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LEAVEWORTHY

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A reminder to our readers:
Your contributions of ideas and articles for this semi-annual publication are welcome. Please send your submissions to CTSAPP@nysba.org.

"Never, Never, Never Give Up"* Man Exonerated After 52 Years

**Winston Churchill*

By Mark Diamond

It was the luck of the draw that she was assigned to the case in the first place. In 1967, two years out of law school and a new associate with the Legal Aid Society in New York City, Malvina Nathanson picked up the appeal of Paul Gatling. He was in his early 30s in 1963 when he was arrested for murder. A veteran with no criminal record, he was accused of shooting to death, in an art gallery, a man who refused to hand over his money.

The evidence seemed strong. The victim's wife was present during the shooting and identified Gatling from a lineup. Another witness said that he had seen Gatling leave the building at the time of the murder. But Gatling had an alibi and maintained his innocence from day one. He went to trial. New York had a viable death penalty at the time. So right before summations, Gatling's family and lawyers convinced him to plead guilty to second-degree murder, a crime not subject to the death penalty. His promised sentence: 30 years to life.

This year, Nathanson and Gatling obtained what he had wanted for half a century—his exoneration. The twists and turns of the case during that time would do justice to a Dashiell Hammett novel.

Within a week of conviction, Gatling filed a motion to withdraw his plea. The motion was denied after a hearing at which one of Gatling's lawyers testified that he had doubts about his client's guilt even as he pleaded guilty. Gatling filed a coram nobis motion (a common-law precursor to CPL article 440 motions) to set aside his conviction on the ground that the plea was involuntary. The motion was denied and the order affirmed. In 1965, Gatling filed a second coram nobis application, noting that the victim's wife expressed doubts about her identification and had stated that someone told her that another person was guilty. In 1966, the application was denied.

That is when Nathanson entered the case. She was assigned to represent Gatling on appeal from the denial of the second coram nobis motion. At the same time, another attorney at Legal Aid filed a third coram nobis motion. The District Attorney had not revealed that, in a previous case, alleged eyewitness Grady Reeves had made the same kind of claim that he made about Gatling, and he had been convicted of

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Never, Never, Never Give Up (cont'd)

perjury. The motion was denied in 1967, and Nathanson was assigned to appeal the third coram nobis denial, too. Then in 1969, Legal Aid filed a fourth coram nobis application, contending that New York's capital punishment statute was inherently coercive. The motion was denied. Nathanson was assigned to that appeal as well. In 1970, all three appeals were denied.

Convinced of her client's innocence, Nathanson began a new investigation in 1971. With the help of a Legal Aid trial attorney and two investigators, Nathanson re-analyzed the entire case. Gatling submitted to a lie detector test and a psychologist's review. Armed with evidence of his innocence and based on his exceptional prison record, the attorneys applied to Governor Rockefeller for commutation of sentence, which was denied in 1972. But when the application was resubmitted the next year, it was granted! Gatling by then had served one-third of his minimum sentence, short of the normal requirement of service of half the minimum. He was released from prison in 1974 after serving 10 years.

Upon his release, Gatling worked for The Legal Aid Society, then the New York City Department of Corrections, the Vera Institute of Justice, several hospitals, and the South Forty Program—an organization he started in prison to assist inmates with reentry. Gatling moved back to Virginia, and he and Nathanson lost touch. Three years ago, he called her from his Veterans Affairs residential facility in Virginia. Gatling had read that Brooklyn District Attorney Kenneth Thompson had started an exoneration unit, and he wanted to apply. Gatling wanted to be able to vote, but faced felony disenfranchisement laws.

So he sought to have his name cleared, not just a commutation of a sentence that was wrong in the first place. Now working pro bono, Nathanson helped Gatling with the application and made contact with Thompson's office. "They were clearly influenced by the original applications to the district attorney and Governor and decided to open an investigation," recalls Nathanson. "A wonderful ADA named Eric Sonnenschein was assigned to the case." Sonnenschein spent over a year on the investigation. His most astonishing discovery was that old police reports showed that the victim had been assaulting his wife at the time of the murder, and she was overheard threatening to kill him. Further, she had not identified Gatling from multiple lineups, but had eventually been pressured by police to identify him. The ADA at Gatling's trial knew all this, but hid it from the defense (a violation under *Brady v. Maryland*, 373 US 83, mandating disclosure of exculpatory evidence). In April 2015, Thompson called Gatling to apologize and "make it right," and he moved to vacate the conviction. (Months later, the District Attorney died.)

On a clear day, on May 2, 2016, Nathanson sat beside Gatling in a courtroom packed with reporters. ADA Mark Hale informed the court that, "based on newly discovered evidence, constitutional violations, and in the interest of justice," the indictment should be dismissed. While granting the motion, Judge Dineen Riviezzo was visibly tearful, as were Gatling and Nathanson. Gatling is now in his 80s. He and Nathanson still talk to one another. His is the oldest exoneration ever obtained by the District Attorney's office and the first conviction by guilty plea overturned. Nathanson says she never imagined in 1967 that she would see her client exonerated after so long. "I had absolutely no doubt all this time that Paul was innocent," she said firmly. "It's funny. I began my career with Paul. I will probably end it with him 50 years later."

PHOTO BY JOHN M. MANTEL FOR DAILYMAIL.COM/SOLO SYNDICATION

Paul Gatling and Malvina Nathanson on May 2, 2016

Pro Bono Appeal: Navigating Inconsistencies in Posthumous DNA Testing Statutes

By Edward J. Markarian and Robert M. Harper

Family Court Act § 519 and Estates Powers and Trusts Law ("EPTL") § 4-1.2 both address a child's right to prove paternity after the putative father's death. However, DNA testing may be considered under Family Court Act § 519 only if "a genetic marker or DNA test had been administered to the putative father prior to his death." In contrast, EPTL § 4-1.2, as amended in 2010, states that "paternity [may be] established by clear and convincing evidence, which may include…evidence derived from a genetic marker test." EPTL § 4-1.2 does not require that genetic testing be performed while the father was alive. These inconsistent statutes came to our attention after we accepted assignment of an appeal through the New York State Bar Association Pro Bono Appeals Program (see www.nysba.org/probonoappeals).

EDWARD J. MARKARIAN

We were aware that post-death DNA testing was authorized under the 2010 amendment of EPTL § 4-1.2, which settled the conflict among the Appellate Divisions that existed prior to the amendment (see *Matter of Janus*, 157 Misc 2d 999, aff'd 210 AD2d 101 [1st Dept] [precluding DNA test]; *Matter of Morningstar*, 17 AD3d 1060 [4th Dept] [allowing DNA test]; *Matter of Poldrugovaz*, 50 AD3d 117 [2d Dept] [allowing test]). However, we were surprised to learn that a corresponding amendment to Family Court Act § 519 had not been made. Our appeal would have been governed by the less-favorable Family Court Act.

We were prepared to argue at the Appellate Division that Family Court Act § 519 should be interpreted according to decisions allowing post-death DNA testing under EPTL § 4-1.2 even before the 2010 amendment of that provision. However, this argument would have asked the Appellate Division to overlook § 519's express language stating that DNA testing had to be performed prior to the father's death. We therefore filed for extensions of time to perfect the appeal, while at the same time commencing new proceedings in Surrogate's Court seeking a determination under the more favorable provisions of EPTL § 4-1.2. Because the Family Court proceeding had been dismissed without prejudice, this second bite at the apple was possible.

Correctly applying EPTL § 4-1.2, the Surrogate's Court Judge ordered DNA testing (rendering our Family Court appeal moot). The putative father's genetic material was readily available because trial counsel in the Family Court proceeding had diligently secured court orders preserving genetic samples. The DNA testing proved paternity. Thereafter, the Social Security Administration made a substantial award of survivor benefits to the decedent's child. Surrogate's Court heirship proceedings are not private. To shield the personal information of the child in this case, we are not mentioning the venue of the proceedings. However, because the Family Court and Surrogate's Court judge was the same person, we wish to publicly applaud his open-mindedness in reaching different conclusions when addressing the same issue under different statutes. Ultimately, we hope that the inconsistent statutes will be harmonized.

ROBERT M. HARPER

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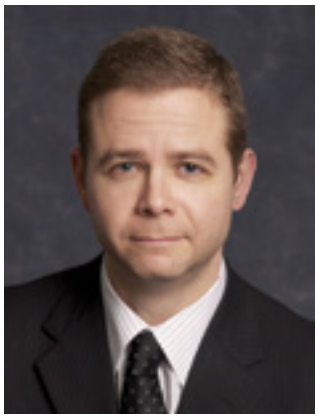
If I Knew Then What I Know Now

By Timothy P. Murphy



Without perspective, it is a challenge to distinguish the forest from the trees, no matter what your career may be. But I am hoping that the longer I practice law, the more perspective I will gain. First, the trees. In one of the first cases I argued in my career before the Appellate Division, 20-plus years ago, I was representing the respondent in a contract dispute. Our client was a prominent western New York business, which naturally did not expect to lose. I approached the case like any other inexperienced appellate attorney might. I focused like a

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If I Knew Then What I Know Now (cont'd)

laser beam during my preparation for oral argument on an unimportant aspect of the case—a distracting case inaccurately cited by my opponent in his brief. I spent much more time than necessary in preparing to beat up my adversary about this relatively minor aspect of the case. In retrospect, it should not have been surprising that my opponent spent precious little time during oral argument on this aspect of his argument. When I got up to argue, I decided to simply react to the arguments I had just heard. I went "big picture," instead of zoning in on the minutiae of trying to show how wrong the case citation was. By happenstance, I was able to avoid looking petty and stayed on message.

Now for the forest. When I argued my first criminal appeal many moons ago, the idea of actually meeting in person this scary person who had been convicted of a violent crime never even crossed my mind. Eventually, I was assigned to represent a client who, though seeming not to have much to argue in the appeal, would not stop begging for me to visit him in prison. I finally gave in and visited him. Meeting the person I was charged with advocating for made me realize how important it is to be an attorney. The value of meeting the client in person also helped me gain perspective on a number of potential issues I had found in the record.

I also created a relationship of trust that would not otherwise have been formed. I never realized the value of meeting my appellate clients before this case. Now it is an integral aspect of my criminal appellate practice to visit each client, or if the prison is too far away, to set up a confidential call with the client to discuss the case. Having perspective allows me to size up the particular fight in front of me and further recognize that with each new case I handle, the forest may become clearer.

Timothy Murphy is Chief Attorney, Appeals and Post-Conviction Unit, Legal Aid Bureau of Buffalo.

By Elizabeth Bernhardt

Law was a second career for me. I had started out to become an English professor, and I taught college students for 15 years before entering law school at age 40. So I had developed writing and oratorical skills and confidence as a public speaker. But this experience was paradoxically both a help and a hindrance. On the one hand, I benefited from having some experience in the world, especially the experience of being responsible for others. On the other hand, my idea of speaking in public was to dramatize and impress. To clarify, when I teach (I still teach, though nowadays it is law students rather than undergraduates), I am concerned above all with my students' progress. My philosophy of teaching is "less teaching, more learning," meaning that I intentionally do not dominate my classes so that my students can step up and develop their own skills. But sometimes I have to lecture, and when I do—whether the subject is a Shakespearean sonnet or Bluebook citation—I try to present material as clearly and dramatically as possible.

I now realize that I approached practicing law the same way. Whether talking things over with my colleagues, negotiating with an adversary, or arguing before a judicial panel, I assumed that my listeners' minds would wander and that only a vehement argument would hold their attention. I injected my speech with drama and emotional urgency. I probably conveyed sincerity and commitment to my point of view—all to the good—but I didn't realize that passion and rhetoric could make it more difficult for people to hear me. What I wish I had known then, that I know now, is that people need mental and emotional space to consider another person's ideas, and that it can be harder to take in what someone else is saying when emotion and excessive rhetoric are used. In other words, people hear me better when I speak softly.

I recently had evidence of this when I made a motion in a lower court. I was standing at ease while the judge spoke, and was honestly shocked to hear him deny my motion from the bench. The court's ruling was not only legally incorrect, it would be a disaster for my client. Against my instincts, I did not respond with emotion. Instead, when the judge finished speaking, I quietly and slowly explained the impact that his ruling would have. The judge then immediately reversed himself and ruled in my client's favor. In a recent case, instead of passionately laying out a syllogism whereby my client's position would prevail, I calmly laid out the relevant facts and law. My client's position prevailed.

Emotions accompany my sense of what is just and fair. When I was an Assistant District Attorney, I felt very strongly my obligation to speak for victims and to help achieve a just outcome. Today, as a defense attorney, I feel a strong obligation and loyalty to clients. But speaking calmly and slowly gives others the space to consider the content of my argument without feeling bullied or pressured. This is not only a good legal technique; it's a better way to communicate with everyone.

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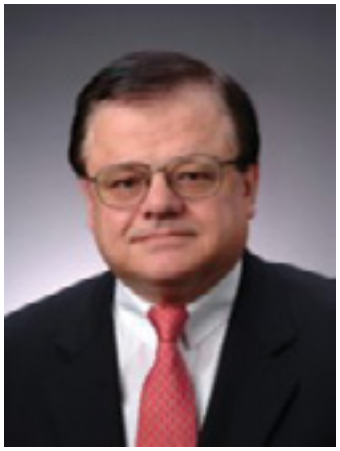
Appellate Perspectives

Appealability of Evidentiary Rulings Made Before Trial on Motions *in Limine*

By Michael J. Hutter



Consider the following scenarios: (1) Your trial in which you represent the plaintiff starts in 30 days, and you have just received, with notice of entry, an order of the trial court made upon a written *in limine* motion filed by defendant, which precludes the testimony of your disclosed expert on the issue of negligence on the ground that the expert is not qualified to give his proposed testimony; (2) Representing the defendant in this same trial, you have received, with notice of entry, an order of the trial court made upon a written *in limine* motion filed by plaintiff, which precludes the testimony of your disclosed expert on the issue of causation on the ground that the testimony is inadmissible under New York's *Frye* standard.

In both scenarios, the rulings will adversely affect your case. Specifically, in the former, the ruling will in all likelihood prevent you from establishing a prima facie case of liability; and to the extent that you may be able to avoid a directed verdict, it decreases the likelihood of obtaining a favorable jury verdict. In the latter, the ruling eliminates the only way you were going to show that your client is not liable. Research in both scenarios strongly suggests that the rulings are likely to be reversed on appeal. As a result, you start thinking about an appeal to the Appellate Division from the order. But is the order separately appealable, or is your only recourse to proceed to trial and have the ruling reviewed on an appeal from the judgment entered against your client after trial under CPLR 5501(a)(3)? These scenarios are not an infrequent occurrence in litigation nowadays. While motions *in limine* requesting a ruling on the admissibility of a given piece of evidence pre-trial are not specifically authorized by the CPLR or the Uniform Rules (22 NYCRR 202.1 *et. seq.*),[1] attorneys have embraced such motions as an effective means to obtain a ruling excluding, admitting or limiting evidence, and to gain the strategic advantages that ensue. [2] In turn, trial courts have recognized the usefulness of such motions and are entertaining them as a proper exercise of their inherent power to admit or exclude evidence at trial. [3]

This article will address the appealability of orders deciding evidentiary issues entered upon a motion *in limine*. After a discussion of a related rule precluding separate appeals of evidentiary rulings made during a trial, the article will show that such rule initially was carried over to appeals of orders deciding an evidentiary matter made on an *in limine* motion. The article will then discuss the emergence in recent years of an approach rejecting that no-appeal rule, and allowing appeals of *in limine* rulings when embodied in an order on a specific showing. Concluding comments will then be made regarding how attorneys can best work with the standard now in place.

Analysis starts with recognition that rulings on the admissibility of evidence made on objections raised at trial are not separately appealable, even if the objection is made by a motion on notice and the ruling on that motion is embodied in a written order in the form specified for orders in CPLR 2219(a). [4] This approach is certainly sound to the extent that the ruling has not been embodied in an order, since CPLR 5512(a) requires an appeal to be taken "from the judgment or order of the court of original instance." However, its applicability to an order can be questioned. In that regard, there is nothing in the provisions of CPLR articles 55 and 57 which precludes an appeal from an order merely because it is concerned with a trial ruling on an evidentiary matter. The appealability of right standards for non-final orders in CPLR 5701(a)(2)(iv) ("order involves some part of the merits") and (v) (order "affects a substantial right") seemingly encompass an evidentiary ruling embodied in an order on an *in limine* motion. Further, the provisions of CPLR 5701(c), which permit appeals upon permission of the appellate court from orders not appealable as of right, are broad enough to cover orders made on an *in limine* motion to the extent that such orders cannot be appealed as of right.

Nonetheless, in an earlier line of cases, the courts rejected the application of these CPLR appeal provisions to trial rulings embodied in an order by asserting that they

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Appealability of Rulings on Motions *in Limine*

are "not orders" for purposes of these appeal provisions. [5] Such an order could not be viewed as an "order" under such provisions, which "were not intended to permit intermediate appeals from evidentiary rulings during trial." [6] Underlying this intent-based rationale is an admittedly strong policy argument, namely, were such appeals to be allowed, the trial process would be interfered with and impeded, and the appellate court would be burdened by "incessant appeals." [7] This well-established, and clearly justifiable, rule precluding separate appeals for trial evidentiary rulings does not augur well for allowing separate appeals for evidentiary rulings made on a motion *in limine*. In that regard, such a ruling is the equivalent of a trial evidence ruling, as they both have the same effect of excluding, allowing or limiting offered evidence.

Thus, it is not at all surprising that the initial decisions of all four Departments of the Appellate Division, addressing the issue of the appealability of an evidentiary ruling made on an *in limine* motion embodied in an order, concluded that such an order is not separately appealable, either as of right or by permission. [8] Noting that such a ruling "did not go to the merits of the case," [9] the courts viewed it as being, at best, an "advisory opinion" which the Appellate Division had no authority to review. [10] As a result, appellate review "must be deferred until after trial," when the effect of the ruling, if any, "can be assessed in the context of the record as a whole." [11] These decisions, it can only be concluded, amount to a per se ban, as they admit of no exceptions. In the scenarios presented, the inability to take a separate appeal from the order places you in a problematic position. To secure your right to appeal the order, you will have to proceed first to trial with all of its attendant expenses, doing so without the key piece of evidence you have long been relying upon available to you, and knowing that as a result you are likely, if not certain, to lose at trial. Do those previously mentioned bases for precluding appeals of trial rulings support a no-appeal rule in these circumstances? Expressed differently, why can you not take an appeal and ask simultaneously to take your case off the trial calendar?

Perhaps with this problematic situation in mind and a desire to prevent it, the Second and Fourth Departments revisited in 2003 the no-appeal rule as to evidentiary rulings made on *in limine* motions. In *Roundout Elec. v. Dover Union Free School Dist.* (304 AD2d 808 [2d Dep't 2003]), the Second Department entertained an appeal from an order made on an *in limine* motion, which limited plaintiff's proof of damages to the amount claimed in the original notice of claim and not the amended notice of claim.

The majority rejected a forceful dissenting opinion of Justice Gloria Goldstein, who was of the view that the order was not appealable because it was nothing more than a ruling on a motion *in limine* determining the admissibility of evidence at trial, which precedent held was not appealable (*Id.* at 811-813). [12] The decision held that the order appealed from could not be so characterized. The reason was that the motion "sought far more than an advisory evidentiary ruling," since it sought in essence to limit the amount of plaintiff's recovery." (*Id.* at 813). As such, it was appealable because it involved the merits of the controversy and affected a substantial right. (*Id.* at 811). While not so acknowledged, the majority's ruling provided an opening, if not a basis, to appeal orders generally involving any and all "evidentiary rulings" made on *in limine* motions. Potentially, then, an order precluding the testimony of a party's expert would be appealable, as well as order precluding impeachment of a party witness by use of his or her prior felony conviction.

Shortly after *Roundout*, the Fourth Department entered the fray in a thoughtful opinion by Justice L. Paul Kehoe in *Scalp & Blade, Inc. v. Advent, Inc.* (309 AD2d 219 [4th Dep't 2003]). At issue was the appealability of an order made on an *in limine* motion, which precluded plaintiffs from offering at trial proof of an additional claim of damages. The Court held that the order was appealable, after initially expressing doubt as to the soundness of the rule that precludes appeals from orders made on *in limine* motions deciding the admissibility of evidence.

Instead, the Court held that such orders, like all interlocutory orders, are appealable pursuant to CPLR 5701(a)(2)(iv) and (v), if they in fact "involve[ ] some part of the merits" or "affect a substantial right." (*Id.* at 223). The Court then examined whether the order before it fell within these appealability provisions. Upon such an examination, it held that the order was encompassed within those standards. The Court so held because the order "has a completely restrictive effect on the efforts of the plaintiffs to prove their case against defendants and recover certain damages from them," and it "effectively grant[ed] defendants partial summary judgment on the critical substantive issue of what constitutes the proper measure of damages in plaintiffs' causes of action." (*Id.* at 224). Like the Second Department, the Fourth Department saw the legal basis for an appeal under subparagraphs (iv) and (v) for *in limine* orders. But unlike the Second Department, the Fourth Department held that a strong case for permitting an appeal under that basis must be made. It is difficult to see the Fourth Department entertaining an appeal of an *in limine* order, for example, addressing the admissibility of a conviction to impeach a witness.

Notably, the First and Third Departments have endorsed the holdings of *Roundout* and *Scalp & Blade*. The First Department did so in *Rodriguez v. Ford Motor* Co. (17 AD3d 159, 160 [1st Dep't. 2005]) by citing to a post-

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Roundout Second Department decision, which permitted an appeal of an *in limine* evidentiary ruling, albeit describing that precedent as an "exception" to the no-appeal rule. The Court then held this "exception" was inapplicable, as the order did not "limit the legal theory of the [plaintiff's] liability case." In *Vaughn v. St. Frances Hosp*. (29 AD3d 1133, 1135 [3d Dep't. 2006]), the Third Department found appealable an order precluding certain evidence, as it had "a clear potential of impacting the merits and it affects a substantial right of the [defendant]." In support of this holding, the Court cited both *Roundout* and *Scalp & Blade.*

All four Departments of the Appellate Division have now clearly rejected their prior decisional law which barred, with no exceptions, an appeal from an order embodying an evidentiary ruling made before trial. Such orders are appealable as of right under CPLR 5701(a)(2), if the order "involves some part of the merits" of the action or "affects a substantial right." Note that the decisions do not hold that the Appellate Division would always hear an appeal from such an order. Rather, they will entertain appeals, provided that a showing has been made that the order sought to be appealed from in fact "involves some part of the merits of the action" or "affects a substantial right."

The basis for the rejection, as *Scalp & Blade* expressly states, is that the no-appeal rule cannot be squared with the plain language of CPLR 5701(a)(2)(iv),(v). To the extent that policy concerns, such as impeding the trial process and the possibility of increasing the workload of the Appellate Division, have validity in the context of orders entered before a trial starts, they cannot be used to override unambiguous statutory language. However, nothing precludes these concerns from being taken into account in the determination as to whether the statutory preconditions have been satisfied. Attorneys contemplating the taking of an appeal from the motion *in limine* order must now consider whether the order falls within subparagraphs (iv) or (v). To be sure, there are decisions which suggest that such orders are not at all appealable. Thus, for example, there are numerous decisions post-*Roundout* and *Scalp & Blade* which summarily dismiss an appeal from an *in limine order*, stating only the order is not appealable. [13] However, these decisions are properly read as being based upon the appellate court concluding that CPLR 5701(a)(2)(iv),(v) does not encompass the specific order before it, either because it did not "involve the merits" or "affect a substantial right." Also, decisions which address the merits of the evidentiary ruling without any discussion as to whether the underlying order is appealable should not be read as holding that any evidentiary ruling will satisfy the statutory conditions. Rather, they should be viewed as appeals where those conditions were indisputably present. [14]

Attorneys must now be prepared, when considering an appeal, and then appealing the *in limine* order, to show the appellate court that those statutory conditions are in fact present. In other words, view the situation as you the appellant, having the burden of showing that your appeal falls within one of those appeal as of right provisions. Keeping in mind that while subparagraphs (iv) and (v) are often used interchangeably, subparagraph (iv) is probably the narrower of the two. [15] Thus, the attorney should focus on, and must be prepared to establish, that the order "satisfies subparagraph (v) in that it "affects a substantial right."

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1. It should be noted that Rule 27 of the Rules of the Commercial Division of the Supreme Court, 22 NYCRR 202.70(g), governs motions *in limine* in the Commercial Division; and many other judges throughout the State in their "Individual Practices" provide for motions *in limine.*
2. *See generally*, David P. Horowitz, "In the Beginning…Motions *in Limine*," 77 N.Y. St. B.J. 16 (May 2005).
3. *See, VanWert v. Randall,* 35 Misc3d 1202(A) (Sup. Ct. Rensselaer Co. 2012), affd., 100 AD3d 1079 (3d Dep't 2012) (["A] successful pretrial motion *in limine* offers the dual advantage of eliminating evidence without the jury becoming aware of it and promoting judicial economy by avoiding the time spent considering objections at trial . . . .").
4. *See, e.g., Roman v. City* of New York, 187 AD2d 390 (1st Dep't 1992); *Kopstein v. City of New York,* 87 AD2d 547, 547 (1st Dep't 1982); *Brown v. Cadmus Holding Corp.,* 238 App Div 867 (2d Dep't 1933); *see also,* Siegel, New York Practice (5th ed) §526, p. 925.
5. *Brown v. Michetti,* 97 AD3d 529, 529 (2d Dep't 1983).
6. *Kopstein,* 87 AD2d at 547, supra,
7. *Oppenheimer v. Duophoto Corp.,* 271 App Div 1005 (1st Dep't 1947).
8. *See, e.g., Santos v. Nicolas,* 65 AD3d 941 (1st Dep't 2009) (order precluding testimony of defendant's proposed expert); *Cotgreave v. Public Adm'r. of Imperial County (Cal.),* 91 AD2d 600, 601 (2d Dep't 1982) (order permitting evidence of prior negligent conduct); *Hough v. Hicks,* 160 AD2d 1114, 1117-1118 (3d Dep't 1990) (order precluding evidence of failure to wear seatbelts); *Mayes v. Zawoliki,* 55 AD3d 1386 (4th Dep't 2008) (order precluding admission of photograph).
9. *Santos,* 65 AD3d at 941, supra.
10. *Savarese v. City of N.Y. Hous. Auth.,* 172 AD2d 506, 509 (2d Dep't 1991).
11. *Brennan v. Mabey's Moving & Stor.,* 226 AD2d 938, 938 (3d Dep't 1996).
12. In so arguing, Justice Goldstein was well aware of the dilemma the plaintiff faced, noting, "it is not the function of appellate courts to issue advisory trial rulings to avoid the necessity of granting a new trial or appeal from a final judgment.
13. *See, e.g., Piorkowski v. Hospital for Special Surgery,* 116 AD3d 560 (1st Dep't 2014); *Balcom v. Reither,* 77 AD3d 863 (2d Dep't 2010); *Bozzetti v. Pohlmann,* 94 AD3d 1201 (3rd Dep't 2012); *Howard v. Shanne,* 114 AD3d 1212 (4th Dep't 2014); *Crewell v. Albany Med. Ctr. Hosp.,* 52 AD3d 1233 (4th Dep't 2008).
14. *See, e.g., Campaign for Fiscal Equity, Inc. v. State of New York,* 271 AD2d 379 (1st Dep't 2000) (adequacy of State funding of public education; exclusion of plaintiff's key expert); *Hurrell-Harring v. State of New York,* 119 AD3d 1052 (3rd Dep't 2014) (constitutionality of State's public defense system; evidentiary defense rejected).
15. See, Weinstein, *et. al.,* 12 New York Civil Practice, ¶ 5701.15.

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If I Knew Then (cont'd from page 4)

By Gary Muldoon

Years ago, I had a criminal appeal where the trial prosecutor had engaged in significant misconduct. Reading the transcript, I was appalled. That misconduct, serious and pervasive, became Point I of my appellate brief. When it came time for oral argument, I let the other side have it, both guns blazing. Surprisingly, in response, they were meek, recognizing the error, but also pointing out some countervailing arguments to affirm the conviction.

The judges did not respond as I had hoped and expected. I was in high dudgeon over this ethical violation, this violation of the right to a fair trial. The judges seemed to take it in stride, recognizing that what had happened was improper, but then again, this happens, and what should be the remedy? The end result: I lost the appeal. The other side played it cooler than I did. They used jiu jitsu tactics. In my high dudgeon, I had placed myself off balance, and they used it to their advantage. Had they responded to my fire with opposite fire of their own, I think the result would have been different.

Years have passed, and maybe I've learned something. What did I learn? I still get upset by misconduct, by injustice—for me, that's important, it impels me to work harder, longer. But I also need to work smarter. Spouting off my own opinion about how improper opposing counsel was at trial is a good thing around the water cooler, but my writing and my oral argument needed to be more restrained. Judges see misconduct all the time, but they do not necessarily react as I did, and they did not appreciate my venting. I needed to present the issue to them and allow them to draw their own conclusions.

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