dist.*, 151 A.D.3d 1254 (3d Dep't 2017), plaintiffs noticed the deposition of a treating doctor to preserve his testimony for trial. During the EBT, plaintiffs attempted to offer the treating doctor "as an expert in the field of orthopedic surgery." Defendant objected, citing plaintiffs' failure to provide any expert disclosure under CPLR 3101(d)(1)(i).

The Third Department noted that "[u]nlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as 'requir[ing] disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony' (Norton v. Nguyen, 49 AD3d at 929; compare Hamer v. City of New York, 106 AD3d 504, 509 [1st Dept 2013]; Jing Xue Jiang v. Dollar Rent a Car, Inc., 91 AD3d 603, 604 [2d Dept 2012]; Andrew v. Hurh, 34 AD3d 1331, 1331 [4th Dept 2006], lv denied 8 NY3d 808 [2007])." *See* Siegel & Connors, New York Practice § 348A (discussing caselaw). The court also noted that while a CPLR 3101(d)(1)(i) expert disclosure demand "is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply [with] or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose."

The court rejected plaintiffs' argument that the transcript of the doctor's videotaped testimony could serve as a substitute for the required CPLR 3101(d)(1)(i) disclosure. As for the appropriate remedy, the court determined that there was no indication that the disclosure violation was willful and, therefore, that preclusion was not appropriate. The court ruled

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that if plaintiffs wanted to use the treating doctor "as an expert witness (or as both a fact witness and as an expert witness), they must—within 30 days of the date of this Court's decision—tender an expert disclosure that satisfies all of the requirements of CPLR 3101(d)(1)(i) and—within 60 days of the date of this Court's decision—produce [the doctor] (at their expense) for the purpose of being deposed as an expert."

A two-justice concurrence argued, among other things, that plaintiffs should be bound by the format that they selected when they sought to videotape the treating doctor's deposition for use at trial, and not be afforded a second opportunity to call the doctor as a live witness at trial. *See* 22 N.Y.C.R.R. § 202.15(a)(rules for videotaping of civil depositions).

XXXIX. CPLR 3103. Protective orders.

CPLR 3103(b) Only Provides for Stay of "Disclosure of the Particular Matter in Dispute"

CPLR 3103(b) imposes a stay of disclosure when a motion is made for a protective order. *See* Siegel & Connors, New York Practice § 353. In *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 46 N.Y.S.3d 18 (1st Dep't 2017), the defendants failed to comply with an order directing disclosure and the court imposed sanctions pursuant to both CPLR 3126 and Part 130. The First Department affirmed this order, and an additional order finding that defendants had waived their right to serve paper discovery demands by disregarding deadlines in two case management orders. Defendants argued that the sanction in the latter order was disproportionate because they had previously moved for a protective order, which stayed disclosure under CPLR 3103(b).

The First Department emphasized that the language in the statute provides that "[s]ervice of a notice of motion for a protective order shall suspend *disclosure of the particular matter in dispute*." *Vandashield*, 146 A.D.3d at 556, 46 N.Y.S.3d at 24. Therefore, the court reasoned, "[d]efendants' motion for a protective order against *plaintiffs'* discovery demands did not stay their obligation to serve their own discovery demands." *Id.* at 556, 46 N.Y.S.3d at 24-25.

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XL. CPLR 3106. Priority of depositions; witnesses; prisoners; designation of deponent.

CPLR 3106(a)'s Priority Rules Do Not Apply in Action Removed to Federal Court

Priority in taking depositions is generally with the defendant in New York practice, as long as the defendant seeks it expeditiously. *See* CPLR 3106(a). In *Roth v. 2810026 Canada Ltd. Ltd.*, 2016 WL 3882914 (W.D.N.Y. 2016), a personal injury action was removed to federal court and the plaintiffs moved to compel defendants' depositions. Defendants objected, asserting that they secured priority under CPLR 3106(a) by noticing plaintiffs' depositions first. Therefore, they contended that they could not be deposed until plaintiffs' depositions had been completed.

The federal district court noted that, upon removal, "state procedure law is inapplicable to the action." *See* Fed.R.Civ.P. 81(c)(1) (Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court"). Under the federal rules, absent a stipulation or court order, the "method of discovery may be used in any sequence." Fed.R.Civ.P. 26(d)(3)(A). Defendants did not cite a stipulation or court order and the court rejected defendants' contention that CPLR 3106(a) applied in federal court. Therefore, the court granted plaintiffs' motion and ordered the defendants' depositions to be conducted within 45 days.

XLI. CPLR 3126. Penalties for Refusal to Comply with Order or to Disclose.

Third Department Outlines Standards for Issuing Order of Preclusion

The Third Department has issued a recent series of decisions that provide guidance, and warning, to lawyers regarding the possible penalties that can be imposed under CPLR 3126 for a failure to comply with disclosure obligations. For example, in *BDS Copy Inks, Inc. v. International Paper*, 123 AD3d 1255, 999 N.Y.S.2d 234 (3d Dep't 2014), the appellate court ruled that the supreme court did not abuse its discretion by striking plaintiffs' complaint under CPLR 3126(3). The record confirmed that during a period of twenty one months, the court met with counsel for the parties on at least

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six occasions and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations.

Plaintiffs argued that they complied with their disclosure obligations by repeatedly offering the defendants the opportunity to search through 60 to 80 banker's boxes stored in a warehouse. Furthermore, plaintiffs continued to maintain that this response was adequate, even after the court made it clear that it did not consider this offer to be adequate. The court seemed to emphasize that plaintiff's principal made no claim that he actually went to the warehouse to inspect the bankers boxes that were offered in document production, while he "continued to maintain that each document in each of the unspecified number of boxes was responsive to defendants' demand."

Noting that a disclosure sanction "is not disturbed in the absence of a clear abuse of discretion," the Third Department affirmed the order striking plaintiffs' complaint. Thus, plaintiffs' alleged damages in the amount of $1,500,000 are likely forfeited.

A more recent decision from the Third Department also involved a plaintiff who compromised their claim by failing to satisfy disclosure obligations. In *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 34 N.Y.S.3d 678 (3d Dep't 2016), plaintiff bank commenced a foreclosure action on defendants' residential real property, which was mortgaged for approximately $82,600. Defendants' answer alleged that plaintiff was not the holder of the note, a common affirmative defense in today's mortgage foreclosure world. The Third Department recounted "a series of delays resulting primarily from conduct by plaintiff and its attorneys which prompted two preclusion motions by defendants." *Id.* at 1435, 34 N.Y.S.3d 679. The supreme court granted the second motion and issued an order under CPLR 3126(2) precluding plaintiff from offering proof of indebtedness as alleged in the complaint.

Among the facts demonstrating a pattern of noncompliance by plaintiff were: 1) its refusal to appear for a deposition, 2) the cancelling of depositions at the last minute, 3) a missed CPLR 3408 court-ordered mandatory settlement conference, 4) a failure to comply with a court-ordered deposition deadline, and 5) the confusion and delay caused by plaintiff's inadequate and unclear effort to substitute counsel.

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While the action was not dismissed, we wonder if there are any options left for plaintiff bank? *See Citibank, N.A. v. Bravo*, 55 Misc.3d 879 (Sup. Ct., Tompkins County 2017)("Defendants' motion is granted and the complaint is dismissed, with prejudice; the mortgage which plaintiff seeks to foreclose in this action is discharged and cancelled, the notice of pendency filed in this action is cancelled, and the Tompkins County Clerk is ordered to mark her records accordingly.")

CPLR 3126 Preclusion Order Reversed Because of Absence of "Willful and Contumacious" Conduct by Incarcerated Defendant and His Lawyer

In *Crupi v. Rashid*, 157 A.D.3d 858, 67 N.Y.S.3d 478 (2d Dep't 2018), plaintiff commenced an action to recover on a promissory note by a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. The supreme court, "sua sponte, precluded the incarcerated defendant, Syed Rashid, from testifying at trial." On appeal, the Second Department acknowledged that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion," but cautioned that "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious."

The Second Department reversed the order of preclusion because "there [was] no evidence demonstrating either that the incarcerated defendant… willfully and contumaciously failed to be deposed, or that his attorney failed to secure his deposition."

Defendants Precluded from Introducing Facebook Printouts Unless Person Who Procured Them Is Produced for a Deposition

The decision in *Lantigua v Goldstein*, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dep't 2017), addressed a disclosure dispute in a medical malpractice action in which plaintiff was confronted at his deposition with printouts of 13 pages that allegedly were from his Facebook account. The printouts depicted a gentleman of many pursuits who "allegedly talked about going out to a bar, having a great workout, and crossing the Williamsburg Bridge three times."

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The plaintiff acknowledged that he had used a Facebook account, but denied that the printouts were from his account and denied making the statements.

The plaintiff then served disclosure requests of his own, seeking information about the individual who obtained the printouts and requesting a deposition of this witness. When responses were not forthcoming, plaintiff moved to, among other things, preclude the defendants from offering as evidence at trial the printouts of the Facebook pages.

The Second Department reversed the supreme court, ruling that the defendants should be precluded from offering as evidence at trial the printouts of Facebook pages that were marked at plaintiff's deposition unless those defendants produced the person who obtained the printouts for a deposition. The court emphasized that the plaintiff denied that the printouts were from his Facebook account, and he had no other means to disprove their authenticity.

XLII. CPLR 3211(a)(1). Motion to Dismiss Based on Documentary Evidence.

Can an Email Suffice as Documentary Evidence Under CPLR 3211(a)(1)?

In *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't 2015), the First Department rejected the supreme court's conclusion that correspondence such as emails do not suffice as "documentary evidence" for purposes of CPLR 3211(a)(1), and cited several decisions in which it has "consistently held otherwise." *See Amsterdam Hospitality Group, LLC v. Marshall–Alan Assoc., Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dept.2014) ("emails can qualify as documentary evidence if they meet the 'essentially undeniable' test."); *see also Kany v. Kany*, 148 A.D.3d 584, 50 N.Y.S.3d 337 (1st Dep't 2017).

The Second Department takes a different view. *See JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015) (emails, correspondence, and affidavits do not constitute "documentary evidence" under CPLR 3211(a)(1)); *Prott v. Lewin & Baglio*, LLP, 150 A.D.3d 908 (2d Dep't 2017) and *25–01 Newkirk Ave., LLC v. Everest Natl. Ins. Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015) ("letters, emails, and affidavits

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fail to meet the requirements for documentary evidence" on a CPLR 3211(a)(1) motion).

XLIII. CPLR 3212. Motion for Summary Judgment.

Court of Appeals Rules That Plaintiff Is Entitled to Partial Summary Judgment on Liability Without Demonstrating Freedom from Comparative Fault

This important issue has generated conflicting decisions in the appellate division, i.e., whether a plaintiff is entitled to partial summary judgment on liability even though plaintiff may be charged with some comparative fault. *See* Siegel & Connors, New York Practice § 280. The issue also generated substantial conflict in the Court of Appeals with a 4-3 decision in *Rodriguez v. City of New York*, _ N.Y.3d _, 2018 WL 1595658 (2018). The majority held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even where the defendant has raised an issue of fact regarding plaintiff's comparative fault. "Placing the burden on the plaintiff to show an absence of comparative fault," the Court concluded, "is inconsistent with the plain language of CPLR 1412." That section designates comparative fault as an "affirmative defense to be pleaded and proved by the party asserting the defense." *See* Siegel & Connors, New York Practice §§ 168E, 223. Therefore, requiring the plaintiff to prove an absence of comparative fault to establish entitlement to partial summary judgment on liability is contrary to the statutory scheme.

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Timeliness of Cross Motion for Summary Judgment

In *Maggio v. 24 West 57 APF, LLC*, 134 A.D.3d 621, 625, 24 N.Y.S.3d 1 (1st Dept.2015), the court noted that in reviewing a summary judgment motion, it may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion. *See* Siegel & Connors, New York Practice § 282. Therefore, the court "may even disregard the tardiness of a cross motion and grant the cross movant summary judgment, on the theory that the cross motion was not necessary in the first place." The issue on which the nonmovant is awarded summary judgment must, however, be "nearly identical" to that on which the movant sought relief.

In *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281–282, 824 N.Y.S.2d 244 (1st Dept.2006), *lv. dismissed* 9 N.Y.3d 862, 840 N.Y.S.2d 765, 872 N.E.2d 878 (2007), the main motion sought summary judgment dismissing certain Labor Law claims (section 200 and 241(6)), and the plaintiff's untimely cross motion sought summary judgment on his 240(1) claim. The First Department held that the cross motion was not sufficiently related to the main motion, and refused to entertain it. In *Maggio*, the scenario was the same. "Thus, even though plaintiff has presented facts and arguments in his cross motion suggesting that his accident was caused by defendants' failure to provide him with an adequate safety device, we are constrained by our own precedent to conclude that the court properly declined to consider it" as untimely.

Motion for Summary Judgment Deemed "Made" When Original Motion Papers Were Served Before Plaintiff's Death

In *Pietrafesa v Canestro*, 130 A.D.3d 602 (2nd Dep't 2015), defendant made a motion for summary judgment dismissing the complaint on May 20, 2013. On July 11, 2013, the plaintiff died. The Second Department noted that this automatically stayed the action and divested supreme court of jurisdiction to conduct proceedings until a personal representative was appointed for the plaintiff's estate and substituted in the action. The day after the death, plaintiff's counsel, who may not have been aware of her client's death, filed papers opposing the defendant's motion, made a cross-motion for summary judgment on the issue of liability, and filed a note of issue.

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On February 20, 2014, the executor of plaintiff's estate was substituted as the plaintiff. On August 8, 2014, the defendant made a formal motion to restore the case to the active calendar and for a determination on the pending motion. Without specifically addressing defendant's motion to restore the case to the calendar, the supreme court denied the defendant's motion for summary judgment as untimely because it was "not made until August 8, 2014," more than 120 days after the filing of the note of issue. *See* CPLR 3212(a).

The Second Department reversed, citing to CPLR 2211 and holding that defendant's motion for summary judgment was "made" when the motion papers were served in May of 2013. The Second Department ruled that "[u]nder the circumstances presented here, the timeliness of the defendant's motion must be judged by the date of service of the original motion papers, rather than the renewed motion papers."

Local Rules in Sixth Judicial District (and Elsewhere) Require Summary Judgment Motions to be Filed, Rather Than Served, within 60 Days After Filing of the Note of Issue

Courts can prescribe short time frames for making motions for summary judgment in all sorts of places, including preliminary conference orders, scheduling orders, individual court rules, county rules, and rules of a judicial district. In *McDowell & Walker, Inc. v. Micha*, 113 A.D.3d 979, 979 N.Y.S.2d 420 (3d Dep't 2014), the Third Department applied the local rules of the Sixth Judicial District, which require that "[s]ummary judgment motions must be *filed* no later than [60] days after the date when the Trial Note of Issue is filed," unless permission is obtained for good cause shown. (emphasis added). Compliance with this local rule, covering Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, and Tompkins Counties, can be tricky.

CPLR 3212(a) speaks in terms of when a summary judgment motion may be "made" and provides that the court may set a deadline for making such motions, as long as that date is no earlier than thirty days after the filing of the note of issue. Pursuant to CPLR 2211, a motion is "made" when the motion or order to show cause is "served," not when it is "filed." *See* § 243; McKinney's Practice Commentaries to CPLR 2211, C2211:4 ("When Motion on Notice Deemed 'Made'"). Lawyers making motions for summary

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judgment in the Sixth Judicial District must take pains to not only make, i.e., serve, their motions for summary judgment within 60 days from the filing of the note of issue, but also to file them within that time frame. We suspect that there are other local or individual rules in the state that require the "filing" of a motion for summary judgment, rather than its mere service, within a specific time frame. Lawyers need to watch for those too. Finally, the filing may also be required under the terms of a stipulation. *See* Siegel & Connors, New York Practice § 279.

Similarly, in *Connolly v 129 E. 69th St. Corp.*, 127 A.D.3d 617, 7 N.Y.S.3d 889 (1st Dep't 2015), the supreme court's individual part rules required that motions for summary judgment be "filed" within 60 days of the filing of the note of issue. Since plaintiffs filed the note of issue on July 10, 2013, the motions for summary judgment were required to be filed by September 9, 2013. While defendant made (served) a motion for summary judgment on September 4, 2013, it did not file the motion until September 10, 2013, one day after the 60–day time period expired. Therefore, the First Department found defendants' motions to be untimely and reversed the supreme court's order granting defendants' motions for summary judgment dismissing the complaint.

Hearsay May Be Considered in Opposition to Motion for Summary Judgment As Long As It Is Not the Only Evidence Submitted

A rule has developed that occasionally permits the court to consider incompetent evidence, such as hearsay, in opposition to a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. Recently, the courts have emphasized that hearsay evidence may be considered to defeat a motion for summary judgment as long as it is accompanied by some other competent evidence. *See City of New York v. Catlin Specialty Insurance Company*, 158 A.D.3d 586, _ N.Y.S.3d _ (1st Dep't 2018).

Affirmations in Compliance with CPLR 2106 May Be Used In Lieu Of, or In Addition To, Affidavits on a Motion For Summary Judgment

Affidavits from those having personal knowledge of the facts are a primary source of proof on a motion for summary judgment. *See* Siegel & Connors, New York Practice § 281. In this regard, CPLR 3212(b) provides that "[a]

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motion for summary judgment shall be supported by affidavit…." We have been informed that lawyers have recently argued that a summary judgment that fails to include an affidavit violates the statute and must be denied. Affirmations in compliance with CPLR 2106 can also be used on a motion for summary judgment, as that provision states that an affirmation "may be served or filed in the action *in lieu of and with the same force and effect as an affidavit*." CPLR 2106(a), (b) (emphasis added); *see* § 205.

XLIV. CPLR 3215. Default judgment.

Answer with Counterclaim, Verified by Defendants' Attorney, May Not Be Used as Proof of Claim on Default Judgment Application

In *Euzebe-Job v. Abdelhamid*, 2017 WL 1403896 (Sup. Ct., Kings County 2017), an automobile accident case, plaintiffs failed to serve a reply in response to defendants counterclaim and defendants applied for a default judgment. The court stressed that "[w]hile counterclaims are not specifically mentioned anywhere in CPLR 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 (2nd Dept 2011)." *See* Siegel & Connors, New York Practice § 294.

To demonstrate proof of the facts constituting its claim, as required by CPLR 3215(f), defendants submitted the answer with counterclaim, which was verified by the defendants' attorney pursuant to CPLR 3020(d). In that the attorney did not possess personal knowledge of the underlying facts supporting the counterclaim, the court ruled that "the verified answer with counterclaim may not be used in lieu of an affidavit by the movants pursuant to CPLR 105 (u)." *See* Siegel & Connors, New York Practice § 246. The application was denied without prejudice.

CPLR 2221 Motion for Reargument/Renewal Is Improper Vehicle to Challenge Default Judgment

In *Country Wide Home Loans, Inc. v. Dunia*, 138 A.D.3d 533, 28 N.Y.S.3d 319 (1st Dep't 2016), the supreme court granted defendant's motion

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pursuant to CPLR 3215(c) to dismiss plaintiff's foreclosure action because plaintiff failed to move for a default judgment within one year of defendant's default. This is the classic "default within the default" scenario in which a plaintiff who fails to "take proceedings" to enter a default judgment within one year after the default occurs forfeits the right to proceed with the action. *See* Siegel & Connors, New York Practice § 294 ("Time for default application"). Remarkably, with the stakes seemingly so high, the defendant's motion was granted on default without any opposition. Plaintiff then moved for renewal under CPLR 2221.

The First Department affirmed the denial of plaintiff's motion to renew. In that the order was granted on default, the court held that the proper remedy for plaintiff was a motion to vacate under CPLR 5015(a)(1), not a motion to renew under CPLR 2221. *See also Hutchinson Burger, Inc. v. Bradshaw*, 149 A.D.3d 545 (1st Dep't 2017); *Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term 2016).

We report the decision here because we have seen recent decisions in which parties have sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. The proper vehicle to challenge an order entered on default is CPLR 5015(a)(1). *See* Siegel & Connors, New York Practice § 427.

XLV. CPLR 3217. Voluntary Discontinuance.

CPLR 3211(a) Pre-Answer Motion to Dismiss Does Not Terminate Plaintiff's Right to Unilaterally Discontinue Action

CPLR 3217(a)(1) provides that "[a]ny party asserting a claim may discontinue it without an order ... by serving upon all parties to the action a notice of discontinuance at any time *before a responsive pleading is served* or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court." (emphasis added).

In *Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808, 58 N.Y.S.3d 769 (4th Dep't 2017), several defendants made CPLR 3211 pre-answer motions to dismiss plaintiff's supplemental complaint and sought

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sanctions. Prior to the return date of the motions, plaintiff served voluntary notices of discontinuance pursuant to CPLR 3217(a)(1) with respect to all defendants. The supreme court ruled that the plaintiff's voluntary discontinuance was untimely, granted the motions to dismiss, and imposed sanctions on plaintiff.

The Fourth Department reversed, ruling that the CPLR 3217 notices of discontinuance "were not untimely because a motion to dismiss pursuant to CPLR 3211 is not a 'responsive pleading' for purposes of CPLR 3217(a)(1)" and therefore did not cut off plaintiff's option of unilaterally discontinuing as of right pursuant to CPLR 3217(a)(1). The court concluded that "[i]t is clear from the language used throughout the CPLR that the Legislature did not intend a CPLR 3211 motion to be considered a 'responsive pleading.'"

The supreme court's order imposing sanctions against the plaintiff is, therefore, deemed a "nullity" and the appeal from it is deemed "academic."

The First Department has held that the service of a CPLR 3211(a) motion to dismiss terminates the plaintiff's right to unilaterally discontinue an action under CPLR 3217(a)(1). *BDO USA, LLP v. Phoenix Four, Inc.*, 113 A.D.3d 507, 979 N.Y.S.2d 45 (1st Dep't 2014); see Siegel & Connors, New York Practice § 297.

XLVI. CPLR 3408. Mandatory settlement conference in residential foreclosure actions.

Amendments to Mandatory Settlement Conference Procedures in CPLR 3408 to Take Effect on December 20, 2016

CPLR 3408 has been substantially amended to require, among other things, that the parties consider a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option at a mandatory settlement conference. CPLR 3408(a). CPLR 3408(c) was amended to require that "each party's representative at the conference … be fully authorized to dispose of the case."

The plaintiff must now bring the following forms, among others, to the conference: "the mortgage and note or copies of the same; standard

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application forms and a description of loss mitigation options, if any, which may be available to the defendant; and any other documentation required by the presiding judge." CPLR 3408(e)(1). "If applicable," the defendant must bring the following to the conference: "information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge." CPLR 3408(e)(2).

CPLR 3408(f) now provides:

> Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
>
> 1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
>
> 2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and
>
> 3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.
>
> Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

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XLVII. CPLR 5015. Relief from judgment or order.

Second Department Concludes That Failure to Comply with Notice Requirements in CPLR 3215(g)(1) Renders Default Judgment Void

In *Paulus v Christopher Vacirca, Inc.*, 128 A.D.3d 116 (2d Dep't 2015), plaintiff failed to provide the required notice to the defendant under CPLR 3215(g)(1) before moving for leave to enter a default judgment. That provision requires that "whenever application [for a default judgment] is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application."

Defendant moved to vacate the default judgment under CPLR 5015(a)(1) and(4). The Second Department held that supreme court properly concluded that defendant was not entitled to vacatur of the default judgment pursuant to CPLR 5015(a)(1) because he failed to demonstrate a reasonable excuse for failing to answer the complaint. Nonetheless, the Second Department ruled, in an issue of "first impression" in that court, that the default judgment should have been vacated pursuant to CPLR 5015(a)(4) because the failure to comply with the notice requirements of CPLR 3215(g)(1) deprived the supreme court of jurisdiction to entertain the plaintiffs' motion for leave to enter a default judgment.

The First, Third, and Fourth Departments have addressed the issue of vacating a default judgment for an appearing party who received no notice of the motion for leave to enter a default judgment, but have reached different results. *See Fleet Fin. v. Nielsen*, 234 A.D.2d 728 (3d Dep't 1996) (concluding that failure to provide notice in accordance with CPLR 3215(g)(1) and (3) does not, standing alone, warrant vacatur of a default judgment); *Walker v. Foreman*, 104 AD3d 460 (1st Dep't 2013) (vacating judgment, court noted that the failure to give proper notice under CPLR 3215(g)(1) requires a new inquest, on proper notice); *Dime Sav. Bank of N.Y. v. Higner*, 281 A.D.2d 895 (4th Dep't 2001) (granting motion to vacate default judgment and foreclosure sale based upon failure to provide notice to defendant homeowner who appeared informally by sending a letter to the bank's attorney denying the validity of the bank's claim). For further discussion of the matter, see Siegel & Connors, New York Practice § 295.

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XLVIII. CPLR 5019. Validity and correction of judgment or order; amendment of docket.

Court of Appeals Holds That Statutory Interest Cannot Be Pursued After Judgment Is Entered

Lawyers attempting to secure 9% statutory interest under CPLR Article 50 for their clients should be careful to resolve all matters relating to interest within the action, and before the final judgment is entered. *See* Siegel & Connors, New York Practice §§ 411–12 (discussing recent caselaw under CPLR Article 50).

The Court of Appeals recent decision in *CRP/Extell Parcel I, L.P. v. Cuomo*, 27 N.Y.3d 1034 (2016), makes the point. In *CRP/Extell*, the Attorney General ordered the sponsor of a condominium offering to return down payments to purchasers. The sponsor then commenced an Article 78 proceeding challenging the Attorney General's determinations as arbitrary and capricious and seeking reformation of the purchase agreements based on a claimed "scrivener's error."

The supreme court denied the petition, directed the release and return of the down payments with accumulated escrow interest, and dismissed the proceeding. The sponsor returned the down payments and accumulated escrow interest, but the purchasers also made a motion and obtained an award of statutory interest under CPLR 5001 totaling $4.9 million! Unfortunately, they did not seek this substantial relief until after the final judgment dismissing the proceeding was entered. *See* CPLR 7806. The Court of Appeals affirmed the appellate division's vacatur of the award, holding that "[o]nce Supreme Court dismissed CRP's petition and judgment was entered, the court was without jurisdiction to entertain the purchasers' postjudgment motion for statutory interest." *See* Siegel & Connors, New York Practice § 420.

Stipulation as to Liability Does Not Trigger Accrual of Category II Interest

In *Mahoney v. Brockbank*, 142 A.D.3d 200, 205, 35 N.Y.S.3d 459, 463 (2d Dep't 2016), *lv. granted* 2017 WL 1224136 (2017), the parties in a personal injury action resolved the issue of liability by stipulation. Almost 2 ½ years

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later, a trial was held on the issue of damages. The issue presented on appeal was whether, pursuant to CPLR 5002, prejudgment interest on the award should be computed from the date of the jury verdict on the issue of damages or, instead, from the date of the stipulation on the issue of liability. The Second Department concluded that the supreme court correctly computed prejudgment interest from the date of the jury verdict because a stipulation as to liability does not trigger the accrual of category II interest under CPLR 5002.

XLIX. CPLR 5222. Restraining notice.

Court of Appeals Holds That "Separate Entity" Rule Prevents Judgment Creditor from Ordering Garnishee Bank with Branch in New York to Restrain Debtor's Assets Held in Bank's Foreign Branches

In *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014), the Court held that the "'separate entity' rule prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor's assets held in foreign branches of the bank."

The decision is discussed in further detail in Siegel & Connors, New York Practice §§ 487, 491, 510.

L. CPLR 5225. Payment or delivery of property of judgment debtor.

Fourth Department Addresses Right to Jury Trial in Proceedings Under CPLR 5225 and 5227

In *Matter of Colonial Surety Co. v. Lakeview Advisors, LLC*, 125 A.D.3d 1292, 3 N.Y.S.3d 800 (4th Dep't 2015), the Fourth Department concluded that a special proceeding "under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the 'ancient creditor's bill in equity,' which was used after all remedies at law had been exhausted." The judgment creditor in this situation is seeking legal relief to the extent she desires an adjudication of whether the third-party owes a money debt to the judgment debtor and also equitable relief in that she wants any such debt to

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be paid to her and not the judgment debtor. In that the judgment creditor's use of CPLR 5225 and 5227 in *Colonial Surety* was "in furtherance of both legal and equitable relief," the court ruled that it was not entitled to a jury trial. *See* CPLR 4102(c).

The decision is discussed in further detail in Siegel & Connors, New York Practice § 510.

LI. CPLR 5231. Income execution.

CPLR 5231 Amended to Address Income Executions

CPLR 5231 contains one of the CPLR's most popular, but complicated, judgment enforcement devices: the 10% income execution. The statute sets up a procedure that most often leads to a two-step service of the income execution. The "first service" is made by the sheriff upon the judgment debtor, and it requires the debtor to make installment payments. *See* CPLR 5231(d). This service affords the debtor the opportunity to honor the execution and avoid the embarrassment of any "second service" of the execution on the person who owes the judgment defendant money, such as an employer.

If the judgment debtor fails to pay installments for a period of twenty days, or if the sheriff is unable to serve an income execution upon the judgment debtor within twenty days after the execution is delivered to the sheriff, the second step service is required. *See* CPLR 5231(e). This second step service is not on the judgment debtor, but rather on the person "from whom the judgment debtor is receiving or will receive money." CPLR 5231(e).

On December 11, 2015, the Governor signed into law several amendments to CPLR 5231 designed to clarify and modernize the procedure for income executions. The new last sentence in CPLR 5231(e) clarifies that the "second service" of the income execution can be made in "any county in which the person or entity from whom the judgment debtor is receiving or will receive money has an office or place of business . . . ." This revision recognizes the reality that "second service" is not made on the judgment debtor, but rather on "the person or entity from whom the judgment debtor is

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receiving or will receive money," which is most typically the judgment debtor's employer.

The amendments to CPLR 5231 are discussed in further detail in Siegel & Connors, New York Practice § 502.

LII. CPLR 5515. Taking an appeal; notice of appeal.

New 2015 Legislation Expanding Judiciary's Powers to Adopt E-filing Affects Filing and Service of Notice of Appeal

We address this new legislation in Siegel & Connors, New York Practice §§ 11, 63, 531, 533. We note it under CPLR 304, above, and again here because if mandatory e-filing in a particular category of action has been adopted in the county where the action was commenced, the filing and service of a notice of appeal under CPLR 5515(1) is subject to the e-filing rules. CPLR 2111(c). That means that any notice of appeal in those actions must be electronically filed and served. The new legislation will also have an impact on the time to serve and file the notice of appeal under CPLR 5513(a).

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LIII. CPLR 5713. Content of order granting permission to appeal to court of appeals.

Court of Appeals Not Bound by Appellate Division's Characterization in Its Certification Order Granting Leave

In an order granting leave to appeal from a nonfinal order, the appellate division certifies the question of law deemed decisive of its determination. *See* CPLR 5713. Even if the certified question states that the "determination was made as a matter of law and not in the exercise of discretion," the Court of Appeals is not bound by the appellate division's characterization in its certification order. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015). Instead, the Court will make an independent determination of whether the appellate division's decision nonetheless reflects a discretionary balancing of interests. If an appellate division's determination is deemed to be discretionary in nature, the Court of Appeals' review is limited to whether the intermediate appellate court abused its discretion as a matter of law. This issue is discussed in further detail in Siegel & Connors, New York Practice §§ 528-529.

LIV. CPLR 6312. Motion papers; undertaking; issues of fact [for preliminary injunctions]

Matter Remitted to Supreme Court to Fix an Undertaking Required by CPLR 6312(b)

CPLR 6312(b) requires that a plaintiff provide an undertaking in an amount to be fixed by the court as a precondition to obtaining a preliminary injunction. *See* Siegel & Connors, New York Practice § 329. Sometimes the parties and the court forget this important statutory requirement, which cannot be waived. *Confidential Brokerage Servs., Inc. v. Confidential Planning Corp.*, 85 A.D.3d 1268, 1270, 924 N.Y.S.2d 207, 209 (3d Dep't 2011). If a preliminary injunction is granted, but an undertaking is not fixed by the court, an appellate court will typically remit the matter to the supreme court to set an appropriate undertaking, as occurred recently in *Mobstub, Inc. v www.staytrendy.com.*, 153 A.D.3d 809, 60 N.Y.S.3d 356 (2d Dep't 2017).

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LV. CPLR 7501. Effect of arbitration agreement.

Court Enforces Arbitration Clause in Nursing Home Admission Agreement

In *Friedman v Hebrew Home for the Aged at Riverdale*, 131 A.D.3d 421, 13 N.Y.S.3d 896 (1st Dep't 2015), plaintiff sued to recover for injuries sustained by his mother at defendant nursing facility. The supreme court denied defendant's motion to stay the action pending arbitration, but the First Department reversed and granted the motion. The court concluded that the arbitration clause in the admission agreement that plaintiff executed in placing his mother in defendant's care did not run afoul of Public Health Law § 2801–d ("Private actions by patients of residential health care facilities"), which was preempted by the Federal Arbitration Act because defendant was engaged in interstate commerce.

Furthermore, the court found that the arbitration clause was "not unconscionable, either procedurally or substantively."

LVI. CPLR 7803. Questions raised.

Court of Appeals Holds That Writ of Prohibition Is Appropriate To Prevent Judge from Compelling Criminal Prosecution

In *Soares v. Carter*, 25 N.Y.3d 1011 (2015), the Court of Appeals affirmed the granting of a writ of prohibition enjoining the City Court Judge from enforcing his orders compelling the People to call witnesses and prosecute a criminal matter after the District Attorney had decided to discontinue the prosecution. "Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions. Such a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all phases of criminal prosecution." (citations omitted) Therefore, any attempt by the Judge to compel prosecution through the use of his contempt power exceeded his jurisdictional authority and warranted the granting of the writ of prohibition. *See* Siegel & Connors, New York Practice § 559.

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LVII. CPLR 7804. Procedure.

Court of Appeals Remits Proceeding to Supreme Court to Allow Respondent to Serve Answer in Article 78 Proceeding

CPLR 7804(f) provides that if a motion to dismiss in an Article 78 proceeding "is denied, the court *shall* permit the respondent to answer." (emphasis added). Despite the mandatory tone of this subdivision, in *Kickertz v. New York University*, 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 547, 29 N.E.3d 893, 894 (2015), the Court of Appeals observed that a court need not permit a respondent to serve an answer after denying a motion to dismiss "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.'"

In *Kickertz*, the First Department reversed supreme court and denied respondent's motion to dismiss the petition. Rather than allowing respondent to now answer the petition, the court granted the petitioner judgment on the merits. The Court of Appeals concluded that there were several triable issues of fact with regard to whether the respondent, a private educational institution, substantially complied with its established disciplinary procedures before expelling the petitioner. Therefore, the Court vacated that portion of the order granting the petition and remitted the proceeding to supreme court to permit the respondent to serve an answer to the petition.

LVIII. Judiciary Law § 753. Power of courts to punish for civil contempts.

Court of Appeals Outlines Elements Required to Establish Civil Contempt

In *El-Dehdan v. El-Dehdan*, 26 NY3d 19, 29, 19 N.Y.S.3d 475, 481, 41 N.E.3d 340, 346 (2015), the Court of Appeals outlined the elements necessary to establish civil contempt under Judiciary Law section 753:

> First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect." Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed." Third, "the party to be held in contempt must have had knowledge of

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> the court's order, although it is not necessary that the order actually have been served upon the party." Fourth, "prejudice to the right of a party to the litigation must be demonstrated."

The plaintiff in *El-Dehdan*, a matrimonial action, sought civil contempt penalties against her spouse who failed to comply with an order requiring him to deposit in escrow the proceeds of the sale of properties which were the subject of a prior equitable distribution determination. The Court held that plaintiff met her burden by establishing the above four elements by clear and convincing evidence.

The *El-Dehdan* Court also stressed that neither Judiciary Law section 753 nor its prior case law impose a "willfulness" requirement for civil contempt. Judiciary Law section 750, which governs criminal contempt, does contain such a requirement as it only permits a court to impose punishment for criminal contempt for "[w]illful disobedience to its lawful mandate." Judiciary Law § 750(A)(3).

For further discussion of civil contempt, see Siegel & Connors, New York Practice §§ 481-484.

LIX. New York State Bar Exam Replaced by Uniform Bar Exam.

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

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LX. 22 N.Y.C.R.R. Part 523: Rules of the Court of Appeals for the Temporary Practice of Law in New York

Part 523 of the Rules of the Court of Appeals, which became effective on December 30, 2015 allows lawyers not licensed in New York to practice here temporarily. The new rules track much of the language in Rule 5.5 of the ABA Model Rules of Professional Conduct, which provides for the "Multijurisdictional Practice of Law." The new Part 523 is discussed in Connors, *No License Required: Temporary Practice in New York State*, New York Law Journal, March 10, 2016, at p. 4.

New York lawyers will not likely be concerned with Part 523's workings unless they are assisting a non-New York lawyer in negotiating its provisions, or actively participating in, and assuming joint responsibility for, the matter. *See* 22 N.Y.C.R.R. § 523.2(a)(3)(i). New York lawyers will be most concerned with multijurisdictional practice rules in other states where they are not licensed. The ABA Commission on Multijurisdictional Practice maintains a helpful website that tracks these developments: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York*, or where no material portion of the services was rendered in New York." (emphasis added).

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LXI. Federal Rules of Civil Procedure Rule 4. Summons.

Time Limit for Service Upon a Defendant in Rule 4(m) Reduced to 90 Days

Effective December 1, 2015, Rule 4(m) was amended to reduce the presumptive time for serving a defendant from 120 days to 90 days. This change was designed to reduce delay at the beginning of litigation. *See* Siegel & Connors, New York Practice §§ 624-625.

LXII. Federal Rules of Civil Procedure Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

Rule 37 Amended to Provide Uniform Standards for a Party's Failure to Preserve Electronically Stored Information

Rule 37 contains provisions addressing sanctions for the violation of disclosure obligations in federal practice. *See* Siegel & Connors, New York Practice §§ 638. Substantial amendments to this Rule became effective on December 1, 2015.

Rule 37(a)(3)(B)(iv) was amended to reflect the common practice of producing copies of documents or electronically stored information ("ESI"), rather than simply permitting inspection of one's electronic database.

Rule 37(e), adopted in 2006, was replaced in its entirety and is now entitled "Failure to Preserve Electronically Stored Information." Rule 37(e)(2) only allows the court to presume that lost information was favorable to a party, or to charge the jury with an adverse inference instruction, upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." The Advisory Committee notes emphasize that the amendment "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

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Coincidentally, just after the amendment to Rule 37(e) took effect, the New York Court of Appeals issued a decision addressing sanctions for the failure to preserve ESI. *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015).

The amendment to Rule 37 is discussed in further detail in Siegel & Connors, New York Practice § 638.

LXIII. Federal Rules of Civil Procedure Rule 84. Forms.

Rule 84, Which Authorized Use of Official Forms in Federal Court, Abrogated Effective December 1, 2015

The Advisory Committee Notes explain that "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted [in 1938], has been fulfilled." *See* Siegel & Connors, New York Practice § 620 (discussing forms in federal court). Therefore, "recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated."

As a result of the abrogation of Rule 84 and the official forms, former Forms 5 and 6 were directly incorporated into Rule 4. Rule 4 now contains these forms entitled "Notice of a Lawsuit and Request to Waive Service of Summons" and "Rule 4 Waiver of the Service of Summons."

Similarly, the New York courts rescinded the Appendix of Official Forms for the CPLR, which were adopted in 1968. The administrative order became effective on July 1, 2016. *See* AO/119/16, dated May 23, 2016. *See* Siegel & Connors, New York Practice § 7.

LXIV. Issues Regarding Removal of Actions from State to Federal Court

The potential pitfalls of any delay in seeking removal when an action is commenced in New York State court with a CPLR 305(b) notice are demonstrated in *Jones Chemicals, Inc. v. Distribution Architects Int'l*, 786 F. Supp. 310 (W.D.N.Y. 1992), where the arguable basis of federal jurisdiction

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was the diversity of citizenship of the parties. The defendants were served with a summons and CPLR 305(b) notice setting forth some information that did indicate the potential existence of diversity jurisdiction, including the plaintiff's residence, the names of co-defendants, etc. There was nothing on the face of the summons and notice, however, to indicate that federal jurisdiction was certain. The defendants were nevertheless held subject to the 30-day removal period running from service of the summons with notice, with the court holding that they had a duty to investigate promptly after service so as to be able to act within the 30 days.

Duty to Investigate Federal Jurisdiction?

Although the *Jones* decision has not been overruled or criticized by other courts, it may not square with some more recent holdings. The Second Circuit has since held that a defendant has no independent duty to investigate whether a case is removable. *See Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001). "If removability is not apparent from the allegations of an initial pleading or subsequent document, the 30-day" period in 28 U.S.C. § 1446(b) does not begin to run. *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 143 (2d Cir. 2014)(discussing 30 day removal periods under 28 U.S.C. §§ 1446(b)(1) and (b)(3) in Class Action Fairness Act cases). However, defendants must still "apply a reasonable amount of intelligence in ascertaining removability." *See Whitaker*, 261 F.3d at 206; *see also Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013). While the "reasonable amount of intelligence" standard "does not require a defendant to look beyond the initial pleading for facts giving rise to removability," *Whitaker*, 261 F.3d at 206, the line is not always clearly drawn.

Some corporate defendants with inefficient bureaucracies can find themselves in perpetual forfeit of federal jurisdiction if they do not set up a system for transmitting summonses and their accompanying papers—in New York practice, either the CPLR 305(b) notice or the complaint—into the hands of their lawyers promptly, so that a possible removal to federal court can be timely considered. Lawyers regularly representing a client sued frequently in state courts should remind the client at periodic intervals of the timeliness issues regarding removal and recommend a process that ensures an immediate forwarding of the initiatory papers.

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Starting the Removal Clock

Another problem, unique to the diversity case because of its monetary threshold, is how to time removal if the action is for money and the complaint does not state the sum demanded. The defendant is then unable to determine whether the case involves more than $75,000, the current requirement for federal subject matter jurisdiction in diversity cases. 28 U.S.C. § 1332(a). The predicament exists in personal injury and wrongful death actions—numerous categories in New York practice—because CPLR 3017(c) explicitly forbids the inclusion of an explicit monetary sum in the complaint in those categories of actions.

The remedy for the curious defendant in that situation is to use the supplemental demand procedure supplied by CPLR 3017(c). It permits the defendant to serve a demand on the plaintiff for a statement of the sum sought, and requires the plaintiff to respond within 15 days. Assuming the response asks for more than $75,000, the response constitutes the "other paper"—a paper other than the complaint—that § 1446(b)(3) also recognizes as an alternative starting time for the 30-day removal period.

In *Moltner v. Starbucks Coffee Co.*, 624 F.3d 34 (2d Cir. 2010), the personal injury complaint alleged several injuries but, as required by CPLR 3017(c), no monetary amounts were stated. D requested a supplemental demand for the damages sought under CPLR 3017(c), and P sent a letter in response stating entitlement to damages not to "exceed $3 million." D removed the case less than two weeks afterwards. The Second Circuit concluded that these steps satisfied the 30-day period for removal dictated by 28 U.S.C. § 1446(b). Under the law of inferences, a $3 million dollar statement, in any form, can be deemed on the upper side of $75,000.

The court concluded that "the time for removal runs from the service of the first paper stating on its face the amount of damages sought." *Moltner*, 624 F.3d at 35. The court rejected plaintiff's argument that defendant, "applying 'a reasonable amount of intelligence' to its reading of the complaint, should have deduced from the complaint's description of her injuries that the amount in controversy would exceed $75,000." *Id.* at 37. Rather, the court opted for a "bright line rule" and held that "the removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought." In *Moltner*, that "paper"

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was plaintiff's letter sent in response to defendant's CPLR 3017(c) demand stating that the amount sought would not exceed $3 million.

An important lesson to be drawn from the *Moltner* decision is that the removal period in a personal injury or wrongful death action may be triggered by something other than a response to a supplemental demand served pursuant to CPLR 3017(c). In *Warfield v. Conti*, 2010 WL 2541168 (S.D.N.Y. 2010), for example, the court ruled that the 30-day removal period began to run when plaintiff's counsel sent defendants' counsel a letter asserting that plaintiff had suffered severe permanent injuries and demanding the defendants' full primary policy, which had a $300,000 limit, and any excess and/or additional policy under which they may be covered.

There are pitfalls faced when removing an action too soon. In *Noguera v. Bedard*, 2011 WL 5117598 (E.D.N.Y. 2011), for example, the court remanded the action to Supreme Court, Kings County for lack of subject matter jurisdiction. The district court concluded that defendants' notice of removal did not properly allege the amount in controversy, relying on the Second Circuit's conclusion in *Moltner* that "the amount in controversy is not established until the 'plaintiff serves the defendant with a paper that that explicitly specifies the amount of monetary damages sought.'" *Noguera*, 2011 WL 5117598 at *1. The court noted that CPLR 3017(c) provides "defendants with an explicit remedy in the face of plaintiff's failure timely to respond to the *ad damnum* demand: the state court, on motion, may order plaintiff to respond." *Id.* at *2. In *Noguera*, plaintiff's time to respond to the CPLR 3017(c) demand had not yet expired at the time the action was removed. The court indicated that removal might ultimately be appropriate after plaintiff provides a response to the CPLR 3017(c) demand.

The Second Circuit has recently cautioned district courts to "'construe the removal statute narrowly, resolving any doubts against removability.'" *Stemmle v. Interlake Steamship Co.*, 198 F. Supp. 3d 149, 156 (E.D.N.Y. 2016). Therefore, a defendant seeking removal of an action to federal court must take great pains to ensure that the removal papers are in order. *Hughes v. Target Corporation*, 2017 WL 2623861 (E.D.N.Y. June 15, 2017)(remanding action to state court because "a barebones, general pleading does not suffice to establish that this action involves an amount in controversy adequate to support federal diversity jurisdiction.").

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LXV. Monitoring the Docket

In *Sable v. Kirsh*, 2017 WL 4620997 (E.D.N.Y. 2017), plaintiff filed a complaint against defendant on July 27, 2015. The court did not issue a summons, although the complaint was served on the defendant.

On March 21, 2016, the clerk issued a notice requesting the plaintiff's counsel "to inform the Court within ten (10) days of this notice, why an order should not be entered dismissing this action for failure to prosecute pursuant to FED. R. CIV. P. (or "Rule") 41(b)."

The Court received no response from either party by the requested date and on April 1, 2016 issued an order dismissing the case for failure to prosecute pursuant to FED. R. CIV. P. 41(b) and directed the clerk to close the case. On April 6, 2016, the clerk entered a judgment, which stated "that Plaintiff Michael Sable take nothing of Defendant Edward Kirsh; that this action is dismissed pursuant to FED. R. CIV. P. 41(b) for failure to prosecute; and that this case is hereby closed."

According to plaintiff, he learned about the Court's actions in May, 2016. When plaintiff confronted his attorney at the time, the attorney asserted that he did not receive any emails from the court. In June 2016, plaintiff asked his attorney to file a motion to vacate the judgment. After numerous unsuccessful attempts to contact his attorney, plaintiff filed a grievance with the Second Department.

The plaintiff then hired a new attorney who filed a motion to vacate the default judgment pursuant to Rule 60(b)(1) and 60(b)(2).

The court noted that under Rule 60(b), a party can be relieved from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or

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> discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

See Siegel & Connors, New York Practice § 629 (6th ed. 2008) ("Vacating Defaults in Federal Court").

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order." FED. R. CIV. P. 60(c).

The court ruled that the motion to vacate was untimely, as it was filed on July 6, 2017, "ninety-one days after the one-year period ended." The court refused to apply the doctrine of "equitable tolling" to extend the one year period, observing that "lack of due diligence on the part of plaintiff's attorney is insufficient to justify application of an equitable toll." *South v. Saab Cars USA*, 28 F.3d 9, 12 (2d Cir. 1994).

The court went on to note that:

> the negligence of a party's attorney is insufficient grounds for relief under Rule 60(b)(1). *See Nemaizer*, 793 F.2d at 62; *see also U.S. ex rel. McAllan v. City of New York*, 248 F.3d 48, 53 (2d Cir. 2001) (noting that "parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders" (internal citations omitted)). "[A]n attorney's actions, whether arising from neglect, carelessness or inexperience, are attributable to the client, who has a duty to protect his own interests by taking such legal steps as are necessary. To rule otherwise would empty the finality of judgments rule of meaning." *Nemaizer*, 793 F.2d at 62-63 (citing *Ackerman v. United States*, 340 U.S. 193, 197-98, 71 S.Ct. 209, 95 L.Ed. 207 (1950)); *see also Carcello v. TJX Companies, Inc.*, 192 F.R.D. 61, 65 (D. Conn. 2000) ("[A] client makes a significant decision when he selects counsel to represent him. Once this selection has been made, the client cannot thereafter avoid the consequences of that counsel's negligence. Rather, his recourse is limited to starting anew, assuming the statutes of limitations and other applicable laws permit, or pursuing a negligence action against counsel." (internal citations and quotations omitted)); *Klein v. Williams*, 144 F.R.D. 16, 18 (E.D.N.Y. 1992)

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(noting that “[a] client is not generally excused from the consequences of his attorney’s negligence, absent a truly extraordinary situation” (internal citations and quotations omitted)).

Moreover, “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.’ ” *Pioneer Inv. Servs., Inc. v. Brunswich Assocs. Ltd. P’ship*, 507 U.S. 380, 391-92, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). “[T]his is because a person who selects counsel cannot thereafter avoid the consequences of th[at] agent’s acts or omissions.” *Nemaizer*, 793 F.2d at 62 (citing *Link v. Wabash*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8.Led.2d 734 (1962)).

In the case at issue, it was Mr. Rosenberg’s “ultimate responsibility to prosecute his client’s claim, keep track of deadlines and respond to motions filed on the docket.” *Lapico v. Portfolio Recovery Assocs.*, LLC, No. 06-cv-1733, 2008 WL 1702187, at *3 (D. Conn. Apr. 11, 2008) (internal citations omitted). His alleged inability to properly file a complaint, respond to the orders of this Court and communicate with his client is a failure to observe the clear, unequivocal rules that govern an attorney’s conduct and this Court. See e.g., NEW YORK RULES OF PROFESSIONAL CONDUCT, Rules 1.3, 1.4; FED. R. CIV. P. 4. Furthermore, the Plaintiff has failed to cite a single case with similar circumstances, where a court in this circuit has found that similar conduct constitutes excusable neglect. Where, as here, a party’s attorney fails to adhere to an unambiguous rule, Second Circuit jurisprudence precludes recovery. *See e.g., Klein*, 144 F.R.D. at 18; *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250–51 (2d Cir. 1997). For this reason, the undersigned concludes that the Plaintiff’s claim lacks merit sufficient to justify granting a Rule 60(b)(1) motion.

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DIVERSITY IN THE PROFESSION

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Implicit Bias Reference List

What is Implicit Bias?

"Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

A Few Key Characteristics of Implicit Biases

- Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that **favor our own ingroup**, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques."

http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/

Reeves, A., *Diversity in Practice: What Does Your Brain See?,* Nov. 2012, available at http://www.nextions.com/wpcontent/files_mf/1352727388_magicfields__attach_1_1.pdf ("The research effectively disproves that any of us are 'color-blind' or 'gender-blind.' We 'see' race and gender even when those characteristics are undefined.").

Implicit Bias in the Legal Profession

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why ("Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.")

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Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at https://bol.bna.com/minorities-women-still-underrepresented-in-law/ ("Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that 'aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.'")

Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation and Lawyers Aren't Doing Enough to Change That,* May 27, 2015, ("Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.")

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms,* Nov. 19, 2015, available at
http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf
(noting in particular that the percentage of African-American firm associates has declined each year since 2009)

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, (citing as a top disappointment that "[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.")

Lam, Bourree, *The Least Diverse Jobs in America,* June 29, 2015, available at
http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/ (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list)

New York State Bar Association, *Judicial Diversity: A Work in Progress,* Sept. 17, 2014, available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html ("People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations"), at p. 8.

Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at
http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias ("Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for "writing analysis" and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man's memo a rating of 4.1 on a scale of 5, while the African American's memo got a 3.2.")

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Negowetti, Nicole E., *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: "[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and 'the lawyer's own character, insight, and experience.' . . . Without specific metrics to objectively evaluate the quality of an associate's work, stereotypes and implicit biases will influence one's judgment.")

http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email "Male partners make 44% more on average than female partners, survey finds," ABA Journal, October 13, 2016.)

http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/ ("A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they "feel they have no choice.") See also http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why

http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases (Partners "saw" more errors in memo attributed to black sounding name in study, even when memo was exactly the same."

http://www.abajournal.com/news/article/women_underrepresented_in_lead_trial_lawyer_positions_aba_study_reports

Implicit Bias in Employment

"Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process," Therese Macan and Stephanie Merritt, International Review of Industrial and Organizational Psychology 2011, Volume 26 (2011).

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https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html

http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation. See also https://www.census.gov/quickfacts/table/PST045215/00 (showing declining numbers of "white alone" individuals in the United States).

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Ian Ayres, When Whites Get a Free Pass, THE NEW YORK TIMES (Feb. 24, 2015), at A23, available at https://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html

http://time.com/3666135/sheryl-sandberg-talking-while-female-manterruptions/

Jessica Bennett, How Not to Be 'Manterrupted' in Meetings, TIME.COM (Jan. 14, 2015)

Tonja Jacobi & Dylan Schweers, Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates, HARV. BUS. REV. (Apr. 11, 2017), https://hbr.org/2017/04/femalesupreme-court-justices-are-interrupted-more-by-male-justices-and-advocates.

http://gap.hks.harvard.edu/orchestrating-impartiality-impact-%E2%80%9Cblind%E2%80%9D-auditions-female-musicians (Implementation of blind auditions caused a surge in hires of female and diverse musicians in symphony orchestras.)

http://www.nber.org/papers/w9873 (In an audit study of employer hiring behavior, researchers Bertrand and Mullainathan (2003) sent out identical resumes to real employers, varying only the perceived race of the applicants by using names typically associated with African Americans or whites. The study found that the "white" applicants were called back approximately 50 percent more often than the identically qualified "black" applicants. The researchers found that employers who identified as "Equal Opportunity Employer" discriminated just as much as other employers.)

http://neatoday.org/2015/09/09/when-implicit-bias-shapes-teacher-expectations/ ("Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination by the National Bureau of Economic Research.")

Implicit Bias in Criminal Justice

Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. http://www.bjs.gov/content/pub/pdf/p13.pdf

Blind injustice: the Supreme Court, implicit racial bias, and the racial disparity in the criminal justice system, *American Criminal Law Review*, Summer 2014: http://ic.galegroup.com/ic/ovic/AcademicJournalsDetailsPage/AcademicJournalsDetailsWindow?failOverType=&query=&prodId=&windowstate=normal&contentModules=&display-query=&mode=view&displayGroupName=Journals&dviSelectedPage=&limiter=&currPage=&disableHighlighting=&displayGroups=&sortBy=&zid=&search_within_results=&p=OVIC&action=e&catId=&activityType=&scanId=&documentId=GALE%7CA375696910&source=Bookmark&u=mnamsumank&jsid=cce6cbf0363435a6bf3d6170d4b781a0

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http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (Discussing colorism: "Other research explored the connection between criminal sentencing and Afrocentric features bias, which refers to the generally negative judgments and beliefs that many people hold regarding individuals who possess Afrocentric features such as dark skin, a wide nose, and full lips. Researchers found that when controlling for numerous factors (e.g., seriousness of the primary offense, number of prior offenses, etc.), individuals with the most prominent Afrocentric features received longer sentences than their less Afrocentrically featured counterparts. … This phenomenon was observed intraracially in both their Black and White male inmate samples.")

https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department (The Department of Justice found reasonable cause to believe that the Baltimore Police Department engages in, among other things, a pattern or practice of conducting stops, searches and arrests without meeting the requirements of the Fourth Amendment and focusing enforcement strategies on African Americans, leading to severe and unjustified racial disparities in violation of Title VI of the Civil Rights Act and the Safe Streets Act.)

Implicit Bias in Education

http://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem (Study of pre-school teachers showed that 42% "saw" challenging/disruptive behavior by black children when there was none.)

https://www.aft.org/ae/winter2015-2016/staats (Understanding implicit Bias: What educators should know)

http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/
(Research shows that African American students, and especially African American boys, are disciplined more often and receive more out-of-school suspensions and expulsions than White students. Perhaps more alarming is the 2010 finding that over 70% of the students involved in school-related arrests or referred to law enforcement were Hispanic or Black. Citing to Education Week, 2013.)

http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-i (Research suggests that Black students as young as age five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks. In a simple analysis of this phenomenon, the over-zealous application of "zero tolerance" policies gets all the blame, but a deeper dig will show a far more complex scenario.)

https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf ("The consequences for Black communities policed by biased officers has been tragic, but it can be equally consequential in schools, points out Becki Cohn-Vargas, the co-author of *Identity Safe Classrooms: Places to Belong and Learn.* "This is not about blaming or pointing fingers," she said, but it clear that the decisions made by teachers also do affect children's life trajectories. Unequal discipline, for example, may fuel the school-to-prison pipeline that has disproportionately affected students of

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color. …Whether or not a teacher "believes in" her students and expects them to succeed has been shown to affect how well that student does in school, particularly among disadvantaged students. But educators should be aware that those expectations can be influenced by their own implicit racial biases.")

http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-ii-solutions
(Youth of color are overrepresented at every stage of the juvenile justice process. Much of the literature that discusses this overrepresentation focuses on racial disparities in the juvenile justice process itself. However, a comprehensive understanding of this racial disproportionality is not possible without examining racial bias in the "feeder systems" that funnel our children into the juvenile justice system.)

https://www.npr.org/sections/ed/2016/06/20/482472535/why-preschool-suspensions-still-happen-and-how-to-stop-them (black students — from kindergarten through high school — are 3.8 times more likely to be suspended than white students.)

Implicit Bias and the LGBTQ Community (Legal or Otherwise)

https://www.sciencedaily.com/releases/2015/07/150723083718.htm (U.S. Supreme Court's positive ruling on same sex marriage caused a decrease in conscious and unconscious bias against gay people.)

http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html
("Over the course of a career, the effects of implicit decision-making can lead to significant, detrimental consequences for the careers of LGBT lawyers. For example, in a law-firm setting, straight partners handing out choice assignments may subconsciously feel more comfortable working with straight associates and thus seek their assistance first, leading to fewer billable hours and less challenging work for LGBT lawyers. Because LGBT attorneys are less likely to choose traditional, opposite-sex family arrangements, LGBT lawyers and their straight counterparts can have social differences that might reinforce implicit biases in some settings. Or a referral source may have a subconscious concern that an LGBT colleague might be perceived negatively by the client or in a courtroom, and choose to pass the case along to a straight colleague.")

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf ("Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors' decisions.1 Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors.")

https://www.huffingtonpost.com/cody-cain/religious-freedom-vs-gay-_b_7718830.html (When people use "religious freedom" as a means to discriminate.)

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https://www.advocate.com/politics/2018/1/24/homophobe-sam-brownback-confirmed-religious-freedom-ambassador

https://www.huffingtonpost.com/entry/opinion-signorile-gay-bi-men-murders_us_5a730f74e4b06fa61b4df141 (Hate crimes against LGBTQ individuals increased exponentially in 2017.)

Strategies for Interrupting Implicit Bias

http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history

https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf

http://nypost.com/2017/10/25/kelloggs-called-out-for-racist-cartoon-on-cereal-box/

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf ("Studies show that people who have close friends who are LGBT tend demonstrate less anti-LGBT bias.")

https://www.usatoday.com/story/money/2017/04/27/whats-your-salary-becomes-no-no-job-interviews/100933948/

SOCIAL MEDIA DISCOVERY:
PLANTIFF & DEFENSE PERSPECTIVES
POST FORMAN V. HENKIN
30 NY3D 656 (2018)

Submitted By:

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Social Media Discovery:

Perspectives Post *Forman v. Henkin*, 30 N.Y.3d 656 (2018)

By Maureen E. Maney, Esq., Kathleen Barclay, Esq. and Caroline Bertholf, J.D. Candidate, 2019

Every lawsuit, regardless of whether it concerns a car accident, a defective product, securities fraud, patent infringement, or sexual harassment, is about people. The beauty of social media is that it serves as a potentially powerful discovery tool that often yields treasures such as unguarded and uncoached e-mails, statements, or photos, before an attorney is involved, that can help us to understand the true nature of a given witness or claim.

Since the inception of Facebook, more than ten years ago, social media usage has increased significantly. (*See*, Aaron Smith et al, Social Media Use in 2018, PEW RESEARCH CENTER, Mar. 1, 2018, *available at* http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/. According to a recent Pew Research Center Study, in 2018 more than 73 percent of adults use YouTube, 68 percent of adults use Facebook, 35 percent of adults use Instagram, 29 percent of adults use Pinterest, 27 percent of adults use Snapchat, 25 percent of adults use LinkedIn, 24 percent of adults use Twitter, and 22 percent of adults use WhatsApp. Of the 68 percent of adults who use Facebook, approximately three-quarters of users log into Facebook on a daily basis. *Id.* Individuals provide personal information on these platforms in both private and public settings. The majority of individuals use social platforms such as Facebook, Twitter, and Instagram to provide a window into thoughts, feelings, and emotions. Because these outlets can provide personal and real-time documentation of events, it has become an increasingly popular and arguably necessary source of information in personal injury cases. This means that there is a

substantial likelihood that the litigants and witnesses in your cases are using Facebook, and are posting statements, pictures, and other content that could be directly relevant to the issues in your lawsuit or shed light on that person's mood and activities, which is likely relevant to the plaintiff's damages.

The initial starting point in social media discovery is to utilize a traditional search engine such as Google. Inserting the name, employer, city, etc. of an individual can yield potentially useful information and even potential social media accounts. Other social media information such as blogs, product reviews, and personal webpages can often be located as a result of a basic search. In addition to Facebook, other potential sources include Instagram, YouTube, LinkedIn, Twitter, Google+, and MySpace, among others.

It should be noted that obtaining this information through discovery is paramount as it is unlikely to be retrieved through other methods. Service of a subpoena on a social network has virtually no chance of success. The same can be said for a signed authorization. A typical response generally directs an individual to have the opposing litigant download their information and share it with you.

"Traditional" Discovery of Social Media

Discovery, as guided by CPLR Section 3101 provides that: "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Over the years, however, New York courts have implemented a special standard in determining the discoverability of information on social media platforms by using publicly accessible information to open the door for the disclosure of private information. In 2013, the First Department held, in *Tapp v. New York State Urban Dev. Corp.*, 958 N.Y.S.2d 392, 393 (1st Dept.

2013), that a "factual predicate" must be established by the person seeking the information, to warrant discovery of additional materials. The factual predicate may only be established by first identifying "relevant information" on the public portion of the social medial platform. *Id*. at 393. This "relevant information" must be information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims," (quoting *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (1st Dept. 2011) or is "reasonably calculated to lead to the discovery of information bearing on the claims." *Abrams v. Pecile*, 922 N.Y.S.2d 16, 17 (1st Dept. 2011) (denying defendant's request for access to plaintiff's social media after no showing was made that discovery would reveal "disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims").

Anything from photographs, to statements, to frequency of use may be discoverable if a factual predicate is established. For example, in a plaintiff's personal injury case, *Jennings v. TD Bank*, 2013 NY Slip Op 32783(U) the plaintiff claimed to have sustained injuries due to the defendant's negligence. The factual predicate was established when an internet search of a plaintiff revealed public Facebook photographs of her apparently in front of a cruise ship, on vacation, pictures relevant to her injury claim. In another plaintiff's personal injury case, *Melissa "G" v. North Bablyon Union Free Sch. Dist.*, 48 Misc. 3d 389, 391 (Sup. Ct., Suffolk County 2006), where the plaintiff claimed loss of enjoyment of life, a factual predicate was established when a search of public Facebook photographs revealed the plaintiff engaging in a variety of recreational activities such as rock climbing, drinking with friends, and being at work because those activities were relevant to the plaintiff's claim.

This "factual predicate" standard is a higher burden to meet from traditional discovery methods not involving social media, because it clearly distinguishes publicly available information

from private information and then engages in a relevancy determination of the private information based on the publicly available information. This process shifted much of the burden to the defendant: first having to prove that the information they found was a "factual predicate" of the claim and second, that disclosure was "material and necessary." These showings, difficult to navigate, typically called for more lengthy discovery and an *in camera* review of the records by courts. *See Richards v. Hertz Corp*, 953 N.Y.S.2d 654, 656-657 (2d Dept. 2012); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311.

Forman v. Henkin

Rather than adopting this special standard for social media discovery, the New York State Court of Appeals, recently jettisoned the showing of a "factual predicate," as developed by lower courts. In February of this year, the Court of Appeals decided *Forman v. Henkin*, 30 N.Y.3d 656 (2018), in which they entertained the standard used in the discovery of social media in personal injury cases.

In *Forman*, the plaintiff, Kelly Forman alleged she was injured after falling from a horse owned by the defendant. The plaintiff claimed to have suffered "serious, severe and permanent personal injuries…prevent[ing her] from attending her usual activities and duties…"[1] Her injuries included: spinal and brain injuries such as cognitive deficits, memory loss, and complications with oral and written communications.[2] Furthermore, the plaintiff claimed social isolation and difficulty using a computer and composing coherent messages, as a result of her injuries.[3] At her deposition

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[1] Br. on behalf of the Defense Association of New York, Inc. as *Amicius Curiae*, March 27, 2017, 6, *available at* http://defenseassociationofnewyork.org/resources/Pictures/Forman%20v%20Henkin.pdf.

[2] *Id.*

[3] *Forman v. Henkin*, 30 N.Y.3d 659.

the plaintiff stated that she had photographs showing her engaging in an active (pre-accident lifestyle), on her Facebook account.[4] But approximately six months after her accident she deleted her Facebook and "could not recall" whether she had posted any post-injury photographs on Facebook.[5] The defendant sought unlimited authorization to the plaintiff's private Facebook account, arguing that any photographs and written content would be both material and necessary under CPLR §3101(a) going to the materiality of plaintiff's ability to reason, write, and communicate effectively.[6]

When the plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. In support of the motion, defendant specifically cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing that the defendants failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account,

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[4] *Forman*, at 659.

[5] *Id.*

[6] *Id.*

nor allege that any specific material located therein was privileged or should be shielded from disclosure on privacy grounds. At oral argument, the defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there was a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

The Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, and all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters. The trial court also recognized that by accessing private Facebook messaging, the frequency, speed, and volume of the plaintiff's writing could be established.[7] Therefore, the trial court directed the plaintiff to provide the defendant with authorization to obtain records from Facebook, indicating each time a private message was posted after the accident and the number of characters or words in each message.[8] The court did not order disclosure of any of plaintiff's written Facebook posts, whether authored before or after the accident.

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[7] *Forman v. Henkin,* 2014 N.Y. Slip Op. 30679(U) (Sup. Ct., N.Y. County 2014) (Billings, J.)).

[8] *Forman,* 2014 N.Y. Slip Op. 30679(U).

On appeal, the Appellate Division, First Department, held that the defendant failed to establish the threshold showing of a "factual predicate," as they could not establish such information existed that was publicly available.[9] Therefore the plaintiff was only required to provide copies of photographs taken that related to the claim and that the plaintiff intended to use in trial.[10] In a dissent[11] by Justice Saxe and joined by Justice Acosta, the justices criticize the heightened scrutiny given to discovery of social media platforms, stating that it is unnecessary to have a higher and more complex level of review to obtain information, when in traditional personal injury cases "[t]here is not usually a need for the trial court to sift through the contents of the plaintiff's filing cabinets to determine which documents are relevant to the issues raised in the litigation."[12] The dissenting judges hold the position that the traditional discovery process would yield the same result, when disclosing digital information, arguing:

> "[u]pon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted through those documents for responsive relevant documents, and, barring legitimate privilege issues, such responsive relevant documents would be turned over; and if they could not be accessed, an authorization for them would be provided."[13]

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[9] *Id.*

[10] *Forman v. Henkin*, 22 N.Y.S.3d 178, 180-182 (N.Y. App. Div. 1st Dept. 2015).

[11] *Forman*, 22 N.Y.S.3d 183.

[12] *Id.* at 187.

[13] *Id.* at 188.

On appeal, the Court of Appeals, closely aligns with the dissent from the Appellate Division, and establishes clear guidance for the discovery of social media.[14] The Court of Appeals found that the lower court erred in using the heightened threshold to establish discoverable social media information, based on whether or not the information was private or public.[15] The *Forman* court directs our attention back to the traditional discovery methods, requiring relevant information to be discoverable under CPLR Section 3101.[16] The court's threshold is determining not whether the information that is sought is private or public, but only whether or not the information sought is "reasonably calculated to yield information that is "material and necessary" or relevant information.[17] The Court of Appeals noted that before discovery has occurred – and unless the parties are already Facebook "friends" – the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account. The Court noted that under such an approach, disclosure turns on the extent to which some of the information sought is readily accessible – and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (*see* CPLR 3101 (a)).

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[14] *Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018).

[15] *Forman*, 30 N.Y.3d 656.

[16] *Id.* at 661.

[17] *Id.*

However, the right to disclosure is not unlimited.[18] The *Forman* court still recognizes that there are three categories of relevant information that remain immune from discovery under CPLR § 3101. This protected information includes: privileged matter; attorney work product; and trial preparation materials (with the exceptions of a showing of "substantial need and undue hardship").

Subsequent Court Treatment of *Forman*

Given the recentness of the *Forman* Decision, there has been limited treatment of it by the lower Courts. In *Doe v. Bronx Preparatory Charter School*, 160 AD 3d 591 (1st Dept., 2018), the First Department Appellate Division, citing *Forman*, ruled that the defendants' demands for access to social media accounts for five (5) years prior to the incident, and to cell phone records for two (2) years prior to the incident, were over broad and not reasonably tailored to obtain discovery relevant to the issues in the case.

The *Forman* Decision was examined by NY County Supreme Court Judge Kathryn E. Freed in the *Christian v. 846 6th Avenue Property Owner, LLC, et al.,* Trial Order, 2018 WL 2282883 (NY County Sup. Ct. May 18, 2018). The *Christian* case was a personal injury action under the Labor Law, where the defendants moved for access to private portions of the plaintiff's Facebook account. The thirty-two (32) year-old plaintiff claimed in the Bill of Particulars that he sustained injuries to his cervical, thoracic, and lumbar spine, as well as both shoulders, and was incapacitated from his employment from the date of the accident to the present and was partially disabled. The defendants submitted several photographs of the plaintiff recovered from his public Facebook account showing, among other things, the plaintiff standing upright with a hard hat in his hand and tying a strap around a stack of objects, and a photo of him hanging from the edge of a basketball hoop. Judge Freed found that while the defendants did not have to make a predicate showing with respect to public portions of the account, they nevertheless had done so. Judge

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[18] *Id.* at 661-62.

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Freed found that contrary to the plaintiff's opposition, nothing in *Forman* indicates that a party must wait until after a deposition before demanding disclosure of the private portions of an individual's social medial account. Furthermore, since defendants had provided the Court with examples of plaintiff's Facebook posts showing that he uses it to share information about his activities with friends and family, there was already a basis to determine that additional relevant information may be found in the private section.

Justice Freed ordered that the plaintiff was directed to turn over printouts of Facebook posts, as well as the original photographs or videos, for six (6) months prior to the date of the accident that showed him engaged in any work or social activities that he claimed he is now unable to perform, as well as posts from the date of the accident to the present that tend to contradict his claim that he is presently unable to work, and that he is partially disabled, excluding any images showing nudity or romantic encounters.

Likewise, in *Paul v. The Witkoff Group, et al.*, 2018 WL 1697285 (NY County Sup. Ct. April 3, 2018) NY County Supreme Court Judge Manuel J. Mendez cited the *Forman* case, stating, "There is nothing so novel about [social media] materials that precludes application of New York's longstanding disclosure rules," but the party moving to compel production needs to include scope and temporal limitations and carefully drafted demands to seek specific information material that is necessary to the prosecution or defense of the action. In the *Paul* case, the plaintiff was injured when he slipped and fell on a ramp covered with ice and snow, and commenced the action to recover for damages due to his alleged injuries. In plaintiff's Bill of Particulars, he claimed severe depression, anxiety, stress, anxiousness, and suicidal thoughts. The plaintiff allegedly posted suicidal comments on his Facebook page, and thus the Court found that responding to the defendants' social media discovery demands would result in the disclosure of relevant evidence bearing on the plaintiff's claim. However, portions of the demand were found to be overly broad and not sufficiently tailored with scope and temporal limitations, and plaintiff was not ordered to respond to those demands. Further, the defendants showed the necessity for a temporary restraining order and preliminary injunction restraining plaintiff from directly, or

indirectly through other persons, modifying, changing, or deleting any information from his social networking accounts relating to the action.

Implications Following *Forman*

It is clear from the Court of Appeals' decision that discovery of social media should be governed by the same principles and procedures as those governing traditional discovery. However, as with any other discovery request, a demand for private Facebook materials should be narrowly tailored to the facts and issues in the case. It is no longer necessary for a defendant to lay a specific kind of foundation from the public portions of a Facebook page to obtain discovery. Yet this does not mean that the defendant will receive unfettered access. A boilerplate demand for a plaintiff's full social medial account is not likely to survive under *Forman*.

An unintended consequence of the *Forman* decision will be the increased use by plaintiff's counsel of a motion for a protective order to prevent or limit social media discovery. Pursuant to CPLR 3103 (a), the court is authorized:

> "[T]he court may at any time on its own initiative, or on motion of any part or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

CPLR 3103 (a).

Anyone who has ever received an individual's complete historic Facebook page knows just how truly voluminous that information can be. In reconciling a plaintiff's motion for protective order against the defendant's motion to compel, it is anticipated that more courts will begin the

practice of directing the information to be submitted for an *in camera* review. Given the sheer volume of information to be reviewed, it is also anticipated that courts will appoint a Judicial Hearing Officer to wade through that information. This will result in an additional expense to the parties that should be factored into when requests are made to also ensure that they are reasonably and narrowly tailored to the facts of the specific case.

Ethical Obligations of Digital Discovery

According to a New York County Lawyers Association Opinion Ethics Opinion,[19] when advising clients about social media platforms in civil litigation, it is important that they understand that even if the social media site is not currently activated, they may need to disclose that they have or had a social media site, if asked about it.[20]

Additionally, any piece of information of potential relevance removed from the platform should be preserved in order to comply with any obligations to produce information, and any information should be left unaltered.[21] According to NYCLA Ethics Opinion 745, while an attorney may advise a client to remove information from social media platforms they cannot advise the client to destroy the information.[22] In fact, at the moment a party reasonably anticipates litigation, precautions must be taken to preserve potential evidence.[23]

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[19] NYCLA Ethics Opinion 745 (2013).

[20] *See* New York Rules of Professional Conduct R. 3.3(a)(1) "A lawyer shall not: 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."; *See generally Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018).

[21] *See* New York Rules of Professional Conduct R. 3.4(a)(3) "A lawyer shall not: conceal or knowingly fail to disclose that which the lawyer is required to by law to reveal."; R. 3.4(a)(3) "A lawyer shall not: knowingly use perjured testimony or false evidence."

[22] NYCLA Ethics Opinion 745 (2013).

[23] *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 939 N.Y.S.2d 321, 331 (1st Dept. 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.").

Additional Considerations and Points of Emphasis

It is ethically permissible to advise your client on social media privacy settings. An attorney can explain how the various settings permit different types of information to be accessed by third parties including friends. It should be recommended that a client use the strongest privacy settings. It should also be noted that just because an account is deactivated, this does not mean that the information is no longer available. By way of example, in *Forman*, the plaintiff's account was deactivated. However, the information was still present and easily recoverable. Potentially discoverable information can also extend to text messages, instant messages, and email as well as public reviews on social media sites.

Multiple state bar opinions agree that simply reviewing the public-facing social media page of an adverse party does not violate ethics rules, providing that no "friending" takes place. (See, e.g., New York State Bar Association, Committee on Professional Ethics, Opinion No. 843 (2010)). However, sending a friend request to an opposing party represented by counsel or using a third party to send the request is not permissible.

Conclusion

While there is no longer a requirement for a "factual predicate" to support discovery of social media, the best practice would be to craft reasonably tailored discovery demands and then build a case supporting a motion to compel disclosure by eliciting information from a plaintiff during deposition. Part of the reason defendant was ultimately successful in Forman is that it was able to establish specific claims of limitation of injuries in relationship to the accident in question. A blanket demand without more would have been unlikely to yield the same results.

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 1
Kelly Forman,
Respondent,
v.
Mark Henkin,
Appellant.

Michael A. Bono, for appellant.
Kenneth J. Gorman, for respondent.
Defense Association of New York, Inc., amicus curiae.

DIFIORE, Chief Judge:

In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss,

difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on

Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court

did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division.[1] On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words 'material and necessary,' . . . are to be interpreted liberally to require disclosure,

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[1] Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party'" (Hain v Jamison, 28 NY3d 524, 534 [2016], quoting Hecht v City of New York, 60 NY2d 57 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see also Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary" – i.e., relevant – regardless of whether discovery is sought from another party (see CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; see e.g. Matter of Kapon v Koch, 23 NY3d 32 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Systems Intern. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (Spectrum, supra, at 377). The burden of establishing a right to protection under these provisions is with the party asserting it – "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (id.).

In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes.

Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (Kavanaugh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; see CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute,[2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure . . . Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (Andon, supra, 94 NY2d at 747; see Kavanaugh, supra, 92 NY2d at 954).[3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing

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[2] While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (see CPLR 3120[1][i], [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"]), counsel for the responding party – after examining any potentially responsive materials – should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

[3] Further, the Appellate Division has the power to exercise independent discretion – to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion – and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (see e.g. Andon, supra; Kavanaugh, supra; see generally Kapon, supra).

information about what they are doing or thinking" (Romano v Steelcase, Inc., 30 Misc 3d 426 [Sup Ct Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (id.). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder – in fact, the viewer need not even be a fellow Facebook account holder (see Facebook Help: What audiences can I choose from when I share? https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed January 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.). While Facebook – and sites like it – offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in Tapp v New York State Urban Dev. Corp. (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims'"

(id. at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (see e.g. Spearin v Linmar, 129 AD3d 528 [1st Dept 2015]; Nieves v 30 Ellwood Realty LLC, 39 Misc 3d 63 [App Term 2013]; Pereira v City of New York, 40 Misc 3d 1210[A] [Sup Ct Queens County 2013]; Romano, supra, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred – and unless the parties are already Facebook "friends" – the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[4] Under such an approach, disclosure turns

[4] This rule has been appropriately criticized by other courts. As one federal court explained, "[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section . . . Furthermore, this approach shields from discovery the information of Facebook users who do not share any information publicly" (Giacchetto v Patchogue-Medford Union Free School Dist., 293 FRD 112, 114 [ED NY 2013]).

on the extent to which some of the information sought is already accessible – and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (see CPLR 3101[a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (see e.g. Kregg v Maldonado, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; Giacchetto, supra, 293 FRD 112, 115; Kennedy v Contract Pharmacal Corp., 2013 WL 1966219, *2 [ED NY 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information. Even

under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (Kavanaugh, supra, 92 NY2d at 954).

Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate – for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private.[5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (see CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records – including the physician-patient privilege – are waived (see Arons v Jutkowitz, 9 NY3d 393, 409 [2007]; Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial.[6] With respect

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[5] There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' . . . [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery or Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

[6] Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme

to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to

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Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.[7]

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason – beyond the general assertion that defendant did not meet his threshold burden – why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

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[7] At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.

* *

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative. Opinion by Chief Judge DiFiore. Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided February 13, 2018

STATE OF NEW YORK
SUPREME COURT COUNTY OF

Plaintiffs,

-against-

Defendants.

COMBINED DISCOVERY DEMAND

PLEASE TAKE NOTICE, that pursuant to CPLR Article 31 and the specific sections contained within that Article and Section 4545, the answering defendants, , by and through their attorneys, ,request that you produce for inspection and copying and that you serve upon them the following:

1. Pursuant to CPLR Section 306-a and 306-b: ***[TO THE PLAINTIFFS ONLY]***

   (a) The date the summons and complaint were filed.
   (b) The address of the clerk where the summons and complaint were filed.
   (c) Copies of the affidavit(s) of service.
   (d) Name and address of assigned judge.
   (e) Copies of the Letters Testamentary for the estate of H.L.B.

RECORDS AND REPORTS ***[TO THE PLAINTIFFS ONLY]***

2. With respect to medical reports and records, the answering defendants demand:

   (a) Copies of the written reports, medical records and films, including, but not limited to x-rays, CT scans, MRIs and ultrasounds, of any and all physicians and medical care providers who treated or provided medical care to the plaintiffs' decedent, relating to the diagnosis, etiology, treatment and prognosis of the plaintiffs' decedent.

AUTHORIZATIONS ***[TO THE PLAINTIFFS ONLY]***

3. With respect to authorizations, the answering defendants demand:

   (a) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting _____________ to obtain and make copies of treating and attending physicians'

records and reports and the records and reports of other medical care providers (hospitals, etc.) concerning the diagnosis, etiology, treatment and prognosis of the plaintiffs' decedent, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(b) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting ________________ to obtain and make copies of such other records as may be referred to and identified in any physicians' statements, including, *inter alia,* x-rays, and pathology specimens, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(c) Using the authorization annexed hereto, or copies thereof, duly executed and acknowledged written authorizations valid under HIPAA permitting ____________________ to contact and speak with plaintiffs' decedent's treating physicians regarding the medical condition at issue in this litigation, pursuant to the Court of Appeals decision in Arons v. Jutkowitz (9 N.Y.3d 889 (2007), valid until the end of litigation.

Please provide the full names and addresses of the above-named physicians and institutions, and any other identifying information necessary to retrieve these records including, but not limited to, identification numbers, subscriber numbers and hospital/patient numbers.

(d) Duly executed and acknowledged written authorizations permitting _______________ to obtain and make copies of the plaintiffs' decedent's employment records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(e) If applicable, duly executed and acknowledged written authorizations permitting ____________________ to obtain and make copies of the plaintiffs' decedent's education records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(f) If applicable, duly executed and acknowledged written authorizations permitting ______________ to obtain and make copies of the plaintiffs' Social Security Disability records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(g) If applicable, duly executed and acknowledged written authorizations permitting ___________________ to obtain and make copies of the plaintiffs' decedent's Worker's Compensation records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(h) If applicable, duly executed and acknowledged written authorizations permitting ______________ to obtain and make copies of the plaintiffs' decedent's No-Fault records, valid until the end of litigation. **Please provide plaintiffs' decedent's date of birth and social security number**.

(i) At or before the time the Note of Issue is filed, duly executed and acknowledged HIPAA compliance authorizations for all providers previously demanded and identified, permitting the undersigned to serve subpoenas for the original or certified copies of records. Said authorizations are to contain full and proper names and addresses, together with any necessary identifying information, such as Social Security Number, and are to be HIPAA compliant to obtain the requisite records, films and billing records.

SPECIAL DAMAGES ***[TO PLAINTIFFS ONLY]***

4. The answering defendants demand that the plaintiffs provide the undersigned with a verified statement with respect to the following questions:

(a) If the plaintiffs claim monetary damage by reason of physicians' expenses, state the name and address of each physician who rendered medical care and treatment to plaintiffs' decedent, the amount of each such physician's expense, and the amount received or the amount which the plaintiffs are entitled to receive under any collateral source, including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan, for each such physician's expense. State the name and address of the collateral source applicable for each of the physicians listed in response to the above.

(b) If the plaintiffs claim monetary damage by reason of hospital expenses, state the name and address of each hospital in which care and treatment was rendered to the plaintiffs' decedent, the amount of each such hospital expense and the amount received or the amount which the plaintiffs are entitled to receive under any collateral source, including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan for each such hospital expense. State the name and address of the collateral source applicable for each of the hospitals listed in response to the above.

(c) If the plaintiffs claim monetary damages by reason of any other medical costs, including nursing service, home care, medication or medical apparatus, state the amount of each of these expenses, the name and address of each payee, the amount received or the amount which the plaintiffs are entitled to receive under any collateral source including Blue Cross/Blue Shield or major medical insurance coverage, or other disability insurance plan, for each of these expenses.

State the name and address of the collateral source applicable for each of the payees listed in response to the above.

(d) If the plaintiffs claim monetary damages in the nature of lost earnings, state the alleged amount of the lost earnings; the alleged gross wage immediately prior to the accident; the name and address of the employer; the amount of remuneration received for wages and the source of said remuneration after the accident, including Workers' Compensation, union benefits, employees' benefit plans, or other collateral source.

(e) State the monetary amount of any other alleged special damage, and the amounts received from any collateral source, including insurance, Social Security (except those benefits provided under Title XVIII of the Social Security Act), Workers' Compensation, or employees' benefits programs, except such collateral sources entitled by law to liens against any recovery of the plaintiffs.

5. Pursuant to Section 3017(c) of the CPLR, the answering defendants hereby request that plaintiffs set forth the total damages to which the plaintiffs deem themselves entitled.

NOTE OF ISSUE NOTIFICATION ***[TO THE PLAINTIFFS ONLY]***

6. The answering defendants demand that at least forty-five (45) days prior to the date on which you plan to file the note of issue, that you advise the answering defendants of the anticipated note of issue filing date so that the answering defendants can be in conformity with any expert disclosure rules under the CPLR or under applicable expert disclosure rules of the Third Department, pertinent judicial districts or rules of individual trial judges pertaining thereto.

WITNESSES ***[TO ALL PARTIES]***

7. With respect to witnesses, the answering defendants demand the names and addresses of the following:

(a) Witnesses claimed or known by the plaintiffs or answering defendants to have either witnessed the occurrence or to have first hand knowledge of same;
(b) Witnesses claimed or known by the plaintiffs and/or answering defendants to have first hand knowledge of facts and circumstances surrounding the occurrence;
(c) Witnesses present at the scene prior to or subsequent to the occurrence;
(d) Witnesses with regard to notice of any fact where notice is an element of the plaintiffs' claims, whether obtained by any of the parties and/or their attorneys and/or representatives;
(e) Witnesses to any alleged statements of any defendants or any representative of a defendants;

(f) Witnesses claimed or known to have witnessed or to have first hand knowledge of the economic damage, pain and suffering, or any other losses alleged by the plaintiffs or plaintiffs' decedent.

If no such persons are known to the plaintiffs, answering defendants and/or their attorneys and representatives, so state in reply to this demand;

If plaintiffs, answering defendants and/or their attorneys and/or representatives obtain the names and addresses of any persons described above subsequent to the service of this notice, such information is to be furnished to the undersigned whenever so obtained.

At the time of trial, the answering defendants will object to the testimony of any witnesses not identified pursuant to this notice.

Please note that this shall be deemed to be a continuing demand up to, and including, the time of trial of this matter.

STATEMENTS ***[TO ALL PARTIES]***

8. Copies of any statement, oral, written, transcribed or otherwise recorded, signed or unsigned, or any summary of any information provided by the parties, their employees, representatives, and/or agents, represented by the undersigned attorneys concerning the issues involved in this action. If it will be claimed that the answering defendant(s) or anyone acting on behalf of the defendant(s), made any admissions or statements against interest which are relevant to the issues in this litigation, please provide:

   (a) The names and addresses of any person(s) making such admission or statements;

   (b) The names and address of any person(s) who were present when such admissions or statements were made;

   (c) The dates upon which said admissions or statements were made;

   (d) The location or forum where any such admission or statement was made, kept or recorded, including whether the statement or admission was made on social media or any other type of electronic forum; and

   (e) If in writing, a copy of such statement. If such statement was oral, please set forth exact transcriptions of the statements or admissions. If an exact transcription of the statement is not possible, please set forth a detailed summary of the substance of each, including, but not limited to, an approximation of the language used in each statement and/or admission and the above demanded information.

9. Any printed material, written material, diagrams, instructions, prescriptions, or other information obtained by the plaintiffs or the plaintiffs' agent from the defendant(s) or from the office(s) of the defendant(s).

10. Any photos, films, or video/audio, or other recordings of any statements obtained by the plaintiffs or the plaintiffs' agent from the defendant(s) or from the office(s) of the defendant(s).

11. Printed copies of any statements made by the plaintiffs or plaintiffs' decedent in any social media or electronic forum, including, but not limited to, Facebook, Twitter, blogs, texts, or e-mails, relevant to the alleged incidents and injuries that are the subject of this action.

PLEASE TAKE NOTICE, that the plaintiffs are directed to preserve and to refrain from deleting or destroying, or otherwise causing the loss of, any statements set forth above for the duration of this litigation.

PLEASE TAKE FURTHER NOTICE, that failure to produce said statement will result in the plaintiffs being precluded from its use at the trial of this matter. In the event it will be contended that the defendants or an agent, servant or employee of the defendants, made an oral statement please set forth the date, time and place of the statement, to whom the statement was made and fully disclose the substance of the statement

WRITTEN MATERIALS ***[TO PLAINTIFFS ONLY]***

12. Copies of diaries, notes, journals, calendars, computer disks, or other written materials prepared, authored, maintained or recorded by plaintiffs, plaintiffs' decedent or plaintiffs' agent related to the subject matter of this litigation.

INSURANCE COVERAGE ***[TO ALL PARTIES]***

13. The existence and contents of any insurance or other agreement, under which any person, insurance company, or other entity, may be liable to satisfy part or all of any judgment which may be entered in this action against the answering defendants; this information is to include the name of the insurer; the policy number; the coverage limits of said policy or agreement and the amount of said coverage limits presently available to satisfy all or part of any judgment which may be entered against the answering defendants in this action.

PHOTOGRAPHS ***[TO ALL PARTIES]***

14. With respect to photograph(s), audio(s) and video(s), the answering defendants demand:

(a) Photographs depicting the scene of the incident/accident which is the subject of the plaintiffs' complaint.
(b) Photographs depicting the bodily injuries claimed in this matter.
(c) Photographs depicting any of the instrumentalities involved in this matter.
(d) All videotapes and other photographic film which concern the injuries, damages or instrumentalities involved in this matter.
(e) Photographs, video or other film intended to be introduced into evidence at time of trial.
(f) A complete duplicate recording of any and all audio tapes or other recordings of any conversations that the plaintiffs, plaintiffs' decedent or any representatives and/or family member of the plaintiffs and/or plaintiffs' decedent had with any defendants or any representative of a defendant.
(g) A complete duplicate recording of any and all audio tapes or other recordings of any conversations that the plaintiffs, plaintiffs' decedent or any representatives and/or family member of the plaintiffs and/or plaintiffs' decedent had with any defendants or any representative of a defendant intended to be introduced into evidence at time of trial.

The undersigned would prefer color copies of the photographs, rather than photocopies.

The undersigned is willing to reimburse the plaintiff(s) for the reasonable costs incurred in the production of these color copies.

DEMONSTRATIVE EXHIBITS AND EVIDENCE ***[TO ALL PARTIES]***

15. With respect to demonstrative exhibits and evidence, we herein demand that all parties provide, as soon as practical, but not less than 30 days before trial, copies of and/or access for discovery and inspection of all demonstrative exhibits and evidence which the parties intend to use at trial including, but not limited to:

(a) Unenhanced, un-highlighted or altered enlargements of medical records;
(b) Enhanced, altered, colored, interactive, animated, illustrated, copies of medical records and/or imaging studies of any kind;
(c) Medical illustrations, whether still, interactive, animated, enhanced, and/or whether each such illustration is purported to show "normal" anatomy or is particular to the facts of this case;
(d) Injury summaries;
(e) Color diagnostics;
(f) Illustrations, animations, graphics, pictures, and/or videos, purporting to show any mechanism of injury;
(g) Forensic animations, graphics, illustrations or pictures/videos, custom graphics, media, static illustrations and/or other demonstrative evidence the party intends to use at trial;
(h) Colorized, enhanced, and/or illustrative imaging studies including, but not limited

to: x-rays, CT scans, MRI, ultrasound, echocardiography, PET scans

(i) Any/all images, videos, animation, presentations, pictures and/or illustrations purporting to portray a reconstruction of the accident and/or incident, which forms the basis of plaintiffs' claims or which plaintiffs intend to show to the trier of fact;

(j) Any Power-Point or other presentation or summary the party intends to use at trial;

(k) Provide the identity of any artist, engineer, company, firm, visual/media consultant, physician, strategist, animator, graphic artist, medical illustrator, designer creating and/or assisting in the creation of any/all demonstrative exhibits the party intends to use at trial, including the names and contact information for each person/entity.

ACCIDENT OR INCIDENT REPORTS OR RECONSTRUCTION *[TO ALL PARTIES]*

16. Copies of any accident or incident reports relating to the accident or incident in question.

17. Copies of any computer generated accident or incident reconstruction relating to the accident or incident in question.

SOCIAL NETWORKING STATEMENTS/PHOTOGRAPHS *[TO PLAINTIFFS ONLY]*

18. Printed copies of any statements journals and/or photographs posted or made by the plaintiffs or plaintiffs' decedent in any social, medical, fundraising or electronic forum, including, but not limited to: Facebook, My Space, Twitter, Instagram, CaringBridge.org, blogs, texts or emails relative to the alleged incident and/or injuries that are the subject of this action.

19. Defendants further demand that plaintiffs preserve any such statements and/or photographs and that same not be altered or deleted during the pendency of this litigation.

PLEASE TAKE FURTHER NOTICE that copies of the items demanded above may be sent to the offices of the attorneys listed below in lieu of physical production of the originals within thirty (30) days of the date of this notice.

PLEASE TAKE FURTHER NOTICE that copies of the items demanded above may be sent to the offices of the attorneys listed below in lieu of physical production of the originals within thirty (30) days of the date of this notice.

PLEASE TAKE FURTHER NOTICE that this shall be deemed a continuing demand up to, and including, the time of trial of this matter. The answering defendants will object to the attempt to introduce into evidence any of the information requested above which has not been furnished to the answering defendants in response to this demand and the answering defendants will object to the testimony of any witnesses not identified pursuant to this notice.

PLEASE TAKE FURTHER NOTICE that in the event any party fails or refuses to comply with this demand, the answering defendants shall seek to preclude any testimony with regard to any of the demands to which a party has not complied.

THE ART OF STORYTELLING: DELIVERING THE THEME TO THE JURY

Submitted By:

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From the SelectedWorks of Jonathan Van Patten

2012

Storytelling for Lawyers

Jonathan Van Patten, *University of South Dakota School of Law*

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STORYTELLING FOR LAWYERS

JONATHAN K. VAN PATTEN†

INTRODUCTION

There are great souls out there who have extraordinary powers of persuasion. If we have been fortunate, we have encountered several of them over the course of our lives. In ways unique to each, they combine authority and wisdom. They appear in different roles—parents, relatives, teachers, pastors, and even political leaders. Their wisdom has shaped us fundamentally, in ways that are discernible long after they are no longer part of our lives. I did not always understand what my favorite law school professor was saying, but his words had power that pulled me along as I was trying to understand. In the words of Jack Nicholson, he made "me want to be a better man."[1] I do not know how to teach this. It is a gift and we are very fortunate when we are exposed to it, and have the maturity to recognize it.

For the great majority of us who do not have this gift, persuasion is a harder task. We encounter skepticism and resistance. If we are to be successful in persuading someone, we must first recognize that it is his or her decision, not ours. In contrast with the great teacher, the process cannot be from the top down. It must work from the ground up. If lawyers have a general problem in the art of persuasion, it is that they preach too much, but lack moral authority. They do not recognize that the movement toward a decision comes primarily from within the decision-maker. This does not mean we cannot be great persuaders; we simply have to do it by other means.

One of the principal techniques of persuasion comes through understanding the art of storytelling. Storytelling is primal.[2] It can show the way to a common ground that ties in to the basic values of the listener. We all grew up with stories. There is a deep psychological need here. I sense, but cannot fully describe, the importance of stories in my childhood. I am able to see more clearly, however, the importance of stories in the development of my own children. My oldest, now a pathologist in Minneapolis, would absorb words and

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1. *Memorable Quotes for As Good As It Gets (1997)*, IMDb.com, http://www.imdb.com/title/tt0119822/quotes (last visited Apr. 18, 2012).

2. Gerry Spence described storytelling in this vivid passage:

> Of course it is all storytelling – nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening . . . the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silence.

Gerry Spence, 72 A.B.A. J. 63 (April 1986).

storylines as if they were the water of life itself. I remember her usual response before the age of two to a story reading was: "More . . . more." *Frog and Toad*,[3] *Harold and the Purple Crayon*,[4] *Where the Wild Things Are*,[5] *The Velveteen Rabbit*,[6] along with the *Winnie-the-Pooh* series,[7] were the main staples of bedtime reading for all of my daughters. I read these stories hundreds of times. The repetition might be viewed as indoctrination, but it is much more complex than that because, even at an early stage, my kids were not a blank slate. There was already some psychological need there that the stories were addressing.[8] It must be deeply embedded in the genetic code. The stories become part of the moral infrastructure that is being worked out as part of the child's development. As noted by Bruno Bettelheim: "The child intuitively comprehends that although these stories are unreal, they are not untrue."[9] The almost insatiable desire for stories is also reflected in the active fantasy life that kids have with their stuffed animals and dolls, as well as action toys. We do not outgrow this.

The search for meaning is mediated through stories.[10] Stories help to make sense of life. Some stories confirm existing beliefs and prejudices, while others stretch the worldview.[11] They are part of our search for meaning. Movies, for example, are about entertainment, but the better ones are also about meaning. Meaning is not necessarily limited to what is intended by the storyteller. The story may take on additional meaning from its audience. In discussing the popularity of *The Shawshank Redemption*,[12] director Frank Darabont made the following observation:

> The film seems to be something of a Rorschach for people. They project their own lives, their own difficulties, their own obstacles, and their own triumphs into it, whether that's a disastrous marriage or a serious, debilitating illness that somebody is trying to overcome. They view the bars of *Shawshank* as a metaphor for their own difficulties and then consequently their own hopes and triumphs and people really do draw

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3. ARNOLD LOBEL, ADVENTURES OF FROG AND TOAD (Sandy Creek 2010) (1970).

4. CROCKETT JOHNSON, HAROLD AND THE PURPLE CRAYON (Harper Collins 1983) (1955).

5. MAURICE SENDAK, WHERE THE WILD THINGS ARE (Scholastic 1974) (1963).

6. MARGERY WILLIAMS & WILLIAM NICHOLSON, THE VELVETEEN RABBIT (Doubleday & Co., Inc. 1960) (1922).

7. A.A. MILNE AND ERNEST H. SHEPARD, THE COMPLETE TALES AND POEMS OF WINNIE-THE-POOH (2001).

8. The exploration of these needs and how stories, especially fairy tales, address the unconscious needs is the subject of Bruno Bettelheim's *The Uses of Enchantment*. BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1975).

9. *Id.* at 73.

10. For example, Jesus often taught through stories, known as parables. *See, e.g., Luke* 10:25-37 (answering the question "who is my neighbor?" with the story about the Good Samaritan). Jesus also taught from authority. *See, e.g., John* 14:6 (Jesus stating, "I am the way the truth and the life.").

11. I do not like bullies, nor corruption by public officials. Thus, the film PALE RIDER (1985) appeals to me. As a teenager, my evolving views on race relations, and also lawyers, were shaped by the films WEST SIDE STORY (1961) and TO KILL A MOCKINGBIRD (1962).

12. THE SHAWSHANK REDEMPTION (1994).

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strength from the movie for that reason.[13]

People project their own values on a good story. They identify with characters and their predicament and begin, in the words of James McElhaney, to pull for one side or the other.[14] This is critical for persuasion built from the bottom up. People should not be told what to think. They will reach the conclusion on their own and will hold on to it more firmly if they can relate it to their own life story.

There is already considerable literature on the use of storytelling by lawyers.[15] The purpose of this Article is to articulate specific propositions regarding the techniques of storytelling. While most of what follows is not necessarily new, it is useful to collect these propositions and set them out in a systematic and accessible format.

TWENTY-FIVE PROPOSITIONS ABOUT STORYTELLING

1. Story Is Not a Collection of Facts. The Story Must Have At Least One Theme To Give It Meaning.

Themes are essential to the story. They make sense of the facts. A story without a theme is not a story. It is chatter. What is a theme? It is a short statement that articulates a principle underlying a story. A principle is not a fact, it is a rule. It helps to evaluate the facts. A principle points to a resolution or conclusion. It provides direction for the story. For example, "promises should be kept" may be the underlying principle for a breach of contract case. It identifies the relevant facts, brings them together, and shapes how the story is

13. *Charlie Rose: A discussion with the cast* of "The Shawshank Redemption," (PBS television broadcast Sept. 6, 2004), available at http://www.charlierose.com/view/interview/1285.

14. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 178-79 (4th ed. 2006).

15. *See, e.g.*, JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES & LECTURES (2006); ERIC OLIVER, PERSUASIVE COMMUNICATION: TWENTY-FIVE YEARS OF TEACHING LAWYERS (2009); ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING (2005). *See also* Howard L. Nations, *Powerful Persuasion*, Nations Law Firm, http://www.howardnations.com/persuasivejury arguments /persuasion.pdf (last visited Apr. 18, 2012); Howard L. Nations, *Themes*, Nations Law Firm, http://www.howardnations.com/themes/hlnthemes.pdf; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53 (2008); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn From the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 163 (2010); Dominic J. Gianna & Lisa A. Marcy, *Winning in the Beginning by Winning the Beginning*, 39 BRIEF 40 (2010); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are As Important As IRAC*, 25 T.M. COOLEY L. REV. 267 (2008); Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Heroes Journey*, 29 SEATTLE U. L. REV. 767 (2006); David J. Dempsey, *Master the Magic of Storytelling*, 29 VT. B. J. 32 (Fall 2003); Tom Galbraith, *Storytelling: The Anecdotal Antidote*, 28 LITIG., no. 3, 2002 at 17; Brian J. Foley and Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459 (2001); Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89 (2001); Benjamin Reid, *The Trial Lawyer as Story Teller: Reviving an Ancient Art*, 24 LITIG., no. 3, 1998 at 8.

told by giving it a cohesive moral structure. No one likes a bully. In the eyes of the law, all are equal. Fairness requires notice and the opportunity to be heard. One should not complain about a problem that is the result of his or her own choice. These statements are propositions that drive the argument. They also can drive the story.

A theme has organizing power.[16] It helps the storyteller to decide what to include and what not to include. It supplies the measure by which to sort the facts. It provides a focus through which to highlight the important facts and a filter through which to exclude or diminish lesser or countervailing facts. The theme reflects a moral infrastructure by which to judge the facts.

If the theme resonates with the listeners, it can become so powerful as to override any opposing narrative. Embedding a theme in a story becomes a way to tie into people's own narrative stories that drive their decision-making processes.[17] The theme will shape the story all the way down to the details, especially the word choices. Word choices should reflect and reinforce the theme.[18] The theme will also supply continuity to the story by connecting the dots and even allowing the listener to anticipate how the dots will be connected, thus making the connection harder to dislodge in the listener. A good story allows the listener to get to the conclusion just slightly ahead of the teller.

A story may have more than one theme. The themes may be complementary or in tension. In such case, one of the chief tasks of the story will be to work through the themes to arrive at a resolution, at least in part, if not completely. Although posing some organizational issues, different themes will actually work to keep the story manageable for the listener. Themes are a sorting device. They help to collect and organize disparate parts of the story. They highlight and they bring focus. But, most of all, they may touch deeply embedded emotional beliefs or themes already held by the listener. They are essential in making a connection with the one who is to be the decision-maker.

For the law student or the lawyer, it is not enough to look at a case and begin to recite the facts. You have to read the whole thing, so that you begin to figure out what is important to the story. Most times, it takes several readings. One of the most effective ways to break down a case is to work backwards from the required legal elements and highlight them in the facts. The facts do not necessarily have significance on their own. They are like the guitar string to the sounding board. By themselves, they do not resonate; they produce a sound like a dull thud. But, plucked next to a sounding board, the vibrations produce a beautiful tone. Facts without law, nothing. Facts next to the law, beautiful

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16. *See* Jonathan K. Van Patten, *Themes and Persuasion*, 56 S.D. L. REV. 256 (2011).

17. For example, one of the jurors who was interviewed immediately after the O.J. Simpson verdict in the Nicole Brown Simpson and Ronald Goldman murder trial stated, after sitting through several months of testimony and offers of tangible evidence, that she did not hear *any* evidence suggesting that Simpson committed the murders. This suggests that her own narrative made her identify with the defense's preposterous argument that Simpson was framed by the police. It allowed her to process through such inconvenient facts such as Goldman's blood found inside Simpson's vehicle.

18. MCELHANEY, *supra* note 14, at 629-36.

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music. In the same way, the underlying themes will make the facts resonate. Stories are about meaning, not just information or entertainment.

How does one find an appropriate theme? You should probably start from the facts as you know them. Try putting them together in chronological order and see if anything on the order of principle emerges. Work through them with different starting points and variable sequences. See what emerges as a simple explanation of why you should win based on the facts as you know them.[19] If working from the ground up doesn't produce anything that seems right, you might then go to external sources. A book of quotes is a good place to start. The best one, by far, is Thomas Vesper's collection of quotes.[20] This may work, if you read widely and choose carefully. It may be a little artificial in that you may then try to impose meaning on the facts that doesn't quite ring true. In other words, don't distort the facts to fit the theme. Don't let the theme get ahead of the evidence. Another way to find a theme is to find the type of argument that fits your intuition about your strongest point. By type of argument, I mean the arguments classified by classical rhetoric.[21] See if you can recognize the structure of the argument that you are trying to make and then, possibly, how a principle, or at least a metaphor, emerges from that. For example, the argument from comparison focuses on similarities and differences.[22] "A wound, though cured, yet leaves behind a scar."[23] Here, a metaphor is used to compare the lasting effect of a common wound to what the plaintiff has suffered in your case. The argument from relationship focuses on connections (or non-connections) between events.[24] "If the glove doesn't fit, you must acquit."[25] The facts make point to a principle based on a lack of connection between a key piece of evidence and the accused.

The search for the right theme should never stop. It may not emerge until relatively late in the game. Although the story must have a theme, the lawyer must continually test that theme against the facts as they evolve through fact investigation and discovery. The theme must be tested with more neutral observers like colleagues, friends, and, if needed, focus groups. The right theme is essential to the story and that makes it essential to the case. If you settle on a decent theme too early, you may be inclined to resist a better theme even though

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19. One of my favorite quotes in this regard is from the Continental Op, one of Dashiell Hammett's fictional detectives: "Plans are all right sometimes . . . and sometimes just stirring things up is all right – if you're tough enough to survive, and keep your eyes open so you'll see what you want when it comes to the top." DASHIELL HAMMETT, *Red Harvest*, *in* THE NOVELS OF DASHIELL HAMMETT 57 (Alfred A. Knopf, Inc. 1965) (1929).

20. THOMAS J. VESPER, UNCLE ANTHONY'S UNABRIDGED ANALOGIES: QUOTES, PROVERBS, BLESSINGS & TOASTS FOR LAWYERS, LECTURERS & LAYPEOPLE (West 2d ed. 2010). *See also* A SCHOLAR'S PURSUIT: THE JOHN HAGEMANN QUOTATION COLLECTION (Hagemann Center Press 2010).

21. Van Patten, *supra* note 16, at 264-79.

22. *Id.* at 267-72.

23. VESPER, *supra* note 20, at 796 (quoting John Oldham).

24. Van Patten, *supra* note 16, at 273-74.

25. JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON 420 (1996) (quoting Johnnie Cochrane).

the evolving case begins to suggest a different emphasis or direction. Always be open to where the argument may lead.

2. The Theme Need Not Be Stated As Such. In Fact, It Will Be Much More Effective If It Is Implicit in the Story.

Although the theme will be the driving force underlying the story, its presence on the surface must be subtle, or else it feels like preaching. Preaching has its place, but in telling a story for persuasion, it will be counter-productive, because it gets ahead of the evidence and does not allow the listener the freedom to follow the story to its end. Generating sales resistance is not the way of persuasion. After finding the right theme, there must be discipline and maturity to counter the temptation to shout it to the hills. *Sotto voce*,[26] as my former voice instructor would say. A light touch with the theme within the story will be enough because of the strength of the theme underneath driving the narrative.[27]

Let us consider the observation of a professional writer who advises would-be novelists and scriptwriters:

> Theme is best expressed through the structure of the story, through what I call the moral argument. This is where you, the author, make a case for how to live, not through philosophical argument, but through the actions of characters . . . . Probably the most important step in that argument is the final moral choice you give to the hero.[28]

Even though the lawyer does not get to write the story onto a blank canvas, it is useful to think of telling the story of the case with this frame of reference. The story may very well come in as a set of facts. In order to make sense of them, you must begin, right away, to look for the underlying moral argument or what I prefer to call the moral infrastructure.

The moral infrastructure consists of the ground rules, both legal and moral, in which the story plays out. The moral infrastructure may often be assumed, especially when the story is told to those who share common beliefs. But it is not necessarily a given. The storyteller should consciously locate the moral infrastructure in which the story takes place. At the most superficial level, it consists of figuring out the law of the jurisdiction in which the story takes place. It is not limited to that, however. This sense of place is more than statutes, regulations, and cases. It includes some sense of right and wrong, community customs and mores, and some grounding in reality. It is not a made up world, but instead, a real world inhabited by listeners who operate on a daily basis

26. "[U]nder the breath: in an undertone . . . very softly." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

27. I am speaking here mainly of storytelling as an introduction to the case in the opening statement. Storytelling in the context of closing argument is different and will be addressed more fully below. In closing argument, the jury has seen the evidence and thus storytelling can be much more direct, often in the form of metaphors, which should not be holding back on subtlety.

28. JOHN TRUBY, THE ANATOMY OF STORY: 22 STEPS TO BECOMING A MASTER STORYTELLER 35 (Faber & Faber 2007).

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within the moral infrastructure. Identifying the moral infrastructure is the key to persuading the listener.

The dynamic of telling a story within a fundamentally different moral structure may be seen in what is called "science fiction" or "fantasy," as in the works of Frank Herbert, author of Dune,[29] or the works of J.K. Rowling.[30] Part of the delight is in the experience of a different moral structure that shapes the characters and events. Sometimes, the story is told by one who is at odds with the underlying moral structure. It is not an easy task to sing a song in a strange land[31] but this is the basis of many detective novels, where the protagonist strives to find order in a world of chaos and justice in a world of corruption and evil.[32]

The moral infrastructure is often expressed in the theme itself. "No one likes a bully" implies that might does not make right. There is a sense of right and wrong, to which the bully's intimidation and force are an anathema. When the bully violates our sense of the moral order, we begin to root for ways in which the bully will be brought down. The story usually starts out with the apparent success of the bully (*e.g.*, *The Princess Bride*[33] or *The Lord of the Rings*[34]) who is eventually brought down by a seemingly weaker, flawed, but essentially good protagonist. These stories make little sense without a moral infrastructure to give the story meaning.

Fairness is another basic theme that reflects an underlying moral infrastructure. Again, it is not a world in which might makes right.[35] Fairness is a principle independent of raw power, which acts as a critique and, ultimately, as a judgment on those who act unfairly. It is not only a basic principle understood by most kids on the playground, it is also an essential principle of our Bill of

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29. FRANK HERBERT, DUNE (1965).

30. *See, e.g.*, J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1999).

31. Psalm 137: 1-4

By the rivers of Babylon
there we sat down and there we wept
when we remembered Zion.
On the poplars there
we hung up our harps.
For there our captors asked us
for songs;
and our tormentors asked for mirth, saying,
"Sing us one of the songs of Zion!"
How could we sing the Lord's song
in a foreign land?

Id. See also ROBERT A. HEINLEIN, STRANGER IN A STRANGE LAND (1961).

32. *See, e.g.*, DENNIS LEHANE, MYSTIC RIVER (2001); MICHAEL CONNELLY, A DARKNESS MORE THAN NIGHT (2001).

33. THE PRINCESS BRIDE (1987).

34. THE LORD OF THE RINGS (Movie Trilogy): THE FELLOWSHIP OF THE RING (2001); THE TWO TOWERS (2002); and THE RETURN OF THE KING (2003).

35. PLATO, GORGIAS (E.R. Dodds trans., 1959).

Rights.[36] As such, it is a prime candidate for a theme because of its potential to resonate with so many listeners.

The search for a theme that will resonate with the listener's own values must be tied to the facts so as to support the storyteller's credibility. Perhaps too often, the storyteller will succumb to the temptation of stretching the facts to fit the theme or stretching the theme to fit the facts.[37] It must be a natural, not a contrived, fit. In addition, the fit can come undone as the case evolves during fact investigation and discovery.

The theme that emerges from the story will appear as part of what could be called the subtext. This is the text that lies beneath the story, conveying a more compact version of the facts and containing the theme or themes. It is a synthesis of the facts and their meaning. The subtext is used to clarify the essential facts and to identify how the theme will give the facts the intended meaning.

Let me start with something simple. One of the Frog and Toad stories is about the planting of a garden in the spring.[38] Toad, the more serious of the two friends, sets out to plant a garden. He is very excited about it and tells Frog his plans. He is going to do the very best he can to grow a wonderful garden. Frog, the wiser of the two friends, knowing how the exuberance of Toad often out-paces his performance, listens politely. So, Toad prepares the soil and plants the seeds with great care. He then watches over his garden. He watches and waits. At some point, he begins to sing to his seeds: "Grow seeds grow." And he waits. Nothing appears to be happening. Frog visits Toad to check on the progress and Toad assures him that he is doing everything he can to grow a successful garden. After several days of watching and encouraging the seeds to grow, and without any visible success, Toad falls asleep at his post. Frog comes along and wakes him up and they discover together that, while Toad had been sleeping, the seeds had sprouted and the visible signs of a garden were finally on the way.[39]

The subtext of this story would go something like this. Toad starts a project with enthusiasm. He wants to do the best job possible, and he does. He believes that he can further help out by being with the seeds and singing to them, believing, through the fallacy of anthropomorphism,[40] that they will respond to

36. U.S. CONST. amend. V.

37. This is a classic temptation for many politicians, and they acquire a bad reputation as a result.

38. As I write this account, I will disclose that I am doing it from memory. I will be right as to most of it, which will demonstrate the power of a simple story for children that I last read for my youngest daughter, over twenty years ago. To the extent that I have any of the details wrong, it will demonstrate how time can erode the details from memory, but not the essence of the story.

39. ARNOLD LOBEL, ADVENTURES OF FROG AND TOAD: FROG AND TOAD TOGETHER 18-29 (Sandy Creek 2010).

40. "[a]n interpretation of what is not human or personal in terms of human or personal characteristics." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). The fallacy has consequences when they are acted upon as if true. Thus, treating snakes as if they harbor some kind of reciprocal affection can be a grave mistake (pun intended). Think also of the volleyball "Wilson" named by Tom Hanks in CAST AWAY (2000).

his care.[41] The seeds do not. They have their own time and way. Toad's efforts and his will do not affect the course of nature. After he falls asleep (but not because of this), the sprouts emerge. The theme of the story is that our will, no matter how strong, cannot change the pace of nature.

With kids, it makes no sense to put the themes on the surface. A theme like I have just described would be a distraction from the story. But the power of the story is almost nothing without the underlying theme. As the story unfolds, the child will see before Toad does the futility of trying to encourage seeds to grow. Far better was Toad's preparation and care to create the conditions for growth. Good stuff. I am appreciative probably even more today of what that story was teaching than when I read it so many times to my daughters, so very long ago.

If we move to a more sophisticated text, it is important to look for the subtext. It will keep your focus on the track of the argument. Again, think of outlining the text in the margin. Let us consider the following remarkable letter written by a former slave to his former master.

> Dayton, Ohio,
> August 7, 1865
>
> To My Old Master, Colonel P.H. Anderson, Big Spring, Tennessee
>
> Sir: I got your letter, and was glad to find that you had not forgotten Jourdon, and that you wanted me to come back and live with you again, promising to do better for me than anybody else can. I have often felt uneasy about you. I thought the Yankees would have hung you long before this, for harboring Rebs they found at your house. I suppose they never heard about your going to Colonel Martin's to kill the Union soldier that was left by his company in their stable. Although you shot at me twice before I left you, I did not want to hear of your being hurt, and am glad you are still living. It would do me good to go back to the dear old home again, and see Miss Mary and Miss Martha and Allen, Esther, Green, and Lee. Give my love to them all, and tell them I hope we will meet in the better world, if not in this. I would have gone back to see you all when I was working in the Nashville Hospital, but one of the neighbors told me that Henry intended to shoot me if he ever got a chance.
>
> I want to know particularly what the good chance is you propose to give me. I am doing tolerably well here. I get twenty-five dollars a month, with victuals and clothing; have a comfortable home for Mandy,—the folks call her Mrs. Anderson,—and the children—Milly, Jane, and Grundy—go to school and are learning well. The teacher says Grundy has a head for a preacher. They go to Sunday school, and Mandy and me attend church regularly. We are kindly treated. Sometimes we overhear others saying, "Them colored people were slaves" down in Tennessee. The children feel hurt when they hear such remarks; but I tell them it was no disgrace in Tennessee to belong to Colonel Anderson. Many darkeys would have been proud, as I used to be, to call you master. Now if you

41. Actually, the whole Frog and Toad series is an extended and positive use of anthropomorphism in that it allows the telling of a story about human beings through the enchanted world of talking frogs and toads. Enchanted characters tell us that the story is not real, but it is nonetheless true.

will write and say what wages you will give me, I will be better able to decide whether it would be to my advantage to move back again.

As to my freedom, which you say I can have, there is nothing to be gained on that score, as I got my free papers in 1864 from the Provost-Marshal-General of the Department of Nashville. Mandy says she would be afraid to go back without some proof that you were disposed to treat us justly and kindly; and *we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forget and forgive old scores, and rely on your justice and friendship in the future.* I served you faithfully for thirty-two years, and Mandy twenty years. At twenty-five dollars a month for me, and two dollars a week for Mandy, our earnings would amount to eleven thousand six hundred and eighty dollars. Add to this the interest for the time our wages have been kept back, and deduct what you paid for our clothing, and three doctor's visits to me, and pulling a tooth for Mandy, and the balance will show what we are in justice entitled to. Please send the money by Adams's Express, in care of V. Winters, Esq., Dayton, Ohio. *If you fail to pay us for faithful labors in the past, we can have little faith in your promises in the future. We trust the good Maker has opened your eyes to the wrongs which you and your fathers have done to me and my fathers, in making us toil for you for generations without recompense. Here I draw my wages every Saturday night; but in Tennessee there was never any pay-day for the negroes any more than for the horses and cows. Surely there will be a day of reckoning for those who defraud the laborer of his hire.*

In answering this letter, please state if there would be any safety for my Milly and Jane, who are now grown up, and both good-looking girls. You know how it was with poor Matilda and Catherine. I would rather stay here and starve—and die, if it come to that—than have my girls brought to shame by the violence and wickedness of their young masters. You will also please state if there has been any schools opened for the colored children in your neighborhood. The great desire of my life now is to give my children an education, and have them form virtuous habits.

Say howdy to George Carter, and thank him for taking the pistol from you when you were shooting at me.

From your old servant,

Jourdon Anderson.[42]

The subtext would go something like this: I am glad to hear from you, despite all that has passed between us. I am a bit surprised you are not dead because you were such a rascal. I would like to hear more about your intentions if I come back, especially since my family and I are treated well here. As to wages, whatever they are for the future, there is the matter of back wages. In order to gauge your sincerity, we would like you to pay wages for the time we served you without pay. If you fail to pay us for faithful labors in the past, we can have little faith in your promises in the future. The failure to pay us was wrong, and surely there will be a day of reckoning for those who took the labor

42. L. MARIA CHILD, THE FREEDMEN'S BOOK, 265-67 (Ticknor and Fields 1865), available at http://www.gutenberg.org/files/38479/38479-h/38479-h.htm#Page_265 (emphasis added).

from the laborer without just compensation. In addition, please state your intentions with respect to my two youngest daughters. I know what you did with my other children. I would rather starve here in Ohio than have such shame and violence brought upon them by your kin. Finally, please let me know about the schools my children may attend. I would like them to have an education and to form virtuous habits.[43]

The power from this story comes from contrast between the wry humor and remarkable restraint on the surface and the skepticism and deep anger that lies underneath. What is also interesting is that the writer is giving his former master a lesson in first principles. The themes that articulate these principles are: all workers, regardless of color, are entitled to fair compensation for their labor; our trust in your word is dependent on your recognition of that principle; violence against and rape of the weak is wrong; and education and virtuous habits are necessary in order for children to grow into good citizens. The short form would be: Because the regime of slavery, the regime of might makes right, is over, will you now live accordingly to principles of natural justice? Given the history of race relations and the specific history between the two, this letter is a powerful testament to the possibility of forgiveness and healing, if only we could live according to principles of fairness and equality.

Now, this could easily veer off into the superficial and ultimately empty world of clichés. Clichés are very often a part of a narrative, especially in political speeches. It is important to distinguish clichés from principles. Clichés are empty. They are *faux* principles. The apparent meaning of clichés is often undermined by the failure of the speaker to apply them to his or her own life. Hypocrisy and "lip service" are fellow travelers with cliché. They reflect the failure, usually intentional, to act on the truth of what is asserted. Genuine principles are grounded on fundamental truths and will require actions that acknowledge these truths in a serious way.

The search for the theme or themes underlying the story will be a search for truth. Because this kind of talk has a checkered past, to say the least, it understandably scares people to go at it directly. So much damage has been done in the name of truth that one does not approach the problem of persuasion with a blank slate. There are too many unresolved grievances and grudges here. In the modern age, everyone is entitled to his or her own opinion. As famously stated by Justice Powell: "Under the First Amendment there is no such thing as a false idea."[44] Instead of a blank slate, there are lots of ideas out there (and, with due respect to Justice Powell, some of them are false) and people start from

43. If I were putting notes in the margin, they would look something like this:

¶ 1 – Greetings, with both respect and a humorous observation about the master's unseemly past.

¶ 2 – Consideration of offer requires trust. Trust requires acknowledgement of past wrong and action to correct it.

¶ 3 – Concern for how daughter will be treated, in light of past abuse; concern for daughters' education and moral habits.

44. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

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the premise that theirs are correct. That is the primary reason the theme, as a form of truth, should not be explicit at first. A full-scale charge attacking the barriers directly rarely succeeds, at least in the realm of opinion, if not also on the battlefield.[45] A story with an implicit theme is a powerful way to overcome barriers that have been erected, some over centuries old, in order to appeal to a common humanity.[46]

3. Begin Your Organization of the Case By Thinking About the Underlying Structure of the Story.

Underlying the story is a structure, of which the moral infrastructure is but a part. Both story and structure co-exist, although the structure is underneath; it is not explicit. It is the job of the storyteller to think about that structure and how it affects the narrative. The structure will have many elements that will be discussed below, including point of view, where to begin, consideration of the basic who, what, when, where, how, and why questions of the story, the sequence of disclosures, when to add emotion, and when to close the deal. But most important in the structure will be the theme or themes.

If you are reading something carefully, like an essay or a book, you might put notes in the margin to indicate the structure. The annotations might also include commentary or reactions to the text. The notes and annotations form an outline-like annotation on the margin. This is a good practice for breaking down stories and writing in general. It is also the beginning of the identification of the subtext. Perhaps more familiar to law students is the annotation of issue, rule, application, and conclusion that should appear in the margins of law school casebooks.[47] This is the basic breakdown of the text from a structural standpoint. This is an important step in any serious analysis of an argument. It is also useful to be aware of these structural parts when constructing the narrative. Moreover, attention to structure will help to maintain the coherency of the narrative, as well as aid in memorization when it comes to delivery of the story to an audience.

While the underlying structure of the story will be taken up with answering the specific questions of point of view, where to begin, etc., it is still useful as an

45. Consider, for example, the battle of Fredericksburg, a huge win for the South due to the frontal assault on an entrenched defensive position ordered by General Joseph Hooker, and the battle of Gettysburg, a huge win for the North, due to an ironic switch of positions and mistake of judgment (or hubris) by General Robert E. Lee. *See generally* SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE, VOLUME 2: FREDERICKSBURG TO MERIDIAN (1963).

46. Music and humor are other possible ways with the potential to overcome these barriers.

47. I am both confessing and expressing a bias here. In law school, I did a heavy dose of underlining and highlighting. Now, after over thirty-five years of law teaching, it seems clear that the underlining was less effective and became even more so the more I underlined. Highlighting is okay if it indicates structure, but not so much if it is simply a form of underlining. Underlining says: "Remember this, it looks like it is important." Much better would be to figure out *why* something is important and to label it accordingly, such as "Issue" or "Rule" or "Rule Restated" if the ground of the decision is moving around a bit.

initial matter to look for an organizational structure. This will help to collect and distribute the facts to the different parts of the story. It is not always a simple chronological distribution, although it may start that way. There is nothing wrong with establishing a timeline early on in the case. The structure here suggested is one of division, which may be chronological (phase one, phase two, and so on) or categorical (facts relating to the breach of contract claim; facts relating to the negligence claim) or personal (relating to particular parties or witnesses). As long as it does not become an end in itself and exclude new evidence that does not seem to fit, the organizational structure will keep the growing file from becoming chaotic.

In addition to looking for an initial organizational structure, attention should be given to the internal dynamic of the story. As Aristotle observed, the plot must be a whole, with a beginning, middle, and end.[48] This observation is not trite; it has significant meaning. The plot must be viewed as a whole, not as the sum of its parts. There are specific functions within the whole – introduction or beginning, middle as development, and the conclusion or resolution of the problem. In addition to the functions of each part, the internal dynamic describes the movement of the plot. There is a dramatic code that runs through the plot:

> The dramatic code, embedded deep in the human psyche, is an artistic description of how a person can grow or evolve. This code is also a process going on underneath every story. The storyteller hides this process beneath particular characters and actions. But the code of growth is what the audience ultimately takes from a good story.[49]

In the dramatic code, change is usually fueled by desire.[50] "A story tracks what a person wants, what he'll do to get it, and what costs he'll have to pay along the way."[51] The story evolves as that person learns new information and makes a decision to change the course of action. As John Truby states:

> All stories move in this way. But some story forms highlight one of these activities over the other. The genres that highlight taking action the most are myth and its later version, the action form. The genres that highlight learning the most are the detective story and the multiperspective drama.
>
> Any character who goes after a desire and is impeded is forced to struggle (otherwise the story is over). And that struggle makes him change. So the ultimate goal of the dramatic code, and of the storyteller, is to present a change in a character or to illustrate why that change did not occur.
>
> . . . .
>
> Drama is a code of maturity. The focal point is the moment of change, the *impact*, when a person breaks free of habits and weaknesses and

48. ARISTOTLE, POETICS (1995).
49. TRUBY, *supra* note 28, at 7.
50. *Id.*
51. *Id.*

> ghosts from his past and transforms to a richer and fuller self. The dramatic code expresses the idea that human beings can become a better version of themselves, psychologically and morally. And that's why people love it.[52]

Remember that this is advice to fiction writers, but there is something here for lawyers as well. First, there is a dynamic to a story that should be respected. It is a dynamic of desire and action, knowledge and decision, and change or rejection of change. Second, this not only connects the points along the plot but also drives the plot forward. This way the story is not static. The lawyer should look for these points as impact points to be developed in accordance with the facts as known. It produces something like a roadmap. If followed, it increases the chances of the story resonating with the listener because it will honor the dramatic code that is embedded in the human psyche.

There is a lot here to think about in terms of initial organization. Outline the structure, begin sorting the facts according to structure, and understand how the story dynamic will drive the narrative. The point is that starting with the initial client interview and continuing through to the trial, the lawyer must be looking for a structure that gives the facts their best chance to resonate. They may not produce a win, but the lawyer must put them in a position to win, if it is possible.

4. Know Your Audience.

As with many things, preparation is important. Knowing your audience and the situation that the story is intended to address will shape your decision about what story to tell and how to tell it. This includes knowing the setting. The courtroom is different than an office. What might be successful in a jury trial may not work for a court trial. What is appropriate in the trial court may not be acceptable at the appellate level. The point is to recognize where you are and to act appropriately, as to the person or persons you are addressing and with respect to the place.

Sometimes, it is not possible to know your audience in advance, like when jury selection leads right into opening statement. You need to go slow. Get them to talk and listen carefully for clues. People often reveal more than they intend when they talk, especially about themselves. The more you can get them to talk while you are absorbing their information on the fly, the better your chances of knowing your eventual jury. Don't make quick assumptions that can come back to haunt you. Stereotypes can easily lead to false assumptions if you are not careful. Do not talk down to people. Give them respect. The need for respect is huge. Do not wind up short here. Give more respect than you think might be due without being insincere. Lack of respect or insincerity will cause your stock with the audience to drop like a stone. Be alert to how you come

52. *Id.* at 8.

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across to people. Scout yourself in this respect. Jury selection is a prime example of where plans may change as a result of first contact with the audience.

Do not try to be something you are not. People can usually spot a phony. Do not pander. If you start droppin' your g's and makin' like you're one of 'em, you may hurt your standing more than if you just came across as your normal self.

Humor is a traditional icebreaker for speakers. The universality of humor provides a bridge across the gap of unfamiliarity. But, be very careful. Although humor in general is universal, humor in particular depends a lot on whom you are talking to. Some of the worst gaffes happen because the humor is inappropriate for the particular audience. Know your audience.

Knowing your audience is especially important in figuring out how a story will resonate (or not). Finding shared values and telling the story in a way that affirms those values is great if you can do it. Finding shared values is not always possible, and sometimes, "a man got to do what he got to do."[53] That is, take a stand and perhaps even die because the narrative is more important than the life.[54] Even then, however, the stand is more effective if the story is intended to remind the audience of their own values and to return to them.

5. Try to Think in Paragraphs When Telling a Story.

There is an essential technique in writing that will serve the speaker well. According to Strunk & White, the paragraph is the unit of composition.[55] I believe this to be the most useful principle for both writing and editing.[56] It is the best tool for the creation and organization of prose and the most effective tool for the diagnosis of writing problems. If the paragraph is the unit, then the unit should be about a single proposition and that proposition will be expressed in the topic sentence. The topic sentence imposes a discipline that keeps the paragraph on track; it wards off intruders and brings in support. The paragraph, not the sentence, is the appropriate size unit in which to think about writing. When put in a sequence, the topic sentences form the outline of an argument. Think of a brief as a series of propositions where each argument proceeds from foundation to conclusion.[57]

This elemental principle of writing may be useful in telling a story. If there is a tendency for a writer to wander off topic, it can be even more so for the speaker. The discipline of going from proposition to proposition will give the continuity that the listener needs in order to follow. It will sharpen the discussion under each proposition because of the imposed discipline of gathering

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53. JOHN STEINBECK, GRAPES OF WRATH, 306 (1939).

54. *See* PLATO, THE APOLOGY (Louis Dyer, ed., Ginn & Co. 1890).

55. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 11-13 (1959).

56. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 252 (2004) [hereinafter Van Patten, *Propositions on Writing and Persuasion*].

57. *Id.* at 254-55.

relevant facts and excluding or saving the facts that would otherwise be out of place. This discipline is very useful for the lawyer who dictates letters and short memos. It provides a mental outline that is easier to manage from a memory standpoint.

A story will have a different dynamic than the formality of a brief. It marches to its own particular set of facts, not to the sequence of argument suggested by the law. However, the notion of propositions that help to organize and drive the story is worth considering. Certainly, it is a staple of oral argument on the legal side. There is no reason it cannot be useful in oral argument on the narrative side as well.

Maybe it is just me, but my memory capacity has been slipping. I first noticed this when I was in community theater. I had difficulty remembering lines, especially when my character was multi-tasking. I had to latch onto the anchor points in the script in order to survive. The propositions are like anchor points or handholds, whichever metaphor you prefer. They help to move us from point to point. No small task these days with so much less being committed to memory than ever before. With all the contemporary ways that memory is stored, one might be tempted to think that it would leave a greater capacity for the brain. But alas, memory in the brain is more a function of use (like a muscle) than capacity. The atrophy of memory is undoubtedly related to our increasing reliance on "memory storage."

It is both astonishing and humbling to contemplate the capacity for memory that earlier generations exhibited. Homer's *Iliad* and *Odyssey* were part of an oral tradition, meaning they were composed and passed on long before they were written down.[58] The *Iliad* is an epic poem containing over 15,000 lines.[59] The Odyssey is another epic poem consisting of 12,110 lines.[60] How was it possible to pass this on in this manner? The verse form would of course help, but it still represents an amazing achievement of the mind. Of more recent vintage, Aleksandr Solzhenitsyn tells of how a great deal of his work had to be memorized because of the fear that any manuscript would be confiscated:

> In the camp this meant committing my verse–many thousands of lines–to memory. To help me with this I improvised decimal counting beads and, in transit prisons, broke up matchsticks and used the fragments as tallies. As I approached the end of my [prison] sentence I grew more confident of my powers of memory, and began writing down and memorizing prose–dialogue at first, but then, bit by bit, whole densely written passages. My memory found room for them! It worked. But more and more of my time–in the end as much as one week every month–

58. *See Homer*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Homer (last visited April 29, 2012).

59. *See Iliad*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Iliad (last visited April 29, 2012).

60. *See Odyssey*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Odyssey (last visited April 29, 2012).

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went into the regular repetition of all I had memorized.[61]

We cannot, nor would we want to, return to the conditions that prompted such astounding feats of memory. But we can draw inspiration and confidence that we could expand our memory "muscles" through more exercise. Thinking in paragraphs will help in that regard.

If thinking in paragraphs helps for organization and sequence, it cannot but help the listener to follow the narrative. Clarity in the delivery leads to clarity in the reception. This fosters a better connection with the listener, giving the story a greater chance to resonate with the listener's deep-seated values. Thinking in paragraphs is the right size for storytelling. In other words, it is easier on you for organization and memorization, and thus, it will make it easier for your listeners.

6. Think About Where to Begin the Story.

In the first year Torts class, I try to use the recitation of the facts of the case as an opportunity for storytelling. Probably the most common problem I see is poor choice on where to start. The story does not necessarily start with the earliest act noted in the case. The story must be told in light of the task at hand. If the character or circumstances of a party, particularly the plaintiff, is important to the story, then lay it in first as foundation, either at the beginning, or where appropriate. Introduce the characters before making them actors. Before we get to the scene of an accident, is there something that we should note about this person before proceeding with the action? Before the defendant's actions have any consequences, is there something we should know about what the defendant did or did not do that eventually led to the moment in question? If some law students are a little short on laying foundation, it may be that some lawyers do too much foundation before getting to the action. There must be economy to the story. The right to hold jurors captive while you tell the story is not a license to bore. One of the most common resentments of jurors (not to mention judges), rightly or wrongly, is that lawyers waste their time.

With respect to actions, think about what is the "first" act. "Who started it" is a common theme and a good question to think about in deciding where to start. Another way to evaluate the "first" act is to think about the theme of the case. For many years, the conventional wisdom on the plaintiff's side was to make the case about the plaintiff. So, the attorney would start with a portrait of the "before" leading to the event and then to the "after." On the basis of books like Patrick Malone and Rick Friedman's *Rules of the Road*,[62] the current thinking has shifted to making the case about the defendant. Doing so almost always requires the story to start further back in time. Using the standard tools of discovery, one can then act almost like a scriptwriter in describing how the

61. ALEKSANDR ISAEVICH SOLZHENITSYN, THE SOLZHENITSYN READER, *The Oak and the Calf* 89 (Edward E. Erickson, Jr. & Daniel J. Mahoney eds., paperback ed. 2008).

62. PATRICK MALONE AND RICK FRIEDMAN, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (2d ed. 2010).

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defendant's decision, made perhaps months or even years before, led to the accident. Here is Jim McElhaney, starting with the defendant's decision to do nothing, well in advance of the accident:

> Ladies and gentlemen, if you had been in the corporate offices of the Midwest Conveyor Belt Manufacturing Company on June 12, you would have seen a group of corporate officials have the chance to prevent a tragedy. On that day they were notified that one of their conveyor belts–a new model they called their "System 900"–had malfunctioned at the Papco Bottling Company.
>
> [Discussion of the problem with the machine]
>
> Then, if you returned to those offices exactly ten days later, you would have seen how the officials at Midwest Conveyor Belt decided to handle that opportunity to avoid a tragedy.
>
> They ignored it. They decided it was not worth their while to investigate how the bottles had exploded at Papco. Midwest decided it was not their problem. So they made another conveyor belt system–just like the one that had jammed at Papco, and they sold it to the Sunshine Cola Company here in town.[63]

If liability is not a problem, you might consider starting the story with damages. Jim McElhaney has given a recitation of a famous opening where the jury follows a middle-aged woman through the corridors of what turns out to be a hospital and into a room where there is a man lying in a bed. During the course of this account, it becomes apparent that the man is unconscious and that the woman is his wife. After she talks with him and kisses him before leaving to go to work for the day, the lawyer then asks: "Who is this man? How did he get this way? And who is responsible? That's what this case is about. Now let me talk about the answers to those questions."[64]

Where to start the story is not a given. It requires careful thought. The decision where to start should reflect your thinking about the theme of the case. It is very significant because of the rule of primacy, what you talk about first is important. Be open to the possibility of revisiting that decision as the case evolves before trial or as focus groups suggest a different emphasis or point of view in the case.

7. Think About Point of View and Emphasis in the Story.

In fiction, point of view usually refers to the teller of the story. Is the narrator of the story the main character, who is telling it in the first person? Or is the narrator an omniscient narrator, who knows the thoughts, conversations, and actions of all. It is a major decision in fictional storytelling.[65] It is not as much a factor in storytelling for lawyers, but it should not be neglected. A good

63. MCELHANEY, *supra* note 14, at 33-34.

64. James W. McElhaney, *Opening Statement and Closing Argument* (Professional Education Group CLE, now no longer available, cassette tape on file with the author).

65. TRUBY, *supra* note 28, at 310.

story attempts to do indirectly what the lawyer may not do directly and that is ask the jury to step into the shoes of a party.[66] By speaking for a party in the first person and using the present tense, the storyteller offers the jurors insight as to the circumstances the party faced and how and why the decisions of the party were made. The storyteller invites identification with the party because of this intimacy, in contrast with the others who are described in the third person. If the jurors identify with this person, they are effectively put in his or her shoes. Where there is a death, say of a child, the jurors may put their own child in the now empty chair that represents the victim in the case.

Consideration of point of view, like the question of where to begin, requires the storyteller to also think seriously about what to emphasize. Who is the story about? Malone and Friedman put the emphasis on the defendant and how the defendant breached one or more "rules of the road."[67] It is a familiar defense tactic to try to shift attention to the plaintiff and ask whether the plaintiff was contributorily negligent, or assumed the risk, or failed to mitigate damages. What is the story about? Is it about the liability event or the damages? Think about how point of view or emphasis will relate to the theme of the story. Think also about how it may affect the sequence of the story. These are important structure issues that must be addressed. Don't let the other side take control over these decisions by default.

8. Constructing the Basic Narrative Will Require Answering the Questions of Who, What, When, Where, How, and Possibly, Why.

The basic questions of the story are who, what, when, where, how, and why. I know this is very rudimentary, but I am surprised how often that important facts relating to these questions are left out in a recitation of the case. Be sure to check off on these questions when putting together the story. Most of these will naturally come from the first interview with the client. If you do not know the answers to any of these basic questions, then you should find out as soon as possible. This is the fact investigation part of your case development. Do not stop short on this. In particular, do not rely completely on your client, who, for various reasons, may not have the clearest view of the situation. Always check against the other available evidence.

9. It Is Important to Think About What Goes In the Story and Especially About What Does Not.

After the essential facts have been accounted for, this collection of information is subject to editing to further refine the focus of the story. If the prior proposition requires the storyteller to go through a checklist to make sure

66. *See, e.g.*, State v. Blaine, 427 N.W.2d 113, 115 (S.D. 1988).

67. MALONE AND FRIEDMAN, *supra* note 62.

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that the necessary facts are accounted for, this proposition suggests trimming and pruning. Lawyers tend to over-include in the narrative, much the same way they may over-include in brief writing. It is common to see briefs that go way beyond what could conceivably be persuasive because the operative principle seems to be "If I found it, you're going to hear about it." Same way with facts. Not every fact is important. There is a place for completeness, but not in a story intended to persuade. The story must be more focused than a complete statement of the facts.

Over-inclusion is not always the lawyer's fault. Clients and witnesses have a tendency to run on when given the chance. One of my favorite examples is from the movie, *Fargo*. Here, a law enforcement officer follows up on a call that came in regarding a suspect in a homicide investigation. He meets a Mr. Mohra, who is shoveling snow and ice off his driveway:

> Mr. Mohra: So, I'm tendin' bar there at Ecklund and Swedlin's last Tuesday, and this little guy's drinkin' and he says, "So where can a guy find some action? I'm goin' crazy out there at the lake." And I says, "What kinda action?" and he says, "Woman action, what do I look like?" And I says, "Well, what do I look like, I don't arrange that kinda thing," and he says, "But I'm goin' crazy out there at the lake," and I says, "Well, this ain't that kinda place."
>
> Officer Olson: Uh-huh.
>
> Mr. Mohra: So he angrily says, "Oh I get it, so you think I'm some kinda crazy jerk for askin'," only he doesn't use the word "jerk."
>
> Officer Olson: I understand.
>
> Mr. Mohra: And then he calls me a jerk, and says that the last guy who thought he was a jerk is dead now. So I don't say nothin' and he says, "What do ya think about that?" So I says, "Well, that don't sound like too good a deal for him, then."
>
> Officer Olson: [*chuckles*] Ya got that right.
>
> Mr. Mohra: And he says, "Yah, that guy's dead, and I don't mean of old age." And then he says, "Geez, I'm goin' crazy out there at the lake."
>
> Officer Olson: White Bear Lake?
>
> Mr. Mohra: Well . . . Ecklund & Swedlin's, that's closer ta Moose Lake, so I made that assumption.
>
> Officer Olson: Oh sure.
>
> Mr. Mohra: So, ya know, he's drinkin', so I don't think a whole great deal of it, but Mrs. Mohra heard about the homicides down here last week and she thought I should call it in, so. . . . I called it in. End o' story.
>
> Officer Olson: What'd this guy look like, anyway?
>
> Mr. Mohra: Oh, he was a little guy. . . . Kinda funny lookin'.
>
> Officer Olson: Uh-huh. In what way?
>
> Mr. Mohra: Oh, just in a general kinda way.[68]

68. *Memorable Quotes for Fargo (1996)*, http://www.imdb.com/title/tt0116282/quotes (last visited Apr. 28, 2012).

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Mr. Mohra's powers of recollection apparently apply only to conversation, not so much as to what the suspect looked like. In any event, there is a lot of useless stuff in this narrative (intentionally so). The storyteller's job is to prune and trim, or in this case, remove most of the vine because not much is there, other than the geographic area where the suspect may be found.

The editing process must be done under the close guidance of the theme. "Themes have organizational power – they collect certain pieces and discard others, provide guidance in sequencing, influence word choices, supply continuity, and generally shape the argument, often through a story that ties the particulars to the moral center of the argument."[69] The trimming process will rely on the theme to help sort through the many true facts to find the best ones. The storyteller needs to be disciplined here. Less is more.

10. Don't Break the Spell By Editorializing on the Story.

The storyteller must understand the difference between the story itself and the storyteller's opinion or commentary on the story.[70] Keep your ego in check. It is about the story, not the storyteller.[71] Do not intrude on the story with editorializing. Remember that the story allows the listener to respond to the themes and to make connections to the facts. When you jump in with commentary, you run the risk of breaking the spell of the story. You also run the risk of prematurely attempting to close the deal and generating sales resistance. Telling the listener what to think just at the point he or she is beginning to make decisions interrupts that process. Heavy-handedness is counterproductive because it intrudes and distracts, and raises the sales resistance. It breaks the spell of a good narrative. Editorializing can be used, but only sparingly and only to provide direction and shape to the story, not to preach. Keep your touch, that is, the editorializing, light.

Watch out for side trips that distract from the main theme. Again, do not let your ego get in the way. Just because you find an interesting scent off the main trail doesn't make it useful to the story. As a law professor, I am guilty of that as much or more than anyone. But class does allow for some treks off the trail. Stories do not.

Bias is an unforced editorial error. Bias reveals way too much, and unnecessarily. A snide remark can reveal a meanness of spirit, which is not a good quality in a sales person. Because of the emotional reactions that bias can trigger, it should be avoided always. With the wrong word or phrase, you can

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69. Van Patten, *supra* note 16, at 256.

70. The fact/opinion distinction is fundamental in the law. It is understandable that many first year students are initially shaky on this distinction. If you are still confused, there is some important remedial work to be done.

71. There are storytellers who function more like entertainers. In that case, it is usually more about the storyteller than the story. But, if the principal task is persuasion, not entertainment, it should be about the story, not the storyteller.

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almost hear the sound of minds snapping shut. Most of the time, it is not that the speaker does not know better, it just reflects a lack of discipline. Other times it is more reflective of arrogance. In *Glidden v. Szybiak*, the New Hampshire Supreme Court considered a dog bite case.[72] A four year old girl, Elaine, had gone to the town's general store on her own and stopped to play with the store's dog, Toby, who was resting on the store porch. Elaine jumped on Toby and pulled at his ears. Toby didn't like that and he bit her. In the course of the recitation of the facts, it was observed by the court, gratuitously, that the owner of Toby, a young woman named Jane, was 26 years old, unmarried, and living with her parents.[73] It is not difficult to infer from this remark that the court believed Jane to be odd, different, and possibly even weird. By the way, Jane lost the case. It is very unseemly for a court, sworn to dispense justice on a neutral basis, to do such a thing. This is not about political correctness. It is about the appearance of bias and its poisonous effect on the system of justice. It does not belong in the courts, whether from the judges or the lawyers. Do not poison your story with stuff like that.

11. Be Aware of the Sequence of Disclosure of Facts. Save Your Best Facts for the Right Spot.

If facts are like a card game, amateurs inevitably will play their best facts too early. They just cannot help it. Maybe the justification is reliance on the theory of primacy, but I think the best explanation is lack of experience. It is rare where a case can be resolved by simply laying down your cards and watching the other side concede. The disclosure of facts, outside of when there is a duty to make timely disclosures, should therefore be thought about in strategic terms in order to maximize their impact on the other side.

The same thing is true in storytelling. In fact, it enhances the storytelling because it helps to hold the audience's attention. Here is John Truby's advice on the fiction side:

> As a creator of verbal games that let the audience relive a life, the storyteller is constructing a kind of puzzle about people and asking the listener to figure it out. The author creates this puzzle in two major ways: he tells the audience certain information about a made-up character, and he *withholds* certain information. Withholding, or hiding, information is crucial to the storyteller's make-believe. It forces the audience to figure out who the character is and what he is doing and so draws the audience into the story. When the audience no longer has to figure out the story, it ceases being an audience, and the story stops.[74]

Selective withholding of information with strategic disclosure will draw the audience into the story. It also encourages them to subtlety identify with a party

72. 63 A.2d 233 (1949).
73. *Id.* at 234.
74. TRUBY, *supra* note 28, at 7.

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or witness because they begin to address the problems that the person faced, under similar conditions of uncertainty.

Instead of disclosing facts too soon, the experienced storyteller uses the artistic tool of foreshadowing to set up their disclosure later on. "It was a dark and stormy night . . ." is an example of foreshadowing because it suggests that something dark and sinister will follow. By the time it is appropriate to disclose the good facts, the audience has been prepared for them by the foreshadowing. The underlying theme will assist here, by influencing the choice of words or phrases that will set the tone.

I have made reference to the fiction writer's toolbox. There is much that can be learned from the techniques of fiction. In a sense, the lawyer is like a screenwriter. Not that the lawyer has license to make up the story, but the lawyer can use screenwriting techniques, such as setting the scene through tone, establishing a point of view through which the characters and the facts are viewed, and moving the action and the story ahead through strategic disclosure of the facts. The lawyer is the screenwriter, the director, and a member of the cast,[75] all in one.

12. Do Not Miss an Opportunity to Use the Right Words or Phrases to Reinforce the Theme.

A good theme is a good start. It is not an end in itself, however. It cannot be dropped into the story like a talisman.[76] It cannot be artificial or last minute, like the addition of liquid smoke to pulled pork. It must be well integrated into the story and reflected in all its parts, down to the word choices.[77] Like good barbeque, this takes time. In part, it is because we have to overcome the tendency to talk like lawyers, or even worse, like law professors. If law school education is like learning a foreign language, with the ultimate goal "to think like a lawyer," then there must be a transition back to one's native tongue after law school. Think like a lawyer, but talk like a real person.

Work through the language of the case. There are words to be embraced and there are some to refrain from embracing. Figure out which ones to use or to discard through writing out the story. I think there are too many word choices to be made on the fly. Write them out and come back to evaluate them with a thesaurus on the one hand and a firm grip on the theme with the other. A thesaurus is an essential tool for picking the right word. When you are close, but it doesn't feel quite right, consult the thesaurus. Depending on your tendencies

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75. Remember that in cross-examination, the lawyer should be the witness, asking for agreement or disagreement from the witness on the stand with propositions put forth by the lawyer. MCELHANEY, *supra* note 14, at 442.

76. "Talisman. 1: an object . . . thought to act as a charm to avert evil and bring good fortune. 2: something that produces extraordinary or apparently magical or miraculous effects." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2333.

77. *See* MCELHANEY, *supra* note 14, at 33-34, 629-36.

as a writer, it will help you tone it down a notch or to kick it up a notch. The theme will give your choice of words a guiding principle. Make the choices in light of the theme in order to enhance the theme and not to subtract or distract from it. If your themes are tied to deeply embedded values of the listener, the words should be chosen to touch those emotional "buttons" that the themes set up.

Look for phrases that touch those emotional buttons. In *Spivey v. Battaglia*, an employee was injured during lunchroom horseplay by a fellow employee.[78] The defendant employee's last name was the same as the company's name. I am sure that it would touch emotional buttons if you opened the story with: "This is a case involving the boss's son." Without saying it, without arguing it, "the boss's son" speaks of privilege, of nepotism, and possibly, of lack of responsibility, because he may have immunity that other employees do not have. In fact, argument gets in the way. The simplicity of "the boss's son" gets the job done in a much deadlier fashion.

Metaphors have special power.[79] A good metaphor is vivid, often humorous, and provides a way of telling the listener how to think about something without seeming too aggressive. Most people resist being told how to think. But a good metaphor slips past that resistance without being noticed. If your metaphor reflects a theme, so much the better. A good metaphor is an important exception to the "don't break the spell of the story by editorializing" rule. It is an outside opinion or commentary on the story, but, like a good-hearted, but mischievous, young boy, the metaphor seems to get away with it nearly every time. Perhaps it is the delight produced by the well-crafted metaphor that provides the license. What is clear is its ability to persuade in ways that direct argument cannot touch. Metaphors are the language of persuasion because they break through (or go around) barriers by touching on the common ground between the teller and the listener. Be careful, however. Although the metaphor has great potential for persuasion, it must be thought through so that it is not turned around against you. You should spend a significant amount of time on developing good bullet-proof metaphors in your case.

13. Do Not Argue When Telling the Story. Let Your Facts Do the Arguing.

The use of argument in opening statement is prohibited. This rule is often violated by amateurs, but the punishment does not have to come from the judge. Rather, it will come from the jury that usually doesn't like to be told what to think at such an early stage. If not punishment from the jury, it will at least create sales resistance, which is not where you want to be on opening.

78. 258 So. 2d 815 (Fla. 1972).

79. *See, e.g.*, PERDUE, *supra* note 15, at 273-312.

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Argument usually creeps into the story when the storyteller wants to tell the listener what the story means. Opinion is argument. Facts can be persuasive on their own if they tie in to recognizable themes or values, especially if the values are already held by the listener. You will want your theme to be reflected in the story, but if you press to hard on that, you will give the impression that you are not entirely confident, or worse, that you are even desperate. Themes require gentle use. "Don't leave home without them," as Karl Malden used to say.[80] But do it with subtlety.

Stories do not bloom under the heavy hand of the gardener. They take a lot of preparation and initial care, but, like Toad's garden, they must grow and bloom on their own. The more you fuss with the story in front of the audience, the worse the result. A light touch is what is needed. Let the story blossom without heavy-handed preaching from the storyteller.

14. Do Not Oversell Your Facts.

In advocacy, the credibility of the speaker is very important. If you have a long-standing or close relationship with the listener, there might be a safety net to save your credibility from minor lapses. But the lawyer in front of the jury has no such safety net. It is likely that the average juror comes in with a great deal of resistance because of a pre-existing fear that the lawyer is there to trick people with words. You do not start out even. You should figure that you are starting out behind. Fortunately, this predicament is not set in stone. The bad reputation of lawyers can be a plus, so long as you do not resemble the apparition of what the average juror fears. Part of what you want to accomplish during *voir dire* is the building of trust, based on the appearance of competence, fair mindedness, and good sense. You want to be accepted by the jury as one they can trust, as one who can be a guide through the trial.[81] The process of building that trust is slow, the process of losing it can be very swift.

You obviously lose credibility very quickly if you get caught asserting something that is not true. You do not have to lie, however, to lose credibility. You can lose it by overselling the facts. Just as you can oversell the law to a judge, you can oversell your facts to a jury. This usually happens when you claim too much for the evidence. When you sponsor an idea, your credibility is at stake. Choose your fights wisely.

You can oversell also by getting ahead of the evidence. It is not stretching the facts, it is a matter of timing. If you let your desire to comment on what the jury should be thinking, you may be getting ahead of the evidence and losing credibility as a result. You can minimize this by not asking for the sale until the case is all in. Let the facts speak. Keep in mind that facts do not speak for

80. *American Express Commercial – Karl Malden – 1970's, available at* http://www.youtube.com/watch?v=4K4seWtxEeA.

81. *See* MCELHANEY, *supra* note 14, at 145-46.

themselves,[82] you must use themes to shape them into a story. The phrase "leading from behind" may be an apt description for what you are trying to do.

Remember that you are the initial judge of the credibility of what you are trying to sell. Do not try to sell what you would not buy. Listen to your inner voice on this. If you would not buy it, try to figure out what you would buy. Sometimes it is a matter of overkill. Keep in mind that there are two ways to win a race. The first is to run faster than anyone, the second is to make sure that no one else runs faster than you.[83] This means that you do not have to *win* every race, that is, by being the fastest or strongest. You can also win a race by not losing. Think about the difference. Lawyers seem to want to win every race. This might cause overreaching when it is not necessary. You do not have to sell the biggest and best, you might just need to sell something that fits, something that works. Your credibility is much more convincing when you believe in what you are selling.

15. Set the Scene and Describe the Characters with the Language of Immediacy.

Storytellers recommend telling the story in the present tense.[84] It brings the facts closer to the audience and involves them in the story:

> Good storytelling lets the audience relive events in the present so they can understand the forces, choices, and emotions that led the character to do what he did. Stories are really giving the audience a form of knowledge–emotional knowledge–or what used to be known as wisdom, but they do it in a playful, entertaining way.[85]

Use of the present tense helps to ground the story in real time. Past tense is the language of history; present tense is the language of re-enactment.

Persuasion in storytelling requires audience participation. And the key to audience participation is the language of immediacy. For description, the present tense will call on the senses – sight, hearing, smell, touch, and taste.[86] Present tense makes the description immediate and the result is that certain details may evoke a response or a recollection from the listener's own life story. Now, results may vary, as the ads for Viagra say. For me, the sound of a pipe organ triggers something primal. Especially when I have not heard that sound for a while, I begin to tear up almost immediately. It reminds me of funerals and weddings, my time as a church musician, and the presence of the unseen mystical hand that has shaped my life. Emotionally, I am pulled back to the basics. For some, it may be the sound of an acoustic or electric guitar. For me,

82. ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING (2005).

83. *See* Van Patten, *Propositions on Writing and Persuasion*, *supra* note 56, at 252-54.

84. *See, e.g.*, PERDUE, *supra* note 15, at 145-46.

85. TRUBY, *supra* note 28, at 6.

86. *See* PERDUE, *supra* note 15, at 37-48.

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it is the pipe organ. Similarly, entering a home and smelling roast turkey immediately pulls me back forty to fifty years to Thanksgiving holidays in Southern California, where I grew up. The aroma of fresh baked bread will trigger associations of home for others. These associations do not have to be triggered by the actual sound or the actual smell. They can be triggered by words, if the scene has been set with the language of immediacy.

A story has a time and place. It is important to provide the listener that setting. Time is invisible, but it gives context to place; it ties into culture and history. Place is visible, but it may tap into emotions that are ordinarily kept below the surface. For examples of how associations may be triggered by the setting, one need not look any further than television commercials. The most effective ones have a sense of time and place that push emotional buttons.[87] Setting the main scene of the story, with attention to detail, is important to summoning forth those emotions that will drive the listener to the desired conclusions.

In describing the characters in the story, the focus is not necessarily on their appearance, although it can be if it is appropriate. More important is the description of their thoughts. If speaking in the first person, the thoughts are limited to those of the narrator. The advantage of choosing the first person voice is that it shares in a very intimate way what the narrator knows and, by inference, what the narrator does not know. The thoughts and emotions of the narrator have an immediacy that invites the audience to share in those thoughts and feelings. It also retains the tension in the story because the narrator's thoughts and feelings are articulated under conditions of uncertainty, which is how they were experienced in real time. Similarly, if it is important to the story to give the audience the inner dialogue of more than one character, then the third party narrator should be used. Note that narrator may alternate between omniscient and simple observer in order to provide the inner dialogue only when necessary to the story. The point is to think carefully about how to achieve the desired audience participation through the description of setting and characters.

As Jim Perdue says: "Courtroom storytellers often neglect to set a scene that conjures up the proper emotional backdrop for the action. . . . Gifted storytellers begin with the 'where.'"[88] Setting the scene and the characters with the language of immediacy will stimulate audience participation without running into the sales resistance that is generated by the hard sell.

16. Let the Facts Illustrate Complicated Concepts.

87. JIM M. PERDUE, *The Art of Storytelling: Presenting an Unforgettable Story in Your Case* (Trial Guides Video 2012) cites a famous Folgers Coffee commercial. http://www.youtube.com/watch?v=zZnqBL6iYjA&feature=player_embedded. This is how you sell coffee. Note that you don't have to actually smell the coffee in order to experience the sensation that the ad is intended to evoke. That commercial relies on pictures and a few sounds to work its pitch. The lawyer must use words, most of the time, to evoke the senses.

88. PERDUE, *supra* note 15, at 40.

If there is a common fault among inexperienced storytellers, it is that they are too wordy. Too much information or, worse, explanation, can prevent the story from taking hold of the imagination of the audience. Try to keep the law out of the initial telling of the story.[89] Facts before law, instead of law before facts. Here is a good example from a recent appellate argument before the South Dakota Supreme Court that involved several criminal charges:

> On September 21, 2010, there was a full harvest moon and it was a bad night in Bridgewater. The innocent victims in this case were Summer Newman and Carrie Lake and they were spending a quiet evening at home that night. Summer was up late working on a puzzle with her seventeen year-old daughter and Carrie was asleep. One fact about Summer and Carrie that is relevant to this appeal is that they tended to have frequent houseguests staying with them, some that they knew very well, relatives, and others that they did not really know at all. And on that particular evening there was a man staying on their couch, who they knew only by the nickname Dre and otherwise could not identify him and he apparently was never located again. And for whatever reason, and I am not capable of looking into people's hearts, but the presence of these various men in town, in Bridgewater, was drawing a lot of attention and causing a stir. Many of them were African-American and without casting any judgment on these unknown men several people in town were blaming a rash of thefts and other incidents on them. And one of those who did so was City Councilman Robert Lee Anderson, the next character in our story. Councilman Anderson had shown some tires that he was selling to some of these men and the next day the tires and transmission were apparently stolen and whether fair or not, Anderson blamed the thefts on those men and whether correctly or not, he associated the men with the house where Summer Newman and Carrie Lake lived. Councilman Anderson was receiving a lot of complaints from his constituents about the men he believed were staying at this house and one can certainly speculate that some of the complaints were based on negative racial stereotypes. But some are based on stolen property and other minor altercations that were again associated rightly or wrongly with these men. Anderson had had an earful from his constituents about this perceived problem. And that day, a Monday, he decided to go to the Bridgewater City Bar to get drunk. He drank steadily and he talked to anyone who would listen about the men who he thought were in that house all evening. By midnight he was very intoxicated.
>
> That's where my client enters the picture. Kevin Jucht is a farmer, he is in his 40s, lives on a farm with his elderly parents. They farm several miles south of Bridgewater. He was on the farm all day, was still in his bib overalls. He hadn't been to the town of Bridgewater for months. But he walked into the bar that night, about midnight, to have a few beers. He barely knew Councilman Anderson, but he got drawn into Anderson's ranting about the men in this house. Eventually Anderson invited Kevin

89. This is a good generalization for opening statement, but definitely not so for storytelling during closing argument.

> over to his office for some more drinks and he got it into his head that he was going over to this house and confront these men about these thefts and tell them about the other incidents happening in town and tell them that they weren't welcome in this town. It's the very epitome of a bad and stupid idea. And my client went along with it. Anderson had heard that the men supposedly staying at this house had guns, so he opened his safe in his office and got out a pistol, put it into my client's hands. Kevin put it in the pocket of his bib overalls for protection. Now, Anderson marched across the street to Summer Newman's house with my client following. Anderson opened the screen door and broke the latch in the process. And then the front door came open, they were pounding on it. Anderson was pounding on it and the front door came open, whether it was kicked or busted open, but it was busted open.
>
> The record is very clear that when the door comes open, Summer Newman, who had heard the commotion, she was awake doing a puzzle, was two feet away from the door. And when it comes open, Anderson who is a very wide, large, overweight man, is filling the doorway. So the door is open and there is Anderson in this narrow doorway. And there are pictures in the record. She can see Kevin Jucht behind him on the porch, but not enough to ever even get a good look at him and he is never identified, either that night with photo lineups, or at the grand jury. However, he was there, obviously. Anderson gets a few feet inside the house. He starts yelling "get out of my town. We don't want you here. People are committing crimes around town"—believing that the men are in this house.
>
> Now the man named Dre who is an African-American, he was on the couch. He looks up and looks over and Anderson then uses a racial epithet directed at him. Summer and Carrie were not timid. They justifiably went right back at Anderson, said, "You get out of our house. This is ridiculous. Get out of here." The police are called. Anderson stumbles back and he puts his elbow through the glass screen door and my client at that point has been on the porch. There is evidence he may have stepped one foot across the threshold and looked in. Otherwise, he is on the porch. He is by that time back on the street. In the middle of the street he's scared, and a van is pulling up. He is scared. He fires three shots directly into the air. They find three shell casings, empty casings in the street. Anderson's wife, who for some reason is listening to the police scanner, hears the police calls and figures, well, Bob must be involved. So she gets into her car. At that point, her car pulls up. Bob grabs his gun away from Kevin, gets into the car and drives away. And my client stumbles off.[90]

Although one ordinarily addresses the South Dakota Supreme Court differently than a jury, this is not far off from an opening statement to a jury. The case involved several charges, including burglary and discharge of a

90. Audio Recording: Oral Argument in State of South Dakota v. Kevin Roger Jucht, #26074, March 20, 2012, *available at* http://ujs.sd.gov/player/UJSPlayerArchive.aspx?AudioFile=../Media/2012_03_20_26074.mp3 (Sioux Falls lawyer Ron Parsons presenting for the Appellant).

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firearm. Notice how the burglary charge, which requires entry of a dwelling with the intent to commit a felony is treated in this narrative. The legal elements are covered in the facts, not in the law. If the law were to be included in this narrative, it would be much longer and would introduce another level of complexity. The simple narrative covers the necessary ground without becoming wordy. Providing the listener with an accessible introduction to the case by way of story also helps to prepare the listener for the law to come.

17. Think About the Other Side and Make Sure You Are Thinking Clearly When You Do.

You are never done with an argument until you have thought seriously about the other side. A case that has not already settled cannot be as easy as your narrative might suggest. You must account for what the other side may do to counter your narrative. It may be difficult to think about the other side's arguments because you start out hearing your client's perspective and often buying into it. But taking the other side seriously will pay dividends. One way to do this is to write out what you think the other side's opening and close should look like. When you feel it falter, take note. When you feel it going well, take note. This may help you to understand what is pulling the jury to the other side. The exercise of advocating the case against you should deepen your understanding of the case. Thinking about the other side is especially important in light of the metaphors that you intend to use. There is hardly anything worse than having your own metaphor turned against you.

There are at least two obstacles to a clear understanding of the other side. Both are self-imposed problems. The first is what may be called "mirror-imaging." The second is the problem of "blind spots." Mirror-imaging involves the projection of your own thought process or value system on to someone else.[91] It is easy to miss something when your assessment of someone else is

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91. A New York Times article on the failures of the CIA discussed the phenomenon of mirror-imaging. Tim Weiner, *Naivete at the CIA: Every Nation's Just Another U.S.*, N.Y TIMES, June 7, 1998, *available at* http://www.users.muohio.edu/shermalw/group-think_nyt98.html.

> Niccolo Machiavelli had it right: never assume the other guy will never do something you would never do. Too bad Machiavelli never worked for the CIA.
>
> The world might be less dangerous than it is today had the CIA and its sister intelligence services foreseen India's nuclear tests last month. Armed with that foresight, the United States might have been able to forestall a test, as it did back in 1995, and thus prevent an arms race in one of the planet's least pacific places.
>
> A report last week by retired Adm. David Jeremiah, a former vice chairman of the Joint Chiefs of Staff, blamed the failure on systemic flaws in the way the intelligence community gathers and handles information, trains its thousands of analysts and commands its $27-billion-a-year empire.
>
> But underlying those failures, Jeremiah said, was a classic American cultural assumption: "This 'everybody thinks like us' mind-set."
>
> The "underlying mind-set" was that India "would behave as we behave," he said. "We should have been much more aggressive in thinking through how the other guy thought."
>
> Instead, he said, U.S. analysts decided that the newly elected Hindu nationalist political

distorted by your own projections onto the subject. It is like the baseball scout who makes recommendations based on who reminds him of himself when he was that age. J.R.R. Tolkien referenced mirror-imaging in *The Lord of the Rings*. Gandalf explained that the path to Mount Doom could be unguarded because Sauron would never imagine someone trying to enter Mordor and destroying the Ring of Power: "For he is very wise, and weighs all things to a nicety in the scales of this malice. But the only measure that he knows is desire, desire for power; and so he judges all hearts. Into his heart the thought will not enter that any will refuse it."[92] When you think about the other side, be clear in your assessment. Do not project yourself on the subject.

The second obstacle to objective assessment of the other side is the problem of blind spots. Unlike blind spots experienced in driving a vehicle, which may be inevitable, these emotional blind spots are self-created.[93] Whether due to unexamined prejudice or actual life experience, the shutting off of information based on who that person is or represents creates the possibility that your assessment of the other side will not be accurate or complete. Lawyer Rick Friedman confesses he has an aversion to certain conservative ideas, but nevertheless warns: "[W]e risk creating our own blind spots, hiding the power of the other side's arguments from ourselves."[94] The best way to minimize or eliminate these blind spots is to start with a healthy respect for the other side. See what they can teach you about the problem. Walk a mile or two in their shoes.

> party, the BJP, couldn't possibly be serious when it campaigned on a nuclear weapons platform. Westerners saw good reasons for India to eschew testing and therefore thought Indians must understand their own best interests the same way.
>
> Intelligence professionals have a name for this kind of thinking: mirror-imaging. It is considered one of the most basic mistakes in the spy manual.
>
> "Mirror-imaging -- projecting your thought process or value system onto someone else -- is one of the greatest threats to objective intelligence analysis," a senior CIA officer, Frank Watanabe, wrote last year in Studies in Intelligence, the agency's in-house journal. "Avoid mirror-imaging at all costs," he advised.
>
> Failing to follow such counsel led the United States to believe that Japan would never attack Pearl Harbor and that Saddam Hussein would never invade Kuwait.

Id.

92. *See* Richard Fernandez, *Negative*, THE BELMONT CLUB, Nov. 4, 2011, http://pjmedia.com/richardfernandez/2011/11/04/negative.

93. RICK FRIEDMAN, ON BECOMING A TRIAL LAWYER 167 (2008).

> Just as Carl Rogers said and countless psychological studies have confirmed, our sense of self distorts our perception of what is going on around us.
>
> . . . .
>
> We formed our selves to deal with a reality that no longer exists–or at least *largely* no longer exists. It's as if we spent our first twenty years in a small room doing close-up work on watches and jewelry, wearing thick lenses to help us see clearly. Now we are outside, driving a car at sixty miles per hour, still wearing those thick lenses designed for close-up work.
>
> Simply stated, our sense of self creates blind spots and distorts of perception. We don't see ourselves as we really are (perhaps we're afraid to), and we are unable to see others as they really are. As events unfold, we are often reacting to unexplored things inside of us rather than to the events themselves.

Id. at 166-67.

94. *Id.* at 141.

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18. Deal with Reluctant or Even Hostile Jurors By Finding a Theme That Will Resonate With Them.

It is inevitable that some perfectly good themes will run into difficulty with certain jurors. This is due, in part, to the success of the "tort-reform" movement in poisoning the jury pool to believe that lawsuits are a danger to the system. Whether it is the belief that lawsuits undermine the quality, availability, and cost of health care, or threaten to ruin the economy by making everything more expensive, or impede the development of newer and safer products, lawsuits in general, and plaintiff's lawyers in particular, are the target of derogatory jokes and unrelenting criticism that has embedded itself deeply into the culture.[95] Thus, the opening that "we have come here to ask you to right a wrong"[96] sometimes falls on deaf ears. This may be due to a fear that giving the plaintiff any money will cause the juror's insurance rates to go up or that the events are the result of God's will and that the plaintiff should simply "buck up" and accept it as such. It may feel like an impenetrable barrier to the plaintiff's lawyer who faces a jury composed of a critical mass of "tort-reform" believers.

An extremely important book by David Ball and Don Keenan, *Reptile: A 2009 Manual of the Plaintiff's Revolution*, addresses that problem. Identifying in ordinary people a deeply embedded concern for survival and a consequent sensitivity to danger, Ball and Keenan argue that themes ought to be grounded in ways to make individuals and the community safer.[97] By changing the theme to resonate with a person's unconscious concerns, it increases the chances of success.[98]

Another way to restructure the theme to deal with other underlying hostile values has been observed by Rick Friedman. A lawyer friend of his, practicing in an anti-tort area of the country, reframed the negligence case into the new theme of sanctity of contract:

> When we get our driver's license from the state, we are entering into a contract with the State of Oklahoma and all other drivers who are legally on the road. The laws of the state are the contract we all agree to follow. Among other things, all of us agree to yield when the state puts a yield

95. DAVID BALL AND DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION 25-26 (2009).

96. MCELHANEY, *supra* note 14, at 31.

97. BALL & KEENAN, *supra* note 95, at 29-40.

98. Ball and Keenan describe the deepest, most basic concerns as being part of the Reptilian brain. They believe that individuals can be turned with the right kind of appeal to those unconscious concerns:

> The Reptile prefers us for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, "Give danger a pass."
>
> Second, the courtroom is a safety arena. Trials were invented (by the safety conscious ancient Greeks, not the burn-'em-at-stake early English) for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for.

Id. at 27.

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> sign up. A year and a half ago, at the corner of Elm and Shuster, Mr. Simpson broke that contract.[99]

Nice move, but does it work? Friedman says yes, as to his friend, and explains why:

> [U]ltimately, a jury verdict is a reflection of how the jurors see the world or would like the world to be. . . .
>
> Jurors want to live in a world that has hope, where people who break the rules are punished, where hard work is rewarded, where contracts are honored, where no one gets something for nothing.[100]

Reframing the theme to deal with underlying concerns of potentially hostile jurors is not a gimmick or manipulation. It is about meeting the jurors where they are and appealing to their good instincts and their self-interest.

19. Think About the Timing of Emotion in Your Story and About When to Close the Deal.

There is clearly room for emotion in storytelling. The issue is timing. Rick Friedman talks about the counter-productive consequences of an emotional opening statement:

> If you are emotional in opening statement, venting your anger at the defendant, you leave little room for the juror's anger. They may even push back, finding ways to view your anger as inappropriate. One friend of mine expresses this concept by saying, "You should never let your emotions get out ahead of the jurors'." Gerry Spence expresses a similar concept, saying you should not destroy a witness until the jury wants that witness destroyed.[101]

You risk damaging your credibility as a guide who can be trusted. There will be time for emotion later, on cross. Not at the beginning of the cross (the so-called "angry cross"), but, as Spence suggests, when the time is right. Emotion is very appropriate in closing argument, but only after you have earned the right.

Don't tell the audience what they are going to think ("You won't believe this") or how to think before they reach the conclusion on their own. There is a time for editorializing, but don't jump the gun. Give the listeners the emotional space to arrive at where the story is heading. The ending of your story should confirm the conclusion they have already arrived at. They are then ready to hear the ending because it will empower their judgment about what is right and what is wrong. Do not get there before they do.

20. Your Voice Is an Instrument. Use It Accordingly.

There are those who are blessed with the gift of a great voice. It is

99. FRIEDMAN, *supra* note 93, at 123.
100. *Id.* at 127.
101. *Id.* at 111.

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impossible to imagine better narrators than Morgan Freeman in *The Shawshank Redemption*[102] or Sam Elliott in *The Big Lebowski*[103] or the voice of a great character, like James Earl Jones as Darth Vader in *Star Wars*.[104] World class voices. We cannot be like them, but you should not ignore the importance of your voice when telling the story. Your voice should be thought of as an instrument to be played. Storytelling is not just talk. It requires attention to such matters as pace, pitch and volume, and even silence.

Pace should be reflective of the storytelling. A story has a shape, like a musical phrase will have a shape. It begins, it rises, it falls. It pushes toward conflict and then finds resolution. Like a musical theme, it may crescendo near the end. The pace of the storytelling cannot be even. The listener will need relief in order to avoid monotony. Pace must be varied, moving more quickly through the foundational parts and slowing down for the more important parts. Pace should match what you are trying to achieve at any particular part of the story. Of course, the most dramatic variance of pace is to stop completely. "Great orators, great trial lawyers, and those with even superficial involvement in theater have always known there is great power in silence."[105] There *is* great power in silence. Do not mess it up with fumbling around for an exhibit or other distracting movement. It must be intentional, and your facial expression and body posture should be commensurate with the silence.

Although telling a story through speech, rather than music, involves the speaking voice, you should not neglect the tools of pitch and volume. High or low, loud or soft, are options at your disposal. Do not fall into a pattern of high and low that becomes sing songy. Remember that pitch is how the voice gives the listener the punctuation of the sentences, with a lift at the end to designate a question and a turn down at the end to indicate a period. A pause may indicate a paragraph ending. Variation in pitch and volume may also help to bring in emotion appropriate to the story. As a caution, you may want outside appraisal of your voice pitch, volume, clarity, and resonance in order to understand how your voice comes across to others. Work to eliminate, or at least tone down, the aspects that annoy or distract. Your voice should be the messenger, not the message.

Delivery of the story, with emphasis through facial expressions as well as hand and body gestures can enhance or break the spell of the narrative.[106] Practice your delivery and, if possible, have it videotaped. It is a different experience watching yourself. Scout yourself, like a coach would scout an upcoming opponent. Use that review to correct the problems that emerge.

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102. THE SHAWSHANK REDEMPTION (1994).

103. THE BIG LEBOWSKI (1998).

104. STAR WARS: EPISODE IV, A NEW HOPE (1977); EPISODE V, THE EMPIRE STRIKES BACK (1980); and EPISODE VI, RETURN OF THE JEDI (1983).

105. FRIEDMAN, *supra* note 93, at 144.

106. *See generally* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS (3d ed. 2003).

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21. Practice and Visualize the Storytelling.

Practicing telling the story before you deliver it to an audience is probably a good idea. Storytelling is interactive and you need to have your own issues settled before you meet your audience. It will likely be different when you do.[107] Try to visualize the impact that the unfolding of the narrative will have on the audience. Do not paint yourself into a corner. I once saw an experienced Sioux Falls attorney paint himself into a corner because of a failure to visualize the presentation. He was giving a children's sermon on grace during the regular service at church. To illustrate his point, he brought candy to give to the kids. However, there were more kids who showed up than he had candy for. To the kids' obvious dismay (as well as his), he did not realize that until he ran out. Result, crying kids and an embarrassed lawyer. Not a good visual, and not a good message on grace either. Like the new science teacher in high school who attempts the in-class experiments, try the presentation more than once ahead of time. And have a Plan B.

22. Use Humor, But Do It Carefully; Make It Appropriate to the Story and the Audience.

Humor in general is a great universal connector. It helps to break the ice and to begin connecting with the audience. Even better is the humorous opening that previews the theme. That is, don't follow a mechanical formula and drop a joke into the opening without looking for the right example of humor to make a point that will be developed in the story. One of my best openings occurred as a guest lecturer for third year medical students, as part of their orientation week before starting on their clinical rotations. My subject was medical malpractice. I felt like Daniel, going into the Lion's Den. I knew one of the medical students, who was a friend of my oldest daughter. In fact, I had taught his high school Sunday School class several years before. So, after being introduced and stating my topic, I acknowledged that I faced a daunting task. I said, "The last time I felt this apprehensive about talking to a group was when I taught high school Sunday School." And then, looking directly at my former student, I said, "And Paul was in that class, too." The class loved that remark because Paul was a popular, but mischievous, member of the med school community (as he was in the church community). With that breaking of the tension, I was off to a good

107. Helmuth von Moltke, Chief of Staff of the Prussian army for thirty years in the latter part of the nineteenth century, is known for the following statement: "No battle plan survives the first contact with the enemy." DANIEL J. HUGHES, ED., MOLTKE ON THE ART OF WAR: SELECTED WRITINGS 45-47 (1993). That wisdom applies to many situations. Whether it is a first date, a first class, a first interview for a job, or the first day of trial, visualization of the event may help to avoid some mistakes that otherwise will haunt you for a long, long time. On the other hand, mistakes, especially of the social kind, are important in character development. As Miss Manners says, how else can one acquire those emotional scars that make us so much more interesting later on in life? *See generally* JUDITH MARTIN, MISS MANNERS' GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR (Freshly Updated ed. 2005).

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start and the presentation was a success.

Although my med school orientation went well, humor in particular can be very risky. Telling the wrong joke at the wrong time or at the wrong place will show you just how risky. In these times of political correctness, even if you are a tenured professor, it may demonstrate that there is no such thing as tenure. If you are talking to the wrong jury, punishment will be swift and sure. The fall from grace (or tenure) can happen in the blink of an eye.

Although there is great risk, there is also great benefit. Be careful, and think it through from many angles. If there is any question, talk to people about it. Do not toss in a joke just because you think it is required in order to connect. Make it appropriate to the audience. If you exercise care, the use of humor will assist greatly in making connections with that audience. High risk, but high rewards.

23. Make a Habit of Using Simple Declarative Sentences As Much As Possible.

One of the most important principles of persuasive writing – using simple, declarative sentences[108] – is even more important for speaking. The ability of a reader to re-read a sentence or retrace steps further back to re-read gives the writer somewhat greater latitude on matters, such as sentence length, dependent clauses, and references. Obviously, it is not good if the reader has to do that, but there is some flexibility there. With listeners, there is not much flexibility. The listener cannot rewind the tape. You must keep your statements short and direct. Do not burden the listeners with long circuitous sentences to make your point. Size matters, shorter is better.

Simple, declarative sentences will not win you the Pulitzer Prize, but they will communicate. Subject, verb, object. Subject, verb, object. Make it a practice to think in that simple sentence format because there is a tendency of lawyers, and especially law professors, to embellish with dependent clauses and multiple modifiers. Dependent clauses are not banned from speaking, but use them sparingly. They make for wonderful transitions from proposition to proposition. But the reason they cause problems is that a dependent clause at the beginning of the sentence will delay the time for the listener to learn about the subject who acts, often with respect to an object. In order to make sense of the sentence, the mind focuses first on the subject, verb, and object and then returns to the dependent clauses at the beginning and wherever else they are found in a complex sentence. And this is all supposed to happen before you as the speaker starts the next sentence. The delivery of a dependent clause can be used to enhance tension, but do it knowingly and do not overuse it.

In speaking, you should be careful about references. The listener, unlike the reader, does not have the opportunity to go back and figure out a reference.

108. Van Patten, *Propositions on Writing and Persuasion*, *supra* note 56, at 266-67.

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Do not make your audience mind readers. For example, you must be careful when using pronouns. Most stories have multiple characters. As the storyteller, you know to whom you are referring, but the audience does not. A less than careful use of pronouns can produce confusion. You can use them, but the reference must be clear. The use of modifiers can often create ambiguities. The ambiguity is: what does the modifier modify? The usual rule is it modifies the object closest to it, but the rule is not always followed, especially in speech. The classic example is Groucho Marx's famous line: "One morning I shot an elephant in my pajamas. How he got into my pajamas, I'll never know."[109] The humor here comes from the intentionally misplaced modifier. This is also an example of why the rule of last antecedent does not apply in every case.[110] The point here is do not get close to ambiguity. If your listener has to resort to the Rule of the Last Antecedent, you have already lost. Make sure your references are tight.

24. Speak With Conviction.

As much or more powerful than well-placed emotion is conviction. Delivering a narrative when you are speaking from the heart is one of the joys of life, both for the storyteller and for the listener. This cannot be taught, except by example. Former Senator Tom Daschle's eulogy at former Governor William Janklow's funeral is a very good place to start.[111] Although I do not share Senator Daschle's politics, I thought it was one of the best speeches I have ever heard. It was very moving, and persuasive. Another powerful example would be Randy Pausch's last lecture, *Achieving Your Childhood Dreams*.[112] The emotional setting of these two speeches was clearly an important reason for the impact, but it wasn't the sole basis.

Speaking with conviction does not require an emotional situation. It requires sincerity. You can't sell what you wouldn't buy, so the conviction must be real. That is why searching for the right theme is so important. Take the hardest case. Defending someone who is apparently guilty as charged. That's a hard sell. But, remembering that there are two ways to win a race – running faster than any one or making sure that no one runs faster than you – you can attack the government's case with conviction, if there is a basis for the theme: before the government may imprison anyone, it must follow its own rules. The right theme helps to keep you from overselling your evidence.

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109. Groucho Marx, BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/g/grouchomar128462.html (last visited April 29, 2012).

110. *See, e.g.*, *Kaberna* v. School Board of Lead-Deadwood School Dist., 438 N.W.2d 542, 543 (S.D. 1989).

111. *See* KELOLAND.COM, Janklow Funeral Service, http://sms.keloland.com/videoarchive/?VideoFile=120118janklowfuneral (last visited April 29, 2012). The speech may be seen beginning at the 52:25 mark, but I would also recommend Russ Janklow's moving introduction of Senator Daschle, beginning at the 49:30 mark.

112. http://www.youtube.com/watch?v=ji5_MqicxSo (last viewed June 19, 2012).

For storytelling, the same is true, even if understood in a slightly different way. Like the children's stories, the story you tell may be unreal, but not untrue. The truth in the story you tell helps the listener to find the truth in the argument you are making. But that will not happen if you use the story as a contrivance, if you don't take the truth of your own story seriously. People can sense manipulation and insincerity. Tell the story from the heart.

25. Keep It Simple.

It takes time to make it simple. The classic line is from Pascal, who apologized to a friend for the length of a letter, saying he did not have time to write a shorter one.[113] Work on your story—pick the right theme, think about the moral infrastructure, the underlying structure, the sequence, the word choices, and know when to add emotion and close the deal. Be sure to leave time to trim and tighten. No editorializing or side trips. Distractions interfere with the power of the story. An important distraction may be your ego. Unless there is a good reason to do so, make it about the story, not the storyteller. Just keep it simple.

CONCLUSION

Stories and metaphors (which are tiny stories) are a vital medium for persuasion. If conceived and executed correctly, they break down the familiar barriers of resistance. Stories allow you to find a common ground with the listener in a non-threatening way, without the appearance of coercion or trickery. By tapping into deeply held, often unconscious beliefs, a good story speaks more directly to real concerns than one could ever hope to do with plain argument. A good story makes the language of persuasion both universal and concrete.

113. *See* Blaise Pascal, The Provincial Letters of Blaise Pascal, Letter XVI, to the Reverend Fathers, the Jesuits, December 4, 1656, *available at* http://oregonstate.edu/instruct/phl302/texts/pascal/letters-c.html#LETTER%20XVI.

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Psychodrama and the Training of Trial Lawyers: Finding the Story*

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INTRODUCTION

Go to any courthouse in the country just about any day of the week and you'll hear it – the sounds of lawyers droning on and on with their technical arguments, their redundant questioning of reluctant witnesses, the subtle points which are relevant only to them. Look at the poor helpless jurors who are tied to their seats by civic duty, by law. They struggle to pay attention but fade in and out as the noise continues to wash over them – numbing them. Look at the litigants whose lives will be directly affected by the result of the proceedings. Even their stake in the outcome cannot hold their attention. Their eyes glaze over despite a valiant effort to appear interested. As Thomas A. Mauet says, "Boredom is the enemy of effective communication . . . ."[1]

Why are these people – these lawyers who have dedicated their professional lives to the art of persuasion – so incapable of telling a simple story passionately and succinctly? Why are the jurors not hanging on every word, [2] mesmerized as they watch these masters perform their art? Each Monday morning, we recount the events of the weekend to our colleagues with more passion and greater animation.

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I appreciate the support of the University of Akron School of Law in providing me a summer research grant.

I acknowledge the kind assistance of John Nolte, Ph.D., for his teaching, direction and suggestions. To have a psychodramatist of his caliber advising me has been a great gift. I also recognize the significant contributions of Gerry Spence, Esq., who is engaged in a constant struggle, not only to find a better way to represent people as a lawyer, but also to share his great gifts with young lawyers through his non-profit Trial Lawyer's College. The successful development of psychodrama as a tool for trial lawyers is largely the result of his vision and generosity.

I am grateful for the invaluable research assistance and encouragement of Anthony Gallia and Melinda Smith. Students like Anthony and Melinda are the reason most of us went into legal education.

This article expands upon a presentation at the Northern Illinois University Law Review's Ninth Annual Symposium, "Defense Strategies in Death Penalty Litigation," on March 23, 2000, entitled "Psychodrama in Capital Cases: A New Tool for Humanizing the Accused."

[1] THOMAS A. MAUET, TRIAL TECHNIQUES 19 (5th ed. 2000).

Why then are we seemingly incapable of effective communication when we are in court?

There seems to be little dispute among trial lawyers and trial advocacy teachers that the essence of the trial is storytelling and that storytelling principles are not only helpful, but also essential to an engaging and persuasive presentation.[2] Trial lawyers and trial advocacy teachers are looking for ways to take advantage of storytelling techniques to make our presentations more persuasive.

Part of the problem is that the format in which the trial lawyer must operate is not conducive to good storytelling. Good stories have a beginning, a middle and an end. They often begin with "once upon a time" and end with "and they lived happily ever after," and in between is a logical progression, a series of scenes interrelated by cause and effect. However, in trial, the story is jumbled. The evidence comes in piecemeal through witnesses and exhibits – often out of chronological order and disrupted by the opponent through objections and cross-examination.[3] To make matters worse, the opponent is simultaneously advancing a competing story. The jury is left with the task of constructing its own narrative as a way of organizing the pieces in a coherent fashion.[4] Opening statements are used to mitigate the problem by giving the [3] jury a cohesive story as a guide for organizing the evidence.[5] Trial advocacy teachers also stress the importance of theme as an organizing principle used throughout the trial to steer the jury in its construction of the evidence.[6]

The problem of format is only part of the problem and may be given too much credit for disrupting our presentations. Format is a convenient scapegoat for our inadequacies as storytellers. Even without the challenge of the format of a trial, most lawyers are simply not good storytellers. The truth is that trial lawyers are not

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[2] *See Lawyers as Storytellers and Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Symposium, *Speeches from the Emperor's Old Prose: Reexamining the Language of Law,* 77 CORNELL L. REV. 1233 (1992). The legal storytelling movement is not limited to the courtroom but has spread to the classroom and legal scholarship. *See, e.g.*, Daniel Farber & Suzanne Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (purporting to offer a systematic appraisal of the storytelling movement, particularly as it relates to legal scholarship); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (disagreeing with Farber and Sherry); Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353 (1992) (discussing the advantages of narrative in scholarship and teaching); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251 (1992) (discussing the need to teach storytelling in law school).

[3] *See generally* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 (1991). Lempert suggests that trial lawyers should present the case in chronological order, not witness order. Witnesses should not be called and then asked everything they know about the case; they should be asked only as much as is necessary to advance the story. Witnesses should then step down, only to be recalled later when further testimony would fit more nicely into the story. *Id.* at 565-66. Lempert recognizes that predictable impediments to this approach would be the inconvenience to the witness and the discretion of the judge under Rule 611 of the Federal Rules of Evidence. *Id.* at 566.

[4] *See generally* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

[5] J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 263 (1983).

[6] RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS 39-40 (2d ed. 1995).

trained to be good storytellers.[7] Lawyers are trained to think analytically.[8] In the words of one writer: "Starting with the first day of law school, lawyers are taught to suspend emotion in favor of cold, legal analysis."[9] They learn to decontextualize facts and categorize them according to their legal significance, sorting the relevant facts issue by issue.[10] They deconstruct and reduce the experience and then reorganize it to correspond with abstract legal principles.[11] The pieces, now reorganized and grouped in a legal context, lose the information-rich context of the experience as lived and felt.[12] Legal analysis, while essential to the lawyer and legal argument, is death to the story.[13] Legal theory and legal discourse are simply too far removed from human experience.[14]

[4] Given the format of the trial and our legal training, there is little wonder that many trial lawyers are boring, repetitive speakers. Lawyers should focus on techniques designed to compensate for the awkward format, and they should strive to communicate with jurors like human beings. But there is another, more fundamental issue that prevents the trial lawyer from communicating the story of the case. The problem with storytelling is that we simply do not know the story. We

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[7] McKenzie, *supra* note 2, at 251-52 ("Although lawyers are storytellers, they are not trained as such. Legal education in the United States today is dominated by the 'case method' of instruction first used by Christopher Langdell at Harvard University in the late nineteenth century. . . . [T]he role of the lawyer as storyteller . . . has been largely ignored in legal education.").

[8] Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

[9] Adrienne Drell, *Chilling Out*, A.B.A. J., Oct. 1994, at 70 (1994).

[10] *See* Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 781 (1998).

[11] *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2103 (1989) ("The popular image of lawyers is that we are committed to formal rationality. We are trained to cabin 'empathic' responses and remain steadfast in our commitment to legal principles despite emotional dissonance.").

[12] *See* Strong, *supra* note 10, at 781, 782.

[13] *See* Philip N. Meyer, *"Desperate for Love III": Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715, 716 (1999) ("There are two modes of functioning, two modes of thought, each providing distinctive ways of ordering experience, of reconstructing reality. The two [the analytical and the narrative] (though complementary) are irreducible to one another. . . . A good story and a well-formed logical argument are different natural kinds . . . . It has been claimed that one is a refinement of or abstraction from the other. But this must be either false or true only in the most unenlightening way.").

[14] Massaro, *supra* note 11, at 2105. Most people and, therefore, most jurors, are affective (right brain) decision-makers. MAUET, *supra* note 1, at 14-15. They care more about people than problems. They use deductive reasoning that is primarily emotional and impulsive. Once they make a decision, they justify the decision as logical and fair by discounting, discrediting or even ignoring information that is inconsistent with their decision. *Id.*; *see also* BERT DECKER, YOU'VE GOT TO BE BELIEVED TO BE HEARD (1992). In stark contrast, lawyers are trained to be cognitive (left brain) decision-makers. *See* Strong, *supra* note 10, at 761. They are more likely to withhold judgment until all of the facts have been accumulated. They then use inductive reasoning and come to logical conclusions based on an analysis of the facts. To the extent that lawyers approach the trial of a lawsuit as a factual/legal dispute, they will fail to effectively communicate with jurors who approach the trial as a human drama. Lawyers typically focus on the facts while the jurors are more interested in the people, their relationships and their human experiences. *See* JAMES E. MCELHANEY, TRIAL NOTEBOOK 133 (3d ed. 1994).

know the facts as our client and other witnesses have told them to us, but not the real story as lived, felt and experienced by our client and the witnesses.

Trial lawyers necessarily focus on the facts that reveal *what happened.* Better trial lawyers add additional facts that describe *why it happened.*[15] Good storytellers develop *how it was experienced* by the characters.

In his article entitled *The Trial as a Persuasive Story*, Professor Steven Lubet gives us a useful example – a simple personal injury case.[16] The lawyer represents the plaintiff who was injured when the car she was operating was struck from behind by the car operated by the defendant. Immediately before the collision, the traffic slowed to allow a fire truck to pass. These are the basic facts describing *what happened*, and they may be all that is legally essential.

We know why the plaintiff slowed down – because of the fire truck. But the jury may be left wondering why the defendant, also part of the traffic, did not slow down. Perhaps the defendant was negligent, but perhaps the plaintiff stopped too abruptly and was at least partially to blame. Perhaps there was no fire truck at all. Perhaps the fire truck was not sounding its siren or otherwise alerting traffic to stop. Professor Lubet insightfully notes that the story will be more persuasive if the lawyer can establish a reason for the defendant's conduct – in other words *why it happened.*[17] For example, what if the [5] defendant was late for a very important business meeting? The defendant's reason to rush now makes it more likely that he did rush. Understanding why the actor might do something gives context and meaning to the action and makes the action more likely to have occurred.

But there is more to the story we could explore. How did the defendant experience the facts? Perhaps the defendant felt his blood pressure rise as the digital clock on the dashboard served as a constant reminder that he would certainly be late. He tightly gripped the steering wheel and leaned forward, angry with himself for not allowing more time as he envisioned the embarrassing scene that awaited him upon his arrival at the office. He stared at the congestion ahead and saw the traffic as a frustrating impediment. He calculated how late he would be and said to himself almost audibly, "Why didn't I leave ten minutes earlier? What am I going to say when I get there?" With the insight of *how it was experienced*, we can now compare our own experience with the actor's experience. We recognize the experience as akin to our own. We can now empathize in the sense of understanding that the action of the defendant is not only more likely, but also ultimately believable.

Trials are frequently likened to a drama.[18] The comparison is an easy one to accept since both theater and trial involve storytelling.[19] One of the lessons we can take from the theater is the notion that credibility originates with the inner feelings the actor is experiencing and not the action itself. Actors and directors have long

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[15] Steven Lubet, *The Trial As a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 78-81 (1990).

[16] *Id.* at 80-81.

[17] *Id.*

[18] JAMES W. JEANS, TRIAL ADVOCACY 303 (2d ed. 1993); *see also* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS (2d ed. 1997).

[19] Strong, *supra* note 10, at 780 ("In the . . . theater of the courtroom, lawyers become themselves principle storytellers, and the producers and directors of tales told by others.").

understood the critical importance of "motivation."[20] Motivation is referred to by different terms – inner motive forces,[21] the objective,[22] and so forth – but the idea is the same. All action in the theatre must have an inner justification.[23] The motivation to act lies in the wishes, needs and desires of the human.[24] When the action is generated by true feelings, the action is logical, coherent and real.[25] When the action is not generated by true feelings, the action is artificial. The inner feelings are the guiding force that generates the action. The inner feelings are the reason for [6] the action and are, therefore, more important than the action itself. The inner forces are what "excite the audience and make the action believable."[26]

If inner motive forces are at the heart of credibility, the typical presentations in court fail to use the most persuasive material. We discuss the action in terms of what happened. But the trial lawyer who stops there fails to give the jury sufficient input to accept or reject the action. Better presentations include the situation or external forces that preceded the action to explain why the action happened. This information is critical to evaluating the action, but only insofar as it gives context to the inner forces (the feelings) that generate the action. If the jury is not also given the inner motive forces (how the facts were experienced) the link between external force and action is missing.

Psychiatrist and psychodramatist Dr. John Nolte[27] also distinguishes between facts and our experience of the facts:

> It is not just what happens to us that is important and that makes us who we are, it is how we experience what has happened to us. The facts are only a small part of anything that happens. Our experiences are stories, our stories. Together they comprise the story of our lives.[28]

Perhaps we tell only the facts (what happened and why) because all we know are the facts. In presenting our cases to the jury, if we could communicate the facts in a way that reveals how the witnesses experienced those facts, the jury would be better able to understand and relate to the witnesses on an emotional level and accept the facts.

We cannot tell what we do not know. As lawyers charged with the responsibility of telling our client's story, if we could somehow experience our client's stories – not just hear about them, but experience them – we would understand on an

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[20] *See* JOHN E. DIETRICH & RALPH W. DUCKWALL, PLAY DIRECTION 6 (2d ed. 1983).

[21] CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 244 (1963).

[22] WILLIAM BALL, A SENSE OF DIRECTION: SOME OBSERVATIONS ON THE ART OF DIRECTING 70-92 (1984).

[23] STANISLAVSKI, *supra* note 21, at 46.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 5.

[27] John Nolte, Ph.D., is a psychologist and psychodramatist in Hartford, Connecticut. Dr. Nolte is on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

[28] John Nolte, Brochure for the "Psychodrama and Telling the Story" Workshop, Oct. 23-25, 1998 (Midwest Ctr. for Psychodrama & Sociometry, Omaha, Neb.) [hereinafter "Psychodrama and Telling the Story" Brochure].

emotional level how the facts were experienced. We could then communicate that experience to the jury.

Proponents of a method called "psychodrama" contend that it is a tool that permits us to access the experience of others – to see things as they saw them and to feel it as they felt it – in other words, to truly empathize. Psychodrama also allows us to access our own experiences and to better [7] understand our experiences. "Psychodrama expands our understanding of experiences, hence our understanding of ourselves."[29]

I attempt in this article to make trial lawyers and trial advocacy teachers aware of this tool called psychodrama and how it is being used in preparation for trial and at trial. But psychodrama is an action method.[30] Writing an article about psychodrama is like writing a manual on how to swim. You will have only a slightly better understanding of swimming after studying a Red Cross manual on how to perform the various strokes. It is not until you are in the water that you will begin to fully appreciate the concept. So it is with psychodrama. No article could serve as a substitute for the experience of doing. To fully evaluate the usefulness of psychodrama in the trial of cases will require experience with the method.

I. WHAT IS PSYCHODRAMA?

A. INTRODUCTION TO PSYCHODRAMA

Psychodrama is considered, first and foremost, a method of psychotherapy.[31] However, unlike traditional Freudian psychoanalysis, where the subjects talk about their experiences, dreams and fantasies, psychodrama requires action.[32] Psychodrama has the subject dramatize certain events as a spontaneous play on a "stage" in a group setting.[33] The subject literally goes through the motions of physically acting out the scene.

Dr. J.L. Moreno, the creator of psychodrama, defined psychodrama as "the science which explores the 'truth' by dramatic methods."[34] Adam Blatner described psychodrama as follows:

> Psychodrama is a method of psychotherapy in which patients enact the relevant events in their lives instead of simply talking about them. This involves exploring in action not only historical events but, more

[29] *Id.*

[30] TIAN DAYTON, PH.D., THE DRAMA WITHIN: PSYCHODRAMA AND EXPERIENTIAL THERAPY 1 (1994).

[31] 3 J.L. MORENO & ZERKA T. MORENO, PSYCHODRAMA: ACTION THERAPY & PRINCIPLES OF PRACTICE 11 (1969). Psychodrama was, from its inception, a therapeutic method. Moreno proposed the replacement of Freudian psychoanalysis with psychodrama. 3 *id.* at 11, 24.

[32] ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE 1 (3d ed. 1988).

[33] *Id.*

[34] J.L. MORENO, WHO SHALL SURVIVE?: FOUNDATIONS OF SOCIOMETRY, GROUP PSYCHOTHERAPY, AND SOCIODRAMA 81 (3d ed. 1978).

> importantly, [8] dimensions of psychological events not ordinarily addressed in conventional dramatic process: unspoken thoughts, encounters with those not present, portrayals of fantasies of what others might be feeling and thinking, envisioning future possibilities, and many other aspects of the phenomenology of human experience.[35]

Psychodrama is a spontaneously created play, produced without script or rehearsal, with improvised props, for the purpose of gaining insight that can only be achieved in action. In psychodrama, life situations and conflicts are explored by enacting them, rather than talking about them.[36]

Psychodrama is used primarily as a group therapy method but, as we shall see, its uses are not limited to therapy. Psychodrama is a method used for promoting personal growth and creativity.[37] In addition to referring to a specific therapeutic method, the term "psychodrama" involves a wide variety of techniques that have application in business, education[38] and now the trial of lawsuits.

B. THE ORIGIN OF PSYCHODRAMA

Dr. J.L. Moreno (1889-1974) originated psychodrama in 1921 and refined it over the next few decades.[39] Moreno is best known as a principal co-founder of group psychotherapy.[40] It was out of his work developing group psychotherapy that Moreno originated the method of psychodrama.[41]

Psychodrama is a reflection of the eclectic interests and eccentric genius of Moreno. Understanding how such a method could develop requires some understanding of Moreno himself.

[9] *1. J.L. Moreno*

Moreno was born in Bucharest, Romania, on May 18, 1889.[42] His family moved to Vienna, Austria, in 1894.[43] He studied philosophy and medicine at the University of Vienna from 1909 until 1917.[44] In 1919 he became a general practitioner in Bad Voslau, a small town south of Vienna, where he used a family counseling approach – a forerunner of his later work.[45] While in Vienna, Moreno was very active and

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[35] BLATNER, *supra* note 32, at 1.

[36] *See, e.g.*, RENE F. MARINEAU, JACOB LEVY MORENO 1889-1974: FATHER OF PSYCHODRAMA, SOCIOMETRY, AND GROUP PSYCHOTHERAPY 157 (1989); MORENO & MORENO, *supra* note 31, at 233.

[37] PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 31 (1992).

[38] *See* BLATNER, *supra* note 32, at 2.

[39] *Id.*

[40] *See* MARINEAU, *supra* note 36, at ix.

[41] *See id.* at xi.

[42] *Id.* at 6.

[43] PSYCHODRAMA SINCE MORENO 2 (Paul Holmes et al. eds., 1994).

[44] MARINEAU, *supra* note 36, at 32; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[45] PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

influential in the artistic and dramatic life of the city.[46] Moreno emigrated from Austria to the United States in 1925 where he began his more formal contributions to psychotherapy.[47] In 1932, he coined the term "group psychotherapy."[48] He developed his theories working in hospitals, prisons and reform schools.[49] He founded Beacon Hill Sanitarium, a teaching institution where psychodrama was the principal method of treatment, in New York in 1936.[50] He founded training institutes for group psychotherapists and psychodramatists and started influential journals and professional associations.[51] J.L. Moreno died on May 14, 1974 in New York.[52] With him when he died were his nurse, Ann Quinn, and one of his students, John Nolte.[53]

Several experiences influenced Moreno and laid the foundation for the development of psychodrama. Three of these formative experiences are discussed here.[54]

[10] 2. *Child's Play*

While a student at the University of Vienna, Moreno observed the way children played and interacted in the parks in Vienna. He began to interact with them and tell them stories. He invented games for them that called upon their imagination. During this time, Moreno created a theater for children and had a regular group of young actors including Elisabeth Berger, who later became a famous actor.[55] They invented and improvised plays and presented classics in the parks and in a small hall that temporarily served as a theater.[56]

Moreno described his experience with the children:

> It was as a teenager, just prior to my matriculation in the Faculty of Philosophy at the University of Vienna that I first noticed the healthy spontaneity of children. At play in the parks of that city of my younger years and in observing the children as they played I found myself struck by the richness of their fantasy life. I hereupon made friends with them and subsequently led them in play, directing them in the creation of little "stories" that they acted out, and helping them to draw readily, from their

[46] *Id.*

[47] MARINEAU, *supra* note 36, at 9; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[48] *See* PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] MARINEAU, *supra* note 36, at 153; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

[53] MARINEAU, *supra* note 36, at 153.

[54] These episodes in Moreno's life are recounted in slightly varying ways in several books, including: IRA A. GREENBERG, PSYCHODRAMA AND AUDIENCE ATTITUDE CHANGE (1968); A. PAUL HARE & JUNE RABSON HARE, J.L. MORENO (1996); MARINEAU, *supra* note 36; J.L. MORENO, THE AUTOBIOGRAPHY OF J.L. MORENO, M.D (1985); MORENO & MORENO, *supra* note 31; PSYCHODRAMA SINCE MORENO, *supra* note 43.

[55] MARINEAU, *supra* note 36, at 35-39.

[56] *Id.* at 39.

> own knowledge and experience, to make real for these children that magic moment of the fantasies which their active imaginations and their high states of spontaneity brought excitedly to life. The realization of what was occurring during these periods that the children were involved in creating while they acted and in living in the worlds of their enactments during the times I directed them at play was for me a remarkable moment of discovery. This discovery subsequently led to the development of a movement . . . .[57]

Moreno later commented on the profound impact of his experience of working and playing with children:

> Gradually the mood came over me that I should leave the realm of the children and move into the world, the larger world, but, of course, always retaining the vision which my work with the children had given me. Therefore, whenever I entered a new dimension of life, the forms I had seen with my own eyes in that virginal world stood before me. [11] Children were my models whenever I tried to envision a new order of things or to create a new form. When I entered a family, a school, a church, a parliament building, or any other social institution, I rebelled. I knew how distorted our institutions had become and I had a new model ready to replace the old: the model of spontaneity and creativity learned from being close to the children.[58]

Moreno's work with children was instrumental in the development of his ideas about play, spontaneity, dramatic reenactment and creativity.

3. The Benefit of Groups

Moreno began working with disadvantaged groups. It happened this way: One afternoon while at the University of Vienna, Moreno saw a pretty woman on the street smiling at him. She was wearing a white blouse and red skirt with red ribbons to match. As Moreno began speaking with her, she was suddenly arrested by a police officer. Moreno followed her to the police station and waited for her. After her release, Moreno spoke with her about the reason for her arrest. She explained that she was a prostitute and that she was not allowed to wear such striking clothes during the day as she might attract customers. Moreno discovered a whole class of people who were segregated, not on the basis of race or religion, but on the basis of their occupation. They had no rights and no respect. They could not find doctors to treat them or lawyers to represent them. They had been stigmatized by society for so long they perceived themselves as despicable sinners and unworthy people. In 1913, Moreno began to visit their houses. He took with him two persons: a specialist in venereal disease, and a publisher of a Viennese newspaper. Moreno's purpose was

[57] GREENBERG, *supra* note 54, at 22.
[58] MORENO, *supra* note 54, at 34; *see also* MARINEAU, *supra* note 36, at 40.

not to reform the prostitutes, but to give them self-respect and dignity. He met with them in groups of eight to ten, two or three times per week. Gradually they began to realize the value of the group – that they could become the therapeutic agents of each other. They found ways to help each other. Moreno had discovered the potential of group psychotherapy.[59]

4. "Spontaneity Theater"

In 1921, a few years after the end of World War I, Moreno was concerned about the lack of social and political leadership in Austria. He wanted to bring [12] the community together and stimulate debate about the future of Austria.[60] He became involved with a group of actors who met regularly at the Café Museum in Vienna.[61] In 1922, Moreno rented space that could hold fifty to seventy-five people. Moreno's new theater group put on spontaneous plays suggested by the audience, or reenacted current news stories – a production called "The Living Newspaper."[62]

One of the actors in the group was Ann Hollering, who became known in psychodrama circles as "Barbara."[63] Barbara was very popular in Moreno's productions because of her excellent performances in romantic or heroic roles. She soon attracted the attention of a young poet and playwright, George Kulka, who sat in the front row of all her performances. A romance developed between them and they were married. Barbara continued to act and George continued to admire her from the front row.

One day George approached Moreno to ask for help. George explained that this seemingly sweet woman was mean-spirited and physically abusive when they were alone. Moreno promised to help. Under the pretense of ensuring that her performances did not grow stale, Moreno asked Barbara if she would be willing to try other roles – roles that would reveal the "rawness of human nature, its vulgarity, and stupidity, its cynical reality . . . ."[64] Barbara gladly accepted the challenge and began playing prostitutes, spinsters, revengeful wives, spiteful sweethearts, and so on. George reported immediate changes. While the couple still argued, the arguments lost their intensity. At times Barbara's conduct toward George reminded her of a character she played and she would laugh in the middle of an argument, diffusing the tension. George also reported that watching Barbara play these roles had caused him to be more tolerant of her and more patient with her. Moreno invited George to act on stage with Barbara. He had them portray scenes from their daily lives at home, from their families, her childhood and their dreams and future plans. Their relationship continued to improve.

Moreno began to appreciate the therapeutic value of insight gained through drama for the protagonist. But the audience also reported that the scenes portrayed

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[59] HARE & HARE, *supra* note 54, at 8-9.
[60] MARINEAU, *supra* note 36, at 70.
[61] *Id.*
[62] *Id.* at 72.
[63] *Id.* at 70.
[64] *Id.* at 74-75.

by George and Barbara had a great emotional impact on them. Audience members personally benefited from the experience. Moreno began to appreciate the therapeutic value of the dramas for the audience. [13] Eventually, Moreno sat down with George and Barbara and explained to them the "development of their psychodrama . . . and . . . the story of their cure."[65]

Moreno combined the spontaneity and creativity of children, the inherent value of group dynamics and the insight of dramatic role playing to create a completely different approach from Freudian psychoanalysis that was action-oriented, public and rooted in immediate reality.[66] His experiences prepared him for the development of psychodrama.

C. WHAT DOES A PSYCHODRAMA SESSION LOOK LIKE?

Psychodrama is usually done with a group of participants.[67] The group can vary in size from as few as five to a hundred or more, but most practitioners prefer a group of ten to fifteen.[68] The psychodrama session can take place in any space that provides room for physical movement and privacy with no distractions.[69] The group includes the *director*, the *protagonist*, the *auxiliaries* and the *audience*.[70]

The *director* runs the session and is usually a therapist in a therapeutic situation. A *protagonist* is selected to work on an issue. Aspects of the protagonist's life will be explored during the psychodrama session. Therefore the protagonist will be the principal actor in the drama.[71] An area for the protagonist to work is established. This area is referred to as the *stage*. The stage can be as simple as a small area in the center of the room.[72]

The director or the protagonist will typically recruit members of the group to assist in dramatizing the scene. These group members are called *auxiliaries*. They will be asked to portray the actual or imagined personae in the protagonist's drama. Members of the group who are not directly involved in the enactment will be the *audience*.

During the session, the protagonist is given the opportunity to work on an issue by acting out a particular scene (or scenes) spontaneously. The scene can be from the protagonist's *past*. The director may choose to have the protagonist reenact the scene as the protagonist recalls it, to allow the protagonist to access the feelings of the moment in a safe environment. [14] Alternatively, the protagonist could act out this past scene in another way – examining how things might have been done differently – giving the protagonist a chance to do it over.

The scene could also depict a *current* or recurring situation in the protagonist's life. This might allow the protagonist to explore the feelings generated, perhaps

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[65] 1 J.L. MORENO, PSYCHODRAMA 3-5 (1946); *see also* MARINEAU, *supra* note 36, at 74-76.

[66] *See* MARINEAU, *supra* note 36, at 76-77.

[67] *See id.* at 157.

[68] *See* KELLERMANN, *supra* note 37, at 26.

[69] *See id.* at 22.

[70] Because J.L. Moreno developed psychodrama from his earlier experiences in "spontaneity theater," he used theater vocabulary. *See* MARINEAU, *supra* note 36, at 136, 156.

[71] *Id.* at 157.

[72] *See* MORENO & MORENO, *supra* note 31, at 233.

examine the source of those feelings and investigate other options for dealing with the situation.

The scene may depict a situation the protagonist anticipates in the *future*. The goal may be to help the protagonist prepare for the event – a kind of rehearsal or role training in anticipation of the future event.

The scenes that could be depicted are unlimited. Every aspect of the protagonist's subjective life can be presented with the help of the group.[73] A protagonist could act out a dream, have an encounter with a loved one who is now deceased or meet her unborn children. Psychodrama is not limited by time, space or reality.[74] Whatever the scene, the protagonist, led by the director and assisted by the auxiliaries, physically acts out the scene as if the event were happening here and now – in the present.

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[73] *See* KELLERMANN, *supra* note 37, at 11-12.
[74] *See* MORENO & MORENO, *supra* note 31, at 23.

D. PSYCHODRAMATIC TECHNIQUES

Numerous techniques were developed by Moreno to achieve various goals during the psychodrama session. A few of the more common techniques include role reversal, soliloquy, doubling and mirroring.

1. Role Reversal

When Atticus Finch, the fictional lawyer portrayed by Gregory Peck in the movie *To Kill a Mockingbird*, advised his daughter that her temper and propensity for fist-fighting were not an appropriate way of dealing with problems, he said, "You never really understand a person until you consider things from his point of view[,] . . . until you climb into his skin and walk around in it."[75] Psychodramatists refer to this method as *role reversal.*

During the drama, the protagonist will typically be asked by the director to reverse roles with various auxiliaries. The protagonist takes the role previously played by the auxiliary and the auxiliary plays the role previously played by the protagonist. This process allows the protagonist to experience the scene from the vantage point of other characters in the drama. It also [15] permits the protagonist to observe the self from the vantage point of other characters in the drama. Role reversals will typically take place many times during the course of the psychodrama session.

Several lines from a poem authored by Moreno are often used to explain his concept of role reversal.[76] The poem suggests the total commitment necessary to the task:

> A meeting of two: eye to eye, face to face.
> And when you are near I will tear your eyes out
> and place them instead of mine,
> and you will tear my eyes out
> and place them instead of yours,
> then I will look at you with your eyes . . .
> and you will look at me with mine.[77]

In reversing roles, the person does not simply try to act as the other person would act, but to feel how the other person would feel – to take on their passions, prejudices, life experience, age, gender, ethnicity, and so on, and experience the depicted scene as the other person would experience it. Adam Blatner commented on the importance of this technique:

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[75] MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS 55 (1996).

[76] *See* HARE & HARE, *supra* note 54, at 15.

[77] THE ESSENTIAL MORENO: WRITINGS ON PSYCHODRAMA, GROUP METHOD, AND SPONTANEITY BY J.L. MORENO, M.D. 4 (Jonathan Fox ed., 1987).

> If one skill could be learned by everyone, I want it to be role reversal – to be able to see things from another's point of view (which does not mean always agreeing with that point of view). The ability to role-reverse fosters a way of being in the world that offers the potential for co-creating understanding, conflict clarification, and resolution. Each of us can learn and actively practice it in our daily lives, and thereby teach others to use it.[78]

2. Soliloquy

Soliloquy is the act of revealing inner feelings and thoughts that would normally be kept hidden.[79] The director will ask the protagonist to express out loud what he is feeling or thinking. The protagonist verbalizes what is otherwise internal.

[16] The soliloquy is often used in psychodrama as a warm-up technique. Giving voice to the feelings and emotions causes the protagonist to begin to focus on them. The soliloquy also provides valuable information the director can use to determine what issues or scenes should be explored.

The soliloquy is often used in conjunction with a role reversal. The protagonist is asked to soliloquize in the role of another person. This allows the protagonist to "warm up" to the role, and also gives the auxiliary, who may play the role, information needed for an accurate portrayal.

3. Doubling

The "double" is a particular kind of auxiliary whose function is to assist the protagonist in presenting the protagonist's position or feelings.[80] The protagonist may be having difficulty accessing or expressing his emotions, or may seem blocked or resistant. Another group member may have an idea about what the protagonist might be feeling. The director could let that other group member model a certain idea, action or emotion, thereby "doubling" for the protagonist.[81] The protagonist is then asked to accept, reject or modify the expression by the double, depending on whether the expression feels accurate to the protagonist. The protagonist will use the accurate suggestion or the suggestion as modified, and reject any suggestion that is not accurate. The result is that the protagonist is able to work through the block or overcome the resistance.

4. Mirroring

Mirroring is a technique that allows protagonists to see themselves. After the protagonist has acted out a particular scene, the protagonist is asked to come off stage and observe a reenactment of his behavior by an auxiliary. The auxiliary will

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[78] BLATNER, *supra* note 32, at ix.
[79] *Id.* at 176.
[80] *Id.* at 164.
[81] *See* KELLERMANN, *supra* note 37, at 147-48.

mimic the protagonist's body posture, use the same gestures, and use the same language as the protagonist. The auxiliary will imitate the protagonist's behavior, both verbal and non-verbal, to give the protagonist a sense of how he is acting or reacting in a particular situation.[82]

Mirroring is intended to give the protagonist insight about his feelings or his behavior. For example, the protagonist may be saying one thing while his body language is conveying something very different. Mirroring may allow the protagonist to discover the contradiction and to explore the protagonist's underlying feelings. The protagonist may be unaware of how a particular [17] behavior is perceived by others. Mirroring gives the protagonist an opportunity to judge his own behavior from a third-party perspective – a human version of video playback.[83] The technique may suggest exploring alternative ways to respond to a situation.

E. THE SEGMENTS OF A PSYCHODRAMA SESSION

A psychodrama session consists of three parts: the warm-up process, the action portion and the post-action sharing by the group.[84]

1. The Warm-Up Process

The warm-up process prepares the protagonist for the action portion to follow. There is no set time for the warm-up process. It may take only a few minutes, but it may take quite a long time, depending on the protagonist. The protagonist is invited onto the stage. The director may have a conversation with the protagonist to focus attention on the issue to be explored and identify a place to start. The director may have the protagonist soliloquize. The director may ask the protagonist to "set the scene" – describing the scene where the drama will take place as if the protagonist is there at the time – in the here and now. Regardless of the techniques employed by the director, the idea is to get the protagonist emotionally readied for the action portion.

2. The Action Portion

The action portion is where the critical scenes are enacted. The protagonist is asked to experience the scene (or scenes) in the here and now. A single scene can be explored one time, or the same scene can be explored multiple times with variations. One scene may lead to other scenes – taking the protagonist closer to the source of the issue. The goal is to provide the protagonist with emotional insight that can only

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[82] *Id.* at 148.

[83] *See* BLATNER, *supra* note 32, at 169.

[84] *See* MORENO & MORENO, *supra* note 31, at 237; *see also* MARINEAU, *supra* note 36, at 136; DAYTON, *supra* note 30, at 63 (depicting a diagram of the psychodrama segments). The diagram shows a fourth segment called "analysis." This additional segment was never formally incorporated into the psychodrama process. *Id.* at 61-62. A fourth segment called "processing" is used in psychodrama training to discuss and analyze the psychodrama session.

be gained through action.

[18] *3. Post-Action Sharing By The Group*

The action portion of psychodrama often produces a raw, exposed feeling in the protagonist. Post-action sharing is a critically important component that gives the individual members of the group an opportunity to empathize with the protagonist by sharing their own thoughts, feelings and experiences with the protagonist. The group members do not give advice, but rather express similar thoughts, feelings or experiences the drama produced or reproduced for them. It is a time to appreciate and acknowledge the gift the protagonist gave to the group and to embrace the protagonist.

F. HOW DOES PSYCHODRAMA WORK?

The goal of psychodrama is to discover the emotional truth of the protagonist, allowing the protagonist to gain insight, self-awareness, enlightenment and illumination – in essence, a deeper and richer understanding. In therapy, insight has generally been regarded as an important factor in producing a "cure."[85] But it has also been recognized that intellectual understanding is not enough to cause emotional or behavioral change. Intellectual understanding may come from reading, discussion or passive introspective analysis. "If information alone could bring about therapeutic change, patients could get well by reading their psychiatric case studies and psychological test reports."[86]

In order to be sufficient to evoke change, the process of self-discovery must be emotional, not just intellectual.[87] The protagonist must *experience* the meaning of their feelings in the present.[88] Psychodrama was designed by Moreno to facilitate the emotional insight that can only be accomplished by actual experience and not written or verbal information. To emphasize the focus on experiential learning, he called the self-discovery generated through psychodrama "*action-insight*."[89] The term describes insight based on overt behavior and not inner thinking.[90] It is learning by doing. "The learning gained through such an experience is passionate and involved, emphasizing the personal participation in the discovery and validation of knowledge."[91]

Kellermann offers this example:

> [19] [I]t would be meaningless to tell an overprotective mother to be less protective. However, if, in psychodrama, she is persuaded to reverse

[85] KELLERMANN, *supra* note 37, at 85.

[86] S.A. Appelbaum, *Psychoanalytic Therapy: A Subset of Healing*, 25 PSYCHOTHERAPY 201, 205 (1988).

[87] *See* KELLERMANN, *supra* note 37, at 86.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 92.

[91] *Id.* at 90 (citation omitted).

> roles with her child, even for a short time, and to experience intensely how it feels to live under her own protective behaviour, she might change. Such a first-hand awareness may give the protagonist an experience which is sufficiently meaningful to produce a lasting impact.[92]

The objective of action-insight is a search inward. It is the emotional experience of the protagonist, as opposed to the outer world of the senses, that is the goal.[93] Action-insight is non-cognitive in that it does not involve intellectualizing. It is a "gut-level" learning that involves processing at the bodily and perceptual-motor level – a process that favors feeling over thought, emotion over intellect, intuition over analysis.[94] It is a learning that often cannot be translated into words because it involves physical and mental sensations that evolved at a pre-verbal, early child development phase.[95] Psychodrama allows the protagonist to enact or reenact, live or relive, any event, real or imagined, past, present or future, and receive, at a gut-level, the insight that can only be gained by being there.

II. PSYCHODRAMA AND TRIAL LAWYERS

A. THE NATIONAL CRIMINAL DEFENSE COLLEGE

In April of 1975, John Ackerman became the first permanent Dean of what is now known as the National Criminal Defense College ("NCDC").[96] The NCDC organizes and sponsors training seminars for criminal defense [20] lawyers, including an intensive residential seminar in the summer that lasts several weeks. In 1975, the training sessions were purely lecture. But Ackerman became familiar with techniques used at the National Institute of Trial Advocacy ("NITA") that required the attendees to actively participate by performing the various skills being taught. After some modifications, Ackerman adopted the NITA method.

The NITA approach proved successful for the NCDC, but after a few years, Ackerman wanted more:

> [I] saw the good lawyers, . . . not just the name lawyers, but the people who were doing extremely good work around the country in criminal defense work, that they had developed ways to do certain parts of the trial that came out of who they were. And I thought, if we could figure out a

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[92] *Id.* at 90-91.

[93] *Id.* at 91.

[94] *Id.* at 93-94.

[95] *Id.* at 93.

[96] The NCDC, located at Mercer Law School in Macon, Georgia, and sponsored by the National Association of Criminal Defense Lawyers, was originally located in Houston, Texas. The college was originally called the National College of Criminal Defense Lawyers and Public Defenders. The name was subsequently changed to the National College for Criminal Defense. When the College relocated to Georgia, the name was changed again to its current name. Videotape: Interview with John Ackerman, Instructor, The Trial Lawyer's College, in Dubois, Wyo. (Aug. 11, 1998) (transcript on file with author) [hereinafter Interview with Ackerman].

way to train the people that came to the college to do all the things necessary in trying a criminal case by intuition, by just knowing at some level inside themselves how to go about the process, that instead of training carpenters, we'd be really training lawyers who would be a lawyer for all seasons, so to speak. Because when you're teaching carpenters you have to worry about exceptions. "You do this in almost every case except in this kind of case where, you know, that's the worst thing you could do," or something like that. That's . . . what happens when you are training carpenters. I wanted to figure out a way to teach lawyers to be intuitive and creative and, and to just kind of understand at a . . . gut-level that there were certain ways that would be effective in dealing with the trial of cases and dealing with juries. And I didn't know how to do that.[97]

Ackerman called his friend John Johnson, a sociologist who was originally from Wyoming but by then was living in the State of Washington. Ackerman and Johnson had met through Gerry Spence in 1966, when they worked together for Spence on a case in Wyoming while Ackerman was still a law student at the University of Wyoming. Ackerman brought Johnson to Houston in the spring of 1978 when Spence was in town, and Johnson presented the idea of using psychodrama to teach lawyers.

[21] The next scheduled NCDC program was at St. Simons Island, Georgia in the summer of 1978, where Spence was scheduled to speak. Ackerman, Spence, Johnson and two or three others tried to do a psychodrama session without the benefit of a trained psychodramatist, to see what it was like.

[A]t that point we saw the potential, but the potential we saw was certainly different from what it has become today. At that time we basically saw it as a way to help people get in touch with themselves, figure out who they were as a human being, to be real, to be open, to be honest, and at that time it hadn't occurred to us that it could be what it is today, and that is a training tool in and of itself, rather than just a way to help people learn about who they were.[98]

Encouraged by the potential they experienced at St. Simons Island, Ackerman, Johnson and Spence scheduled the first ever psychodrama workshop for lawyers – a two-and-a-half day seminar at the Snow King Inn in Jackson Hole, Wyoming, in the fall of 1978. They hired a professional psychodramatist to direct the sessions. The brochure called the seminar "The Criminal Trial: A Psychodramatic Analysis," and it mentioned Gerry Spence, who had already achieved national recognition. Fifty to sixty people signed up. The experiment was successful.

[W]e got through that two-and-a-half days and the feedback we got from

[97] *Id.*
[98] *Id.*

> the people that had come was that it was just an absolutely fantastic experience. And in addition to the personal psychodramas, we dealt a lot with problems people were having with cases they were involved in, problems with judges, problems with clients, things like that. And we were able to work through some things there that worked out quite well.[99]

A series of psychodrama programs were scheduled from 1978 until 1983 through the NCDC, using a psychodramatist named Don Clarkson.[100] The psychodrama sessions were run as separate programs; they were not integrated into the NCDC summer training program. When Ackerman's tenure at the college ended in 1983, the interest in using psychodrama began to wane. Only two or three psychodrama programs were scheduled after Ackerman left.

By 1988, psychodrama was no longer used as a training method at the NCDC. However the idea of using psychodrama to train trial lawyers remained alive. When Gerry Spence decided to begin his own training [22] program for lawyers, he called his friend John Johnson and they involved Don Clarkson. Clarkson called his colleague, John Nolte, to participate as a psychodramatist. On July 31, 1994, a new experiment began: the Trial Lawyer's College.

B. GERRY SPENCE'S TRIAL LAWYERS COLLEGE

In 1994, Gerry Spence started an intensive trial advocacy course at his 34,000-acre Thunderhead Ranch, located twenty miles east of the small town of Dubois, Wyoming. Forty-eight lawyers are selected each year from hundreds of applicants to stay at the ranch for twenty-one days and to experience psychodrama as a method of trial preparation.[101] Spence calls the course "the Trial Lawyer's College" and he describes it in his 1998 book, *Give Me Liberty*:

> Let me tell you a story: . . . We are in our fifth year at our nonprofit Trial Lawyer's College (TLC), a pilot program we have organized and which we conduct every year at my ranch for training trial lawyers for the people. . . . The first step in the program is to give the [attendees] the opportunity to become human again. . . . At our Trial Lawyer's College, both [attendees] and [faculty] are given the opportunity to rediscover themselves. They are put through days of psychodrama by experienced psychologists. . . . [T]hey learn how to crawl into the hides of their clients, to experience their pain, to understand the witness on the witness stand, even to understand and care for their opponent. In the course of their training, they become the judge, and even feel how it is to be the

[99] *Id.*

[100] Don Clarkson is a licensed independent clinical social worker and certified psychodramatist. He is on the staff of Howard University Counseling Service and is an Associate Professor in the Howard University School of Social Work in Washington, D.C.

[101] From 1994 through 1999, the Trial Lawyer's College was a thirty-one day program. In 2000, the program was condensed to twenty-one days.

juror. . . . By the end of their experience at TLC, we have witnessed a miracle. Nearly every attendee has entered into the most sacred realm of human experience – that place I call personhood. They have learned to tell the truth, not only about their case but about themselves. They have learned the power of credibility.[102]

[23] Spence revived and expanded Ackerman's idea of using psychodrama to train trial lawyers.[103] Not surprisingly, Ackerman is now on the teaching faculty of Spence's Trial Lawyer's College.

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[102] GERRY SPENCE, GIVE ME LIBERTY: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 303-05 (1998).

[103] Interview with Ackerman, *supra* note 96.

III. PSYCHODRAMA AND TRIAL SKILLS TRAINING

The trial of a case is telling the jury the client's story.[104] We can only tell what we know. Traditional methods focus on telling the facts as they have been related to us. Psychodrama is a method that enhances empathy by permitting us to experience the facts vividly and to discover how those facts were experienced.[105] Psychodrama allows us to find the true story – to discover important facets of our story that were previously overlooked.

A. DIRECT-EXAMINATION: FINDING THE STORY

1. Lawyer Preparation

In direct-examination, we tell our client's story through the witnesses, each witness responding to the questions asked by the lawyer. Because the lawyer controls the information by the very questions asked, the story is revealed as the lawyer understands it. If the lawyer has only a limited understanding of the events, a limited story will be revealed. Typically the lawyer knows the story through informal interviews, witness statements or depositions. The lawyer knows only the facts reported by the witnesses. The lawyer was not there when it happened. The lawyer did not observe the event, much less experience the event as the witness experienced it.

Through psychodrama, the lawyer is able to experience the event. The lawyer can reverse roles with the witness and experience the event from the vantage point of the witness. The lawyer will have access to the emotional content involved in the story that is not otherwise fully available. The lawyer will have a deeper understanding of the truth involved – an understanding [24] grounded in empathy, not sympathy.[106] The lawyer's deeper understanding of the witness' story will suggest different questions – better questions.

One psychodramatic tool that can be used to accomplish this task is the reenactment – a psychodrama that recreates the event the way it is remembered by the witness. Let me give you an example from a recent psychodrama session

[104] Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567-68 (1994).

[105] *See* BLATNER, *supra* note 32, at 6.

[106] Lynne Henderson has defined "empathy" as including: "(1) feeling the emotion of another; (2) understanding the experience or situation of another . . . ; and (3) action brought about by experiencing the distress of another . . . ." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Psychodrama is a tool that provides a means of attaining parts (1) and (2) of Henderson's definition. The availability of this tool may also make it more likely that the third segment will be achieved, i.e. that understanding will lead to action in the form of decision-making by jurors and judges. The appropriateness of the third portion, of including emotions or sympathy or empathy (as it is varyingly described, *see* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 nn.15-39 (1997)) in decision-making has been the subject of considerable debate. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statement*, 63 U. CHI. L. REV. 361 (1996); Feigenson, *supra*; Henderson, *supra*; Massaro, *supra* note 11; Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997).

conducted at the Trial Lawyer's College.[107] A lawyer was preparing for a medical malpractice trial involving a brachial plexus injury – a birth injury caused by pulling too hard on the head and neck of the infant during delivery. The result of the injury was permanent paralysis of one of the arms. This lawyer was working on the direct-examination of her client with a group of about twenty that consisted primarily of other trial lawyers. She practiced her direct-examination in front of the group. The direct-examination of the mother failed to convey a sense of the excitement, urgency, panic and horror that was likely involved immediately before, during and after the delivery. The questions by the lawyer were clinical, revealing only hard, factual information.

The lawyer was asked by the group leader, the director, to become a *protagonist* in a psychodrama. She was asked to reverse roles with her client. She agreed. An area was cleared in the center of the room. This area became the *stage*. The other members of the group became the *audience*. They sat in chairs arranged in a semicircle in front of the stage. The lawyer/protagonist was asked to walk around on the stage and perform a *soliloquy* as her client. She spoke her thoughts and feelings about how it feels to be a woman pregnant with her first child and late in the third trimester. As she spoke she placed her hand on her stomach and imagined her stomach large and round and the feeling of the baby moving inside. The soliloquy allowed her to *warm up* to the role before moving to the first scene.

[25] The first scene involved the lawyer/protagonist, in the role of her client in the car on the way to the hospital. Four chairs became improvised props. The chairs, arranged in two rows of two, became the car – the first row for the front seat and the second row for the back seat. A member of the audience was recruited to be an *auxiliary* and to play the role of the client's husband as he drove the client to the hospital. This scene allowed the protagonist to further warm up to the role in preparation for the critical scene.

When they arrived at the hospital, other audience members were recruited to serve as auxiliaries in the roles of doctors, nurses and other health care professionals. The reenactment took place in a room that was used as an exercise room. There was a variety of exercise equipment in the room including a weight bench and weight belts. The weight bench became a hospital bed as the lawyer/protagonist, still in character, was moved from the car to the delivery room. She clutched her husband's hand and expressed the pain and excitement of the moment. As the fetal monitors began to sound their alarm, her excitement turned to panic. Audience members mimicked the sound of the monitors. Doctors began to bark orders and the health care professional hurried in response. The lawyer/protagonist expressed fear and confusion. Finally, the baby was delivered and the panic dissipated and was replaced by the joy of seeing her firstborn child – a girl. A weight belt wrapped in a sweatshirt represented the baby. As the mother unwrapped the baby, she discovered the arm that was limp. She went through the motions of picking up the tiny arm and

[107] Psychodrama sessions are confidential. Only the protagonist is permitted to describe the psychodrama session without consent. The protagonists involved in the psychodrama sessions described in this article have reviewed the descriptions for accuracy and have given their consent that these descriptions be used.

releasing it, only to see it fall lifeless against the crying newborn. Her joy was replaced by anguish. She began screaming, "What's wrong with my baby? What have you done to my baby?" At the direction of one of the doctors, a nurse forcibly took the baby from the mother. The childless mother sobbed as her husband made a futile attempt to console her.

With the emotion of the scene still fresh, the lawyer was asked to try her direct-examination again. The direct-examination that followed was dramatically different than the first. It revealed the mixture and rapid change of emotion experienced by the client. It took on a quality of being told in the present tense – the here and now. It effectively conveyed the emotional content of the story. The lawyer understood not only the facts, but also how the client experienced those facts. A wealth of new material was now available to the lawyer for use in the direct examination. The lawyer was now in a position to ask questions that revealed not only the facts, but also how the client experienced those facts.

[26] 2. *Witness Preparation*

Often it is the witness who is having difficulty accessing the emotional truth. During the direct-examination she tells what should be a compelling and emotionally charged story in clinical terms or in a monotone that belies the subject matter. The subject and the delivery are incongruous. It is bad enough that the jury will not get the full impact of the story. It is worse if the jury concludes that the witness is uncaring and emotionally detached. It could be disastrous if the jury concludes that the witness is simply lying.

Psychodrama permits the witness to relive the emotions in a safe environment. The psychodramatic experience serves to prepare the witness for trial. The exercise does not mask the truth with trumped-up emotion, but allows the witness to tell more of the truth by releasing the pent-up emotion. "Protagonists are not manipulated into expression, but helped to overcome those resistances which block their spontaneity."[108] The witness is now able to articulate the feelings because the feelings have been brought from a subconscious level to a conscious level. Unspoken thoughts can now be expressed.[109]

B. CROSS-EXAMINATION: FINDING THE STORY

As the phrase suggests, cross-examination is typically interrogation that is "cross," or as Webster defines the term, "showing ill humor or annoyed."[110] We cross-examine the witness out of our fear. The witness is called by the other side to destroy our case. Despite all of the discovery available to us, the witness is still unpredictable. More often than not, we set about the task of destroying the witness' credibility by verbally attacking the witness in a harsh and demeaning tone. The problem with this approach is that the jurors are not motivated out of the same sense

[108] KELLERMANN, *supra* note 37, at 83.
[109] *See* BLATNER, *supra* note 32, at 9.
[110] JEANS, *supra* note 18, at 414.

of fear. They do not want the witness to be attacked simply because the witness was called as a witness by one party to this lawsuit and not the other. The jurors are searching for the truth. What is the truth of this particular witness as it relates to the case?

Psychodrama is the search for the truth through dramatic methods. A simple role reversal will allow the lawyer to see the witness not as an enemy to be destroyed, but as a human being whose motivation is to be revealed. The lawyer must experience the world as the witness experiences the world – not just think about it, but also become the witness.

Consider the following example:

> [27] You represent Mike O'Loughlin who is accused of selling drugs. The prosecution's chief witness is Rose Gray, who now admits to being a partner of O'Loughlin's in the drug trade. When first arrested, she denied knowing the defendant. She explained on direct examination that she lied to the police "to keep from going to jail." She is a single mother of two daughters, ages five and three. The penalty for selling drugs is twenty years. Ms. Gray has agreed to testify against the defendant in exchange for the prosecutor's agreement to charge her with possession only, rather than for the sale of drugs, and to recommend a three-year suspended sentence. Ms. Gray was convicted of possession of a controlled substance eight years ago and was sentenced to one year in the penitentiary. She was released after three months. [111]

A typical cross-examination might go as follows:

> Q: Ms. Gray, this is not the first time you have been involved with the authorities as a result of drugs, isn't that true?
> A: Yes.
> Q: In fact, you were convicted of possession of a controlled substance eight years ago, isn't that true?
> A: I know it was a while ago, yes.
> Q: You received a sentence of one year, correct?
> A: Yes, but I was released early.
> Q: You served three months in the penitentiary for women, true?
> A: Yes, that's right.
> Q: You understand that the prosecutor has the option of charging you with drug dealing?
> A: I understand.
> Q: If convicted you would go back to the penitentiary, isn't that true?
> A: Yes.
> Q: This time for twenty years?

[111] The example used here was developed at the Trial Lawyer's College. It is described in more general terms in another article. *See* James D. Leach et al., *Psychodrama and Trial Lawyering*, TRIAL, Apr. 1999, at 46.

A: That's my understanding.
Q: But the prosecutor offered you a deal, isn't that true?
A: Yes. [28]
Q: If you testify against Mike, they will not charge you with dealing drugs, true?
A: That's what they said.
Q: They will only charge you with possession of drugs, isn't that true?
A: Yes.
Q: By testifying against Mike, you are guaranteed that you will not go to prison for twenty years, right?
A: By telling the truth, yes.
Q: Having now testified, you will likely receive a three-year suspended sentence, true?
A: That will be up to the judge.
Q: A three-year suspended sentence is what the prosecution will recommend, right?
A: That's right.
Q: When you were arrested for dealing drugs, you denied knowing Mike, true?
A: Yes, I was scared.
Q: Now you say that he was your partner in this drug operation.
A: That's right.
Q: You lied to the police?
A: Yes, I didn't want to go to jail.
Q: You lied to keep from going to jail?
A: Yes.
Q: And that is your goal here today – to keep from going to jail?
A: I'm not lying.
Q: You entered into this deal with the prosecutor to keep from going to jail for twenty years, isn't that true, Ms. Gray?
A: I agreed to tell the truth, yes.
Q: You will lie to keep from going to jail, isn't that true?
A: I'm not lying.
Q: We have already established that you have lied to keep from going to jail, true?
A: Yes, but I'm not lying now.
Q: No further questions.

This approach is intended to discredit the witness by revealing the witness's motivation for lying. The witness's motivation is brought to the jury's attention by forcing the witness to acknowledge the motivation. The [29] approach will usually require a stern attitude and some persistence to overcome a predictably reluctant witness.

There are two shortcomings with this approach. First, this approach explores only the intellectual truth of the witness's circumstances, but fails to explore the

emotional truth. The jury has been supplied with the facts, but has not been shown how the witness experiences those facts – how they affect her emotionally. Second, the approach takes unnecessary risks of offending the jury. By focusing only on the factual truth and ignoring the emotional truth, the lawyer appears cold and uncaring, even hostile, to the witness.

A different approach could be developed using psychodramatic techniques. In preparing for the cross-examination, a lawyer reversed roles with the witness and experienced what it might feel like to be a young mother facing prison. The insight generated by performing the exercise resulted in the following cross-examination delivered in a soft voice:

Q: Ms. Gray, I understand you have small children?
A: Yes.
Q: Daughters?
A: Yes.
Q: Could you please tell the members of the jury their names and ages?
A: Sure. Sarah is five and Taylor is three.
Q: Do you have any help raising your children?
A: No.
Q: Their father does not help you?
A: No, we haven't seen him in quite some time.
Q: It must be difficult for you?
A: We do okay.
Q: Well, if you go to the penitentiary for twenty years, who would look after your little girls?
A: I don't know.
Q: That must worry you quite a bit.
A: Yes, it does.
Q: How old will Taylor be in twenty years?
A: Twenty-three, I guess.
Q: She will be a grown woman?
A: Yes.
Q: What about Sarah?
A: She'll be twenty-five.
Q: If you go to prison for twenty years, your children will grow up without you? [30]
A: Yes.
Q: That must be frightening for a young mother?
A: (No response.)
Q: You will not take them to school?
A: No.
Q: You will not see them in school plays?
A: No.
Q: You will not read to them at night or tuck them into bed?
A: No.

Q: You will not see them off to the high school prom, or attend their high school graduations?
A: No.
Q: You will not be there to take care of them when they are sick?
A: Not if I'm in prison, no.
Q: They may even get married while you are away in the penitentiary?
A: They could.
Q: You would like to be there for them, isn't that true?
A: Of course I would.
Q: You have been to prison before?
A: Yes.
Q: You know what it is like there?
A: Yes.
Q: You were scared while you were there?
A: Sometimes.
Q: Scared of the other inmates?
A: Some of them.
Q: There is no privacy in prison?
A: Not much.
Q: You sleep in the same room with other inmates?
A: Yes.
Q: Shower with other inmates?
A: Yes.
Q: The guards tell you when you can eat?
A: Yes.
Q: When you can sleep?
A: Yes.
Q: When to take a shower?
A: Yes.
Q: You can only have visitors on specified days? [31]
A: Yes.
Q: And for specified times?
A: Yes.
Q: In a large and noisy room?
A: Yes.
Q: Sometimes nobody comes to visit?
A: (No response.)
Q: You count the days until you can go home?
A: Yes, if you know how long it will be.
Q: You don't want to go back there, isn't that true?
A: That's true.
Q: Not for twenty years?
A: (No response.)
Q: There is a way you can avoid all that?
A: Yes.

Q: You understand that if you testify for the prosecutor in this case, the prosecutor will charge you with simple possession and not dealing in drugs?
A: That's what he said.
Q: And you believe him?
A: Yes.
Q: He will recommend a three-year suspended sentence?
A: Yes.
Q: That means you may not have to go to prison at all, isn't that true?
A: Yes.
Q: And you can go home to Sarah and Taylor?
A: Yes.
Q: Wouldn't that be wonderful?
A: Yes.
Q: To have your life back?
A: Yes.
Q: And so you accepted that deal?
A: Yes.
Q: Well Ms. Gray, even Mike can understand why you are doing this. I don't have any more questions.

The goal of discrediting the witness is accomplished to a greater extent here than in the first example. First, not only are the facts presented, but how the witness emotionally experiences those facts has also been explored. The jurors can empathize with the witness while concluding that she cannot [32] be believed. She has too much to gain and too much to lose to be a credible source of information. Second, the lawyer is perceived as kind, compassionate and understanding, and the risk of offending the jurors has been reduced or eliminated.

The material generated out of the role reversal allows the lawyer to approach the witness, not as an enemy to be destroyed, but as a human being whose motivation is to be understood. The lawyer has looked at the situation from the witness's vantage point, through the witness's eyes and has felt what it must be like to be her. The lawyer spent time in preparation for the cross-examination, not simply by playing the role of the witness, but by becoming the witness psychodramatically, feeling the pressure of testifying or going to prison, and agonizing over the prospect of losing her children and having them lose her.

C. OPENING STATEMENT AND CLOSING ARGUMENT: FINDING THE STORY

The opening statement and the closing argument are the times during the trial when the story can be told, not in question-and-answer form, not piecemeal, but as a narrative. It is an opportunity to tell a complete story, passionately and persuasively. We have already discovered that the facts are only a part of what happens. The way those facts are experienced is the rest of the story. The story is not complete and will

lack human drama and compassion if the experience of the facts is ignored.

Lawyers often visit relevant scenes in preparation for trial.[112] It may be the scene of the alleged crime – the intersection where the automobile accident happened, or the machine that caused the plaintiff's injuries. This experience permits the lawyers to gain insight and understanding about the facts of the case so they can accurately and richly convey those facts to the jury. However, most lawyers do not visit the emotional aspects of the story. They do not experience the events as experienced by the witnesses or the client. Psychodrama provides an opportunity to visit the emotional aspects of the case, to experience the facts. The lawyer is then in a better position to tell the jury not only what happened, but how it felt. Let me give you an example:

> Rod received a telephone call at home. His wife, Jan, and their two sons had been involved in an automobile collision on the interstate highway. They had been taken to a hospital more than an hour away. As Rod frantically prepared to [33] leave for the hospital, he received a second telephone call. His youngest son, Paul, was dead. Paul was only thirteen years old.
>
> When Rod arrived at the hospital, he was asked to identify his son's body. He waited while they prepared Paul. Finally, a woman came for Rod, and escorted him down a long hallway to a large stainless steel door. The woman opened the door and started to lead Rod inside. Rod asked the woman if he could go in alone. She agreed, but reassured Rod that she would be nearby if he needed her. Rod entered the room alone. He found Paul on a table in the center of the room. Paul was fully dressed, including his winter coat. Rod cried, and for the next twenty minutes, said goodbye to his son.

Those are the sad facts – a small, but important, part of a tragic story. The trial lawyer had to relate this part of the story in court as an element of damages in the wrongful death case. The lawyer could have done an adequate job with these facts alone. However, to uncover all of the available material to choose from in constructing the opening or the closing, the facts are only the beginning. The lawyer must understand how those facts were experienced by Rod. After reversing roles with Rod, the lawyer reenacted the scene psychodramatically. After the psychodrama session, the lawyer described Rod's experience at the hospital:

> The white walls, the white tile floor and the florescent lights gave the narrow hallway the appearance of a tunnel of light described by survivors of near death experiences. Rod had the metallic taste of panic in his mouth. Each heavy step required a deliberate act on his part. Twice he felt his consciousness slip away, but only for an instant. The bright

[112] *See, e.g.*, FED. R. CIV. P. 34; FED R. CRIM. P. 16 (permitting entry on land or other property for inspection and other purposes).

hallway faded to black but quickly returned again. It was as if he had been asleep for a time, but the interval of unconsciousness was so brief he did not have time to fall. Rod steadied himself by touching the wall with his left hand as he continued to walk. The woman looked at him and asked if he were okay. Rod lied, "I'll be fine." He needed to see Paul. He was afraid that she might not take him to see Paul if she knew how weak and nauseated he felt. He avoided her eyes and continued his methodical march.

> They arrived at a large stainless steel door. For the first time since the telephone call, Rod realized that he took [34] comfort in the thought that the doctors might be mistaken. Maybe Paul was not dead. He knew that seeing Paul would make the news more real and extinguish the last of his unrealistic hope. The woman placed her hand on the door handle, but before turning it, looked at Rod – her sad eyes asking if he could handle this. He nodded to her and she opened the door. She started inside, but paused when she realized that Rod did not follow. "Can I have some time alone with him?" he asked. "Of course," she said. She would be right outside if he needed her. She backed away and Rod entered the morgue of Lima Memorial Hospital alone.

> There he was – lying on a table in the center of the room – fully dressed. He was even wearing his winter coat. He looked like he was sleeping. Rob approached and looked down at his son. Paul's image blurred as Rod's eyes filled with tears. Rod stroked Paul's soft brown hair and gently repeated, "Oh, Paul; oh, Paul." It was so cold in there. Paul's hair felt cold to the touch. Rod thought, "It's so cold in here. I'm glad he's wearing his coat."

The role reversal and reenactment permitted the lawyer to experience the facts rather than simply learn about them. The story, whether told in opening or closing, is rich with the emotional detail that can only be accessed by the experience.

D. EXPERIENCES WITH PSYCHODRAMA IN THE CLASSROOM

One of the challenges for trial advocacy teachers is to keep everyone engaged in the class while working with one or two students at a time. Psychodrama can be useful in accomplishing this task. First, the size of the typical trial advocacy class is relatively small, ranging from ten to twenty students. This is an ideal number for a psychodrama session.[113] Second, trial advocacy classes are often scheduled in three-hour blocks, which provide sufficient time to use psychodrama.

Psychodrama is not a substitute for skills training in the classroom. Students must learn fundamental techniques – how to deliver a proper opening statement and

[113] *See* KELLERMANN, *supra* note 37, at 26.

how it differs from closing argument, how to ask leading questions on cross-examination, how to impeach a witness with a prior inconsistent statement, and so forth. However, psychodrama is a valuable tool [35] in helping the students discover the most effective story to tell and in enhancing their presentations.

1. Reenactments to Enhance Storytelling

Since 1990, I have taught trial advocacy at the University of Dayton School of Law and the University of Akron School of Law. At some point during the semester, each student is asked to relate a true story from his or her own experience. The stories they choose vary. Some select comical stories while others opt for more serious, personal stories. The way in which they tell their own stories is compared to the way in which they present opening statements or closing arguments. For their personal stories the students typically stand before their classmates and relate the events with great physical involvement. Their gestures reveal that they are describing events as they are envisioning or "seeing" them in their mind's eye.

For example, one student used her hands to trace the outline of a pony she was describing. With her arms out in front of her, hands raised just above eye level, palms facing down, she defined for the class the height of the pony's back. It was apparent that she was envisioning the pony as she described it for us. She even honored the physical space the pony occupied in the room by stepping around the space rather than walking through it. Another student, telling a story that involved standing waist-deep in a pool of water, unconsciously used her hands to touch the surface of the water and to swish the water back and forth with her hands as she related the events of her story. In another story, a student described pulling his friend back from the street and out of the path of a passing car. In doing so he mimicked the quickness and physical characteristics of his reaction by quickly taking a step forward, reaching his hands out, pulling his hands back and stepping back to his original position. This movement allowed the audience to see how it happened.

The class invariably accepts these personal stories as true, in part because the physical involvement is consistent with the words. The student appears to be describing the event as she is reliving it in her mind. Her physical movements place the objects or define the action, and permit the audience to relive it with her. The stories are credible because the student is describing it as it is happening in her mind.

When the same students are asked to present an opening statement or closing argument, the presentations generally lack physical involvement. For example, the height of a brick wall is described in terms of feet without setting the scene physically by touching the top of the wall. A doorway is described verbally without the physical movement that would outline and place that doorway in the [36] room. Movements of the characters in the story are described without the benefit of a physical demonstration. Having never seen the object or experienced the movement, the student does not envision the object to be described or relive the movement.

These students are then asked to participate in a psychodramatic reenactment of the case they are arguing. They assume the role of a character in the story through a simple role reversal and then physically act out the scene to be described. Other

students in the class play the other required roles. After the reenactment, the students are asked to give the opening statement or closing argument again. This time physical involvement joins the language and the events are told with the same degree of animation as the personal stories. The students now have a sense of having been there, and their performances reflect the quality of reliving the story rather than just retelling it.

2. *Reenactments to Select the Factual Theory*

The students are given simulated cases to try during the course of the semester. The facts in these cases, as in real cases, are in dispute. With conflicting evidence, the students are left to select a factual theory among two or more possible theories. Reenactments have been very helpful in selecting the factual theory that is most persuasive. A factual theory that was attractive at first has proven incredible when the students tested the theory by physically going through the motions.

3. *Role Reversals to Gain Insight*

Students who are having difficulty embracing a particular client or directing or cross-examining a particular witness are asked to assume the role of the client or witness through a simple role reversal. Through soliloquy, interview or reenactment, the student gets a better sense of the client or witness. This insight is often all that is required to work through the impasse.

IV. DO PSYCHODRAMA SESSIONS REQUIRE A TRAINED PSYCHODRAMATIST?

Psychodrama has not gained widespread acceptance as a *therapeutic method.*[114] In fact, there has been a great deal of controversy concerning the use of psychodrama as a therapeutic tool. Whether psychodrama is effective for therapy is beyond the focus of this article. The issue here is the usefulness of psychodrama for the non-therapeutic application of trial preparation and [37] trial.[115] However, the therapeutic use of psychodrama does raise concerns that the use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants. For example, reenactment of a traumatic event in the client's life, such as the death of a loved one, or rape, could have the effect of re-traumatizing the client.[116]

In an article for the American Trial Lawyers Association's *Trial Magazine*, jury

[114] *See* BLATNER, *supra* note 32, at 32 (discussing "Resistance to Psychodrama").

[115] Kellermann argues that psychodrama is a form of treatment to be used by professionally trained clinicians who attempt to treat more or less disturbed clients. He does not suggest, however, that non-therapeutic applications are inappropriate. He would simply like to distinguish non-therapeutic applications and give them a different name, such as "creative dramatics." *See* KELLERMANN, *supra* note 37, at 18-19.

[116] *See* Leach et al., *supra* note 111, at 48.

consultant Amy Singer, Ph.D., stated:

> Psychodrama is one of the psychologist's most powerful tools for quickly penetrating someone's defenses, while at the same time enabling the person to break through denial and reveal highly personal truths. It is an ideal technique to help the injured client – particularly young abuse victims – get in touch with painful thoughts and feelings regarding his or her own tragedy, and to reveal these feelings to others – first to the attorney and later to jurors.
>
> Since psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients. Attorneys should not attempt to organize a psychodrama session by themselves.[117]

In direct response to Dr. Singer's statement, James Leach, John Nolte and Katlin Larimer[118] wrote:

> Psychodrama is a powerful and complex methodology that requires extensive training to master, and psychodramatic psychotherapy should only be conducted by a credentialed mental health professional. Still, psychodrama has many [38] nonclinical applications that easily include role reversals and can include simple reenactment of the client's experiences.
>
> A lawyer with sufficient training in psychodrama can and should use it for the purposes outlined in this article. If, however, the lawyer wishes to reenact a traumatic event in the client's life, such as a death, a rape, or abuse of a child, the lawyer should seek assistance from a professional psychodramatist to avoid retraumatizing the client. If the client is being treated by a mental health professional, the lawyer should consult the professional to determine whether to use psychodrama.[119]

Both articles would suggest that involving severely traumatized clients and witnesses as protagonists in a psychodrama session concerning the subject matter of the trauma presents certain risks to the protagonist. There seems to be a consensus that this situation would demand the skill and knowledge of a professionally trained psychodramatist to avoid the risk of inflicting further psychological harm to the

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[117] Amy Singer, *Connecting with Severely Injured Clients*, TRIAL, June 1998, at 50.

[118] James D. Leach practices law in Rapid City, South Dakota, and has extensive training in psychodrama. John Nolte, Ph.D., is a psychologist in Hartford, Connecticut, who studied psychodrama under J.L. Moreno. Katlin Larimer, of Omaha, Nebraska, is a psychotherapist with certification in psychotherapy. All three authors are on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

[119] Leach et al., *supra* note 111, at 48.

protagonist. However, Singer's blanket statement that, "[s]ince psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients," and that "[a]ttorneys should not attempt to organize a psychodrama session by themselves," apparently leaves no room for psychodrama sessions involving less extreme circumstances.[120] Leach, Nolte and Larimer disagree with Singer. They would not only permit lawyers with psychodrama experience to use psychodrama with clients in the absence of a psychologist, they encourage it.[121]

The conflict may stem from a fundamental difference of opinion concerning what psychodrama is and what it is not.[122] Singer views psychodrama as a complex therapeutic activity.[123] Certainly this view would lend itself to a heightened concern about the appropriateness of using psychodrama in the absence of a psychologist. However, Nolte, while acknowledging that psychodrama can be used in therapy, has a much broader view of the method:

> [39] Because it was originated by a psychiatrist and because he developed it largely within the setting of a mental hospital, psychodrama is widely thought of as "a method of psychotherapy." This is misleading at best and has had a strong negative influence upon the development of the non-clinical applications of the method. It is more accurate to consider psychodrama as a method or system of communication, and psychotherapy as one of its uses.[124]

Viewed as a method or system of communication there will be less reservation about using the method.

A few ideas emerge from the debate. When the lawyer is the protagonist and is using various psychodramatic techniques to gain a better understanding of the client and witnesses, the risks are minimized. Even in a reenactment, the lawyer, having not experienced the trauma in the first place, is not at risk of being re-traumatized in the relatively safe environment of the psychodrama session. Similarly, when the lawyer is using psychodrama to understand how various jurors or the judge might view the case, the concerns raised by Singer are not implicated. It is when the client or the witness is involved in the psychodrama session that the issue arises. Being aware of the issue permits the lawyer to exercise judgment about when a certified psychodramatist should be used.

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[120] *See* Singer, *supra* note 117, at 50.

[121] *See* Leach et al., *supra* note 111, at 48.

[122] Kellermann argues that psychodrama is a form of treatment. While he admits that non-therapeutic applications are appropriate, he distinguishes non-therapeutic applications by giving them a different name. *See* KELLERMANN, *supra* note 37, at 18-19. However, the issue cannot be dismissed as merely a matter of semantics. Regardless of the terminology used, the issue remains whether psychodrama, by any name, presents risks to participants when used by attorneys who have only a modest amount of psychodrama training.

[123] *See* Singer, *supra* note 117, at 53.

[124] John Nolte, Psychodrama (1998) (unpublished manuscript, on file with author).

CONCLUSION: THE STORYTELLER IN TRIAL

The trial of a case is the telling of a story. Therefore, to be good trial lawyers, we must be good storytellers.[125] The problem is that most of us were hampered in our development as storytellers by an inadequate and counterproductive legal education – one that not only failed to teach us how to tell stories, but also dictated that we dismiss emotion and empathy in favor of formal legal principles and cold legal analysis.[126] Upon graduation from law school, we can list the elements of a tort, but cannot embrace and convey the human tragedy behind the cause of action. To become good storytellers and effective trial lawyers, we must now accept what we once learned to reject, to take up what we once set aside – the human drama, how the experience was lived and felt by the people involved.

[40] We can only tell what we know. Our discovery of the story may begin with the facts, but the underlying story, the real story, is in the way those facts were experienced by our client and the witnesses.[127] Psychodrama is a discovery tool that allows us to access the experience – to see things as they saw them, to feel it as they felt it – and then use what we have discovered in every phase of the trial. We can then present our case to the jury in a way that reveals not only what happened and why it happened, but also how it was experienced – the inner motive forces involved.[128] In doing so we will bridge the gap between the reason to act and the action itself. The jury can then understand and relate to our client and the witnesses on an emotional level. The jurors will recognize the experience as parallel to their own. They may not have experienced the precise situation described in the trial, but they have experienced similar emotions. They have now been given sufficient input to truly empathize with the characters involved and accept the story as true. The story as lived, felt and experienced is not only engaging – it is ultimately believable.

[125] *See generally* McKenzie, *supra* note 2.

[126] *See* Cramton, *supra* note 8, at 248; Drell, *supra* note 9, at 70; Massaro, *supra* note 11, at 2103.

[127] "Psychodrama and Telling the Story" Brochure, *supra* note 28.

[128] *See* STANISLAVSKI, *supra* note 21, at 244.

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STORYTELLING FOR OPPOSITIONISTS AND OTHERS: A PLEA FOR NARRATIVE

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STORYTELLING FOR OPPOSITIONISTS AND OTHERS: A PLEA FOR NARRATIVE

*Richard Delgado**

INTRODUCTION

Everyone has been writing stories these days. And I don't just mean writing *about* stories or narrative theory, important as those are.[1] I mean actual stories, as in "once-upon-a-time" type stories. Derrick Bell has been writing "Chronicles," and in the *Harvard Law Review* at that.[2] Others have been writing dialogues,[3] stories,[4] and metastories.[5] Many others have been daring to become more personal in their writing, to inject narrative, perspective, and feeling — how it

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1. *See* ON NARRATIVE (W. Mitchell ed. 1981); 1 & 2 P. RICOEUR, TIME AND NARRATIVE (1984-85); Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative,* 97 HARV. L. REV. 4 (1983); Des Pres, *On Governing Narratives: The Turkish-Armenian Case,* 75 YALE REV. 517 (1986); West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory,* 60 N.Y.U. L. REV. 146 (1985) [hereinafter *Jurisprudence As Narrative*]; *see also* J. ADAMS, THE CONSPIRACY OF THE TEXT: THE PLACE OF NARRATIVE IN THE DEVELOPMENT OF THOUGHT (1986); J. CAMPBELL, THE POWER OF MYTH (1988) (transcript of interview with Bill Moyers); T. LEITCH, WHAT STORIES ARE: NARRATIVE THEORY AND INTERPRETATION (1986).

2. D. BELL, AND WE ARE NOT SAVED (1987) [hereinafter AND WE ARE NOT SAVED]; Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles,* 99 HARV. L. REV. 4 (1985) [hereinafter *The Civil Rights Chronicles*].

3. *E.g.,* Delgado, *Derrick Bell and the Ideology of Race Reform Law: Will We Ever Be Saved?* (Book Review), 97 YALE L.J. 923 (1988) [hereinafter *Saved?*]; Delgado & Leskovac, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue* (Book Review), 40 RUTGERS L. REV. 1031 (1988); *see also* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 238-39 (1980) (dialogue between a disadvantaged and an affluent person on the notion of equal sacrifice).

4. *E.g.,* I NEVER TOLD ANYONE, WRITINGS BY WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (E. Bass & L. Thorsten eds. 1983); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,* 22 HARV. C.R.-C.L. L. REV. 401, 401-02 (1987) [hereinafter *Alchemical Notes*]; *see also* West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner,* 99 HARV. L. REV. 384 (1985); Meisol, *A New Genre of Legal Scholarship: Storytelling Feminist Takes on the Fundamentals of Law,* L.A. Times, Oct. 7, 1988, part V, at 8, col. 1 (quoting Robin West: "We need to flood the market with our own stories until we get [the] point across.").

5. *E.g.,* Bracamonte, *Foreword: Minority Critiques of the Critical Legal Studies Movement,* 22 HARV. C.R.-C.L. L. REV. 297, 297 (1987); *Alchemical Notes, supra* note 4, at 401. *See generally* J. GARDNER, THE ART OF FICTION 82-94 (1984) (defining and giving examples of metafiction).

was for me — into their otherwise scholarly, footnoted articles[6] and, in the case of the truly brave, into their teaching.[7]

Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups,[8] groups whose marginality defines the boundaries of the mainstream, whose voice and perspective — whose consciousness — has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.[9]

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6. *E.g.*, Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authority* (Book Review), 68 B.U. L. REV. 217, 230 (1988); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 574-75 (1984) [hereinafter *The Imperial Scholar*]; Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (beginning article on rape reform by recounting her own rape); Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 329 (1988); *see also* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *Theory*]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Jurisprudence*].

7. *E.g.*, Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 11 NATL. BLACK L.J. 1 (1989); Johnson & Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433 (1986); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 14-16 (1988) [hereinafter *Affirmative Action*] (use of S. WEBB & R.W. NELSON, SELMA, LORD, SELMA: GIRLHOOD MEMORIES OF THE CIVIL RIGHTS DAYS (1980) to explain civil rights movement and limits of liberal legalism in American Legal History class; use of an Alice Walker essay to explain rationale of compensation for wrongful death in torts class); D. Friedrichs, Narrative Jurisprudence and Other Heresies: Legal Education at the Margin 16-27 (Mar. 1988) (unpublished manuscript on file with author) (use of narrative forms, including biographies and autobiographies of legal practitioners and scholars, in teaching interdisciplinary law and society class). Professors who teach in nonstandard fashion sometimes evoke strong reactions of rejection from their students. *See, e.g.*, Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 3, col. 1.

8. By "outgroup" I mean any group whose consciousness is other than that of the dominant one. *Cf.* Walker, *Choice: A Tribute to Dr. Martin Luther King, Jr.*, in IN SEARCH OF OUR MOTHERS' GARDENS 142 (1983); *Affirmative Action*, *supra* note 7, at 1 n.2 (term "outsiders" used to include those who are not white males and who are historically underrepresented in law schools); *The Imperial Scholar*, *supra* note 6, at 566 (nonwhites' exclusion from inner circles of civil rights scholarship). *See generally* M.-L. VON FRANZ, PROBLEMS OF THE FEMININE IN FAIRYTALES (1976).

9. Des Pres, *supra* note 1; *see* T. PETERSON, HAM & JAPHETH: THE MYTHIC WORLD OF WHITES IN THE ANTEBELLUM SOUTH 5 (1978); *see also* J. ZIPES, FAIRYTALES AND THE ART OF SUBVERSION (1985); A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G.N. Smith trans./eds. 1971); Lévi-Strauss, *The Structural Study of Myth*, 66 J. AM. FOLKLORE 428 (1955).

The stories of outgroups aim to subvert that ingroup reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws — both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these.[10] Rather, it is the prevailing *mindset* by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom.[11]

Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.[12] These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.[13] Ideology — the received wisdom — makes current social arrangements seem fair and natural. Those in power sleep well at night — their conduct does not seem to

10. *See, e.g.,* AND WE ARE NOT SAVED, *supra* note 2; D. BELL, RACE, RACISM, AND AMERICAN LAW (1981) [hereinafter RACE, RACISM, AND AMERICAN LAW]; Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1359 (1988); *Saved?, supra* note 3; *Alchemical Notes, supra* note 4.

11. *See, e.g.,* T. PETERSON, *supra* note 9; Bonsignore, *In Parables: Teaching About Law Through Parables,* 12 LEGAL STUD. F. (forthcoming); Des Pres, *supra* note 1; Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978) [hereinafter *A Critical Review*]; Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color,* 5 LAW & INEQUALITY 103 (1987) [hereinafter *Taking Rights*] (role of "Euromyths" in sustaining white domination); *see also* A. LORDE, SISTER OUTSIDER (1984); Kennedy, *Legal Education as Training for Hierarchy,* in THE POLITICS OF LAW 40 (D. Kairys ed. 1981); Steele, *I'm Black, You're White, Who's Innocent?,* HARPER'S, June 1988, at 45 (innocence-giving myths and accounts enable whites to be comfortable with things as they are).

12. *See* AND WE ARE NOT SAVED, *supra* note 2, at 5-7; W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 5 (1981) ("Stories are systematic means of storing, bringing up to date, rearranging, comparing, testing, and interpreting available information about social behavior"); *The Master's Tools Will Never Dismantle the Master's House,* in A. LORDE, *supra* note 11, at 110; Cover, *supra* note 1, at 4-5; *Saved?, supra* note 3; Delgado & Leskovac, *supra* note 3; Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Storytelling,* 87 MICH. L. REV. 543, 550-52 (1988) (on the need to balance rhetoricians' search for belief and community against deconstructionists' suspicion); *see also* J. GARDNER, *supra* note 5, at 88; Tagliabue, *Police Draw the Curtain, but the Farce Still Plays,* N.Y. Times, June 14, 1988, at A4, col. 3.

13. *See generally* M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 135 (1985); H. GADAMER, TRUTH AND METHOD (1975); Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 13 (1988); *Saved?, supra* note 3, at 929; Delgado & Leskovac, *supra* note 3, at 1039; Peller, *The Metaphysics of American Law,* 73 CALIF. L. REV. 1151 (1985); White, *The Value of Narrativity in the Representation of Reality,* in ON NARRATIVE, *supra* note 1, at 23.

them like oppression.[14]

The cure is storytelling (or as I shall sometimes call it, counter-storytelling). As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo.[15] Stories told by underdogs are frequently ironic or satiric;[16] a root word for "humor" is humus — bringing low, down to earth.[17] Along with the tradition of storytelling in black culture[18] there exists the Spanish tradition of the picaresque novel or story, which tells of humble folk piquing the pompous or powerful and bringing them down to more human levels.[19]

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that

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14. *See supra* note 8 (consciousness as the defining characteristic of "outgroups"); *The Imperial Scholar, supra* note 6; *Saved?, supra* note 3, at 926, 931; Delgado & Leskovac, *supra* note 3, at 1050-54, 1058. *See generally* Lévi-Strauss, *supra* note 9, at 428-29 (supporting the idea that myths are used by social groups to overcome contradiction —to feel comfortable with a reality that would otherwise be difficult to explain).

15. *See* B. BETTELHEIM, THE USES OF ENCHANTMENT (1975); Kundera, *The Novel and Europe*, N.Y. REV. BOOKS, July 19, 1984, at 15 (stories enable us to go beyond conventional interpretation; good storytellers subvert and deepen culture); Steele, *supra* note 11, at 45; Stone, *The Reason for Stories: Toward a Moral Fiction*, HARPER'S, June 1988, at 71 (stories essential to sense of self; fiction expands range of human possibilities); *see also supra* note 12.

16. *See, e.g., infra* section I.D (the savage satire of Al-Hammar X); *infra* section I.E (the more subtle use of irony by the author of the anonymous leaflet); *see also* LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 1-2 (B. Botkin ed. 1945); PUTTIN' ON OLE MASSA: THE SLAVE NARRATIVES OF HENRY BIBB, WILLIAM WELLS BROWN, AND SOLOMON NORTHRUP 33, 46 (G. Osofsky ed. 1969) [hereinafter PUTTIN' ON OLE MASSA]; Arnez & Anthony, *Contemporary Negro Humor as Social Satire*, 29 PHYLON 339 (1968); Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 335-37 (1987) [hereinafter *Looking to the Bottom*]; Warren & Ellison, *A Dialogue*, REPORTER, Mar. 25, 1965, at 42; *Taking Rights, supra* note 11.

17. J. SHIPLEY, THE ORIGINS OF ENGLISH WORDS 441 (1984) (humor derives from *ugu*, a word for wetness; related to humus — earth or earthly sources of wetness); *see also* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 452 (C. Onions ed. 1966).

18. *See* THE BOOK OF NEGRO FOLKLORE (L. Hughes & A. Bontemps eds. 1958); THE NEGRO AND HIS FOLKLORE IN NINETEENTH CENTURY PERIODICALS (B. Jackson ed. 1967); Greene, *A Short Commentary on the Chronicles*, 3 HARV. BLACKLETTER J. 60, 62 (1986); *see also* L. PARRISH, SLAVE SONGS OF THE GEORGIA SEA ISLANDS (1942).

19. *See, e.g.,* M. CERVANTES, DON QUIXOTE OF LA MANCHA (W. Starkie trans./ed. 1954) (1605). For ironic perspectives on modern Chicano culture, see R. RODRIGUEZ, HUNGER OF MEMORY (1980); López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162, (1987); Rodriguez, *The Fear of Losing a Culture*, TIME, July 11, 1988, at 84. *Cf. The Imperial Scholar, supra* note 6 (ironic examination of the dearth of minority scholarship in the civil rights field); Tagliabue, *supra* note 12 (Polish street theater group uses humor and irony to expose Communism's flaws).

by combining elements from the story and current reality, we may construct a new world richer than either alone.[20] Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.[21]

But stories and counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half — the destructive half — of the creative dialectic.

Stories and counterstories, to be effective, must be or must appear to be noncoercive. They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain.[22] They are insinuative, not frontal; they offer a respite from the linear, coercive discourse that characterizes much legal writing.

This essay examines the use of stories in the struggle for racial reform. Part I shows how we construct social reality by devising and passing on stories — interpretive structures by which we impose order on experience and it on us. To illustrate how stories structure reality, I choose a single race-tinged event and tell it in the form of five stories or narratives. Each account is followed by analysis, showing what the story includes and leaves out and how it perpetuates one version of social reality rather than another. Part II deals with counterstories,

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20. The process of *creating* that new world will not always be pleasant or easy, but sometimes full of challenge and tension. *See Saved?, supra* note 3, at 927 n.20, 947; *Alchemical Notes, supra* note 4, at 406-09; D. Friedrichs, *supra* note 7, at 4 ("[Stories] challenge taken-for-granted hierarchies both by exposing . . . the cruel consequences of such hierarchies, and by imaginatively promoting alternative accounts of how humans might live . . . ."); *see also* D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 28 (1980); Rycroft, *The Sixth Sense* (Book Review), N.Y. Rev. Books, Mar. 13, 1986, at 11. *See generally* M. BALL *supra* note 13; J.B. WHITE, THE LEGAL IMAGINATION (1973) [hereinafter THE LEGAL IMAGINATION]; J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984) [hereinafter WHEN WORDS].

21. *See* Stone, *supra* note 15, at 71, 75; West, *Economic Man and Literary Woman: One Contrast,* 39 MERCER L. REV. 867, 875 (1988) [hereinafter *Economic Man*]; *Jurisprudence as Narrative supra*, note 1, at 145-46 ("When we discuss what is, we rely quite rightly upon description and analysis. But when we discuss what is possible, what we desire and what we dread, we quite naturally turn to stories . . . ."); Friedrichs, *supra* note 7, at 13. *Cf.* Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,* 62 TEXAS L. REV. 1563 (1984); Tushnet, *An Essay on Rights,* 62 TEXAS L. REV. 1363, 1382-84 (1984). *See generally* J. GARDNER, ON MORAL FICTION 5, 15-16 (1978); G. ELIOT, *The Natural History of German Life,* in ESSAYS OF GEORGE ELIOT 266 (T. Pinney ed. 1963).

22. For discussion of this "willing suspension of disbelief," see Friedrichs, *supra* note 7, at 7 (narrative form useful for conveying "heretical notions" because less "abrasively didactic" than other forms; readers willingly expose themselves to narrative accounts of outgroup figures). But note Bell's warning: Moses, Jesus, Plato, and Socrates all used stories to explain or challenge law and politics. Even so, the minority storyteller must balance tale telling with solid legal analysis, so as not to seem "too general and too devoid of legal theory for some of [his or her] academic friends." *The Civil Rights Chronicles, supra* note 2, at 82.

competing versions that can be used to challenge a stock story and prepare the way for a new one. Section II.A lays out in greater detail the case for counter-storytelling by outgroups. Section II.B addresses the questions, Why should members of the dominant group listen to the stories told by outgroups? How can they — members of the in-group — benefit?

I. Storytelling and Counter-Storytelling

The same object, as everyone knows, can be described in many ways.[23] A rectangular red object on my living room floor may be a nuisance if I stub my toe on it in the dark, a doorstop if I use it for that purpose, further evidence of my lackadaisical housekeeping to my visiting mother, a toy to my young daughter, or simply a brick left over from my patio restoration project. There is no single true, or all-encompassing description. The same holds true of events. Watching an individual perform strenuous repetitive movements, we might say that he or she is exercising, discharging nervous energy, seeing to his or her health under doctor's orders, or suffering a seizure or convulsion. Often, we will not be able to ascertain the single best description or interpretation of what we have seen. We participate in creating what we see in the very act of describing it.[24]

Social and moral realities, the subject of this essay, are just as indeterminate and subject to interpretation as single objects or events, if not more so. For example, what is the "correct" answer to the question, The American Indians are — (A) a colonized people; (B) tragic victims of technological progress; (C) subjects of a suffocating, misdirected federal beneficence; (D) a minority stubbornly resistant to assimilation; or (E) ——; or (F) ——?

My premise is that much of social reality is constructed. We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire.[25] These patterns of perception become habitual, tempting us to

23. *See* J. Derrida, Of Grammatology (1976) (words alter — do violence to — events or experiences); *A Map that "Changes the World,"* San Francisco Chron., Oct. 14, 1988, at A3, col. 1 (National Geographic adopted new "more realistic" world map that depicted United States smaller than previous map, Soviet Union and oceans larger; experts quoted as saying that no map is a "true representation of the world." "[A]n Eskimo cartographer . . . might do something different."); *see also* Tagliabue, *supra* note 12.

24. *See, e.g.*, R. Akutagawa, *In a Grove*, in Rashomon and Other Stories 19 (T. Kojima trans. 1970); R. Leoncavallo, I Pagliacci (1892) (in the *Prologue*, hunchbacked clown Tonio explains that stories are real, perhaps the most real thing of all, turning *commedia dell'arte* — "it's only a play, we're just acting" — on its head).

25. *See* J.B. White, Heracles' Bow 175 (1985) [hereinafter Heracles' Bow]; Stone, *supra* note 15; *see also* Cole, *Thoughts from the Land of And*, 39 Mercer L. Rev. 907, 921-25

believe that the way things are is inevitable, or the best that can be in an imperfect world.[26] Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible.

In the area of racial reform the majority story would go something like this:

> Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

Yet, coexisting with that rather comforting tale is another story of black subordination in America, a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend."[27] This other history continues into the present, implicating individuals still alive.[28] It includes infant death rates among blacks nearly double those of whites, unemployment rates among black males nearly triple those of whites, and a gap between the races in income, wealth, and life expectancy that is the same as it

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(1988) (discussing theories that language determines the physical world, rather than the opposite); White, *Thinking About Our Language,* 96 YALE L.J. 1960, 1971 (1987) [hereinafter *Thinking About Our Language*] (describing the dangers of reification). *See generally* N. GOODMAN, WAYS OF WORLDMAKING (1978); E. CASSIRER, LANGUAGE AND MYTH (1946).

I say "shape," not "create" or "determine," because I believe there is a degree of intersubjectivity in the stories we tell. *See infra* sections I.A.-.E, recounting an event in the form of five stories. Every well-told story is virtually an archetype — it rings true in light of the hearer's stock of preexisting stories. But stories may *expand* that empathic range if artfully crafted and told; that is their main virtue. *See infra* Part II.

26. *See* Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW, *supra* note 11, at 281, 286-87 (ascribing this seeming inevitability to unthinking adoption of belief systems); Kairys, *Introduction* to THE POLITICS OF LAW, *supra* note 11, at 3-4.

27. AND WE ARE NOT SAVED, *supra* note 2, at 217. *See generally* RACE, RACISM, AND AMERICAN LAW, *supra* note 10, at 1-58 (chapter entitled Slavery and American Law); D. GLASGOW, THE BLACK UNDERCLASS (1980) (examining the roots and ongoing causes of the black underclass).

28. *See Saved?, supra* note 3, at 938.

was fifteen years ago, if not greater.[29] It includes despair, crime, and drug addiction in black neighborhoods, and college and university enrollment figures for blacks that are dropping for the first time in decades.[30] It dares to call our most prized legal doctrines and protections shams — devices enacted with great fanfare, only to be ignored, obstructed, or cut back as soon as the celebrations die down.[31]

How can there be such divergent stories? Why do they not combine? Is it simply that members of the dominant group see the same glass as half full, blacks as half empty? I believe there is more than this at work; there is a war between stories. They contend for, tug at, our minds. To see how the dialectic of competition and rejection works — to see the reality-creating potential of stories and the normative implications of adopting one story rather than another — consider the following series of accounts, each describing the same event.

A. *A Standard Event and a Stock Story That Explains It*

The following series of stories revolves around the same event: A black lawyer interviews for a teaching position at a major law school (school *X*), and is rejected. Any other race-tinged event could have served equally well for purposes of illustration. This particular event was chosen because it occurs on familiar ground — most readers of this essay are past or present members of a law school community who have heard about or participated in events like the one described.

The Stock Story

Setting. A professor and student are talking in the professor's office. Both are white. The professor, Blas Vernier, is tenured, in mid-career, and well regarded by his colleagues and students. The student, Judith Rogers, is a member of the student advisory appointments committee.

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29. *See* CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND: A REPORT ON HOW BLACKS HAVE FARED UNDER THE REAGAN POLICIES 4 (1984); J. SMITH & F. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS xxiv-xxv, 81, 101-11 (1986) (Rand report finding increase in black families headed by a female, in percentage receiving AFDC, and in number of black males unemployed or no longer looking for jobs); *id.* at 105, 108-09 (gap between blacks and whites same as it was a generation ago); *Saved?, supra* note 3, at 931-32 (discussing statistics); McLeod, *Report Says Poverty Increasing for Hispanics Living in U.S.*, San Francisco Chron., Nov. 4, 1988, at A-4, col. 4 (family income for black and Hispanic families, adjusted for inflation, decreased during past decade; poverty increased; gap between blacks and whites widened).

30. *See Saved?, supra* note 3, at 931-32; *Black Males Increasingly Rare in College*, Washington Post, Jan. 16, 1989, at A7, col. 1.

31. *See* AND WE ARE NOT SAVED, *supra* note 2; *Saved?, supra* note 3, at 924; *A Critical Review, supra* note 11, at 1051, 1097, 1118.

Rogers: Professor Vernier, what happened with the black candidate, John Henry? I heard he was voted down at the faculty meeting yesterday. The students on my committee liked him a lot.

Vernier: It was a difficult decision, Judith. We discussed him for over two hours. I can't tell you the final vote, of course, but it wasn't particularly close. Even some of my colleagues who were initially for his appointment voted against him when the full record came out.

Rogers: But we have no minority professors at all, except for Professor Chen, who is untenured, and Professor Tompkins, who teaches Trial Practice on loan from the district attorney's office once a year.

Vernier: Don't forget Mary Foster, the Assistant Dean.

Rogers: But she doesn't teach, just handles admissions and the placement office.

Vernier: And does those things very well. But back to John Henry. I understand your disappointment. Henry was a strong candidate, one of the stronger blacks we've interviewed recently. But ultimately he didn't measure up. We didn't think he wanted to teach for the right reasons. He was vague and diffuse about his research interests. All he could say was that he wanted to write about equality and civil rights, but so far as we could tell, he had nothing new to say about those areas. What's more, we had some problems with his teaching interests. He wanted to teach peripheral courses, in areas where we already have enough people. And we had the sense that he wouldn't be really rigorous in those areas, either.

Rogers: But we need courses in employment discrimination and civil rights. And he's had a long career with the NAACP Legal Defense Fund and really seemed to know his stuff.

Vernier: It's true we could stand to add a course or two of that nature, although as you know our main needs are in Commercial Law and Corporations, and Henry doesn't teach either. But I think our need is not as acute as you say. Many of the topics you're interested in are covered in the second half of the Constitutional Law course taught by Professor White, who has a national reputation for his work in civil liberties and freedom of speech.

Rogers: But Henry could have taught those topics from a black perspective. And he would have been a wonderful role model for our minority students.

Vernier: Those things are true, and we gave them considerable weight. But when it came right down to it, we felt we couldn't take that great a risk. Henry wasn't on the law review at school, as you are, Judith, and has never written a line in a legal journal. Some of us

doubted he ever would. And then, what would happen five years from now when he came up for tenure? It wouldn't be fair to place him in an environment like this. He'd just have to pick up his career and start over if he didn't produce.

Rogers: With all due respect, Professor, that's paternalistic. I think Henry should have been given the chance. He might have surprised us.

Vernier: So I thought, too, until I heard my colleagues' discussion, which I'm afraid, given the demands of confidentiality, I can't share with you. Just let me say that we examined his case long and hard and I am convinced, fairly. The decision, while painful, was correct.

Rogers: So another year is going to go by without a minority candidate or professor?

Vernier: These things take time. I was on the appointments committee last year, chaired it in fact. And I can tell you we would love nothing better than to find a qualified black. Every year, we call the Supreme Court to check on current clerks, telephone our colleagues at other leading law schools, and place ads in black newspapers and journals. But the pool is so small. And the few good ones have many opportunities. We can't pay nearly as much as private practice, you know.

[*Rogers, who would like to be a legal services attorney, but is attracted to the higher salaries of corporate practice, nods glumly.*]

Vernier: It may be that we'll have to wait another few years, until the current crop of black and minority law students graduates and gets some experience. We have some excellent prospects, including some members of your very class.

Rogers: [*Thinks: I've heard that one before, but says*] Well, thanks, Professor. I know the students will be disappointed. But maybe when the committee considers visiting professors later in the season it will be able to find a professor of color who meets its standards and fits our needs.

Vernier: We'll try our best. Although you should know that some of us believe that merely shuffling the few minorities in teaching from one school to another does nothing to expand the pool. And once they get here, it's hard to say no if they express a desire to stay on.

Rogers: [*Thinks: That's a lot like tenure. How ironic; there are certain of your colleagues we would love to get rid of, too. But says*] Well, thanks, Professor. I've got to get to class. I still wish the vote had come out otherwise. Our student committee is preparing a list of

minority candidates that we would like to see considered. Maybe you'll find one or more of them worthy of teaching here.

Vernier: Judith, believe me, there is nothing that would please me more.

* * *

In the above dialogue, Professor Vernier's account represents the stock story — the one the institution collectively forms and tells about itself.[32] This story picks and chooses from among the available facts to present a picture of what happened: an account that justifies the world as it is. It emphasizes the school's benevolent motivation ("look how hard we're trying") and good faith.[33] It stresses stability and the avoidance of risks. It measures the black candidate through the prism of preexisting, well-agreed-upon criteria of conventional scholarship and teaching.[34] Given those standards, it purports to be scrupulously meritocratic and fair; Henry would have been hired had he measured up. No one raises the possibility that the merit criteria employed in judging Henry are themselves debatable, *chosen* — not inevitable. No one, least of all Vernier, calls attention to the way in which merit functions to conceal the contingent connection between institutional power and the things rated.

There is also little consideration of the possibility that Henry's presence on the faculty might have altered the institution's character, helped introduce a different prism and different criteria for selecting future candidates.[35] The account is highly procedural — it emphasizes that Henry got a full, careful hearing — rather than substantive: a black was rejected.[36] It emphasizes certain "facts" without examin-

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32. Compare this stock story with the larger one, of which it is a part, *supra* text accompanying note 27. *Cf.* THE LEGAL IMAGINATION, *supra* note 20, at 299-304 (discussing ways institutions talk about people).

33. *See Saved?, supra* note 3, at 936 (discussing Supreme Court decisions that require intent and tight chains of causation for discrimination to be actionable).

34. Feminists have argued that the law is essentially a male instrument and that male-normed criteria of excellence operate to injure women in tenure and promotion decisions and on law school examinations. *See, e.g.,* Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process,* 1 BERK. WOMEN'S L.J. 39, 44 (1985); Polan, *Toward a Theory of Law and Patriarchy,* in THE POLITICS OF LAW, *supra* note 11, at 299; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law,* in THE POLITICS OF LAW, *supra* note 11, at 117.

35. That is to say, the faculty would be a different collectivity with the addition of an articulate and outspoken black, unless of course his voice was silenced by peer pressure or hostility. Compare Heisenberg's Principle of Uncertainty, discussed in G. ZUKAV, THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS 133-36 (1979).

36. *See The Imperial Scholar, supra* note 6, at 568 (emphasis on procedure in "imperial" scholarship). In former times, powerful whites used *substantive* myths, stories about blacks' purported actual inferiority, to justify oppression. Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research,* 31 UCLA L. REV. 128 (1983); *cf.* Buck v. Bell,

ing their truth — namely, that the pool is very small, that good minority candidates have many choices, and that the appropriate view is the long view; haste makes waste.[37]

The dominant fact about this first story, however, is its seeming neutrality. It scrupulously avoids issues of blame or responsibility. Race played no part in the candidate's rejection; indeed the school leaned over backwards to accommodate him. A white candidate with similar credentials would not have made it as far as Henry did. The story comforts and soothes.[38] And Vernier's sincerity makes him an effective apologist for his system.[39]

Vernier's story is also deeply coercive, although the coercion is disguised. Judith was aware of it but chose not to confront it directly; Vernier holds all the cards. He pressures her to go along with the institution's story by threatening her prospects at the same time that he flatters her achievements. A victim herself, she is invited to take on and share the consciousness of her oppressor. She does not accept Vernier's story, but he does slip a few doubts through cracks in her armor. The professor's story shows how forceful and repeated storytelling can perpetuate a particular view of reality. Naturally, the stock story is not the only one that can be told. By emphasizing other events and giving them slightly different interpretations, a quite different picture can be made to emerge.[40]

B. *The Same Event Told by John Henry*

Scene. John Henry has just received his rejection letter from the head of the appointments committee. The letter is quite cheerful. It tells Henry how much the faculty enjoyed meeting him and hearing his presentation on trends in civil rights litigation. It advises him that because of curricular concerns, the school's prime emphasis this year will be on filling slots in the Commercial Law and Corporations area. It concludes by encouraging Henry to remain in contact with the

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274 U.S. 200 (1927) (permitting states to sterilize the "feeble-minded"). Today, racial myths take a *procedural* turn — remediation must be deliberate, a backlash by "innocent" whites must be avoided at all costs, some remedies constitute "reverse discrimination," and tight standing and causation requirements are reasonable when a black sues for redress.

37. *See supra* text accompanying note 32.

38. It may be argued that Henry's story, which follows, and the two counterstories also soothe and comfort those of the storyteller's persuasion. *See* HERACLES' BOW, *supra* note 25, at 171.

39. *See* Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U. L. REV. 285, 288-89 (1985) (liberals' sincerity key ingredient in their ability to justify their position).

40. *See Thinking About Our Language*, *supra* note 25, at 1963-64 (legal hearings designed to test different versions of language).

school and wishes him luck in his search for a teaching position. It nowhere tells him that he has been rejected.

A few days after receiving the letter, John Henry is having lunch with a junior colleague from the Fund. The colleague, who is also black, wants to teach some day and so quizzes Henry about his experiences in interviewing at school *X*.

Henry: It was, how shall I put it? Worse than I hoped but better than I feared. I'm not going to get an offer, although they of course never came right out and said so. And, from what I saw I'm not sure I would want to teach there, even if I had gotten one. If school *X* is any sample of what blacks can expect in this supposedly colorblind, erudite world of legal education, I think I prefer Howard, where, incidentally, I'm interviewing next week. I got more than a whiff of these attitudes when I went to law school almost 15 years ago, but I had dared to hope that things might have changed in the interim. They haven't.

Junior colleague: But how did they treat you? Did you give a colloquium?

Henry: You bet I gave a colloquium, and that's where it began. A good half of the faculty looked bored or puzzled and asked no questions. A quarter jumped down my throat after I had spoken maybe ten minutes, wanting to know whether I would advocate the same approach if the plaintiff were white and the defendant black. The old "neutral principles" idea,[41] thirty years later. In the question-and-answer period, several younger professors tried to rescue me; one even changed the subject and asked about my philosophy of teaching. That brought everybody to the edge of their chairs. I got the impression many of them merely wanted assurance that I would write *some* articles, even if they were mediocre. But they were *all* extremely concerned that I be a good teacher. I think many of them were looking for a mascot, not a fellow scholar — someone who would counsel and keep the students in line, not someone who could challenge his or her colleagues at their own game.

During the small-group interviews, many of them didn't even show up. The ones that did asked me about curricular matters, what courses I would like to teach, how I enjoyed going to law school at Michigan and whether I took courses from their friend, so-and-so, who teaches there. The few who asked me anything about my colloquium ignored what I had said but asked me questions based on recent law review articles, written by their friends, most of which, of course, I

41. Wechsler, *Toward Neutral Principles of Constitutional Law*, 75 HARV. L. REV. 1 (1959).

had not read. They all seemed to deal with issues of equality, but none seemed to bear much connection to my work and litigation perspective.

Several asked what my grade point average was in law school — fifteen years ago, can you believe it! — and whether I was on the law review. They had my resume in front of them, so they knew the answer to that perfectly well. The first two who asked seemed dumbfounded when I said I had been invited to join the review and even more so when I said I had declined in order to work part-time in a prison law program. After a while I just answered the question by saying no.

Don't get me wrong. They're a good law school; I could see myself teaching there. But I think they're looking for someone they will never find — a black who won't challenge them in any way, who is just like them. I tried telling them about the cases I have argued and the litigation strategies I have pioneered. Most of them couldn't have cared less. Their eyes glazed over after three minutes, or they changed the subject.

Junior colleague: John, let me ask you something flat out. You don't have to answer this if you don't want to. You know that I practiced corporate law in a large firm in Atlanta for three years before coming to the Fund. I could see myself teaching business subjects some day, in addition of course to civil rights. The school you interviewed at is advertising that they need professors of business law. Do I want to teach there?

Henry: [*Slowly*] That's a tough one. If I went there, my greatest fear is that I would be marginalized and ignored — either that or coopted into the mainstream. I doubt they would see my work in civil rights as on a level with theirs in, say, property. You might have a different experience, though, teaching corporate and business law courses. Are you serious about applying?

Junior colleague: I think so.

Henry: Okay, my man. Let me call the Asian professor I met there. His name is Chen, I think. He seemed sympathetic, and I guess he would level with us. I'll ask him what he thinks the climate would be like for someone like you. Maybe in the process I'll learn something about how I was seen and get some pointers on how to conduct myself the next time I interview at a white, elite law school — if I have to. I think Howard is quite interested in me, and frankly I'm tempted to just accept an offer there if they make one. It would simplify life a great deal.

Junior colleague: I would appreciate that. You're a good buddy. Let me know what you find out.

* * *

Henry and his younger colleague's story is, obviously, quite different from the institution's story. Their story shows, among other things, how different "neutrality" can feel from the perspective of an outsider.[42] Henry's story emphasizes certain facts, sequences, tones of voice, and body language that the stock story leaves out.[43] It infers different intentions, attitudes, and states of mind on the part of the faculty he met.[44] Although not completely condemnatory, it is not nearly so generous to the school. It implies that the supposedly colorblind hiring process is really monochromatic: School *X* hires professors of any color, so long as they are white. In Henry's story, process questions submerge; the bottom line becomes more important. The story specifically challenges the school's meritocratic premises. It questions, somewhat satirically, the school's conception of a "good" teaching prospect and asks what came first, the current faculty (with its strengths and weaknesses) or the criteria. Did the "is" give birth to the "ought"? Henry's account, although less obviously slanted than Vernier's, contains exaggerations of its own. This is perhaps natural and understandable; Henry wanted his younger colleague to think well of him. His account is self-serving. For example, he implied that many of the faculty asked him about his law school grades, when in fact only two did. And, although Henry does struggle to free himself from the process trap to which Vernier succumbed, he does not succeed entirely. He charges that his "hearing" at the law school was substantively biased by racism and inappropriate criteria. But he also charges that the hearing was afflicted by ordinary defects: For example, many of his hearers did not bother to show up — it was a mock hearing. Henry still accepts the system's dominant values, wants to play, and win, by its rules. Perhaps this explains the calmness, the tone of resignation about Henry's story. Whether this is because he

42. *See* City of Memphis v. Greene, 451 U.S. 100, 138-44 (1981) (Marshall, J., dissenting). Marshall tells a "counterstory," in which a traffic barrier erected between an affluent white and a black neighborhood is put into a different perspective from that adopted by the majority.

43. Vernier's story also patronizes Rogers; the professor treats her as some whites treat blacks. Rogers is temporarily a member of an outgroup. She has the potential to leave her student status and become like Vernier, but for now he and she are on unequal footings, an inequality Vernier exploits.

44. Henry's narrative includes the details that: some of the members of the appointments committee appeared bored; that others asked paternalistic questions; that some faculty members failed to attend their own interviews of him; that a question uppermost in the minds of most of his interviewers was whether or not he would teach competently, rather than write brilliantly; and that his Civil Rights interests were peripheral.

has internalized some of his victimizers' consciousness, has a good alternative coming up next week at Howard, or simply despairs of changing School *X* we do not know. But this situation soon changed drastically.

Following Henry's lunch with his younger colleague, Henry telephoned Chen and one other younger, bearded faculty member he met at the law school. The other professor, who is white, had visibly warmed up to Henry. He had asked him to call any time if Henry had questions. As a result of talking with these two at length, Henry learns facts that leave him seriously upset.[45] No longer resigned, Henry consults with several colleagues at the Fund about a lawsuit. After receiving an offer from Howard, Henry retains private counsel.[46] The following two stories are the result.

C. *The Legal Complaint and Judge's Order*

1. *The Complaint*

About a year after his unsuccessful interview, and ten months after speaking with Chen and the white professor, Henry files the following complaint in the superior court of College County of State *X:*

> *Henry v. Regents, et al.* Comes now the plaintiff and alleges as follows.
>
> [Following various jurisdictional and exhaustion-of-remedies allegations]: 8) That the defendant has intentionally engaged in an unlawful employment practice in that the defendant has discriminated against plaintiff by denying him an appointment as Professor of Law, because of his race and color; that defendant has denied plaintiff employment as Professor of Law because of his engagement in civil rights activities; that defendant has denied plaintiff employment as Professor of Law because as a black Professor teaching Civil Rights he would not "fit in"; and that the above mentioned acts of discrimination violate 42 U.S.C. section

45. Henry learned:

(i) That Professor White had delivered a vitriolic attack on his intellectual qualifications to teach law and had implied he would leave if Henry were hired;

(ii) That another faculty member had purportedly obtained telephone information from a former co-worker that Henry "had a few skeletons in his closet";

(iii) That the faculty feared that someone like Henry could cause trouble by stirring up the students ("wouldn't be a good role model even for the minorities");

(iv) That the faculty had disliked his colloquium, finding it devoid of history, economics, or theory. It struck them as the talk of "just a practicing lawyer"; it was "too much like a brief."

A desiccated version of Chen's account appears in the legal complaint that follows.

46. Part of Henry's change of mood was caused by his belated realization that he (like Judith Rogers) was coerced. He was coerced, during his interview, to agree to be just like his interviewers. This was something he was unwilling to do; his rejection was the direct result. He resolves to reconstruct John Henry's story. But he chooses, because of his experience as an attorney, the familiar route of a legal complaint. Unlike Al-Hammar X (whose story is told *infra* section I.D), Henry has not yet rejected dominant values. In time, he may. He is still committed to reasonableness — to telling measured, legal stories.

1981 in that they were based on race, color, and civil rights activities and orientations.
9) That the plaintiff has lost wages by reason of the illegal employment practices of defendant and has earned less money in other employment than he would have earned had he received appointment as Professor of Law at defendant institution.

Whereupon plaintiff prays that this Court find that the defendant has intentionally and illegally denied plaintiff employment because of his race, color, and civil rights activities, and because as a black man he would not "fit in"; that the Court enjoin defendant from engaging in these and similar practices; that the defendant be ordered to pay plaintiff all lost wages because of said unlawful employment practices; that the defendant pay plaintiff's reasonable attorney's fees; and that defendant be ordered to pay all costs in this action.

Phyllis M. Leventhal
Attorney for Plaintiff
Address: 49 State Building
Capitol City, State *X*

2. *The Judge's Order Dismissing the Action*

After a short period of discovery, the judge dismissed Henry's suit with a brief opinion:

The defendant's motion for summary judgment is granted.

Even viewing the evidence in the light most favorable to Plaintiff, it is clear to this Court that he cannot prevail. Plaintiff has adduced no evidence, save his own assertion that he was not hired, that he has suffered unlawful employment discrimination. Given the historic shortage of qualified minorities in the applicant pool, it is not surprising that white faces should preponderate on a law faculty. This imbalance is not irrelevant but by itself does not constitute invidious discrimination. It is of no greater or less significance than the proportion of blacks to whites on the school's athletic teams.

Even assuming that he is qualified to teach at School *X*, Plaintiff has not made out a claim that his failure to be hired there is a product of discrimination. If he could adduce even one example of obvious discrimination — for example, if he had been told that his lack of authorship disqualified him, but he could prove that some white faculty members had neither published nor perished — this would be a far different case. But there is no such smoking gun. Plaintiff believes he was blackballed as a potential "troublemaker," someone who might use his position atop the ivory tower to cry out against the university, to bite the very hand that had uplifted him. But a propensity toward disloyalty is simply one of the competing considerations in the hiring process, the weight of which our scales of justice shall not attempt to assay. There is, however, nothing intrinsically wrong with requiring a college professor to be true to his school.

Nor do we find that differential standards were applied to Plaintiff's application. It may be that the law faculty devalued his potential contri-

butions as a teacher and scholar of civil rights law. But a faculty is entitled to make judgments that one class or area of study is more urgently needed to round out the school's curriculum than another.

Moreover, this Court would be most hesitant to substitute its own standards for those of the professors who make up the faculty of *X* School of Law. The Law School is an eminent institution, one of the nation's finest. The decisions of such a body are necessarily judgmental and highly subjective. It is not an appropriate function for this Court to tell the faculty whom they should hire. That is a matter for their professional judgment, and short of manifest unfairness or illegality, this Court cannot and will not interfere. The factors that make a good law professor are many, subtle, and eminently professional in character. They are best made by those who, had he been hired, would have been Plaintiff's peers. It would ill serve the Plaintiff to force him on an unwilling institution. We find no actionable wrong. This case is dismissed.

Both the complaint and the order dismissing it are stylized versions of Henry's story. Both use existing statutory and case law as a type of "screen" that makes certain facts relevant and others not.[47] Henry's lawyer struggled to present her client's story in terms a court would accept. She failed. Unless reversed on appeal, the complaint's story will remain a renegade version of the world, officially devalued.[48]

Putting the facts in the linguistic code required by the court sterilized them. The interview was abstracted from its context, squeezed into a prescribed mold that stripped it of the features that gave it meaning for Henry. It lost its power to outrage. In a sense, even if successful the complaint would have legitimated the current social order. As Cornel West and others have warned, litigation and other seemingly revolutionary activity can serve this end.[49] Civil rights liti-

47. *See* HERACLES' BOW *supra* note 25, at 174-75; Milovanovic, *Jailhouse Lawyers and Jailhouse Lawyering,* 1988 INTL. J. SOC. (forthcoming) (describing what gets "lost in the translation" when inmate jailhouse lawyers rewrite what happened in the streets into the language of the courts — a loss of the race-, class-, and sex-based inequalities that contributed to the inmate's dilemma, as well as such features as alienation, anger, and despair); Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731 (1987) (judiciary's fidelity to facts and canons of fair argumentation less than perfect); Bannister & Milovanovic, The Necessity Defense, Substantive Justice and Oppositional Linguistic Praxis 23-24 (1988) (unpublished manuscript, on file with author) (screening function of legal rules). The screening function of formal legal standards sometimes benefits litigants of color by suppressing blatant racism and holding the participants to higher standards than they would otherwise display. Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359 [hereinafter *Fairness and Formality*]. These advantages can cause minorities to place unrealistically high hopes on formal adjudication as a means of achieving social justice. Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement* (Book Review), 13 LAW & SOC. INQUIRY 145 (1988).

48. *See* Cover, *supra* note 1, at 53 ("[j]udges are people of violence," whose object is to kill competing legal traditions); *Thinking About Our Language, supra* note 25, at 1963-64 (legal proceedings designed to pit different narratives against each other).

49. *See* C. WEST, PROPHESY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 41 (1982).

gation also demeans, humbles, and victimizes the victim, draining away outrage and converting him or her into a supplicant.[50]

Stories do not pose these risks. Stories do not try to seize a part of the body of received wisdom and use it against itself, jiujitsu fashion, as litigation does. Stories attack and subvert the very "institutional logic" of the system. On the rare occasions when law-reform litigation is effective for blacks, the hard-won new "rights" are quietly stolen away by narrow interpretation, foot dragging, delay, and outright obstruction.[51] Stories' success is not so easily circumvented; a telling point is registered instantaneously and the stock story it wounds will never be the same.

John Henry's complaint was doubly unsuccessful. It was dismissed, its failure validating the dominant story, its principal opponent so far. It also gave the judge an opportunity to tell his own story — dismissive, curt, verging on insult, and give it circulation and currency.[52]

D. *Al-Hammar X's Counter-story*

None of the above stories attempts to unseat the prevailing institutional story. Henry's account comes closest; it highlights different facts and interprets those it does share with the standard account differently. His formal complaint also challenges the school's account, but it must fit itself under existing law, which it failed to do.

A few days after word of Henry's rejection reached the student body, Noel Al-Hammar X, leader of the radical Third World Coalition, delivered a speech at noon on the steps of the law school patio. The audience consisted of most of the black and brown students at the law school, several dozen white students, and a few faculty members. Chen was absent, having a class to prepare for. The Assistant Dean was present, uneasily taking mental notes in case the Dean asked her later on what she heard.

Al-Hammar's speech was scathing, denunciatory, and at times downright rude. He spoke several words that the campus newspaper reporter wondered if his paper would print. He impugned the good faith of the faculty, accused them of institutional if not garden-variety

50. Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Equal Protection*, 12 SIGNS 421 (1987).

51. *See Saved?, supra* note 3, at 396.

52. How does a judge get away with this form of discourse? The answer must lie in our "story" of judging, what judges do. That story includes the function of scolding persons who have brought complaints we disapprove of — such as Henry's — and excluding them from the universe of "reasonable" complainants: John, like all the others, is an ever-complaining minority.

racism, and pointed out in great detail the long history of the faculty as an all-white club. He said that the law school was bent on hiring only white males, "ladies" only if they were well-behaved clones of white males, and would never hire a black unless forced to do so by student pressure or the courts. He exhorted his fellow students not to rest until the law faculty took steps to address its own ethnocentricity and racism. He urged boycotting or disrupting classes, writing letters to the state legislature, withholding alumni contributions, setting up a "shadow" appointments committee, and several other measures that made the Assistant Dean wince.

Al-Hammar's talk received a great deal of attention, particularly from the faculty who were not there to hear it. Several versions of his story circulated among the faculty offices and corridors ("Did you hear what he said?"). Many of the stories-about-the-story were wildly exaggerated. Nevertheless, Al-Hammar's story is an authentic counterstory. It directly challenges — both in its words and tone — the corporate story the law school carefully worked out to explain Henry's non-appointment. It rejects many of the institution's premises, including we-try-so-hard, the-pool-is-so-small, and even mocks the school's meritocratic self-concept. "They say Henry is mediocre, has a pedestrian mind. Well, they ain't sat in none of my classes and listened to themselves. Mediocrity they got. They're experts on mediocrity." Al-Hammar denounced the faculty's excuse making, saying there were dozens of qualified black candidates, if not hundreds. "There isn't that big a pool of Chancellors, or quarterbacks," he said. "But when they need one, they find one, don't they?"

Al-Hammar also deviates stylistically, as a storyteller, from John Henry. He rebels against the "reasonable discourse" of law. He is angry, and anger is out of bounds in legal discourse, even as a response to discrimination. John Henry was unsuccessful in getting others to listen. So was Al-Hammar, but for a different reason. His counterstory overwhelmed the audience. More than just a narrative, it was a call to action, a call to join him in destroying the current story. But his audience was not ready to act. Too many of his listeners felt challenged or coerced; their defenses went up. The campus newspaper the next day published a garbled version, saying that he had urged the law faculty to relax its standards in order to provide minority students with role models. This prompted three letters to the editor asking how an unqualified black professor could be a good role model for anyone, black or white.

Moreover, the audience Al-Hammar intended to affect, namely the faculty, was even more unmoved by his counterstory. It attacked

them too frontally. They were quick to dismiss him as an extremist, a demagogue, a hothead — someone to be taken seriously only for the damage he might do should he attract a body of followers. Consequently, for the next week the faculty spent much time in one-on-one conversations with "responsible" student leaders, including Judith Rogers.

By the end of the week, a consensus story had formed about Al-Hammar's story. That story-about-a-story held that Al-Hammar had gone too far, that there was more to the situation than Al-Hammar knew or was prepared to admit. Moreover, Al-Hammar was portrayed *not* as someone who had reached out, in pain, for sympathy and friendship. Rather, he was depicted as a "bad actor," someone with a "chip on his shoulder," someone no responsible member of the law school community should trade stories with. Nonetheless, a few progressive students and faculty members believed Al-Hammar had done the institution a favor by raising the issues and demanding that they be addressed. They were a distinct minority.

E. *The Anonymous Leaflet Counterstory*

About a month after Al-Hammar spoke, the law faculty formed a special committee for minority hiring. The committee contained practically every young liberal on the faculty, two of its three female professors, and the Assistant Dean. The Dean announced the committee's formation in a memorandum sent to the law school's ethnic student associations, the student government, and the alumni newsletter, which gave it front-page coverage. It was also posted on bulletin boards around the law school.

The memo spoke about the committee and its mission in serious, measured phrases — "social need," "national search," "renewed effort," "balancing the various considerations," "identifying members of a future pool from which we might draw." Shortly after the memo was distributed, an anonymous four-page leaflet appeared in the student lounge, on the same bulletin boards on which the Dean's memo had been posted, and in various mailboxes of faculty members and law school organizations. Its author, whether student or faculty member, was never identified.[53]

The leaflet was entitled, "Another Committee, Aren't We Wonderful?" It began with a caricature of the Dean's memo, mocking its measured language and high-flown tone. Then, beginning in the mid-

53. Like all the stories, the leaflet is purely fictional; perhaps it was born as an "internal memo," stimulated by Al-Hammar's speech, in the minds of many progressive listeners at the same time.

dle of the page the memo told, in conversational terms, the following story:

'And so, friends and neighbors (the leaflet continued), how is it that the good law schools go about looking for new faculty members? Here is how it works. The appointments committee starts out the year with a model new faculty member in mind. This mythic creature went to a leading law school, graduated first or second in his or her class, clerked for the Supreme Court, and wrote the leading note in the law review on some topic dealing with the federal courts. This individual is brilliant, personable, humane, and has just the right amount of practice experience with the right firm.

Schools begin with this paragon in mind and energetically beat the bushes, beginning in September, in search of him or her. At this stage, they believe themselves genuinely and sincerely colorblind. If they find such a mythic figure who is black or Hispanic or gay or lesbian, they will hire this person in a flash. They will of course do the same if the person is white.

By February, however, the school has not hired many mythic figures. Some that they interviewed turned them down. Now, it's late in the year and they have to get someone to teach Trusts and Estates. Although there are none left on their list who are Supreme Court clerks, etc., they can easily find several who are a notch or two below that — who went to good schools, but not Harvard, or who went to Harvard, yet were not first or second in their classes. Still, they know, with a degree verging on certainty, that this person is smart and can do the job. They know this from personal acquaintance with this individual, or they hear it from someone they know and trust. Joe says Bill is really smart, a good lawyer, and will be terrific in the classroom.

So they hire this person because, although he or she is not a mythic figure, functionally equivalent guarantees — namely first- or second-hand experience — assure them that this person will be a good teacher and scholar. And so it generally turns out—the new professor does just fine.

. 'Persons hired in this fashion are almost always white, male, and straight. The reason: We rarely know blacks, Hispanics, women, and gays. Moreover, when we hire the white male, the known but less-than-mythic quantity, late in February, *it does not seem to us like we are making an exception.* Yet we are. We are employing a form of affirmative action — bending the stated rules so as to hire the person we want.[54]

54. *See Fairness and Formality, supra* note 47, at 1388-92 (prejudice flourishes in informal settings). I am indebted to my colleague, Mari Matsuda, for this observation.

The upshot is that whites have two chances of being hired — by meeting the formal criteria we start out with in September — that is, by being mythic figures — and also by meeting the second, informal, modified criteria we apply later to friends and acquaintances when we are in a pinch. Minorities have just one chance of being hired — the first.

To be sure, once every decade or so a law school, imbued with crusading zeal, will bend the rules and hire a minority with credentials just short of Superman or Superwoman. And, when it does so, *it will feel like an exception.* The school will congratulate itself — it has lifted up one of the downtrodden. And, it will remind the new professor repeatedly how lucky he or she is to be here in this wonderful place. It will also make sure, through subtle or not-so-subtle means, that the students know so, too.

But (the leaflet continued), there is a coda.

If, later, the minority professor hired this way unexpectedly succeeds, this will produce consternation among his or her colleagues. For, things were not intended to go that way. When he or she came aboard, the minority professor lacked those standard indicia of merit — Supreme Court clerkship, high LSAT score, prep school background — that the majority-race professors had and believe essential to scholarly success.

Yet the minority professor is succeeding all the same —publishing in good law reviews, receiving invitations to serve on important commissions, winning popularity with students. This is infuriating. Many majority-race professors are persons of relatively slender achievements — you can look up their publishing record any time you have five minutes. Their principal achievements lie in the distant past, when aided by their parents' upper class background, they did well in high school and college, and got the requisite test scores on standardized tests which test exactly the accumulated cultural capital they acquired so easily and naturally at home. Shortly after that, their careers started to stagnate. They publish an article every five years or so, often in a minor law review, after gallingly having it turned down by the very review they served on as editor twenty years ago.

So, their claim to fame lies in their early exploits, the badges they acquired up to about the age of twenty-five, at which point the edge they acquired from Mummy and Daddy began to lose effect. Now, along comes the hungry minority professor, imbued with a fierce desire to get ahead, a good intellect, and a willingness to work 70 hours a week if necessary to make up for lost time. The minority person lacks

the merit badges awarded early in life, the white professor's main source of security. So, the minority's colleagues don't like it and use perfectly predictable ways to transfer the costs of their discomfort to the misbehaving minority.

So that, my friends, is why minority professors

'(i) have a hard time getting hired; and,

'(ii) have a hard time if they are hired.

When you and I are running the world, we won't replicate this unfair system, will we? Of course not — unless, of course, it changes us in the process.

* * *

This second counterstory attacks the faculty less frontally in some respects — for example it does not focus on the fate of any particular black candidate, such as Henry, but attacks a general mindset. It employs several devices including narrative and careful observation — the latter to build credibility (the reader says, "That's right"), the former to beguile the reader and get him or her to suspend judgment.[55] (Everyone loves a story.) The last part of the story is painful; it strikes close to home. Yet the way for its acceptance has been paved by the earlier parts, which paint a plausible picture of events, so that the final part demands consideration. It generalizes and exaggerates — many majority-race professors are *not* persons of slender achievement. But such broad strokes are part of the narrator's art. The realistically drawn first part of the story, despite shading off into caricature at the end, forces readers to focus on the flaws in the good face the dean attempted to put on events. And, despite its somewhat accusatory thrust, the story, as was mentioned, debunks only a mindset, not a person. Unlike Al-Hammar X's story, it does not call the chair of the appointments committee, a much-loved senior professor, a racist. (But did Al-Hammar's story, confrontational as it was, pave the way for the generally positive reception accorded the anonymous account?)

The story invites the reader to alienate herself or himself from the events described, to enter into the mental set of the teller, whose view

55. For a discussion of narrative strategies to intrigue and beguile the reader, see THE LEGAL IMAGINATION, *supra* note 20, at 802:

> From the beginning you know where the lawyer wants to come out, and every word points that way. . . . But the judge is bound to keep an open mind, to keep his reader in suspense as long as he can, if he is to express fairly the process of his decision. There is a difference between an opinion that reaches a conclusion and one that is aimed there . . . .
>
> . . . [I]f it is to express the process by which the original intention is worked out, the judicial narrative must keep the reader in a sort of suspense or open-mindedness, during which he is exposed one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judgment. Very few opinions do this . . . .

is different from the reader's own. The oppositional nature of the story, the manner in which it challenges and rebuffs the stock story, thus causes him or her to oscillate between poles.[56] It is insinuative: At times, the reader is seduced by the story and its logical coherence — it is a plausible counter-view of what happened; it has a degree of explanatory power.

Yet the story places the majority-race reader on the defensive. He or she alternately leaves the storyteller's perspective to return to his or her own, saying, "That's outrageous, I'm being accused of. . . ." The reader thus moves back and forth between two worlds, the storyteller's, which the reader occupies vicariously to the extent the story is well-told and rings true, and his or her own, which he or she returns to and reevaluates in light of the story's message. Can my world still stand? What parts of it remain valid? What parts of the story seem true? How can I reconcile the two worlds, and will the resulting world be a better one than the one with which I began?

These are in large part normative questions, which lead to the final two issues I want to explore. Why *should* members of outgroups tell stories? And, why *should* others listen?

II. Why Outgroups Should Tell Stories and Why Others Should Listen

Subordinated groups have always told stories.[57] Black slaves told, in song, letters, and verse, about their own pain and oppression.[58]

56. *E.g.*, HERACLES' BOW, *supra* note 25, at 94, 174; Note, *Figuring the Law: Holism and Tropological Influence in Legal Interpretation*, 97 YALE L.J. 823, 843 (1988). On the theory that the force of narrative may be independent of the narrator, see THE LEGAL IMAGINATION, *supra* note 20, at 865-66 (possibility that whenever a story is told, it may take on a life of its own, escaping the writer's control and becoming an unshakable presence for the auditor). For a summary of major theories of persuasion, see J. SPROULE, ARGUMENT: LANGUAGE AND ITS INFLUENCE 260-68 (1980). Sproule identifies three types of theories: Rhetorical Theories, Cognitive Consistency Theories, and Interpersonal Theories. Rhetorical Theories can be traced back to the Greek sophists, are typified by Aristotle's *Rhetoric*, are generally based on observations of public communication rather than on experimentation, and assume arguments should be studied not only for their effects, but for their ethics. Cognitive Consistency Theories (among the best-known of which is L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957)) are experimental and statistical and grounded on the tendency of the individual to move toward a coherent system of images by eliminating, reducing, or incorporating discordant new ideas. Interpersonal Theories consider the informal influences people have on each other. For example, the Balance Theory developed by Fritz Heider and Theodore Newcomb in the decade after World War II predicts that two persons who initially disagree over an issue will move toward harmony that may result in a unilateral change of mind, a purposeful ignoring or misinterpreting of each others' attitudes, or a changed relationship in which the disagreement becomes "consistent with dislike."

57. All groups do. *See supra* text accompanying notes 8-9; sources cited *supra* note 16; Steele, *supra* note 11, at 47-48; *cf.* Cover, *supra* note 1, at 49-50 (on the "interpretation of texts of resistance"); Tagliabue, *supra* note 12 (street theater used to expose Communism's flaws).

58. Dorinson & Boskin, *Racial and Ethnic Humor*, in HUMOR IN AMERICA 172 (L. Mintz

They described the terrible wrongs they had experienced at the hands of whites, and mocked (behind whites' backs) the veneer of gentility whites purchased at the cost of the slaves' suffering.[59] Mexican-Americans in the Southwest composed *corridos* (ballads) and stories, passed on from generation to generation, of abuse at the hands of gringo justice, the Texas Rangers, and ruthless lawyers and developers who cheated them out of their lands.[60] Native American literature, both oral and written, deals with all these themes as well.[61] Feminist consciousness-raising consists, in part, of the sharing of stories, of tales from personal experience, on the basis of which the group constructs a shared reality about women's status vis-à-vis men.[62]

This proliferation of counterstories is not an accident or coincidence. Oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation. Members of outgroups can use stories in two basic ways: first, as means of psychic self-preservation;[63] and, second, as means of lessening their own subordination.[64] These two means correspond to the two perspectives from which a story can be viewed — that of the teller, and that of the

ed. 1988); *see Looking to the Bottom, supra* note 16, at 347 n.105; *see also* sources cited *supra* notes 16 & 18.

59. *See* L. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM 105 (1977) (trickster tales), 121-33 ("fooling master" tales), 298-320 ("black humor" to confront obliquely their oppressor, including jokes that mock hypocrisy, segregation, and integration); PUTTIN' ON OLE MASSA, *supra* note 16; Dorinson & Boskin, *supra* note 58, at 173; *see also* other sources cited *supra* note 16.

60. *E.g.*, A. LUCERO-WHITE LEA, LITERARY FOLKLORE OF THE HISPANIC SOUTHWEST (1953); Campa, *Sayings and Riddles in New Mexico*, U.N.M. BULL., Sept. 5, 1937, at 3.

61. *E.g.*, A GATHERING OF SPIRIT: WRITING AND ART BY NORTH AMERICAN INDIAN WOMEN (B. Brant ed. 1984); R. ORTIZ, THE GREAT SIOUX NATION: SITTING IN JUDGMENT ON AMERICA (1977); Deloria, *Indian Humor*, in LITERATURE OF THE AMERICAN INDIANS 152-69 (A. Chapman ed. 1975); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

62. *See* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982); A. LORDE, *supra* note 11; MacKinnon, *Theory*, *supra* note 6; MacKinnon, *Jurisprudence*, *supra* note 6; *see also* Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U. L. REV. 217, 241-48 (1988) (critiquing various aspects of feminist consciousness-raising); Polan, *supra* note 34.

63. *See* AND WE ARE NOT SAVED, *supra* note 2, at 215-21 (Chronicle of the Slave Scrolls); *see also* Al-Hammar's story, *supra* section I.D, which seems to have been told as much as a mental health imperative as in hopes of swaying the audience.

64. *See supra* notes 15-19 and accompanying text; Steele, *supra* note 11, at 47-49 (racial myths center about idea of innocence). Will whites listen to blacks' and other outgroups' stories — or simply "tune them out" or reinterpret them? *See* sources cited *infra* note 79. Some may do the latter, but others will not. (i) As was observed earlier, stories are often entertaining and not particularly threatening, *see supra* notes 51-52 and accompanying text; (ii) Stories benefit the majority-race listener, by enriching his or her reality, *see infra* section II.B; (iii) Often it will be the majority-race individual who initiates the encounter, tells the first story ("What do you think of John Henry's not getting hired? I'm sure it wasn't discrimination, aren't you?") in which case he or she is obliged by the norms of social etiquette to listen to the black's counterstory.

listener. The storyteller gains psychically, the listener morally and epistemologically.

A. *How Storytelling Benefits Members of Outgroups*

The member of an outgroup gains, first, psychic self-preservation. A principal cause of the demoralization of marginalized groups is self-condemnation. They internalize the images that society thrusts on them — they believe that their lowly position is their own fault.[65]

The therapy is to tell stories. By becoming acquainted with the facts of their own historic oppression — with the violence, murder, deceit, co-optation, and connivance that have caused their desperate estate — members of outgroups gain healing.[66]

The story need not lead to a violent act; Frantz Fanon was wrong in writing that it is only through exacting blood from the oppressor that colonized people gain liberation.[67] Rather, the story need only lead to a realization of how one came to be oppressed and subjugated. Then, one can stop perpetrating (mental) violence on oneself.[68]

So, stories — stories about oppression, about victimization, about one's own brutalization — far from deepening the despair of the oppressed, lead to healing, liberation, mental health.[69] They also promote group solidarity. Storytelling emboldens the hearer, who may have had the same thoughts and experiences the storyteller describes, but hesitated to give them voice. Having heard another express them, he or she realizes, I am not alone.[70]

Yet, stories help oppressed groups in a second way — through their effect on the oppressor. Most oppression, as was mentioned earlier, does not seem like oppression to those perpetrating it.[71] It is ra-

65. John Henry's state before talking with Chen was close to this. *See supra* note 60; F. FANON, THE WRETCHED OF THE EARTH (1968); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 HARV. C.R.-C.L. L. REV. 135 (1984); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity,* 87 MICH. L. REV. 2128 (1989); *see also* A. GRAMSCI, *supra* note 9; Gordon, *supra* note 26, at 284-86; Steele, *supra* note 11, at 48.

66. *See* sources cited *supra* note 62; Wiecek, *Preface to the Historical Race Relations Symposium,* 17 RUTGERS L. REV. 407, 412 (1986).

67. F. FANON, *supra* note 65.

68. *See* AND WE ARE NOT SAVED, *supra* note 2, at 215-21 (Chronicle of the Slave Scrolls).

69. *Id.*

70. For example, recall John Henry's lunch conversation with his younger colleague, *supra* text accompanying notes 41-42. *See also* E. NOELLE-NEUMANN, THE SPIRAL OF SILENCE (1984); Crenshaw, *supra* note 10, at 1336 (blacks' greatest resource the ability to speak and share experience of racism, to "name our reality"), 1349 (warning of danger of absorbing wrong stories, wrong reality).

71. *Supra* note 14 and accompanying text; *see* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?,* 22 HARV. C.R.-C.L. L. REV. 301, 309-10 (1987); *see also The Imperial Scholar, supra* note 6; *A Critical Review, supra* note 11, at 1054-55.

tionalized, causing few pangs of conscience. The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it.[72] One such story was put forward in the Introduction to this essay — the stock story of race relations in this country.[73]

This story is drastically at odds with the way most people of color would describe their condition. Artfully designed parables, chronicles, allegories, and pungent tales like the one told in the anonymous leaflet can jar the comfortable dominant complacency that is the principal anchor dragging down any incentive for reform.[74] They can destroy — but the destruction they produce must be voluntary, a type of willing death. Because this is a white-dominated society in which the majority race controls the reins of power, racial reform must include them.[75] Their complacency — born of comforting stories — is a major stumbling block to racial progress. Counterstories can attack that complacency.

What is more, they can do so in ways that promise at least the possibility of success. Most civil rights strategies confront the obstacle of blacks' otherness.[76] The dominant group, noticing that a particular effort is waged on behalf of blacks, increases its resistance. Stories at times can overcome that otherness, hold that instinctive resistance in abeyance.[77] Stories are the oldest, most primordial meeting ground in human experience. Their allure will often provide the most effective means of overcoming otherness, of forming a new collectivity based on the shared story.[78]

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72. *See supra* notes 25-26 and accompanying text; *see also* West, *Critical Legal Studies and a Liberal Critic*, 97 YALE L.J. 757, 767 (1988); Steele, *supra* note 11 (innocence-giving myths validate things as they are).

73. *Supra* text accompanying note 27. This story is reassuring. There is little need for guilt or responsibility; we have all the case law and statutes that we need; black people have been and are making steady progress; and the few out-and-out racists that remain will be punished when they step out of line.

74. *See* sources cited *supra* note 16 (underdogs' stories often ironic or satiric); Phelps, *The Story of Law in* Huckleberry Finn, 39 MERCER L. REV. 889 (1988); Crenshaw, *supra* note 10, at 1335.

75. *See* M. BALL, *supra* note 13, at 135-36; 1 P. RICOEUR, *supra* note 1, at x-xi; Crenshaw, *supra* note 10, at 1335-37, 1359, 1366-68; *Saved?*, *supra* note 3, at 943.

76. Note the almost reflex rejection of Al-Hammar's story, for example. *Supra* section I.D.

77. For illustration, note the serious attention given to the anonymous leaflet by faculty and the law school community. *Supra* section I.E.

78. Stories may thus be the private-life analogue of formality in litigation and in the public sphere generally, namely, devices whose purpose and effect is to discourage and reduce prejudice. *See Fairness and Formality*, *supra* note 47.

B. *Why Members of the Ingroup Should Listen to Stories*

Members of outgroups should tell stories. Why should members of ingroups listen to them?

Members of the majority race should listen to stories, of all sorts, in order to enrich their own reality. Reality is not fixed, not a given.[79] Rather, we construct it through conversations, through our lives together.[80] Racial and class-based isolation prevents the hearing of diverse stories and counterstories. It diminishes the conversation through which we create reality, construct our communal lives. Deliberately exposing oneself to counterstories can avoid that impoverishment, heighten "suspicion,"[81] and can enable the listener and the teller to build a world richer than either could make alone.[82] On another occasion, the listener will be the teller, sharing a secret, a piece of information, or an angle of vision that will enrich the former teller; and so on dialectically, in a rich tapestry of conversation, of stories.[83] It is through this process that we can overcome enthnocentrism and the unthinking conviction that our way of seeing the world is the only one — that the way things are is inevitable, natural, just, and best — when it is, for some, full of pain, exclusion, and both petty and major tyranny.[84]

Listening to stories makes the adjustment to further stories easier; one acquires the ability to see the world through others' eyes.[85] It can

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79. *Saved?, supra* note 3, at 947; *see* Teachout, *Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture* (Book Review), 83 MICH. L. REV. 849 (1985); *Thinking About Our Language, supra* note 25, at 1962.

80. *See* sources cited *supra* note 10; J. MILL, ON LIBERTY 35 (D. Spitz ed. 1975) (we should accept as true only those interpretive beliefs that we have invited *the whole world* to prove unfounded); *Saved?, supra* note 3; Shapiro, *supra* note 47. *See generally* N. DAVIS, FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE (1987).

81. *See* Sherwin, *supra* note 12 (critical rhetoric can combine culture-building, constituent-strengthening dimension of storytelling and "deconning" element).

82. *See* sources cited *supra* note 20; M. BALL, *supra* note 13, at 135; *Saved?, supra* note 3.

83. *See* sources cited *supra* note 74. Stories enable us to begin to reform thought structures by means of which we create our world — no small accomplishment. The task is akin to making a bed while still lying in it. Stories give us a glimpse of a world we have never seen, using the current stock of narratives to point the way to another better, larger, more inclusive one. *But see supra* notes 47-48 and accompanying text (poorly told stories can result in rejection, rationalization, or cognitive dissonance on part of listener and fail to have intended effect).

84. *See, e.g.,* the pain and anger in Al-Hammar's story, *supra* section I.D. Stories make belief structures visible and show that they need not be as they are. On the disjunction between majority- and minority-race life experiences and perceptions of the world, see Delgado, *Critical Legal Studies and the Realities of Race — Does the Fundamental Contradiction Have a Corollary?,* 23 HARV. C.R.-C.L. L. REV. 407, 407-08 (1988). *See also Economic Man, supra* note 21, at 873-77.

85. *See Affirmative Action, supra* note 7, at 8. Note that Al-Hammar's explosive tale of rage and disgust may have paved the way for the more ironic and appealing anonymous account. Stories can often be staged, arranged in sequence so as to heighten consciousness incrementally.

lead the way to new environments. A willing listener is generally "welcomed with open arms."[86] Listening to the stories of outgroups can avoid intellectual apartheid. Shared words can banish sameness, stiffness, and monochromaticity and reduce the felt terror of otherness when hearing new voices for the first time.[87]

If we would deepen and humanize ourselves, we must seek out storytellers different from ourselves[88] and afford them the audience they deserve. The benefit will be reciprocal.

CONCLUSION

Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. They challenge us to wipe off our own lenses and ask, "Could I have been overlooking something all along?"

Telling stories invests text with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.

Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs: All movements for change must gain the support, or at least understanding, of the dominant group, which is white.

Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writ-

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The stories told in Part I represent, if not a linear progression, at least movement — something more than simple oscillation around an undefinable midline.

86. *Id.* at 16.

87. *Id.* at 12-16. There are dangers in storytelling, particularly for the first-time storyteller. The hearer of an unfamiliar counterstory may reject it, as well as the storyteller, precisely because the story unmasks hypocrisy and increases discomfort. *See Saved?, supra* note 3; *cf.* R. LAING, THE POLITICS OF EXPERIENCE 77-81 (1967) (double bind theory of schizophrenia); Bateson, Jackson, Haley & Wakeland, *Toward a Theory of Schizophrenia,* 1 BEHAV. SCI. 251 (1956) (same). *See generally* L. FESTINGER, *supra* note 56. Or, the hearer may consciously or unconsciously reinterpret the new story, in light of the hearer's own belief system and inventory of stock stories, so as to blunt, or even reverse its meaning. *See id.*; Winkler, *Scholars Nourished on the 60's Question the Impact of Their Research on Public Policy and Law,* Chron. Higher Ed., Nov. 9, 1988, at A5, col. 2 (Mary Frances Berry, professor of history and former Assistant Secretary of HEW, and other historians recounted cases where scholars' testimony to courts and Congress had an effect opposite from that intended because the decisionmaker had a different agenda, or reinterpreted scholar's account to favor the other side).

88. Note the abstract, bloodless — not to mention ineffectual — quality of John Henry's legal complaint. *Supra* subsection I.C.1. It does little to challenge, enlighten or move us, as some of the other stories do.

ers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.

Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together.[89]

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89. HOW THINGS CAME OUT

The curious reader will be glad to know that:

Professor White never modified his view.

Al-Hammar X graduated in the top 15% of his class, enrolled in a famous LL.M. program, and plans to become a law professor.

Judith Rogers continued to be friendly with Professor Vernier, and actually succeeded in making him more receptive to minority candidates.

John Henry was hired at Howard, where he had a long and illustrious career.

The students at school *X* formed a committee to press for more minority and women professors. They did all the things Al-Hammar X suggested except disrupt classes. Two years later, the school hired two black women and a Hispanic male, maintaining however that this was not the result of student pressure but rather its own long-term recruiting.

BIOGRAPHIES

KATHLEEN A. BARCLAY, ESQ.
BIOGRAPHY

Kathleen is a 1999 graduate of Union College and received her law degree in 2004 from Boston College Law School. Prior to joining Maguire Cardona, Kathleen gained extensive experience practicing law in Boston, before moving to the Albany area with her husband and family in 2009. She is admitted to practice law in the State of New York and the Commonwealth of Massachusetts.

Kathleen focuses her practice in the areas of medical malpractice defense, errors and omissions, product liability, general liability defense and insurance coverage. Kathleen is a highly skilled courtroom advocate and has successfully obtained jury verdicts for her clients at trial, as well as obtained dismissal of cases prior to trial through motions for summary judgment.

Kathleen is an active member of the Capital District Trial Lawyers Association, Albany County Bar Association, Capital District Women's Bar Association and New York State Bar Association. Kathleen serves on the Board of Directors for the Capital District Trial Lawyers Association. Kathleen currently serves on the Board of Directors for the Albany County Bar Association, as well as the Chair of the Judicial Qualifications Committee. Kathleen also serves on the New York State Bar Association Committee on the Tort System, and is a member of the Trial Lawyer's Section. Kathleen is a member of the House of Delegates for the New York State Bar Association.

In 2015, 2016, and 2017 Kathleen was honored by Super Lawyers and included in its annual issue acknowledging outstanding Upstate New York attorneys. Kathleen was recognized for her successes in the category of Personal Injury Medical Malpractice Defense.

Running is one of her favorite activities, and Kathleen has participated in both the Baltimore Marathon and the Boston Marathon. Kathleen has also become an active Crossfitter. She resides in Ballston Lake with her husband and two sons.

PROFESSOR PATRICK M. CONNORS
BIOGRAPHY

Patrick M. Connors is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School where he has taught New York Practice and Legal Ethics since 2000. Commencing with the January 2013 supplement, Professor Connors became the author for the treatise Siegel, New York Practice. The publication's sixth edition, "David D. Siegel & Patrick M. Connors, New York Practice (6th ed. 2018)," was released in March, 2018. The treatise has been cited in thousands of reported decisions and has been called "The Bible" for litigation in New York State courts.

He received his B.A. degree from Georgetown University and his J.D. degree from St. John's Law School, where he was an editor of the Law Review and research assistant to Professor David D. Siegel. Upon graduation from St. John's in 1988, Professor Connors served as a personal law clerk to Judge Richard D. Simons of the New York Court of Appeals until 1991. From 1991 until May of 2000 he was an associate and then member of the litigation department at Hancock & Estabrook, LLP, in Syracuse, New York.

Professor Connors is also the author of the McKinney's Practice Commentaries for CPLR Article 22, Stay, Motions, Orders and Mandates, Article 23, Subpoenas, Oaths and Affirmations, Article 30, Remedies and Pleading, and Article 31, Disclosure. He also authored the Practice Commentaries for the former New York Rules of Professional Conduct and several articles in the Surrogate's Court Procedure Act. He is currently an author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are published in the New York Law Journal. From 1992 through 2003, he was a Reporter for the Committee on New York Pattern Jury Instructions ("PJI"), the panel of New York State Supreme Court Justices that drafts and oversees the frequent revisions of the standard jury charges in civil cases. His publications have been cited in hundreds of reported cases.

He was a member of the New York State Bar Association's Committee on Professional Ethics from 1996 through 2016. He served on the New York State Attorney Grievance Committee for the Fifth Judicial District from 1997 until 2000. He was the Reporter for the New York State Bar Association's Special Committee on the Code of Judicial Conduct, which published a report recommending substantial amendments to New York's Code of Judicial Conduct. He was also the Reporter for the New York State Bar Association's Task Force on Non-lawyer Ownership of Law Firms. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice and served as a member of the New York State Bar Association's CPLR Committee from 2003 through 2007.

Professor Connors is a frequent lecturer at continuing legal education seminars on recent developments in New York Practice, professional ethics and legal malpractice. He has also served as an expert witness and consultant on issues pertaining to attorney ethics, legal malpractice, and civil procedure.

JAMES HACKER, ESQ.
BIOGRAPHY

Jim Hacker is a 1981 graduate of Hamilton College where he is a Trustee and a 1984 graduate of Albany Law School where he chairs the Board of Trustees. He is an elected Fellow of the American College of Trial Lawyers as well as an elected Fellow of the International Academy of Trial Lawyers.

He is the former President of the Albany County Bar Association and is a Regional Vice President of the New York State Trial Lawyers Albany. He also serves on the Board of Directors for the Legal Aid Society for Northeastern New York and is a past President of the Capital District Trial Lawyers Association who awarded him their Annual “Daniel H. Mahoney” Award in 2016. Mr. Hacker holds an AV rating from Martindale Hubbell and has been recognized as “A Best Lawyer in America” in both the fields of personal injury and commercial litigation.

Mr. Hacker divides his practice between the areas of commercial litigation and plaintiff’s personal injury.

In handling personal injury cases, Mr. Hacker has represented individuals in cases involving complex product liability issues, automobile accidents resulting in serious injuries, traumatic brain injuries, spinal damage, burn injuries, carbon monoxide poisoning and medical malpractice.

With respect to commercial litigation, Mr. Hacker represents individuals and corporations with respect to their issues involving breach of contract, restrictive covenants and insurance disputes.

Recently Mr. Hacker has been serving as a neutral in mediation and arbitration matters brought before him by private litigants. He is known for his practical and fair approach to resolving disputes amicably in the alternative dispute resolution arena.

Mr. Hacker is the managing partner of E. Stewart Jones Hacker Murphy, LLP, a prominent 16 attorney firm in Albany, Troy and Saratoga Springs, New York with focuses on commercial litigation, personal injury, tax certiorari litigation and criminal defense.

MAUREEN E. MANEY, ESQ.
BIOGRAPHY

Maureen E. Maney is a partner in the Syracuse law firm of Mackenzie Hughes LLP. She concentrates her practice on the defense of corporations, municipalities, individuals, health care providers, religious entities, and not for profit organizations in a wide variety of civil litigation at both the trial and appellate levels in state and federal court. Maureen assists clients with matters involving commercial disputes, employment, products liability, medical and nursing malpractice, civil rights, fiduciary litigation and negligence claims. She has also served as local counsel to national law firms on diverse litigation matters.

Maureen's clients include hospitals, nursing homes, national transportation companies, business entities, municipalities, financial institutions, religious corporations, and individuals. Maureen is an adjunct professor at the Syracuse University College of Law and a frequent lecturer for state and local bar associations.

After earning a Bachelor of Arts degree (summa cum laude) in 1997 from Le Moyne College, Maureen attended Albany Law School of Union University, where she graduated with a Juris Doctor (magna cum laude) in 2001. She was admitted to the New York State Bar in 2002.

Maureen is a past president of the Women's Bar Association of the State of New York ("WBASNY"), an organization with over 4,400 attorneys and judges. In 2013, Maureen was recognized as a "Rising Start" by the New York Law Journal. She has been selected for inclusion in the New York – Upstate Super Lawyers. Maureen is rated AV Preeminent with Martindale Hubbell. She is an active member of the New York State Bar Association, WBASNY, and the Onondaga County Bar Association.

MIRNA MARTINEZ SANTIAGO, ESQ.
BIOGRAPHY

MIRNA MARTINEZ SANTIAGO is Deputy Counsel at one of the largest Latino not-for-profit organizations in the United States. Mirna has over 20 years of legal experience, handling a range of matters fromtorts to professional liability to insurance coverage to regulatory affairs. She also incepted the Girls Rule the Law program and conference to introduce underprivileged and underrepresented middle and high school girls to the law.

Mirna lectures on an array of topics – with a focus on diversity, inclusion and the elimination of bias – and has published on legal, as well as non-legal subjects. Mirna has been featured in Latina Magazine and on NBC News speaking about the Afro-Latina experience.

Bar & Court Admissions: State Courts of New York; U.S. District Court for the Southern, Eastern, and Western Districts of New York.

Education: New York University, B.A., 1992; State University of New York at Buffalo, School of Law, J.D.,1995; Columbia University Graduate School of Journalism, Certificate in Magazine and Book Publishing, 2001

Professional Honors:

- 2017 – present: Delegate, 2nd Department, New York State Bar Association House of Delegates
- 2015/2016: Chair: Torts, Insurance and Compensation Law Section of the New York State Bar Association
- 2014 – 2016: Defense Association of New York Diversity Initiative, Planning Committee
- 2012: New York State Bar Association: Torts, Insurance & Compensation Law Section Award for Outstanding Chair (Diversity)
- 2010: New York State Bar Association: Sheldon Hurtwitz Young Lawyer Award for Outstanding Contribution to the Practice of Law in the Field of Insurance

Language Skills:

Spanish (fluently spoken and written)
Garifuna (fluently spoken)

PAT SPEIGHT, SEANCHAI STORYTELLER
BIOGRAPHY

Pat Speight specializes in traditional Irish Tales, Folk Tales from the fireplaces of Ireland. Pat has stories to make you laugh to make you cry and to scare and cheer, stories about Animals and Birds, Kings and Warriors, Saints and Sinners, Witches and Magicians, Pickpockets and Ghosts, Fairies and Mermaids and Mythical, Mystical characters that inspire and captivate the imagination. He appeared on the NBC Today Show with host Meredith Vieira in 2009 when the show celebrated St Patrick's Day on location in Ireland.

In 2002 Pat Speight was appointed first *Storyteller In Residence* to Cork County Council. One of the founding members of http://www.storytellersofireland.org/, he has travelled far and wide and has been a featured Storyteller at many a Festival, including …

USA National Storytelling Festival
Jonesborough Tennessee
Manchester Irish Festival
The North West International Festival
Cape Clear Festival
The Ulster Folk and Transport Festival
Scealta Shamhna in Dublin
Stories from the Hearth Wexford
The Irish Centre London
Seacat Storytelling Festival
Newcastle Irish Festival
Irish Festival Chicago, USA
Courtmacsherry Storytelling Carnival