Inns of Court,

Trial Horrors

April 20, 2015

Participants

Susan Britt, Esq

Ned Hirsch, Esq

Justice Arthur Diamond

Harry Kutner, Esq

Joe Ryan, Esq

Veronica Ebuema, Esq

Brendan Lee, Law Student

Melissa Brown, Law Student

Michele Nicotera, Law Student

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Topics

1. The Mega Trial: Pizza Connection 35 Minutes
   Presented by Joseph Ryan
   Brendan Lee

2. Expert Disclosure, CPLR 3104 (d) 35 Minutes
   Presented by Ned Hirsch, Justice Diamond
   Melissa Brown

3. Scary Jury Selection 1.5 hours

   Presented by Harry Kutner, Susan Britt, Veronica Ebuema and Justice Diamond

   Brendan Lee Melissa Brown and Michele Nicotera

CLE ...2 credits

HON. ARTHUR M. DIAMOND

BIOGRAPHICAL DATA

Arthur M. Diamond has served on the NYS Supreme Court since January, 2004.

Justice Diamond is a graduate of Rutgers University (New Brunswick 1974) and Hofstra University School of Law (1978). He began his legal career in the Office of the Nassau County District Attorney Denis Dillon where he spent eight years and served as Deputy Chief of the Trial Bureau. In 1992 he became of counsel to the Garden City law firm of *Fishkin & Pugach*, concentrating in the areas of criminal and personal injury law. In 1999 and 2000 he was appointed to the County Court by Gov. George Pataki.

His column, *Evidentially Speaking*, appears regularly in the Nassau Lawyer, the official publication of the Nassau County Bar Association. He has lectured on evidence at the Nassau County Bar Association, New York County Lawyers Association, the Statewide Judicial Seminars at the New York State Judicial Institute in White Plains, New York, the Second and Third Department Attorney for the Child panels and the Hofstra University Continuing Legal Education Institute. He is co-editor of the Evidence chapter and a peer reviewer of the Article 81 chapter of the 2013 revision of the *Bench Book for Judges.*

In 2011 he was appointed by Chief Judge Lippman to the statewide Judicial Advisory Council, a committee of Justices dedicated to improving trial practices in New York courts and in 2015 was appointed to the New York State Advisory Committee on Guardianship.

Susan Fagen Britt
25 Athem Drive
Glen Cove, New York 11542
(516) 791-4545 Home
(516) 551-4122 Cell Phone

Experience

Aug 1997 to present **Hirsch, Britt & Mosé** Garden City, New York
Partner

Representation of clients from the inception of the lawsuit through the trial. Includes examinations before trial, court conferences, settlement negotiations, client conferences, jury selection and trial. Lectures on advanced topics pertaining to medical malpractice, new developments in the medical legal field and related topics to client hospitals and organizations. Provides risk management services to client hospitals and organizations. Practice areas include medical litigation, general liability, personal injury, employment litigation, discrimination in the workplace and sexual harassment. Representation of attorneys in legal malpractice and professional partnership dissolution.

Jan 1992 to Aug 1997 **Matturro & Hirsch** Carle Place, New York
Partner

Representation of clients from the inception of the lawsuit through the trial. Includes examinations before trial, court conferences, settlement negotiations, client conferences, jury selection and trial. Lectures on advanced topics pertaining to medical malpractice, new developments in the medical legal field and related topics to client hospitals and organizations. Provides risk management services to client hospitals and organizations.

Aug 1991to present **New York College of Osteopathic Medicine** Old Westbury, New York
Assistant Adjunct Professor, Department of Medicine

Course Director for Class in Medical Jurisprudence and Medical Ethics. Teaching required course for second year medical students in the area of medical malpractice, health care law, biomedical ethics, HMO and managed health care plans, contracts and torts.

Jan 1989 to Present **Hofstra University School of Law**
Instructor - NITA Program

Trial Techniques. Law student course offering training in all areas of the trial. Special Professor of Law- Teaching New York Civil Practice.

Aug 1984 to Jan 1991 **Rivkin Radler Bayh Hart and Kremer** Uniondale, New York
Associate Attorney

Representation of clients from inception of lawsuit through the trial. Includes examinations before trial, client conferences, settlement negotiations, court conferences, jury selection and trial. Provided educational programs and risk management services to client hospitals and organizations.

1980 to 1981 **Downstate Medical Center** Brooklyn, New York
Research assistant

Participated in the investigation and collection of scientific data for human enzyme research.

1967 to 1973 **Brookdale Hospital and Medical Center** Brooklyn, New York
Registered Professional Nurse

Involved in all areas of nursing practice including patient care, supervision of support staff, education of patients and their families, participation in the collection of statistical data for various public health studies and development of nursing protocol.

1973 to 1974 **Brooklyn College** Brooklyn, New York
Adjunct lecturer, Department of Biology

Taught course, designed for second year nursing students, in Microbiology.

Education

1984 **Hofstra University School of Law** Hempstead, New York
Juris Doctor

1979 **Adelphi University** Garden City, New York
Bachelor of Science, Major in Biology

1967 **Kingsborough Community College** Brooklyn, New York
Associate Degree in Science, Major: Nursing

License to practice nursing 1967

Admissions to Bar
New York State 1985
United States District Court for the Eastern District 1985
United States District Court for the Southern District 1985

Memberships
Nassau County Bar Association
Theodore Roosevelt Chapter of the American Inns of Court
Elected to Board of Trustees for the American Lung Association of Nassau-Suffolk Counties, New York
Institutional Review Board, New York College of Osteopathic Medicine
Executive Board INNS OF COURT

JOSEPH W. RYAN, JR. P.C.
225 Old Country Road
Melville Law Center
Melville, NY 11747
(JoeRyanLaw.com)

LEGAL EEXPERIENCE:

1981 to Present:
Engaged in the private practice of law devoted principally to civil and complex criminal litigation before all federal and state courts. Original member of the Theodore Roosevelt Inn of Court.

1975 to 1981:
Practice with former Assembly Speaker Joseph F. Carlino in the practice of law in Mineola, New York, specializing in civil and criminal litigation.

1969 to 1975:
Assistant United States Attorney for the Eastern District of New York, serving in the following capacities:

- Chief, Frauds Section
- Chief, Narcotics Section
- Deputy Chief, Criminal Division

1965 to 1969:
Assistant Counsel, Judicial Inquiry on Professional Conduct, Supreme Court, Kings County, New York, conducting investigation and trials of disciplinary proceedings involving attorneys and judges

EDUCATION:

St. John's University School of Law LLB, JD 1964
United States Merchant Marine Academy, BS 1961

PUBLIC APPOINTMENTS:

Appointed Special District Attorney of Suffolk County by the County Court to conduct Grand Jury investigation of corruption allegations relating to a Suffolk County Contract to lease vehicles from PHH, Inc.

Re-appointed by Chief Judge Carol Amon and currently serve as a member of the Merit Selection Committee for United States Magistrate Judges for the Eastern District of New York.

EDGAR A. HIRSCH, III

Hirsch, Britt & Mosé
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GARDEN CITY, NEW YORK 11530-1659
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FACSIMILE: (516)741-8445
Email: hbmesqs@yahoo.com

Experience

Aug 1997 to present	**Hirsch, Britt & Mosé,** Garden City, New York *Partner* Representation of clients from the inception of the lawsuit through the trial. Includes Examinations Before Trial, Court conferences, settlement negotiations, client conferences, jury selection and trial. Lectures on advanced topics pertaining to medical litigation.
Jan 1992 to Aug 1997	**Matturro & Hirsch,** Carle Place, New York *Partner*
Nov 1984 to Jan 1992	**Rivkin Radler Bayh Hart and Kremer**, Uniondale, New York *Partner*
1982 to Nov 1984	**Kroll, Pomerantz & Cameron,** New York, New York *Associate Attorney*
March 1979 to 1982	**Martin, Clearwater & Bell**, New York, New York
Memberships	Theodore Roosevelt Chapter American Inns of Court Charter Member

Education

1976 to 1979	**Syracuse University College of Law,** Syracuse, New York Notes & Comments Editor - Law Review
1972 to 1976	**University of Virginia,** Charlottesville, Virginia Magna Cum Laude
Admissions to Bar	New York State 1980 United States District Court for the Eastern District 1985
Lecturer	North Shore University Hospital New York College of Osteopathic Medicine Nassau Academy of Law

CURRICULUM VITAE

Harry H. Kutner, Jr.
136 Willis Avenue
Mineola, New York 11501
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Fax: (516) 741-8712
hkutner@gmail.com
http://www.hkutner.com

Education:

Fordham University School of Law, New York, NY 1973
J.D., Doctor of Jurisprudence
Honors: Editor, Advocate

Iona College, New Rochelle, New York 1969
B.A., Bachelor of Arts (Political Science)
Honors: Who's Who in American Colleges & Universities, Basketball

Admitted:

New York, 1974
U.S. Court of Appeals Second Circuit 1980
U.S. Federal Courts, 1975 (EDNY and SDNY)
U.S. Supreme Court 1980
U.S. Tax Court 1982

Professional experience:

Legal career spanning nearly thirty-seven years, noteworthy for its variety and results across a wide spectrum of legal issues. Clients have been successfully represented in both civil and criminal litigation in federal and state courts. Reported cases involved personal injury, wrongful death, zoning and land use, class action frauds, as well as estates, real estate, commercial sales and financing, civil rights, extradition, intentional torts, medical malpractice, Article 78, criminal especially DWI, and commercial.

Representative cases tried to verdict in federal and state courts as plaintiff and defendant:

> medical malpractice, dental malpractice, automobile liability, product liability, premises liability, breach of contract, construction accident, wrongful death, 42 USC § 1983 civil rights, and criminal-felonies (murder, robbery, East Coast Rodney King, burglary, grand larceny, assault, etc.) and misdemeanors (DWI, assault, larceny, etc.)

Mr. Kutner testified in front of Congress, and although it became mildly contentious with the Chairman (later imprisoned), his testimony contributed to several consumer and bank reforms.

Recital of the following reported cases, in a wide range of issues in both civil and criminal matters is illustrative:

People v. Stock, 88 Misc.2d 1058 (D. Ct. Nassau Co. 1976)

Bethiel v. Saxton, 55 A.D.2d 612 (2d Dept. 1976) wrongful death, (early case dealing with economic value of a housewife)

Carinha v. Action Crane Corp., 58 A.D.2d 261 (1st Dept. 1977) combined wrongful death and leg-off cases: very early LL § 240 case involving contractual and common law indemnity, general and special employment, Workers' Comp. as complete defense.

People v. Ronald C., 61 A.D.2d 988 (2d Dept. 1978) robbery case: whether it was abuse of discretion for trial court to refuse "Serrano" plea.

Bethiel v. Action Crane Corp., 61 A.D.2d 1022 (2d Dept. 1978): later appeal after special issue trial among three defendants as to employer of crane driver at time of collision.

People v. Joe, 63 A.D.2d 737 (2d Dept. 1978) criminal possession of weapon: conviction reversed, indictment dismissed based on illegal stop, search and seizure.

Scharf v. Thaul, 65 A.D.2d 819 (2d Dept. 1978) in Article 78 zoning case: affirmed homeowner client's prevailing at Special Term annulling Zoning Board's denial of variance.

Rand v. Rand, 84 A.D.2d 785 (2d Dept. 1981): successful appeal of denial of vacatur of client's default and consolidation of two actions.

People v. Albanese, 88 A.D.2d 603 (2d Dept. 1982): reversal.

People v. Robert P.T., 91 A.D.2d 1075 (2d Dept. 1983): modification of sentence.

Thompson v. Whitestone S & L, 101 A.D.2d 833 (2d Dept. 1984), lv. to app. den., 65 N.Y.2d 636 (1985): clients' class action certification affirmed.

Hayden v. Village of Hempstead, 103 A.D.2d 765 (2d Dept. 1984): reversal of Special Term's refusal to grant client's GML § 50-e(5) application for leave to file late notice of claim.

Rand v. Rand, 134 A.D.2d 336 (2d Dept. 1987) contract action: appeal of order of substitution.

Maia v. Castro, 139 Misc.2d 312 (D. Ct. Nass. Co. 1988): prevailed on tenants' motion to dismiss client's eviction based on "good cause" to terminate lease, and federal law's application.

Merrick Gables v. Fields, 143 A.D.2d 117 (2d Dept. 1988): upheld client's use variance grant by Town Board of Zoning Appeals.

Abrams, etc. v. Harris Home Designs, etc., 1989 WL 88690 (S.D.N.Y): upheld the integrity of Mr. Kutner's billing records.

DeGennaro v. Town of Riverhead, 836 F. Supp. 109 (E.D.N.Y. 1993) 42 USC § 1983 action: denied FRCP 56 motion; later at trial, client obtained award against defendants for $765,000.00 paid.

Bezerra v. County of Nassau, 846 F. Supp. 214 (E.D.N.Y. 1994) 42 USC § 1983 action: partial denial of motion to dismiss client's case.

People v. Karimi, 204 A.D.2d 572 (2d Dept. 1994): affirmance of dismissal of client's Suffolk indictment.

Mackay v. Real Cars, Inc., 215 A.D.2d 538 (2d Dept. 1995): affirmance of dismissal of libel action against client.

Siskin v. Complete Aircraft, 231 B.R. 514 (Bankr. Ct. E.D.N.Y. 1999): debtor's claims upheld that Mr. Kutner's collection actions violated bankruptcy stay; later, debtor's claims completely dismissed (258 B.R. 554).

Civitano v. Beovich, 184 Misc.2d 505 (Surr. Ct. Nass. Co. 2000): surcharges against client executor of estate.

Ligon v. Doherty, 208 F. Supp.2d 384 (E.D.N.Y. 2002) 42 U.S.C. § 1983 action: defendants' motion to dismiss client's claim.

Woodley v. State, 306 A.D.2d 524 (2d Dept. 2003): affirmed order dismissing claimant's CCA § 8-b claim.

Villano v. Kresch, 3 A.D.3d 344 (1st Dept. 2004): legal fee allocation affirmed.

Panagis v. Vlattas, 6 A.D.3d 596 (2d Dept. 2004): affirmance of denial of defendants' motion to dismiss client's claim.

Halleran v. Narula, 6 A.D.3d 661 (2d Dept. 2004): medical malpractice affirmed denial of defendants' motion to dismiss.

DePiazzy v. Lakey, 10 A.D.3d 670 (2d Dept. 2004): affirmed denial of default vacatur motion by clients.

Prosperity Partners v. Bonilla, 2005 WL 1661702 (E.D.N.Y.): client's FRCP 12-56 motion granted.

David W. v. State, 27 A.D.3d 111 (2d Dept. 2006): dismissal of client's CCA § 8-b wrongful imprisonment claim affirmed.

Blake v. Pataki, 13 Misc. 3d 347 (Sup. Ct. Suff. Co. 2006): client's habeas corpus petition granted dismissing extradition proceeding.

Kutner v. Antonacci, 16 Misc.3d 585 (D. Ct. Nass. Co. 2007): legal fee collection action in which court found 16% interest provision unreasonable.

Foersch v. Norris, 2007 WL 1655769 (E.D.N.Y.): client's motion for extension of time to serve granted.

Prosperity Partners v. Bonilla, 249 Fed. Appx. 910 (2d Cir. 2007): affirmed defendant client's dismissal of suit.

People ex. rel. Kutner (Camilleri) v. Reilly, 44 A.D.3d 974 (2d Dept. 2007): denial of client's writ for bail reduction affirmed.

Kutner v. Vazquez, 17 Misc.3d 1123(A) (D. Ct. Nass. Co. 2007): denied parties' cross-motions for summary judgment.

U.S.A. v. Mustachio, 254 Fed Appx. 853 (2d Cir. 2007): client's bail reduction denial was affirmed.

Blake v. Pataki, 57 A.D.3d 583 (2d Dept. 2008): client's grant of habeas corpus at Special Term reversed.

People v. Olsen, 23 Misc.3d 593 (D. Ct. Nass. Co. 2009): client's multi-pronged motion to review records denied; case later dismissed.

Rasanen v. Brown, 603 F. Supp.2d 550 (E.D.N.Y. 2009) 42 USC § 1983 action: client's action not dismissed.

People v. Flood, 25 Misc.3d 843 (D. Ct. Nass. Co. 2009): upheld original dismissal of DWI (0.15%), and dismissed second prosecution as time-barred.

Stella v. County, 71 A.D.3d 573 (1st Dept. 2010): affirmed dismissal of claims against clients.

LoPresti v. Florio, 71 A.D.3d 574 (1st Dept. 2010): affirmed dismissal of attorney-plaintiff's suit against clients, but allowed her 306-b extension of time.

Gorman v. Rice, 29 Misc.3d 610 (Sup. Ct. Nass. Co. 2010): granted client's Article 78 (prohibition) and dismissed prosecution for DWI (0.25%).

Forgione v. Forgione, 77 A.D.3d 943 (2d Dept. 2010): in estate proceeding, affirmed client's dismissal of sister's probate proceeding.

Military service:

U.S.M.C. 1970-1972 (Honorable Discharge)

Affiliations:

Criminal Courts Bar Association Past President, 1975 - Present
Catholic Lawyers Guild, Past President, 1974 - Present
Friendly Sons of St. Patrick (Past President and Charter Member)
Nassau Community College (Trustee 1991 - 1997)

References available upon request

HUGH "BRENDAN" LEE

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Garden City, New York 11530
(516) 972-1752 · h.brendan.lee@gmail.com

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, New York
Candidate for Juris Doctor, June 2016
Honors: *Senior Executive Editor*, Journal of Civil Rights and Economic Development
Recipient, Academic Merit Scholarship

BOSTON COLLEGE, Chestnut Hill, Massachusetts
Bachelor of Arts, History with minor in Economics, May 2011

LEGAL EXPERIENCE

U.S. SECURITIES AND EXCHANGE COMMISSION, New York, NY
Student Honors Program Legal Intern, Enforcement Division, Spring 2015
Works with SEC Asset Management Unit on a broad range of projects pertaining to enforcement of the Investment Advisers Act of 1940 and Investment Company Act of 1940. Projects include the investigation and analysis of issuer practices and disclosure obligations of investment advisors, hedge funds, mutual funds, and private equity funds.

FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP, New York, NY
Law Clerk, Summer 2014
Conducted research and prepare memoranda on a wide array of subjects for attorneys. Participated in client calls with attorneys and client managers to resolve disputes and impasses in the preparation of cases. Directly advocated on behalf of clients by drafting and submitted letters to relevant government agencies in response to requests. Responsible for preparation of a variety of employment-based permanent residency cases for submission to the U.S. Department of Labor and U.S Customs and Immigration Services.

Assistant Paralegal, January 2012 – August 2013
Tracked, prioritized, and managed a large caseload, including short and long term cases, information requests from government agencies, and ad-hoc client requests.

CIVIL LEGAL ADVICE AND REFERRAL OFFICE (CLARO), Queens, NY
Law Student Volunteer, August 2013 – April 2014
Provided assistance to underserved members of the community involved in consumer debt litigation. Conducted preliminary review of court file and related documents to determine appropriate course of action. Regularly interacted with the clerk's office to retrieve required documents and filed motions on behalf of clients. Led team of undergraduate and graduate volunteers, ensuring efficient service of clients and quality of work.

THE RHODE ISLAND OFFICE OF THE ATTORNEY GENERAL, Warwick, RI
Intern, September 2011 – December 2011
Prepared cases for Kent County Superior Court. Assembled discovery materials for adversarial party. Oversaw the maintenance of case files in office. Observed pretrial conferences and calendar calls in judges' chambers. Involved in all phases of criminal court process. Performed other tasks and responsibilities as required.

COMPUTER SKILLS

LexisNexis Certified; Proficient in Microsoft Office and Bloomberg

MELISSA A. BROWN

109 Capitolian Boulevard, Rockville Centre, New York 11570
(516) 225-3004•melissa.brown13@stjohns.edu

EDUCATION

St. John's University School of Law, Queens, New York
Candidate for J.D., June 2016
Academics: G.P.A. 3.74
Honors: *Associate Managing Editor, St. John's Law Review*
Dean's Award for Excellence in Legal Writing II and Family Violence & Sexual Assault
Dean's List (Fall 2013, Spring 2014, Fall 2014)
Third Place, Adam A. Milani Disability Law Writing Competition
Activities: *Teaching Assistant*, Constitutional Law, Professor Rosemary C. Salomone

The Pennsylvania State University, State College, Pennsylvania
B.A., Public Relations; B.A., International Studies, May 2011
Minor: French and Francophone Studies
Activities: *Lion Ambassador*, Penn State Alumni Corps
Planned various campus-wide activities and conducted prospective student tours
Study Abroad: IES Abroad/Université de Paris 4-Sorbonne, Paris, France, Spring 2010

EXPERIENCE

Consumer Justice for the Elderly: Litigation Clinic, Queens, New York
Legal Intern, St. John's University School of Law, January 2015 – Present
Represent low-income, elderly Queens residents in civil litigation pertaining to consumer matters; specifically foreclosure defense and predatory lending. Responsible for legal research, writing, pre-trial litigation, and case management.

Professor Rosemary C. Salomone, Kenneth Wang Professor of Law, Queens, New York
Research Assistant, St. John's University School of Law, August 2014 – Present
Conduct legal research in support of Professor Salomone's academic work, with a focus on public schools, linguistics, religion, and international and comparative law. Assist in editing footnotes to conform to Blue Book standards.

Hon. Cathy Seibel, United States District Court, Southern District of New York, White Plains, New York
Judicial Intern, Summer 2014
Conducted legal research and assisted in drafting decisions and orders in response to various motions pending before the Court. Attended trials, pre-trial conferences, and hearings.

New York County District Attorney's Office, New York, New York
Trial Preparation Assistant, Major Economic Crimes Bureau, September 2011 – June 2013
Drafted various legal documents including subpoenas, affidavits of service, interoffice memoranda, and search warrant narratives. Analyzed financial records and corporate documents related to ongoing investigations. Aided Assistant District Attorneys with preparation for a Grand Jury that led to indictment of eleven individuals and a financial institution.

The Jimirro Center for the Study of Media Influence, State College, Pennsylvania
Public Relations Writer, Spring 2011
Researched and wrote a feature story highlighting the Center's research regarding alcohol use among college students and the effects of campus implemented social norms campaigns. Designed and created a brochure for the organization Girls on the Run, one of the Center's three outreach clients.

Moderne Communications, Inc., Rockville Centre, New York
Intern, Summer 2010
Used social media to help promote Company events, projects and general information about the marketing community. Communicated with current and potential clients through email campaigns. Aided in the creation of media kits through research and data collection. Supervised preparation and execution of onsite promotional events.

Raindance Film Festival, London, United Kingdom
Intern, Summer 2009
Wrote and edited articles featured on Company website. Drafted press releases for courses Raindance offered to generate awareness and increase student enrollment. Maintained Company website and weekly e-newsletter.

INTERESTS: Crossword Puzzles, Running, Singing

MICHELLE NICOTERA
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Holmes, NY 12531
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EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2015

Academics: G.P.A. – 3.32, Rank – Top 36%
Honors: Articles & Notes Editor, *American Bankruptcy Institute Law Review*, Senior Duberstein Director, *Moot Court Honor Society,* Columbian Lawyers Scholar, *Columbian Lawyers Association of Westchester County*
Activities: Finalist, *Mollen Moot Court Competition*; Finalist, *Reardon Moot Court Competition*; Participant, *Duberstein Bankruptcy Moot Court Competition*; Participant, *National Religious Freedom Moot Court Competition*; President, *Armed Forces Society*, Student Member, *Columbian Lawyers Association of Westchester*
Publication: *The Eight Circuit BAP Holds that Health Savings Accounts are Not Excluded From the Bankruptcy Estate*, ABI BANKR. CASE BLOG, http://stjohns.abiworld.org/node?page=1 (Jan. 11, 2014); *Health Savings Accounts and the Bankruptcy Estate*, 6 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 24 (2014) (forthcoming).

NEW YORK UNIVERSITY, New York, NY
B.A. Economics, May 2012

Academics: G.P.A. – 3.4, Minor – Italian
Honors: Chesler Pre-Law Scholar; Lawyer Alumni Mentor Program
Study Abroad: New York University Florence, Florence, Italy, Fall 2010
Activities: President (May 2011-May 2012), Treasurer (May 2009-May 2011) *All-University Gospel Choir*; Member, *Peer Health Awareness Team*; Ambassador, *NYU Global Ambassadors*

LEGAL EXPERIENCE

Army JAG Corps., United States Military Academy, West Point, NY
Intern, Summer 2014
Researched and drafted legal reviews in administrative law, civil law, and military prosecution, observed cadet misconduct proceedings, compiled a comprehensive intern handbook for future Army JAG interns, taught and led prospective cadet candidates in mock trials

The Honorable Daniel D. Angiolillo, Appellate Division 2nd Dept., White Plains, NY
Judicial Intern, Summer 2013
Researched appeals, drafted memos and briefs with recommendation as to affirmation or reversal on appeal

The Honorable Francis A. Nicolai, Putnam County Supreme Court, Carmel, NY
Judicial Intern, Summer 2011, Summer 2012
Researched motions, drafted decisions, compiled case briefs and observed court proceedings for a variety of cases including matrimonial disputes, foreclosures, and tax certiorari

Westchester County District Attorney's Office, Special Prosecutions Office, White Plains, NY
Intern, Summer 2010
Created and managed case files, briefed pending cases, observed witness interviews and attended court hearings and proceedings

SKILLS & INTERESTS

LexisNexis Professional Research Certification
Proficient in Italian, Literate in Spanish
Accomplished guitarist, bassoonist, bassist, mandolin player, pianist, and vocalist
American Red Cross Lifeguard/Professional Rescuer, First Aid, CPR/AED, Responding to Emergencies Certifications

Practice Pointers

- Jury Instructions
- Motion In Limine

OVERTURNING A SEVERANCE MOTION DENIAL

The Standard to Overturn a Severance Motion Denial is HIGHER:

United States v. Adkins, 842 F.2d 210, 212 (8th Cir. 1988).
To make a showing of prejudice on appeal, appellant must show "more than the mere fact that he would have had a better chance for acquittal had he been tried separately .... The appellant must demonstrate that the jury was unable to compartmentalize the evidence as it related to the separate defendants."

United States v. Trainor, 477 F.3d 24, 36 (1st Cir. 2007) .
A claim of prejudice will not succeed unless "prejudice [is] so pervasive that miscarriage of justice looms."

United States v. Tarrango, 396 F.3d 666, 672-73 (5th Cir. 2005) .
Severance is required "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence"' (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Emily Bolles & William Hornbeck, Federal Criminal Conspiracy, 51 Am. Crim. L. Rev. 1181, 1208 (2014).

Application of Fed. R. Crim. P. 14

Case law indicates that the trial judge has complete discretion in considering severance under Rule 14.

SUPREME COURT

Opper v. United States, 348 U.S. 84 (1954).

" it is within the sound discretion of the trial judge as to whether the defendants should be tried together or severally . . . ."

2nd CIRCUIT

United States v. Chang An-Lo, 851 F.2d 547 (2d Cir. 1988).

" motions to sever under Rule 14 are committed to the sound discretion of the trial judge, and a denial of such motion will be reversed only upon a showing of clear abuse of that determination."

Brendan Judge, No Easy Solutions to the Problem of Criminal Mega-Trials, 66 Notre Dame L. Rev. 211, 221-22 (1990)

RELIEF FROM PREJUDICIAL JOINDER – Fed. R. Crim. P. 14

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

JOINDER OF OFFENSES OR DEFENDANTS – Fed. R. Crim. P. 8

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are of the *same or similar character*, or are based on the *same act or transaction*, or are connected with or constitute parts of a *common scheme or plan*.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the *same act or transaction*, or in *the same series of acts or transactions*, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

POLICY CONSIDERATIONS

The government's apparent preference for lengthier joint trials rather than shorter separate trials is often based on defensible policies, such as

- the efficiency of one long trial,
- a desire to present a full picture of a complex multidefendant criminal scheme,
- an interest in limiting the number of appearances by government witnesses who may be reluctant to testify at all or whose appearances may present security problems, or
- a reluctance to allow the discovery that might be the side effect of multiple trials.

Federal Bar Council Committee on Second Circuit Courts Concerning Problems Created by Extremely Long Criminal Trials

JOINDER & SEVERANCE

The Problems of Mega Trials

- Burdens the Defendant
- Burdens the Court
- Burdens the Jury

SECOND CIRCUIT GUIDELINES FOR MEGA TRIALS FROM "PIZZA CONNECTION"

1. The prosecutor must submit to the court an estimate of the time required to present the government's case. Where the estimate exceeds four months, the prosecutor must reasonably support a decision to try the defendants jointly rather than separately. The court should then determine whether the prosecutor's basis is adequate by weighing the interests of the parties, court, jurors, and society.

2. In considering severance, the court "should explore with the prosecutor" whether to limit the prosecution to easily proven offenses that would "carry exposure to adequate maximum penalties."

3. The prosecutor must "make an especially compelling justification" for a trial of more than ten defendants that the prosecutor estimates would take more than four months.

PUBLICITY AND "ATMOSPHERE OF VIOLENCE"

- Indications that the Publicity and the Alleged Atmosphere of violence which Surrounded this Case did not Deprive Defendants of Due Process
  - Trial Judge instructed Jury not to consider a Defendant's alleged ties to a recent mob-related murder
  - Trial Judge instructed Jury not to pay attention to anything which appeared in the media concerning the trial
  - Trial Judge conducted *voir dire* of Jury to ensure their impartiality had not been affected by murder of an unindicted co-conspirator, the murder of a defendant, and the non-fatal shooting of defendant.

SPILLOVER PREJUDICE

- Indications that Prejudicial Spillover Suffered by Defendants was Sufficiently Substantial to Warrant Reversal:
  - "... much of the evidence ... presented at the joint trial regarding the activities of the alleged co-conspirators would have been admissible in the single-defendant trials."
  - "Further, the district judge instructed the jury to consider the evidence against each defendant separately from the evidence presented against other defendants."
  - "... the jury carefully evaluated the evidence and rendered discriminating verdicts."

Length and Complexity of Trial

- Indications the Jury was able to Properly Evaluate the Evidence:
  - ". . . a mix of guilty and not guilty verdicts is some indication that the jury was able to sift through voluminous evidence and differentiate among various defendants."
  - ". . . The apparent effort it made during its deliberations to parse and weigh evidence . . . suggest[s] that the jurors, rather than despairing in the face of the daunting amount of evidence, accepted their arduous role and diligently and conscientiously proceeded of the six-day period of deliberations. "
  - "The Jury's ability to discover that no evidence support [a] particular racketeering act, when 128 such acts were charged in the indictment . . ."

ISSUES PRESENTED

"A principal issue raised on appeal is whether the joint trial of the numerous defendants deprived the individual defendants of their right to due process. To support their claims of lack of due process, appellants mainly point to

1. the **LENGTH** and **COMPLEXITY** of the trial,
2. the **SPILLOVER PREJUDICE** which allegedly resulted from the joinder of the defendants, and
3. the **PUBLICITY** and the alleged **ATMOSPHERE OF VIOLENCE** which surrounded the trial."

Casamento, 887 F.2d at 1149 (2d Cir. 1989)

INDICTMENT

- Count 14: Charged 15 Defendants with Failing to File Required Currency Reports
- Count 15: Charged 10 Defendants with Failing to File Required Currency Reports
- Count 16: Charged 31 Defendants with Conspiring to Conduct and Participating, through a Pattern of Racketeering, in an Enterprise which Engaged in International Drug Trafficking and Money Laundering related thereto (RICO Conspiracy)

CONFUSED YET?

INDICTMENT

- Indictment SS 84 Cr. 236 contained 16 counts
  - Count 1: Charged all 35 Defendants with Conspiring to Import and Distribute Narcotics
  - Count 2-11: Charged Individual Defendants with Engaging in a Continuing Criminal Enterprise
  - Count 12: Charged 15 Defendants with Conspiring to Transport Money out of the United States without Filing Required Currency Reports
  - Count 13: Charged 6 Defendants with Causing or Aiding/Abetting False Statements to be made to the IRS

FACTS OF THE CASE

- The trial centered around a Mafia-run enterprise that distributed no less than $1.6 billion of heroin in the United States between 1975 and April 1984, and then laundered the cash before sending it back to the suppliers in Sicily.
- Multi-Count Indictment Charged 35 Defendants
- Joint Trial of 21 of those Defendants, which spanned for more than 17 months.
    - More than 40,000 Pages of Trial Transcript
    - Introduction of "Thousands" of Exhibits
    - Testimony of More than 275 Witnesses

United States v. Casamento, aka "Pizza Connection Case"

887 F.2d 1141 (2d Cir. 1989).

MEGA TRIALS

Common Characteristics:

- Multiple Defendants
- Multiple Charges
- Can Often Last More than a Year

Legal Issues Implicated

- Joinder/Severance

AGENDA

- Part One: **MEGA TRIALS**
- Part Two: **N.Y. CVP. § 3101(d)**
- Part Three: **JUROR MISCONDUCT**

Theodore Roosevelt American Inns of Court Presents

TRIAL NIGHTMARES

April 20, 2015

CPLR 3101(d)

CPLR 3101(d) governs the disclosure of expert information, including the identity of the expert in all types of cases other than cases involving medical, dental or podiatric malpractice. A copy of an expert demand and response is enclosed. You will note that the expert response requires a sufficient identity of the expert's qualifications and training, background and expertise from which experienced counsel practicing in this field can often identify the expert, although the name is not disclosed.

CPLR 3101(d) also requires that the responding party disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which the expert is expected to testify, the qualifications of the expert and a summary of all the grounds for the expert's opinion.

This trial nightmare concerns a scenario where the expert who will testify for the adverse party is either your own former expert or even a former client. This creates numerous legal and ethical issues, including when this information was or should have been reasonably discovered, how the Court will rule in this regard, the attorney's obligations to the present client and the attorney's obligation to preserve confidences learned from a former client who is now serving as an expert. Issues of whether the conflicted counsel must withdraw or be disqualified from the case or whether other suitable remedies can be fashioned will be discussed during this trial nightmare.

Ned Hirsch

N.Y. CVP. LAW § 3101 : NY Code - Section 3101: Scope of disclosure
Search N.Y. CVP. LAW § 3101 : NY Code - Section 3101: Scope of disclosure
Search by Keyword or Citation

47 17.1K

(a) Generally. 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, by: (1) a party, or the officer, director, member, agent or employee of a party; (2) a person who possessed a cause of action or defense asserted in the action; (3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required. (b) Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable. (c) Attorney's work product. The work product of an attorney shall not be obtainable. (d) Trial preparation. 1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph. (ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action. (iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or

podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order. 2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. (e) Party's statement. A party may obtain a copy of his own statement. (f) Contents of insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement. (g) Accident reports. Except as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution. (h) Amendment or supplementation of responses. A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading. Where a party obtains such information an insufficient period of time before the commencement of trial appropriately to amend or supplement the response, the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. Further amendment or supplementation may be obtained by court order. (i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X

Index No.: 904/00

Plaintiffs,

- against -

DEMAND PURSUANT TO CPLR 3101(D) FOR EXPERT WITNESS DISCLOSURE

Defendants.
----------X

SIRS:

PLEASE TAKE NOTICE, that pursuant to CPLR 3101(d), the plaintiffs are hereby required to produce, within twenty (20) days of the receipt hereof, the following at the office of the undersigned:

1. With respect to any and all proposed medical expert witness, indicate:

   A. The area of expertise;

   B. Educational background, including the names and addresses of each undergraduate school and medical school attended, with the years of attendance and graduation;

   C. The names and addresses of each hospital in which an internship and residency was served and the dates thereof;

   D. The name and address of each hospital in which privileges of admitting patients is extended, and the nature of the privilege;

   E. The title of any article, text or other publication authored, contributed to, or edited by, the expert, together with an appropriate citation (by name of publication, volume number, date or other appropriate identifying manner);

   F. The name and address of each institution and/or organization at which any office, directorship, academic, administrative or official position is or has been held, the nature of such position and the dates such position was held;

   G. The state or states in which this individual was licensed to practice medicine;

H. Each state in which this individual is actively engaged in the practice of medicine;

I. Societies of which each said expert is a member of and the date of each membership;

J. The present Board Certifications and/or qualifications, if any, the names of the certifying boards and the date of any such certification;

K. The subject matter on which each expert is expected to testify, including each alleged departure from good and accepted medical practice to which said expert will testify;

L. The substance of these facts and opinions to which each expert is expected to testify, including a summary of his or her grounds for each opinion.

2. This is a continuing demand for information regarding experts retained by you for trial. Failure to comply with this notice in a timely manner shall be grounds for an Order precluding you from offering the testimony at trial of any expert witness whose name and expected testimony is not disclosed, striking the Complaint, dismissing the action and/or such other relief as the Court deems just and proper under the circumstances.

Dated: Garden City, New York
February 27, 2015

Very truly yours,

_____

By:
HIRSCH, BRITT & MOSÉ
Attorneys for Defendant

1225 Franklin Avenue, Suite 470
Garden City, New York 11530
(516) 741-1717

TO:

Attorney for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

MR. SMITH,

Plaintiff,

-against-

DR. AAA,

Defendants.

----------X

Index No.: 2396/08

RESPONSE TO DEMAND FOR EXPERT INFORMATION PURSUANT TO CPLR 3101(d)

Pursuant to CPLR 3101(d), defendant **DR. AAA**, by his attorneys, HIRSCH, BRITT & MOSÉ, hereby respond to plaintiff's Demand for Expert Witness Information, upon information and belief as follows:

1. Pursuant to the provisions of CPLR 3101(d)(1), the defendants decline to provide the name of the person they expect to call as an expert witness at the trial of this action.

2. The defendants expect to call a physician who is Board Certified in the field of orthopedic surgery as an expert witness at the time of trial. The expert is a physician licensed to practice medicine in the State of New York. The expert is a 1977 graduate of the Harvard Medical School. The expert completed an internship and residency in general surgery at Roosevelt Hospital from 1977 to 1979. He then completed a three year residency in orthopedic surgery at the Hospital for Special Surgery from 1979 through 1982. The expert maintains hospital affiliations in the New York metropolitan area and has served as a Chief of the Orthopedic Surgery Division at a leading medical institution. The expert has served as a clinical assistant professor of orthopedic surgery and has participated in presentations relevant to total knee replacement surgery and is a member of several professional societies in his field of expertise.

3. The expert will testify concerning the propriety of medical care rendered by **DR. AAA** to the plaintiff. The expert will testify on issues of liability (there were no departures from accepted standards of orthopedic and surgical care and treatment), informed consent, causation (proximate cause) and damages or alleged injuries.

4. The expert will testify based upon information contained in the hospital and medical records from the institutions where the plaintiff received treatment, including but not limited to South Nassau Communities Hospital and will further testify predicated upon the office records of **DR. AAA** and correspondence directed to **DR. AAA** dated October 12, 2006 from Dr. Jones. The expert will offer opinions to a reasonable degree of medical certainty concerning the exercise of the operating surgeon's judgment. He will testify concerning the history, physical examination, diagnosis and various imaging studies which were available to **DR. AAA**. He will testify as to how these sources of medical information impacted upon the care and treatment which **DR. AAA** provided to the plaintiff.

5. It is the opinion of the expert to reasonable degree of medical certainty that **DR. AAA** comported with good and accepted practice in his preoperative, operative and postoperative care of the plaintiff. Preoperatively, the expert will opine that **DR. AAA** took a complete and appropriate history and that he was aware of prior surgery performed on the plaintiff's right knee which predates the surgery at issue. **DR. AAA** was also aware of preoperative limitations of flexion and will opine that the amount of preoperative motion is a predictor of postoperative motion.

6. The expert will explain the surgery at issue, its goals, purposes, limitations and potential outcomes.

7. The expert will testify concerning the informed consent provided to the patient and that the informed consent comported with good and accepted standards of orthopedic practice for the procedure at issue. He will comment upon **DR. AAA's** documentation of various factors which he discussed with MR.

SMITH and that there was no deviation from good and accepted practice with regard to the informed consent provided by **DR. AAA** to the patient.

8. The expert will rely upon the trial testimony of **DR. AAA**, the deposition testimony of **DR. AAA** and **DR. AAA**'s office records concerning informed consent, including entries in **DR. AAA** 's records where he discussed knee stiffness and the significant possibility that the patient would require revision surgeries during his life. The persistent pain was also discussed with the patient, although a significant goal of the procedure was to limit pain and achieve knee stability. The expert will testify that **DR. AAA**'s discussions of risks, benefits and alternatives to surgery comported to good and accepted medical practice.

9. The expert will testify that the surgery performed by **DR. AAA** on June 6, 2006 at South Nassau Communities Hospital comported with good and accepted practice. The expert will testify that **DR. AAA** appropriately exercised his surgical judgment in the best interests of the patient, as well as with regard to the selection of the artificial components utilized at surgery. The expert will testify that the artificial components are not custom made, and therefore, **DR. AAA** was required to exercise his judgment and did so in conformity with good and accepted practice in making a decision concerning larger and/or smaller components. The expert will testify that **DR. AAA**, in his judgment, utilized an appropriate risk benefit analysis to determine the advantages and disadvantages involved in the selection of the size of the appropriate components. The expert will comment that **DR. AAA** was not negligent in the selection of any of the surgical components.

10. The expert will comment upon the significance of the intraoperative measurement obtained by **DR. AAA** which indicated that he obtained flexion of approximately 115 degrees from dangling against gravity.

11. The expert will testify that the amount of tourniquet time employed by a surgeon is based upon the surgical needs and factors encountered and that any recommended or suggested tourniquet time constitutes a general guideline. He will testify that postoperative records do not reveal any evidence of damage to nerves, muscles, etc., from any alleged excessive tourniquet time, and consequently, the ability to achieve a proper recovery after surgery was not compromised.

12. The expert will testify that the documentation by **DR. AAA** in his office records and operative notes was appropriate and conformed to good and accepted standards of medical record keeping. Additionally, he will comment upon any causative effects with regard to record keeping.

13. The expert will comment upon postoperative care rendered by **DR. AAA**, as well as the consultation provided by Dr. Jones as reflected in Dr. Jones' report of October 12, 2006. The expert will testify concerning the patient's pain threshold and ability to push through pain to achieve a maximal result. The expert will compare and comment upon preoperative and postoperative ranges of motion and ability to flex.

14. The expert will comment upon revision surgery offered by Dr. Jones which Dr. Jones opines would offer a better chance for increased range of motion with an expectation that flexion would fall between 120 degrees and 90 degrees.

15. The expert will comment upon various etiologies offered by Dr. Jones for the patient's decreased flexion, including the effect of prior surgeries, which Dr. Jones indicates will correlate with decreased range of motion postoperatively. Secondly, the pain which the patient experienced following surgery which hindered his rehabilitation and his ability to flex. Thirdly, the formation of excess scarring and the effects of "biology" on the patient's ultimate recovery.

16. The expert will testify on the significance of any and all x-rays taken of the plaintiff both preoperatively and postoperatively. The expert will testify concerning plaintiff's claims for damages and the fact that the plaintiff is pain free and not consuming pain medications. The expert will comment upon the impact upon the plaintiff's lifestyle and ability to engage in activities predicated upon his range of motion. The expert may be asked to comment upon the plaintiff's ability to satisfy the needs of a demanding profession and work an excessive amount of hours, as well as contribute significant time to his church, etc. The expert will testify concerning the impact of preoperative and postoperative ranges of motion on various activities which plaintiff allegedly performed. The expert may testify concerning culpable conduct.

17. The expert will testify on causation and proximate cause.

18. The substance, facts and opinions upon which the expert is expected to testify will be predicated upon the expert's learning, education, experiences as a practicing physician, general medical knowledge, comprehensive reviews of relevant medical records (including hospital records, physical therapy records, the report of Dr. Jones, etc.), Bills of Particulars, deposition transcripts, radiology studies and reports, surgical reports and notes made relevant to the patient's care and treatment and trial testimony.

19. The expert may use drawings, pictures or anatomic models to the extent permitted by the Court to facilitate the jury's understanding of the anatomy, the surgery or issues raised in the trial.

20. The expert will address such issues as are raised at the time of trial and may comment upon any additional issues raised by plaintiffs at the time of trial.

21. Defendants reserve the right to amend and/or supplement this response at any time up to and including the time of trial.

Dated: Garden City, New York
December 15, 2014

Very truly yours,

By: Edgar A. Hirsch III
HIRSCH, BRITT & MOSÉ
Attorneys for Defendants
DR. AAA
1225 Franklin Avenue, Suite 470
Garden City, New York 11530
(516) 741-1717
File No.

TO:

Attorneys for Plaintiff

INNS OF COURT - TRIAL NIGHTMARE

Scene: Courtroom during jury deliberations
Justice Arthur Diamond presiding

Bailiff: We have a note from the jury (Handing to the Judge)

Judge Diamond: We will mark this as a Court's exhibit.
The jury is asking for a calculator, any objection?
You may see the note.
No, Your Honor.

Recess

Attorney Hirsch telephones claims examiner at No-Pay Insurance Company.

Hirsch: I want to advise you concerning a disturbing note that the Court received from the jury during deliberations. They are asking for a calculator.

Ms. Stingy (Claims Examiner): Ned, this case has been on trial for 3 weeks. You have been telling me how well the case has been going and that our client and our expert had testified very well. What do you make of the request for a calculator?

Hirsch: Well, I think we can come to only one conclusion. Obviously, they are calculating some catastrophic damages.

Ms. Stingy: So, should I approach the claims committee for settlement authority?

Hirsch: Yes, I will talk to the doctor. I will call you back in about half an hour.

30 minutes later ....

Ms. Stingy: Ned, we have authority to settle. You can offer whatever it takes to get out of this disaster up to the limits of the $1 million policy.

Hirsch returns to the Courtroom.

Hirsch: Your Honor. I have been speaking to counsel, and we have achieved a settlement of this matter for $900,000. We would like to place it on the record.

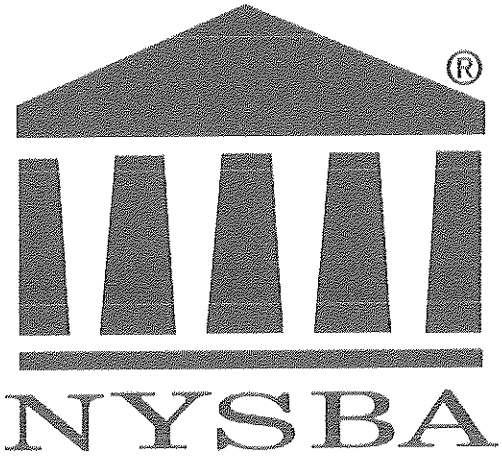
Next scene – Parking lot outside the Courthouse. Juror approaches Mr. Hirsch.

Juror: The Court advised that our deliberations were halted since you had settled the case. Personally, I am surprised because we were going to render a defendant's verdict and award the plaintiff no money at all.

Hirsch: But the Court received a note where the jury was asking for a calculator. I figured you were computing some rather high figures to render your verdict against us.

Juror: No Mr. Hirsch, we were going to return a unanimous verdict in your client's favor. One of the jurors just had a little free time and needed the calculator for his own personal use.

Hirsch collapses in parking lot.



SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

MARCH 18, 2014

Gregory K. Arenson, Section Chair
Mark A. Berman, Co-Chair of the Social Media Committee
Ignatius A. Grande, Co-Chair of the Social Media Committee

Opinions expressed are those of the Section preparing this report and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

PREPARED BY

THE SOCIAL MEDIA COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

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Deirdre E. Tracey

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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the expansion of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more technologically advanced, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association developed these social media ethics guidelines (the "Guidelines") to assist lawyers in understanding the ethical challenges of social media.

These Guidelines are merely that, and are not "best practices." The world of social media is a nascent area that is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Moreover, there may be no single set of "best practices" where there are multiple ethics code throughout the United States that govern lawyers' conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer's permitted use of social media may differ due to varying jurisdictions' different social mores, population bases and historical approaches to their own ethics rules and opinions. We specifically note this because New York State ethics rules and opinions sometimes take different approaches from other jurisdictions with the same or similar ethics rules.

These Guidelines are predicated upon the New York Rules of Professional Conduct ("NYRPC")[1] and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction's ethics opinion differs from New York's interpretation of the NYRPC. In New York State, ethics opinions are issued not just by the New York State Bar Association, but by local bar associations located throughout New York.[2]

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states' ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

Lawyers must be conversant with the nuances of each social media network the lawyer or his or her client may use. This is a serious challenge that lawyers must appreciate and cannot take lightly.

> [Lawyers must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that

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1 https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

2 A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.

particular site.[3]

Indeed, the comment to Rule 1.1 to the Model Rules of Professional Conduct of the American Bar Association was recently amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[4]

Lawyers appreciate that one of the best ways to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media communications. Unintended social media communications have ethical consequences when conducting research. For example, by viewing someone's social media profile on a network, such as LinkedIn, a lawyer may cause the holder of the account to be automatically notified by such network of the attempted or actual viewing of the profile.

Further, because social media communications are often not just directed at a single person but at a group of people, attorney advertising rules and other related issues raise ethical concerns. It is not always readily apparent that a lawyer's social media communications may constitute prohibited "attorney advertising." Similarly, privileged information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, which may be subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data which might be viewed by a lawyer, and the definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.

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[3] Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics ("NYCBA"), Formal Op. 2012-2 (2012).

[4] American Bar Ass'n Model Rules of Prof. Conduct, Rule 1.1, Comment 8.

1. ATTORNEY ADVERTISING

Guideline No. 1.A Applicability of Advertising Rules

A lawyer's social media profile that is used only for personal purposes (*i.e.*, to maintain contact with friends and family) is not subject to attorney advertising and solicitation rules. However, a social media profile that a lawyer primarily uses for the purpose of her and her law firm's business is subject to such rules.[5]

NYRPC 1.0, 7.1, 7.3.

> *Comment*: Whether a social media account is primarily used for legal or marketing purposes of the lawyer or her law firm is a question of fact. In the case of a lawyer's profile on a hybrid account that, for instance, is used for multiple purposes, it would be prudent for the lawyer to assume that the attorney advertising and solicitation rules apply.
>
> A lawyer's post, including a "Tweet," that is used to promote the lawyer's legal services or the services of the law firm for which the lawyer works is subject to the ethical rules where the post's primary purpose is to bring in or retain legal business. In order to satisfy Twitter's 140-character limitation, lawyers may utilize commonly recognized abbreviations for information that is required in attorney advertisements.

Guideline No. 1.B: Prohibited Use of "Specialists" on Social Media

Lawyers and law firms shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[6]

NYRPC 7.4.

> *Comment*: To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such

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[5] See also Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011); Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. No. 2012-186 (2012).

[6] See New York State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 972 (2013). See also Florida Bar Advisory Advertising Op. (Sept. 11, 2013). But see N.H. Bar Ass'n, *Ethics Corner* (June 21, 2013) ("[Y]ou may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as 'Skills and Expertise' used to be 'Specialties,' and listing your areas of practice as 'Specialties' could be problematic.").

information include the number of years in practice and the number of cases handled in a particular field or area.[7]

If the social media network, such as LinkedIn, does not permit otherwise ethically prohibited "pre-defined" headings, such as "specialist," to be modified, the lawyer shall not identify herself under such heading unless appropriately certified. New York has not addressed whether a lawyer or law firm could, consistent with NYRPC Rule 7.4(a), "list practice areas under other headings such as "Products & Services" or "Skills and Expertise."[8] However, 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. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings including expert.[9]

A limited exception to identification as a specialist may exist for individual lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.

Guideline No. 1.C: Lawyer Solicitation to View Social Media and a Lawyer's Responsibility to Monitor Social Media Content

When inviting others to view a lawyer's social media network, account, or profile, a lawyer must be mindful of the traditional ethical restrictions relating to solicitation and the recommendations of lawyers.[10]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer is not responsible for information that another person, who is not an agent of the lawyer, posts on a lawyer's website, unless the lawyer prompts such person to post the information or otherwise uses such person to circumvent the ethics rules concerning advertising.

A lawyer has a duty to monitor her social media profile, as well as blogs, for comments and recommendations to ensure compliance with ethics rules. If a person who is not an agent

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7 See also Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985)).

8 NYSBA Op. 972 (2013).

9 Fl. Bar Advisory Advertising Op. (Sept. 11, 2013) (staff opinion prohibiting attorneys from listing practice areas under the "Skills & Expertise" heading in LinkedIn).

10 See also Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised Apr. 16, 2013).

of the lawyer unilaterally posts content to the lawyer's social media website or profile that does not comply with ethics rules, the lawyer must remove such content if such removal is within the lawyer's control and, if not within the lawyer's control, she must ask that person to remove it.[11]

NYRPC 7.1, 7.2, 7.3, 7.4.

> *Comment*: While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer's obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer's social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

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[11] **See also id.**; Phila. Bar Assn. Prof'l Guidance Comm., Op. 2012-8 (2012); Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011).

2. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 2.A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

Comment: An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Guideline No. 2.B: Public Solicitation is Prohibited Through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications,[12] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[13] business from the public through such means.[14] If a potential client initiates a specific request seeking to

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[12] "Computer-accessed communication" is defined by NYRPC 1.0(c) as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." The official comments to NYRPC 7.3 advise: "Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

[13] "Solicitation" means "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client." NYRPC 7.3(b).

[14] See NYSBA Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications. See also Ill. State Bar Ass'n, Op. 96-10 (1997); Michigan Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 96-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

The Philadelphia Bar Ass'n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania's ethics rules. See Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010).

retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and solicitation on a website are not considered real-time or interactive communications. This guideline does not apply if the recipient is a close friend, relative, former client, or existing client: although ethics rules would otherwise apply to such communications.

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

Comment: Answering general questions on the Internet is analogous to writing for any publication on a legal topic.[15] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[16] In responding to questions, a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.[17] A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.[18]

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[19] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[20] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real time communication.[21]

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15 See NYSBA Op. 899 (2011).

16 See id.

17 Id.

18 Id.

19 See id.

20 Id.

21 Id.

3. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 3.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person's social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.[22] Public means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Such automatic messages, as noted below, have been specifically found to lead to an ethical violation when seeking to investigate or monitor jurors.

Guideline No. 3.B: Contacting an Unrepresented Party to View a Restricted Portion of a Social Media Website

A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile. However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

NYRPC 4.1, 4.3, 8.4.

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22 See NYSBA Op. 843 (2010).

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.[23] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using "deception."[24]

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account.[25] In New York, the lawyer is not required to disclose the reasons for making the "friend" request.[26]

New Hampshire, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[27] San Diego requires disclosure of the lawyer's "affiliation and the purpose for the request."[28] Philadelphia notes that the failure to disclose that the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[29]

In Oregon, there is an opinion that, if the person being sought out on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[30]

Guideline No. 3.C: Viewing A Represented Party's Restricted Social Media Website

A lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by such person.

NYRPC 4.1, 4.2.

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23 See also N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

24 NYCBA Formal Op. 2010-2 (2010).

25 Id.

26 See id.

27 N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

28 San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

29 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

30 Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

Comment: Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[31]

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person which the lawyer rightfully has a right to view, such as a professional group where both the lawyer and represented person are members or as a result of being a "friend" of a "friend" of such represented person.

Guideline No. 3.D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a person's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, legal assistant, secretary, or agent[32] and could, as well, apply to the lawyer's client.[33]

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31 Id. See San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

32 See NYCBA Formal Op. 2010-2 (2010).

33 See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

4. ETHICALLY COMMUNICATING WITH CLIENTS

Guideline No. 4.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well 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.[34] Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[35] or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[36] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile.

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a "live" posting is simply made "unlive."

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34 New York County Lawyers' Ass'n Comm. on Prof'l Ethics ("NYCLA"), Formal Op. 745 (2013).

35 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).

36 NYCLA Formal Op. 745 (July 2, 2013).

Guideline No. 4.B: Adding New Social Media Content

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." [37]

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

> *Comment*: A lawyer may review what a client plans to publish on a social media website in advance of publication and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct.

Guideline No. 4.C: False Social Media Statements

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 statement or evidence supports such a conclusion.[38]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

> *Comment*: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." NYRPC 3.1(a). Frivolous conduct includes the knowing assertion of "material factual statements that are false." NYRPC 3.1(b)(3). See also NYRPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

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37 Id.

38 Id.

Guideline No. 4.D: A Lawyer's Use of Client-Provided Social Media Information

A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain confidential information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

> *Comment*: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[39] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[40]
>
> NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"
>
> > a lawyer may cause a client to communicate with a represented person . . . 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.
>
> Thus, lawyers need to use caution when communicating with a client about her connecting to or "friending" a represented person and obtaining private information from that represented person's social media site.
>
> New Hampshire opines that a lawyer's client may, for instance, send a "friend" request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations. [41]

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39 NYCBA Formal Op. 2002-3 (2002).

40 Id.

41 N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[42]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[43]

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42 Id.

43 American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011).

5. RESEARCHING SOCIAL MEDIA PROFILES OR POSTS OF PROSPECTIVE AND SITTING JURORS AND REPORTING JUROR MISCONDUCT

Guideline No. 5.A: Lawyers May Conduct Social Media Research

A lawyer may research a prospective or sitting juror's public social media website, account, profile, and posts.

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[44]

Guideline No. 5.B: A Juror's Social Media Website, Profile, or Posts May Be Viewed As Long As There Is No Communication with the Juror

A lawyer may view the social media website, profile, or posts of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror.[45]

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: Lawyers should "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[46] New York opinions have stated that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media network may be considered a technical ethical violation. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.[47]

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44 See NYCBA Formal Op. 2012-02 (2012).

45 See NYCLA Formal Op. 743 (2011); NYCBA Formal Op. 2012-2 (2012); see also Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 (2013).

46 Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. St. B.A.J. 50 (2013).

47 See NYCBA Formal Op. 2012-2 (2012); NYCLA Formal Op. 743 (2011).

A lawyer reviewing social media to perform juror research must be aware that an automated notice may be sent to the prospective or sitting juror identifying the name of the person viewing the juror's social media account.[48] For instance, currently, if a lawyer logged into LinkedIn then performed a simple Google search and clicked on a link to a LinkedIn account of a juror an automatic message may be sent by LinkedIn to the person whose profile is viewed. In order for the lawyer's profile not to be identified through LinkedIn when viewing a person's public LinkedIn profile, the lawyer must change her settings so that she is anonymous or, alternatively, be fully logged out of her LinkedIn account.

New York opinions draw a distinction between public and private juror information.[49] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing). New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members.

Guideline No. 5.C: Deceit Shall Not Be Used to View a Juror's Social Media Profile

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media, account, profile, or posts of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable".[50]

Guideline No. 5.D: Juror Contact During Trial

After a juror has been sworn and until a trial is completed, a lawyer may view or monitor the social media profile or posts of a juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror.

NYRPC 3.5, 4.1, 5.3, 8.4.

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48 Id.

49 Id.

50 See NYCBA Formal Op. 2012-02 (2012); NYCLA Formal Op. 743 (2011).

Comment: The concerns and issues identified in the comments to Guideline No. 5.C. are also applicable during the evidentiary and deliberative phases of a trial. These phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of a litigation are greater than during the jury selection process and could result in a mistrial.[51]

> [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[52]

Guideline No. 5.E: Juror Misconduct

In the event a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[53]

NYRPC 3.5, 8.4.

Comments: "[A] lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge." NYRPC 3.5(d). If a lawyer learns of juror misconduct due to social media research, he or she must promptly notify the court.[54]

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51 Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

52 See NYCBA Formal Op. 2012-2 (2012).

53 See NYCLA Op. 743 (2011); NYCBA Op. 2012-2 (2012).

54 Id.

APPENDIX

DEFINITIONS

Social Media (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, and Reddit. Social media may be viewed via, websites, mobile or desktop applications, text messaging or other electronic communications.

Restricted: Information that is not available to a person viewing a social media account because an existing on-line relationship between the member of the account and the person seeking to view it is lacking (whether directly, *e.g.*, a direct Facebook "friend," or indirectly, *e.g.*, a Facebook "friend of a friend"). Note that content intended to be "restricted" may be "public" through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how technologically the content is made available by the social media network.

Public: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

Friending: The process through which the member of a social media network designates another person as a "friend" in response to a request to access Restricted information. "Friending" may enable a member's "friends" to view the member's restricted content. "Friending" may also create a publicly viewable identification of the relationship between the two users. "Friending" is the term used by Facebook, but other social media networks use analogous concepts such as "circles" on Google+ or "follower" or "f" on Twitter.

Posting or Post: Uploading public or Restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, "Tweets" on Twitter).

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person's ability to view specified aspects of a member's account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

MORE FROM THE #JURY BOX: THE LATEST ON JURIES AND SOCIAL MEDIA

HON. AMY J. ST. EVE,[†] HON. CHARLES P. BURNS,[††] & MICHAEL A. ZUCKERMAN[‡]

ABSTRACT

This Article presents the results of a survey of jurors in federal and state court on their use of social media during their jury service. We began surveying federal jurors in 2011 and reported preliminary results in 2012; since then, we have surveyed several hundred more jurors, including state jurors, for a more complete picture of juror attitudes toward social media. Our results support the growing consensus that jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media. We conclude with a set of recommended best practices for using a social-media instruction.

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INTRODUCTION

Born out a common-law tradition and guaranteed by the U.S. Constitution, the impartial jury is one of the most fundamental American institutions. It is also one of the most resilient. The impartial jury has survived the telephone, the radio, the automobile, and the television.[1] There is no reason why it cannot survive Facebook and Twitter, too. But to ensure the continued fairness and integrity of the jury system, the legal profession must be proactive and vigilant in addressing juror misconduct through social media.[2]

In mid-2011, against a rise in reported instances of juror misconduct through social media, U.S. District Court Judge Amy St. Eve began an informal survey of actual jurors. The survey asked jurors at the conclusion of their service whether they had been tempted to communicate about the case through social media and, if so, what prevented them from doing so. Based on 140 responses from jurors in federal court, we reported in a March 2012 article that the survey data supported the growing consensus in the legal profession that courts should specifically instruct jurors not to use social media to communicate about the case.[3]

In this Article, we introduce 443 additional responses from jurors in both federal and state court, and revisit the informal survey results anew, with assistance from an additional co-author. Part I discusses social-media developments since our last article and highlights three recent judicial opinions. Part II presents the results of the informal survey. As we explain in Part III, the results continue to support the emerging consensus that jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media. Although the informal survey results are not scientific, we hope that they will further the dialogue by adding the voices of actual jurors.

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[1] *See, e.g.*, Catharine Skipp, *Jurors' TV Viewing Is Growing Issue*, N.Y. TIMES, Dec. 29, 1989, at B1 (describing potential effects of both television and movies on juror sympathies); *Jurors Forbidden To Listen On Radio*, WASH. HERALD, Oct. 24, 1922, at 8 (covering "the first time in history" that jurors were instructed not to listen to the details of a trial being broadcast on radio).

[2] State v. Smith, No. M2010-01384, 2013 WL 4804845, at *9 (Tenn. Sept. 10, 2013) ("The American judicial system 'depends upon public confidence in the jury's verdict.'" (quoting United States v. Siegelman, 640 F.3d 1159, 1186 (11th Cir. 2011)).

[3] *See* Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012).

I. RECENT DEVELOPMENTS IN SOCIAL MEDIA

A. The Revolution Continues

Social media has continued to grow in both usage and influence.[4] More than ever, Americans of all ages are joining and using Facebook, Twitter, LinkedIn, and other social networks.[5] George H.W. Bush, for example, recently became the third U.S. President on Twitter.[6] Facebook now has more than 1.1 billion users who, every minute, post 243,000 photos to the network, up from 208,000 a year ago.[7] Twitter's expanding user base now "tweets" 350,000 comments every minute, up from 100,000 a year ago.[8] And every minute, 120 new LinkedIn accounts are created, up from 100 a year ago.[9] These dizzying numbers are just the tip of the iceberg—there are hundreds of other social networks, and new ones are popping up all of the time.[10]

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[4] Anthony Carranza, *Social Media Networking Stats and Trends in 2013*, EXAMINER.COM (Oct. 14, 2013), http://www.examiner.com/article/social-media-networking-stats-and-trends-2013; *see also* Ryan Holmes, *5 Predictions for Social Media in 2014*, CNNMONEY (Dec. 10, 2013, 12:44 PM), http://tech.fortune.cnn.com/2013/12/10/social-media-2014 (predicting that "upstart" social networks will "catch fire"); Shea Bennetet, *Social Media Growth Worldwide—2 Billion Users By 2016, Led by India*, MEDIA BISTRO (Nov. 19, 2013, 3:00 PM), http://www.mediabistro.com/alltwitter/social-media-growth-worldwide_b51877 ("[T]he huge opportunity to recruit new users in less-developed markets [will] ensur[e] that the social networking uptick will continue for years to come.").

[5] *See* Drew Desilver, *Chart of the Week: A Minute on the Internet*, PEW RESEARCH CENTER (Nov. 27, 2012), http://www.pewresearch.org/fact-tank/2013/11/27/chart-of-the-week-a-minute-on-the-internet ("Keeping up with what people do online is no easy task . . . ."); Belle Beth Cooper, *10 Surprising Social Media Statistics That Will Make You Rethink Your Social Strategy*, FASTCOMPANY (Nov. 18, 2013, 5:52 AM), http://www.fastcompany.com/3021749/work-smart/10-surprising-social-media-statistics-that-will-make-you-rethink-your-social-stra (reporting that baby boomers are one of the fastest growing demographics on social media).

[6] Chris Taylor, *George H.W. Bush is Third U.S. President to Join Twitter*, MASHABLE (Dec. 10, 2012), http://mashable.com/2013/12/10/president-bush-twitter. The other two are Presidents Obama and Clinton. *Id.*

[7] Desilver, *supra* note 5.

[8] *Id.*

[9] *Id.*

[10] *See, e.g.*, Nick Bilton, *Teenagers Prove Fickle When Choosing Social Networks*, N.Y. TIMES BITS BLOG (Oct. 26, 2013, 12:07 PM), http://bits.blogs.nytimes.com/2013/10/26/teens-prove-fickle-when-choosing-their-favorite-social-network (discussing changing attitudes about particular social networks); Adrienne Erin, *New Social Networks You Didn't Know About (Until Now!)*, AL.COM (July 15, 2013, 12:24 PM), http://www.al.com/living/index.ssf/

The legal profession continues to embrace social media, but it has been forced to confront difficult questions.[11] What are the limits on researching a juror through social media?[12] Can a judge have a social-media profile?[13] What is the evidentiary value of a Facebook "like"?[14] Can social-media activity give rise to personal jurisdiction?[15] How can courts best manage increased public awareness of judicial proceedings?[16] These and other important questions have not stopped social media from taking hold in

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2013/07/new_social_networks_you_didnt.html (discussing "Srgrouples," "NextDoor," and "Path"); Bob Al-Greene, *10 Hot Social Networks to Watch*, MASHABLE (May 29, 2013), http://mashable.com/2013/05/29/10-hot-social-networks (discussing "Medium," "Kleek," "Viddy," "RunKeeper," "Ghost," "Pose," "Vine," "Atmospheir," "Days," and "App.net").

[11] *E.g.*, Nancy L. Ripperger, *Ethics: Facebook—Friend or Foe? What Are the Ethical Risks of Using Facebook in Your Litigation Practice?*, PRECEDENT MAGAZINE, Summer 2013, at 36–38, *available at* http://www.mobar.org/uploadedFiles/Home/Publications/Precedent/2013/Fall/facebook.pdf.

[12] *See, e.g.*, Michelle Celarier, *Ex-SAC Exec's Defense Probes Jurors' Social Media Postings*, N.Y. POST (Nov. 18, 2013, 11:57 PM), http://nypost.com/2013/11/18/ex-sac-execs-defense-probes-jurors-social-media-postings (reporting on a jury consulting firm "doing an extra level of due diligence on prospective jurors by Googling their names, checking out their social-media profiles and looking into public sites for asset searches").

[13] Yes, according to ABA Formal Opinion 462 (Feb. 21, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf. A related question is whether judges and lawyers may connect to each other on social media. *See* Jane Musgrave, *Florida High Court Asked to Decide Whether Judges, Lawyers Can Be Facebook Friends*, PALM BEACH POST (Jan. 16. 2013, 7:29 PM), http://www.palmbeachpost.com/news/news/crime-law/state-high-court-asked-to-decide-whether-judges-la/nTyhj.

[14] *See, e.g.*, Ebersole v. Kline-Perry, No. 12-CV-00026, 2012 WL 3776489, at *5 (E.D. Va. Aug. 29, 2012) ("The greater the number of 'likes' on the page, the more likely it is that others visited the page . . . . The evidence was therefore relevant as to how widely disseminated the letter was . . . .").

[15] *See, e.g.*, NobelBiz, Inc. v. Veracity Networks, LLC, No. 13-CV-02518, 2013 WL 5425101, at *4 (N.D. Cal. Sept. 27, 2013) (rejecting broad-based argument that "*all* activity on social media sites is a form of advertising subjecting the account holding to personal jurisdiction wherever his or her social media account may be viewed").

[16] *See, e.g.*, Douglas Dowty, *Rick Springfield Mistrial a First for Social Media's Impact in Central New York*, SYRACUSE.COM (Nov. 20, 2013, 3:23 PM), http://www.syracuse.com/news/index.ssf/2013/11/social_media_a_whole_new_game_in_cases_like_rick_springfield_mistrial.html (reporting on a mistrial declared during deliberations after new evidence surfaced from a social-media site, corroborating the plaintiff's claims).

law offices and courthouses across the country.[17] According to a recent report, 80 percent of the nation's largest law firms have blogs;[18] many of them are also on Facebook and other social networks.[19] Eighty-one percent of lawyers use social media.[20] Federal and state courts increasingly do too[21]—are you following @illinoiscourts on Twitter?

B. The Threats to Jury Impartiality Remain

In our prior article, we explained how social networking by jurors carries with it the dangerous potential to undermine the fundamental fairness of jury trials.[22] This potential, unfortunately, continues to become reality in myriad reported cases.[23] In our previous work, we offered

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[17] *See* Simon Chester & Daniel Del Gobbo, *Social Media Networking For Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging*, LAW PRACTICE MAGAZINE, Jan.–Feb. 2012, at 28, *available at* http://www.americanbar.org/publications/law_practice_magazine/2012/january_february/social-media-networking-for-lawyers.html ("What a difference five years makes. Social media has exploded.").

[18] *See* Adrian Dayton, *You Read It Here: Blogs Never Sleep*, NATIONAL LAW JOURNAL (Sept. 16, 2013, 12:00 AM), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202619190022.

[19] *See generally* GUY ALVAREZ, BRIAN DALTON, JOE LAMPORT & KRISTINA TSAMIS, THE SOCIAL LAW FIRM: AN ASSESSMENT OF THE USE OF SOCIAL TECHNOLOGIES AT AMERICA'S LEADING LAW FIRMS (2013), *available at* http://good2bsocial.com/wp-content/uploads/2013/12/THE-SOCIAL-LAW-FIRM.pdf.

[20] *See* Stephen Fairly, *ABA Survey Says Lawyers Getting Clients Via Social Media*, NATIONAL LAW REVIEW (Aug. 29, 2013), http://www.natlawreview.com/article/aba-survey-says-lawyers-getting-clients-social-media (citing ABA LEGAL TECHNOLOGY SURVEY REPORT (2013)); *see also* Nicole Black, *Lawyers Get Creative With Use of Social Media*, SUI GENERIS (Oct. 8, 2013, 2:27 PM), http://nylawblog.typepad.com/suigeneris/2013/10/lawyers-get-creative-with-use-of-social-media.html.

[21] *See generally* CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS, 2013 CCPIO NEW MEDIA SURVEY (2013), *available at* http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report_CCPIO.pdf.

[22] *See* St. Eve & Zuckerman, *supra* note 3, at 9. Social media creates problems elsewhere in the justice system too. *See, e.g.*, James Staas, *Man Convicted of Witness Intimidation After Grand Jury Testimony Is Posted on Facebook*, BUFFALO NEWS (Oct. 30, 2013, 2:38 PM), http://www.buffalonews.com/city-region/erie-county-court/man-convicted-of-witness-intimidation-after-grand-jury-testimony-is-posted-on-facebook-20131030.

[23] *E.g.*, Naomi Martin, *Juror in David Warren Trial Was Booted Because He Used Social Media*, NOLA.COM (Dec. 6, 2013, 9:30 AM), http://www.nola.com/crime/index.ssf/2013/12/juror_in_david_warren_trial_wa.html; Mark Pearson, *When Jurors Go 'Rogue' on the Internet and Social Media*, JOURNLAW (May 30, 2013,

numerous examples; now, based on recent reports, we offer even more.[24] These examples are an important reminder that judges and lawyers must remain vigilant in their efforts to ensure a fair trial in the age of social media.[25]

Facebook remains a popular vehicle through which jurors commit misconduct. Consider, for example, the juror in Mississippi, who posted on Facebook: "I guess all I need to know is GUILTY. lol."[26] Or the juror from across the Pond, who posted: "Woooow I wasn't expecting to be in a jury Deciding a paedophile's fate, I've always wanted to F**k up a paedophile & now I'm within the law!"[27] Another recent example comes from a wrongful-death trial in Missouri, throughout which the jury foreperson regularly communicated about the case on Facebook.[28] Some examples of the Facebook communications include:

- **Juror**: "Got picked for jury duty."
- **Juror**: "Sworn to secrecy as to details of this case. Most importantly . . . the 3:00 p.m. Cocktail hour is not observed!"

2:12 PM), http://journlaw.com/2013/05/30/when-jurors-go-rogue-on-the-internet-and-social-media.

[24] Published reports, of course, do not capture every instance of juror misconduct. Some of it goes undetected or cannot be proved. *See, e.g.*, Kervick v. Silver Hill Hosp., 72 A.3d 1044, 1065 & n.13 (Conn. 2013) (rejecting claim that juror posted comments online about the trial where the comments were posted anonymously and there was no reliable evidence that a real juror actually posted them during trial).

[25] *Cf.* Martin, *supra* note 23 ("Use of social media by jurors in trials has become an increasing concern for judges and lawyers around the country. The worry is jurors will be exposed to information about the case that they are prohibited from seeing—such as news accounts that contain information not admitted in court—and that they will share information about the trial, which they are prohibited from doing while they are serving on the jury.").

[26] Shaw v. State, No. 2011-KA-01536-COA, 2013 WL 5533080, at *8 (Miss. Ct. App. Oct. 08, 2013). The offending jurors also friended a trial witness on Facebook. *Id.* Even so, the appeals court affirmed the trial court's denial of a motion for mistrial. *Id.*

[27] *See Juror Jailed Over Pedophile Facebook Post*, METRO NEWS (July 29, 2013, 5:09 PM), http://metro.co.uk/2013/07/29/juror-jailed-over-paedophile-facebook-post-3903315; John Aston, *Two Jurors Jailed for Contempt of Court Over Use of Internet During Trials*, THE INDEPENDENT (U.K.) (July 30, 2013), http://www.independent.co.uk/news/uk/crime/two-jurors-jailed-for-contempt-of-court-over-use-of-internet-during-trials-8737004.html.

[28] Sylvia Hsieh, *Juror's Facebook Posts May Overturn Wrongful Death Verdict*, LAWYERS.COM (Feb. 14, 2013), http://blogs.lawyers.com/2013/02/jurors-facebook-posts-overturn-verdict. The offending juror was jailed for two months for contempt. *Id.*

Friend: "If he's cute and has a nice butt, he's innocent!"

- **Juror:** "Drunk and having a great food at our fav neighborhood hangout."
  Friend: "I'm still amazed they allow jurors to nip from a flask all day."
- **Juror:** "Starting day 8 of jury service."
  Friend: "Remember nice ass = innocent!"
- **Juror:** "Civic duty fulfilled and justice served. Now, where's my cocktail????"
  Friend: "Was it Miss Peacock in the library with the lead pipe?"
- **Juror:** "Civil case . . . Verdict for the defendants . . . . I was the jury forearm . . . . deliberations and verdict . . . in under one hour."[29]

Not all recent reported examples of misconduct involve Facebook. Jurors continue to blog about their jury service,[30] like the California juror who posted dozens of comments on her personal blog throughout a lengthy trial.[31] One of her early posts said: "[T]his is my secret blog. I don't know how secret it really is though. I want to tell secret jury things."[32] As described in other recent reports, a juror discussed the case on a newspaper's online comment board,[33] and another did online research about a witness and the judge.[34] One juror even communicated from her mobile

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[29] *Id.*

[30] *See, e.g.*, McNeely v. Cate, No. 11-56393, 2013 WL 5651267 (9th Cir. Oct. 17, 2013) (considering a habeas claim based on the jury foreperson's blog post during trial); Figueroa v. Highline Med. Ctr., No. 68272-5-I, 2013 WL 5636674, at *7 (Wash. Ct. App. Oct. 14, 2013) (summarizing a juror's blog postings during trial as "limited and innocuous").

[31] People v. Johnson, No. F057736, 2013 WL 5366390 (Cal. Ct. App. Sept. 25, 2013).

[32] *Id.* at *133. The juror apparently posted, among other things, "hypothetical" questions related to the case. "At least one of her posts drew a comment from a family member who 'love[d]' the blogger's 'hypothetical question to a case that you cannot talk about (let alone blog about).'" *Id.* (alteration in original).

[33] *See* Michelle Bowman, *States Punish Web-Cruising Jurors*, LAWYERS.COM (June 18, 2013), http://blogs.lawyers.com/2013/06/states-cpunish-web-cruising-juror. The trial court found the juror in criminal contempt. *Id.*

[34] Drew Singer, *Juror Misconduct Strikes Again at Jenkens Atty's Trial*, LAW360.COM (Oct. 24, 2013), http://www.law360.com/articles/483305/juror-misconduct-strikes-again-at-jenkens-atty-s-trial.

device in plain sight of the judge.[35] In that case, the judge noticed "an unexpected glow on a juror's chest while the courtroom lights were dimmed during video evidence in an armed-robbery trial."[36] The light, it turned out, was from the juror's cell phone. He was texting.[37]

C. Recent Case Law on Jurors & Social Media

Jurors' often brazen acts of misconduct have contributed to a growing body of case law about jurors and social media. How should trial courts respond to possible juror misconduct on social media? What does it mean to be "friends" on Facebook? Are there limits on how courts can respond? In this Section, we review some recent cases that have addressed questions like these.

1. The Trial Court's Duty to Investigate—State v. Smith

In *State v. Smith*,[38] the Tennessee Supreme Court considered how a trial court should react when it learns "during a jury's deliberations that a juror exchanged Facebook messages" with a witness.[39] The issue arose out of a murder prosecution in which Dr. Adele Lewis, a medical examiner affiliated with Vanderbilt University, testified for the state.[40] Though four of the jurors were also affiliated with Vanderbilt, none of them were asked during voir dire whether they knew Dr. Lewis.[41] After the close of evidence, the trial court charged the jury and instructed them to begin deliberations.[42]

Problems came to light about an hour later.[43] Dr. Lewis informed the trial judge that a juror had initiated a Facebook conversation with her.[44] In an email to the judge, Dr. Lewis recounted the conversation:

> **[Juror]:** A-dele!! I thought you did a great job today on the witness stand . . . I was in the jury . . . not sure if you

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[35] *Oregon Juror Jailed for Texting During Trial*, ASSOCIATED PRESS (Apr. 18, 2013, 10:47 PM), http://bigstory.ap.org/article/oregon-juror-jailed-texting-during-trial. The judge held the juror in contempt of court and required him to spend the night in county jail. *Id.*

[36] *Id.*

[37] *Id.* On the topic of texting, Facebook recently announced that its mobile app will allow users to send each other Facebook messages with the ease of texting. *See* Kurt Wagner, *Facebook Makes Its Messenger App More Like Texting*, MASHABLE (Oct. 29, 2013), http://mashable.com/2013/10/29/facebook-messenger-texting.

[38] State v. Smith, No. M2010-01384, 2013 WL 4804845 (Tenn. Sept. 10, 2013).

[39] *Id.* at *1.

[40] *Id.*

[41] *Id.*

[42] *Id.* at *2.

[43] *Id.*

[44] *Id.*

> recognized me or not!! You really explained things so great!!
>
> **[Dr. Lewis]:** I was thinking that was you. There is a risk of a mistrial if that gets out.
>
> **[Juror]:** I know . . . I didn't say anything about you . . . there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least.[45]

The trial judge told the lawyers about the email at some point, but it is unclear when, how, or what discussions took place.[46] Deliberations went on and the jury found the defendant guilty of first-degree murder, for which he was sentenced to life in prison.[47]

Before the jury left the courthouse, defense counsel suggested that the court examine the juror who communicated with Dr. Lewis.[48] The court flatly denied the request, being "satisfied with the communication that [it had] gotten from Dr. Lewis with regard to the matter."[49] The intermediate appellate court affirmed, but the Tennessee Supreme Court reversed.

In a lengthy opinion, the state high court began by observing that, "[l]ike judges, jurors must be—and must be perceived to be—disinterested and impartial."[50] This means that the trial court must ensure that jurors "base their verdict solely on the evidence introduced at trial."[51] If the trial court learns of any inappropriate communications between a juror and a third party, it must "assure that the juror has not been exposed to" any improper information or influence.[52] On the rise of social media, the high court acknowledged that technology has "made it easier for jurors" to have third-party contacts,[53] but explained that "pre-internet" case law provides an appropriate framework to address instances of juror misconduct committed though social media.[54]

Applying these pre-internet principles, the Tennessee Supreme Court held that the trial court failed to adequately investigate the "nature and extent of the improper communications" between the juror and Dr.

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[45] *Id.*
[46] *Id.*
[47] *Id.* at *2–*3.
[48] *Id.* at *3.
[49] *Id.*
[50] *Id.* at *4.
[51] *Id.*
[52] *Id.* at *5.
[53] *Id.* at *7.
[54] *Id.*

Lewis.[55] The court explained that, after learning of the communication, the trial judge "was required to do more than simply inform the parties . . . and then await the jury's verdict."[56] The trial judge should have "immediately" conducted a "hearing in open court to obtain all the relevant facts surrounding the extra-judicial communication," including its impact on the juror's "ability to serve as a juror" and whether any improper information was shared with other jurors.[57] Without such a hearing, the record was inadequate and the case was remanded with instructions to conduct a hearing.[58]

The state high court concluded its opinion with a comment on the digital age. Observing that the judicial process depends on public confidence in its outcomes, the court cautioned that juror communications about a case on social media could erode that confidence.[59] More than that, the court continued, juror misconduct through social media threatens the fundamental American guarantee of a fair trial.[60] And so for these reasons, the court admonished trial courts "to take additional precautions to assure that jurors understand their obligation to base their decisions only on the evidence admitted in court."[61] Specifically, the court explained:

> Trial courts should give jurors specific, understandable instructions that prohibit extra-judicial communications with third parties and the use of technology to obtain facts that have not been presented in evidence. Trial courts should clearly prohibit jurors' use of devices such as smart phones and tablet computers to access social media websites or applications to discuss, communicate, or research anything about the trial. In addition, trial courts should inform jurors that their failure to adhere to these prohibitions may result in a mistrial and could expose them to a citation for contempt. Trial courts should deliver these instructions and admonitions on more than one occasion.[62]

2. What's in a Friend?—Sluss v. Commonwealth

The meaning of a Facebook friendship has become increasingly significant as parties begin to cry foul over jurors' undisclosed Facebook

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[55] *Id.* at *9.
[56] *Id.* at *7.
[57] *Id.*
[58] *Id.* at *8.
[59] *Id.* at *9 (citing St. Eve & Zuckerman, *supra* note 3, at 12).
[60] *Id.*
[61] *Id.*
[62] *Id.*

connections.[63] In *Sluss v. Commonwealth*,[64] for example, the Kentucky Supreme Court considered the defendant's claim of juror bias based on, among other things, two jurors' undisclosed Facebook friendships with the victim's mother.[65]

The case arose out of the tragic death of eleven-year-old Destiny Brewer, who died when Ross Brandon Sluss crashed his truck into a vehicle carrying her.[66] Sluss, who was intoxicated at the time, was later charged with murder and other offenses.[67] The case was in the public eye from the beginning and community members "took to the internet to discuss the incident and the upcoming trial on websites such as Facebook and Topix."[68]

At Sluss' trial, the jurors were asked during general voir dire if they knew the victim or her family.[69] Two jurors—call them Juror 1 and Juror 2—said nothing.[70] None of the jurors were asked if they were "Facebook friends" with the victim or her family.[71] Then, during individual voir dire, Juror 1 stated that she had a Facebook account from which she knew only that the murder "happened."[72] Juror 2 stated that she was not on Facebook and knew nothing of the murder.[73] Jurors 1 and 2 sat on the actual jury, which found Sluss guilty of murder.[74]

Defense counsel later discovered that both jurors were "Facebook friends" with the victim's mother, whose Facebook profile contained information about her daughter's death.[75] Counsel proffered screenshots of the pertinent Facebook pages to the trial court and unsuccessfully moved for a new trial.[76]

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[63] *See, e.g.*, W.G.M. v. State, No. CR-12-0472, 2013 WL 4710406, at *1–*4 (Ala. Crim. App. Aug. 30, 2013) (rejecting claim of juror misconduct based on undisclosed Facebook friendship because (1) juror was never asked about social-networking relationships during voir dire; and (2) "the status of being a 'friend' on Facebook does not necessarily equate to a close relationship from which a bias could be presumed").
[64] Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012).
[65] *Id.* at 217.
[66] *Id.*
[67] *Id.* at 218.
[68] *Id.* at 221.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 222.
[74] *Id.* at 221–22.
[75] *Id.*
[76] *Id.*

Sluss then appealed to the Kentucky Supreme Court, arguing primarily that "the mere fact that each juror was a 'Facebook friend' with [the victim's mother] creates a presumption of juror bias and should have been disclosed during voir dire."[77] Not so, the court explained: Facebook friendships "do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire."[78] Some people, like the victim's mother, have thousands of Facebook friends, and the nature of each friendship "varies greatly, from passing acquaintanceships . . . to close friends and family."[79] As such, the court concluded that "a juror who is a 'Facebook friend' with a family member of a victim, standing alone, is arguably not enough evidence to presume juror bias sufficient to require a new trial"; what matters is the actual nature of friendship.[80]

Although mere Facebook friendships were not enough, the court was troubled by the jurors' apparent misstatements during voir dire and also the trial court's inadequate investigation of the relationship between the jurors and the victim's mother.[81] The state supreme court accordingly reversed and remanded, directing the trial court to consider, among other things, whether the jurors lied during voir dire about their Facebook usage; whether the jurors were, in fact, Facebook friends with the victim's mother and, if so, when they became friends; and the nature and extent of any actual friendships between the jurors and the victim's mother.[82]

3. The Limits on Proactive Measures—Steiner v. Superior Court

Many courts and lawyers now appreciate the challenge of ensuring an impartial jury in the age of social media. In the high-profile prosecution of Jodi Arias, for example, defense counsel sought an order requiring the jurors to reveal their Twitter usernames "so their accounts can be monitored for communications about the case."[83] (The court denied the motion.[84])

Some attempts to ensure impartiality, however, have gone too far. Take, for example, the judicially imposed restrictions at issue in *Steiner v.*

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[77] *Id.* at 222.
[78] *Id.*
[79] *Id.* (explaining further that "Facebook allows only one binary choice between two individuals where they either are 'friends' or are not 'friends,' with no status in between").
[80] *Id.*
[81] *Id.* at 223–24.
[82] *Id.* at 229.
[83] *See Motion on Arias Jurors' Twitter Handles Denied*, ASSOCIATED PRESS (Dec. 4, 2013, 2:02 PM), http://www.myfoxphoenix.com/story/24135483/motion-on-arias-jurors-twitter-handles-denied.
[84] *See id.*

Superior Court.[85] *Steiner* began as an ordinary tort case in which the plaintiff alleged injuries from asbestos in the defendants' products.[86] As the case moved towards trial, however, the defendants became concerned that jurors would "Google" the plaintiff's attorney, Simone Farrise, and see statements on her website about victories in similar cases.[87] After jury selection, but before opening statements, the defendants asked the trial court to order Farrise to remove those references for the duration of the trial.[88] Farrise objected, but the trial court shared the defendants' concern and so granted their request.[89] The court also "admonished the jurors not to Google the attorneys."[90]

After trial, Farrise restored her website and then appealed both the jury verdict (which was for the defendants) and the trial court's order directed at her website. Though the California Court of Appeal affirmed the verdict, it found error in the trial court's order requiring Farrise to take down portions of her website.[91] As the appellate court explained, the order was overbroad and constituted "an unlawful prior restraint on the attorney's free speech rights under the First Amendment."[92] Prophylactic measures directed at a website unrelated to the case went "too far."[93] "Juror

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[85] Steiner v. Superior Court, 164 Cal. Rptr. 3d 155 (Cal. Ct. App. 2013). There are other examples too. *E.g.*, Marceaux v. Lafayette City-Parish Consolidated Gov't, 731 F.3d 488, 494–96 (5th Cir. Sept. 30, 2013) (reversing district court's order shutting down a website in advance of jury selection); William R. Levesque, *Seizure of Juror's Computer Rescinded*, TAMPA BAY TIMES, Jan. 9, 2013, at 1B (reporting that a federal judge ordered the U.S. Marshalls to seize a former juror's personal computer after allegations of Internet misconduct arose after her service; the judge rescinded the order after the prosecutor raised due process concerns). On the limits of the trial court's investigative power, see, for example, Richard Raysman & Peter Brown, *Social Media Use As Evidence of Juror Misconduct*, 11 INTERNET L. & STRATEGY 5, 3 (2013).

[86] *Steiner*, 164 Cal. Rptr. 3d at 157.

[87] *Id.* at 158.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] For the discerning reader who wonders why the trial court's order was not moot, the order was indeed moot, but the appellate court concluded that the public interest warranted consideration of the issue. *Id.* at 160 ("The actual order . . . does raise questions as to a trial court's authority to issue an order restricting an attorney's free speech rights during trial to prevent potential jury contamination. Because any order restricting such speech during trial is likely to become moot before [an appeal] can be heard, we agree it raises an issue of broad public interest that is likely to evade timely review." (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546–47 (1976)).

[92] *Steiner*, 164 Cal. Rptr. 3d at 157.

[93] *Id.* at 166.

admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case."[94]

II. THE INFORMAL SURVEY OF ACTUAL JURORS

In March 2012, we reported the preliminary results of our informal survey of actual jurors.[95] We had 140 responses at that time, all from jurors in federal court. Now, with 443 additional responses from jurors in both federal and state court, we revisit the results anew. As explained below, the results show a small but significant number of jurors who were tempted to communicate about the case through social media. Almost all of these jurors ultimately decided not to do so because of the court's social-media instruction. Even jurors who were not tempted to communicate about the case through social media indicated that the court's instruction was effective in keeping their temptation at bay. After briefly describing the survey, we turn to the numbers and then share comments from the jurors themselves.

A. Background on the Survey

For more than three years, actual jurors in Illinois have been asked to complete a short survey at the conclusion of their jury service. The survey began with jurors in the U.S. District Court for the Northern District of Illinois, and about a year ago expanded to jurors in the Circuit Court of Cook County, Criminal Division. All survey responses were anonymous.

Each participating juror sat in either a federal criminal or civil case in the Northern District of Illinois or a state criminal case in Cook County, Illinois. The federal cases were presided over primarily by Judge Amy J. St. Eve.[96] Judge Charles P. Burns presided over all of the state criminal cases. In every case, the presiding judge administered a model social-media instruction during opening and closing instructions.[97] Additionally, in many of the longer trials, the judge daily admonished jurors not to communicate about the case through social media.

The survey asked the jurors about their experience and included these questions about social-media use during trial:

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[94] *Id.* at 157.

[95] *See generally* St. Eve & Zuckerman, *supra* note 3.

[96] U.S. District Judge Matthew F. Kennelly presided over some of the early cases.

[97] For the text of the model instructions on which the actual instructions were based, see Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case* (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

> Were you tempted to communicate about the case through any social networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter?
>
> If so, what prevented you from doing so?[98]

The results that follow are not scientific, nor are they intended to be.[99] Perhaps most significantly, juror participation was voluntary and some jurors may not have been candid (though juror anonymity likely encouraged candor).[100] Despite their informality, the results are nonetheless instructive in navigating the social-media minefield. In addition to the numerical tally, the results come together to form one of the largest collections of comments from actual jurors about social media.

B. The Results

To date, 583 jurors have participated in the informal survey, representing 358 jurors from federal court and 225 jurors from state court. The first question asked the juror whether she was tempted to communicate about the case through social media. Jurors from both federal and state court overwhelmingly responded in the negative, though a sizable, significant minority said "yes" or some equivalent.[101] Here is the breakdown:

	Number	Percent
Total	583	- -
Not tempted	520	89.19%
Tempted	47	8.06%
No Response	16	2.74%

Consistent with the preliminary results we reported in March 2012, a significant number of jurors referenced the judge or the judge's instruction as the reason why they did not, or were not even tempted to, communicate about the case on social media.

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[98] The full text of the Jury Questionnaire, together with jurors' responses, is on file with the authors.

[99] *See* St. Eve & Zuckerman, *supra* note 3, at 21 & n.114 (acknowledging the unscientific nature of the results).

[100] *See* ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT, & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 77 (2010) (observing that respondent anonymity is likely to increase response rate and accuracy in surveys about "sensitive behaviors").

[101] We observed a slight uptick in the rate of temptation over time. Although no hard conclusions can be drawn due to the unscientific nature of this survey, we believe this may be an area ripe for future inquiry.

Notably, the results from federal and state court are nearly identical. We observed almost the exact same rates of temptation and response across both forums:

	Federal		State	
	Number	Percent	Number	Percent
Total	358	--	225	--
Not tempted	317	88.55%	203	90.22%
Tempted	30	8.38%	17	7.55%
No Response	11	3.07%	5	2.22%

We also observed similar comments from jurors in both forums. At almost identical rates, federal and state jurors told us that the judge or the judge's instruction influenced them not to communicate about the case through social media. Jurors across both forums also explained their decision to refrain from social media by mentioning their oath, respect for the judicial process, and integrity.

1. Analysis of Responses from Jurors Who Were Tempted

Across both forums, forty-seven jurors responded that they were tempted to communicate about the case through social media. Forty-five of the forty-seven tempted jurors said that they ultimately did not succumb to their temptation. The two others said nothing either way—one stressed that she was tempted to talk about her "experience" and not "content," and the other simply said that she was tempted to communicate with her "family."

Asked what "prevented" them from communicating about the case on social media, most of the forty-five jurors—forty-one of them—referenced the court's social-media instruction. One juror, for example, said that she wanted to talk about the case on Facebook, but did not because of "the Judge's orders." Others similarly made direct references to judge's social-media instruction in explaining what prevented them from giving in to their temptation:

- "Judge told us not to communicate"
- "The request of the Judge"
- "The Judge's orders" (2 jurors)
- "The Judge"
- "Direct orders"
- "I morally thought I should obey the Judge"
- "The Judge saying not to"
- "The Judge's admonishment"

- "The Judge's instructions"
- "Instructions not to do it"
- "Your instructions"
- "Agreement with judge not to do so"
- "ask[ed] not to"
- "Judge's orders and importance to the case"
- "Nope. The judge was clear about not sharing the information"
- "I was instructed not to, and I tend to do the right thing"
- "I was tempted but told not to, so I follow[ed] the rules"
- "Wanted to but knew I could not"
- "We were told not to"

One juror, who likely sat in a longer trial, pointed to the judge's "daily warnings" (underline in original) as the reason for her restraint. Repetition was important to another juror, who likewise explained that the judge's "repeated directions not to" communicate about the case on social media were effective.

Other tempted jurors indirectly referred to the judge's instruction in explaining why they did not communicate about the case on social media. At least two of them mentioned the "law"—"point of law" and "I have to be loyal to the law"—and numerous others pointed to their oath or respect for the process:

- "I took an oath"
- "My oath"
- "I follow rules under the oath I made"
- "I knew it was my duty to fulfill the oath I took before the court not to say anything"
- "My duty as a jur[or] under oath"
- "Took oath not to communicate"
- "My oath not to tell"
- "I took this very seriously and wanted to do what I swore I would"

- "I swore not to"
- "I had to remind myself that this is a job and I made an oath and was going to follow rules under the oath I made"
- "I was tempted, but my respect for the privilege of service as a juror to our Court System prevented me from doing so"
- "I respect the process"

Consistent with the court's instructions, others decided not to give in to their social-media temptations because they understood that doing so would threaten their impartiality. One juror, for example, was tempted by Google but stayed offline in order "to keep an open mind." Other jurors explained their decision like this:

- "I did not want to sway my opinion"
- "To keep an open mind"
- "Afraid I would be bias[ed]"
- "Changing my personal opinion"

Although no jurors were threatened with contempt, two jurors sought to avoid criminal sanctions; in their words:

- "I didn't want to ruin the trial or get arrested or something"
- "JAIL" (capitals in original)

In an apparent recognition of the mistrial that might result, one juror decided not to communicate about the case in light of the "time invested of all jurors." Another juror similarly remarked that as the trial went on, her temptation diminished because she "then had enough invested not to."

2. Analysis of Responses from Jurors Who Were Not Tempted

The overwhelming majority of jurors—520 or 88.55 percent of the sample—reported no temptation to communicate about the case through social media. Some were emphatic about it:

- "No not at all" (nine jurors)
- "Absolutely not" (three jurors)
- "No" (underline in original; ten jurors)
- "No!"

Although most jurors responded to the question about temptation by stating simply "no" or some equivalent, about seventy jurors went further without any prompt and explained why. The comments from these jurors are revealing.

Similar to those from the tempted jurors, the comments from the jurors who were not tempted overwhelmingly related to the court's social-media instruction. Many jurors explicitly referenced the judge or the instruction as the reason for their lack of temptation:

- "The Judge's orders" (three jurors)
- "The Judge asked us not to"
- "The Judge's instruction" (two jurors)
- "The Judge made it pretty clear not to"
- "The Judge's order not to discuss the case"
- "The Judge said not to"
- "Judge's admonition to not communicate about the case"
- "instructed not to"
- "stayed true to my given orders"
- "Instructed by Judge not to"
- "I was told not to"
- "Because the Judge instructed us not to"
- "The fact that we were not supposed to"
- "did not want to break the rules"
- "Jury instructions"
- "The Judge"
- "No, Judge said not to!"
- "You told us not to"
- "Judge asked us not to go online re: this case"
- "Judge's direction"
- "the reminders from the judge were good all the same"
- "Followed requests of court not to discuss"

- "The warning"
- "instructions from the Judge" (two jurors)
- "was instructed not to"
- "ordered not to look"

One juror characterized the social-media instruction as a "gag order" and explained that she did not discuss the case on social media because "there was a gag order prohibiting us from discussing the trial." Two jurors said "the law," and another remarked that "its against the law" to communicate about the case through social media.

Other jurors' explanations for their lack of temptation linked the social-media instruction to principles of fairness:

- "The Judge's instructions and I did not want to compromise the case"
- "Judge's direction [and] wanted to provide a fair and unbiased decision"
- "[The Judge] instructed us not to look through any social networks. Besides, I want to hear and see evidence of the case"
- "My own personal belief but the judge's orders"

Some jurors just referenced fairness as the reason for their lack of temptation:

- "Did not want to jeopardize proceeding in any way"
- "I didn't want to be biased in the case"
- "I did not want to compromise the case"

For a handful of jurors, their lack of temptation and their juror oaths went hand-in-hand:

- "I was sworn to not say anything"
- "it would have been improper once I was instructed not to"
- "My duty not to do so"

Others attributed their lack of temptation to something more personal:

- "promise to God"
- "morally"

- "I took this very serious[ly] and kept my mouth shut"
- "I was not going to undermine the integrity of the process"
- "Civic duty"
- "My sense of integrity"
- "Kept an open mind"
- "did my job"
- "Respect" (two jurors)
- "Got home too late to think about going on Facebook :)"

For one juror, refraining from prohibited social-media communications was a source of personal pride: "I was proud of the fact that we, as a jury, did not discuss the case until it came time for deliberations." For another, it was out of "fear," presumably another reference to being held in contempt for violating the court's instruction. And since jurors, after all, are human, one remarked that "nothing" could prevent her from using social media to communicate about the case, although she insisted she was not tempted to do so.

Finally, in reporting no temptation, twenty jurors explained that they do not use (or have no interest in ever using) social-networking services. Thirteen of them, or 65 percent, were from federal court, with the remaining seven jurors, or 35 percent, from state court. Additionally, the rate of jurors reporting that they do not use social media increased with time in both federal and state court. The comments from these jurors are a good reminder that, despite the rise of social media, not every juror is a user. Some of their comments include:

- "not big on technology!" (underline in original)
- "don't use any of those"
- "I don't use them, except for LinkedIn but I do not 'chat' on the Internet"
- "don't use them"
- "I do not use social networks"
- "I do not use any of those social networks ever"
- "don't use those things much"
- "I don't have any accounts"

- "I very rarely use these networks"
- "I don't use social networks to communicate"
- "No interest"
- "I am not on any of those networks. Just follow Twitter but do not Tweet"
- "I don't really do 'social networks'"
- "No, I don't use that too much"
- "I don't 'social network' anyway"
- "don't use those elect. gadgets"
- "I don't use social networks much"
- "not on social networks"
- "not interested"
- "didn't want to"
- "don't use those sites"
- "don't have, don't care"
- "I don't use them"

III. BEST PRACTICES FOR ENSURING AN IMPARTIAL JURY IN THE AGE OF SOCIAL MEDIA

A. Employ a Social-Media Instruction

The informal survey responses, though unscientific, support the emerging majority view that the best way to ensure an impartial jury in the age of social media is through carefully crafted jury instructions.[102] As borne out by jurors in our sample, such instructions can effectively mitigate the risks of juror misconduct associated with social media. As dozens of jurors told us, they did not communicate about the case on social media because of the "Judge's instruction," or because "[t]he Judge made it pretty clear not to."

Unlike more draconian tools like threats of imprisonment and blanket technology bans, social-media instructions are more respectful of

[102] Christian Nolan, *Supreme Court Requires Jury Instruction to Avoid Social Media*, CONN. LAW. TRIB. (Aug. 9, 2013, 6:22 PM), http://www.ctlawtribune.com/id=1202614781226 (describing the practices of the Connecticut state court system).

jurors, and less likely to negatively impact their willingness to serve.[103] Trial judges are intimately familiar with instructing juries and have traditionally relied on instructions as the primary defense against misconduct.[104] There is no reason to deviate now. The law presumes that jurors will follow their instructions,[105] and in the social-media context, scores of actual jurors told us that they actually did.[106]

Social-media instructions may not prevent every instance of juror misconduct. Instructions are not a silver bullet, but there likely is none; after all, the jury system is "fundamentally human"[107] and therefore entails a "risk of human fallibility."[108] But as experience, studies and our informal survey results support, a social-media instruction is a necessary and often independently sufficient method to minimize, if not eliminate, the risk of juror misconduct through social media. Resolving to employ a social-media instruction, however, is only the beginning. There are further questions of timing and content.

B. Instruct on Social Media Early and Often

Courts should instruct juries on social media early and often. We suggest an instruction in the judge's opening remarks to the jury, as a part of the judge's closing instructions before the jury begins deliberations, and daily in trials spanning several days. Indeed, one of the jurors in our sample lauded the judge for the "daily" instruction. Another said that she was tempted at the beginning but less so over time, which underscores the importance of repetition.[109]

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[103] *See* J.E.B. v. Alabama *ex rel.* T.B., 577 U.S. 127, 146 (1994) (observing that the integrity of our jury system depends on full public participation in the process).

[104] *See* Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 163 (Cal. Ct. App. 2013) ("It is well established that 'frequent and specific cautionary admonitions and jury instructions . . . constitute the accepted, presumptively adequate, and plainly less restrictive means of dealing with the threat of jury contamination.'" (citation omitted) (modification in original)).

[105] *See* Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

[106] *See supra* Part II.B.2.

[107] People v. Marshall, 790 P.2d 676, 699 (Cal. Ct. App. 1990).

[108] Anderson v. Fuller, 455 U.S. 1028, 1033 (1982); *see also* Rideau v. Louisiana, 373 U.S. 723, 733 (1963) (Clark, J., dissenting) ("[I]t is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors.").

[109] *See also* State v. Smith, No. M2010-01384, 2013 WL 4804845, at *9 (Tenn. Sept. 10, 2013) ("Trial courts should deliver [social-media and Internet-related] instructions and admonitions on more than one occasion.").

C. Make the Instruction Effective

The mere existence of a social-media instruction, without regard to content, might be enough for some jurors, as it was for two jurors in our sample. One juror said, "I am an honest person so knowing I had rules to follow made it easy." Another juror agreed: "I am a rule follower." Though not unique, jurors of this type are rare.

For most jurors, the content of the social-media instruction is what matters. Our prior article provided some suggestions about effective content and highlighted the numerous articles and model instructions that can guide the reader on the subject. We take the same approach here, and briefly offer some guiding principles.

1. Hit Social Media on Its Head

At its core, an effective social-media instruction must appreciate the changing nature of the risk and the importance of social media to the modern-day juror.[110] Social media has become part of Americans' daily lives; many use Facebook, Twitter and other social networks almost reflexively, and increasingly from their mobile devices.[111] Some jurors may not even realize that it is wrong to communicate on social media about the case. And given the extraordinary ability to broadcast oneself on social media, even one-sided online comments like "I am on jury duty" can invite responses and start a conversion.[112]

This brave new world of social media "now requires trial courts to take additional precautions" to preserve the fairness and integrity of the jury system.[113] Standard "no communication" instructions will no longer do;

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[110] *See For Modern Jurors, Being On a Case Means Being Offline*, NAT'L PUB. RADIO (June 24, 2013), http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/jurors-and-social-media [hereinafter *Modern Jurors*]. For a succinct discussion of the dangers specific to social media, see, for example, the Tennessee Supreme Court's discussion in *Smith*, 2013 WL 4804845, at *5–*7, and our prior discussion, *see* St. Eve & Zuckerman, *supra* note 3.

[111] *See Modern Jurors*, *supra* note 110; Maeve Duggan & Aaron Smith, *Cell Internet Use 2013*, PEW INTERNET & AMERICAN LIFE PROJECT (Sept. 16, 2013), http://pewinternet.org/Reports/2013/Cell-Internet.aspx (reporting that 63 percent of cell-phone users access the internet through their phone).

[112] *See* Martin, *supra* note 23 (juror struck for saying she was on the jury in a high-profile case). As one New Jersey judge put it, even a seemingly innocent Tweet can be seen as "an invitation to a conversation." *Modern Jurors*, *supra* note 110.

[113] *Smith*, 2013 WL 4804845, at *9; *see also* Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2013) ("The traditional prohibition against external communication and outside research must be rewritten to meet the demands of the twenty-first century." (quoting Laura Whitney Lee, Note, *Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury*

courts must explicitly admonish jurors against using Facebook, Twitter, and other social media to communicate about the case or their jury service during trial.[114] Because the social-media world is constantly changing, the instruction should use broad language that captures the universe of potential digital communications tools at jurors' fingertips. The resulting social-media instruction might sound like "something out of a Best Buy catalog" (as one news report put it),[115] but no matter: Specificity is critical and is becoming the new reality in American courtrooms.[116]

2. Include a Meaningful Explanation

In stating why she followed the court's instruction, one juror in our sample pointed out that the judge "explain[ed]" the rule. Another said that she "felt the request was justified." Particularly at a time when restrictions on social-media use "might feel like solitary confinement" to some,[117] it is important to tell the jury why the restrictions exist. It is not because of some technical legal formality, but is necessary to ensure the fundamental fairness of the trial in a variety of ways. By explaining to the jury the important reasons that underlie the rule, jurors are more likely to be invested in preserving the integrity of the process and less likely to write off the rule as unimportant or unnecessary.

3. Remind Jurors of Their Oath and Its Importance

Jurors generally want to do the right thing. They recognize that "[j]ury service is a duty as well as a privilege of citizenship," and that their work is essential to the fair administration of justice.[118] Some may cringe at the prospect of jury duty, but in our experience, nearly all who serve take their obligation seriously and find the experience personally rewarding. It is thus not surprising that many jurors in the informal survey referenced their oaths as the reason they did not communicate about the case on social

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Instructions to Reflect the Realities of the Electronic Age, 60 DEPAUL L. REV. 181, 186 (2011))).

[114] *See, e.g.*, Kervick v. Silver Hill Hosp., 72 A.3d 1044, 1059 n.11 (Conn. 2013) (encouraging all state courts to adopt a model instruction that explicitly covers "all types of oral and written communications, including electronic communications such as e-mailing, blogging, texting, Twittering, and posting on Facebook and other social networking sites").

[115] *See Modern Jurors*, *supra* note 110.

[116] *See id.* ("[W]hile jurors were once warned not to discuss with others the cases they were hearing, warnings to jurors in today's social media age have become much more consistent. Jurors are increasingly hearing what they should not do with the devices that connect them to the world.").

[117] *See id.*

[118] *See* Thiel v. S. Pac. Co., 328 U.S. 217, 224 (1946).

media.[119] Staying true to their oath was personal—a source of "pride" for one, a "civic duty" for another, and a matter of "respect" for several others.

An effective instruction should capitalize on these concepts, weaving them into the instruction. Rather than threatening jurors with contempt, jury instructions should remind the jurors of their oath and its importance, and work in references to civic pride, respect, and democratic ideals.[120] These concepts resonate with jurors and help them to further appreciate their opportunity to "participate in the administration of justice," an opportunity that one scholar has called the "pinnacle of democratic participation."[121]

4. Don't Forget the Basics

Juror misconduct through social media is a growing concern, but not all jurors use social media. Even for the vast majority that do, social media is not the only vehicle through which they can commit misconduct. One of the jurors in our sample, for example, volunteered that he was not tempted to use social media, "but I did want to research the case." A juror in a recent high-profile case in New York admitted to doing just that, and was swiftly dismissed from the case (after some stern comments from the judge).[122] And according to another recent report, an Oklahoma state court juror did something much more basic: She drove by the crime scene during deliberations.[123] The takeaway? Remain vigilant about social media. But don't be blinded by it.

CONCLUSION

"The jury system is an institution that is legally fundamental but also fundamentally human."[124] There is no perfect solution to the growing risk of juror misconduct associated with social media. But there are effective ways to mitigate the risk and preserve the fairness and integrity of the system. Based on informal survey data from 583 actual jurors, we continue to suggest that courts employ specialized social-media instructions early and often during trial. Our survey data may be unscientific, but the voices of actual jurors speak volumes. They tell us that jurors tend to follow

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[119] *See supra* Part II.B.1.

[120] *See, e.g.*, Andrew Guthrie Ferguson, *The Joy of Jury Duty*, THE ATLANTIC, May 3, 2013 ("Turning the dread of jury duty into a form of enjoyment begins with understanding why jury duty matters.").

[121] Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U.L. REV. 65, 129 (2003).

[122] Singer, *supra* note 34.

[123] *See* Wilkerson v. Newton-Embry, No. 09-CV-00251, 2012 WL 2571277, at *3 (N.D. Okla. July 02, 2012).

[124] People v. Marshall, 790 P.2d 676, 699–700 (Cal. 1990).

properly crafted social-media instructions; that jurors generally appreciate their critical role in the judicial process; and that these conclusions apply with equal force to jurors in both federal and state court.

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WHITE-COLLAR CRIME

Expert Analysis

Jurors Behaving Badly: How Courts Respond

Robert G. Morvillo started this column 29 years ago, providing timely and insightful advice for practitioners. Bob passed away unexpectedly in December. This column is not only dedicated to him, but indeed, is the topic he chose prior to his passing.

By
Robert J. Anello

The U.S. Constitution guarantees a criminal defendant the right to a fair trial decided by an impartial jury, the right to due process, and the right to be present at all stages of a trial. On occasion, these guarantees are threatened by the misconduct of jurors selected to hear the case and sit in judgment of the defendant. Even when a juror's actions implicate a defendant's constitutional rights, however, such a violation rarely results in the reversal of a conviction handed down by the panel on which that juror sat. Instead, courts typically uphold the judgment. Indeed, the Supreme Court has stated that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time...after the verdict, seriously disrupt the finality of the process."[1]

The Second Circuit's recent decision in *United States v. Collins* has helped define the role of the district court in addressing juror conduct.[2] *United States v. Daugerdas*, a case pending in the Southern District of New York where a juror's conduct has been described by the defense as a "monstrous fraud on the court," likely will help define the extent to which a juror's deception during voir dire is reviewable post-trial.[3]

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How Bad Is Bad Enough?

In *Daugerdas*, five defendants were charged with a variety of crimes, including tax evasion, mail and wire fraud, and conspiracy to defraud the United States and the Internal Revenue Service. After an 11-week trial, the jury returned a split verdict, acquitting one defendant of all charges and finding the remaining defendants guilty of some or all of the charges against them. After trial, all convicted defendants filed a motion for a new trial based on false information provided by one of the jurors during voir dire.

> Even when a juror's actions implicate a defendant's constitutional rights, such a violation rarely results in the reversal of a conviction.

No dispute exists regarding the factual misrepresentations made by the juror. After informing the court she was a stay-at-home wife with a bachelor's degree, Catherine Conrad was seated as Juror No. 1. Despite numerous inquiries intended to ferret out any bias among the prospective jurors, Conrad failed to reveal that she had received a law degree from Brooklyn Law School, was admitted to the New York bar in 2000, and had been suspended for an indefinite period of time from the practice of law by the Departmental Disciplinary Committee based on an "admitted problem with alcohol dependency."

Conrad also failed to reveal that: i) she was the unsuccessful plaintiff in a civil personal injury lawsuit; ii) she had been arrested in New York on four occasions for shoplifting and driving under the influence and was serving a three-year term of probation on the shoplifting charges; iii) an outstanding warrant existed for her arrest in Arizona in connection with a disorderly conduct charge in that state; and iv) her husband, described to Arizona police by Conrad as a "Mafia boss in New York," had numerous felony convictions in New Jersey and had been incarcerated a number of times, including for one period in excess of seven years.[4]

The undisclosed information about Conrad came to light after a post-verdict letter sent by Conrad to the prosecution caused the defendants concern and spurred them to conduct a public records search. After discovering the breadth of Conrad's misrepresentations during voir dire, the defendants sought a new trial, arguing that Conrad withheld material information that would have resulted in her being excused from jury service. Specifically, they asserted that "Conrad's failure to respond truthfully to many of the Court's questions obstructed the voir dire process and resulted in Conrad being seated as a juror despite her psychological impairment and bias, thereby depriving defendants of their right to a fair trial."[5]

In *United States v. Colombo*, the Second Circuit previously recognized that a full and fair voir dire is necessary to protect a defendant's right to trial by an impartial jury, finding that: "there must be sufficient information elicited on voir dire to permit a defendant to intelligently

exercise not only his challenges for cause, but also his peremptory challenges, the right to which has been specifically acknowledged by the Supreme Court...."[6] In *McDonough Power Equipment Inc. v. Greenwood*, the Supreme Court held that to obtain a new trial where a juror fails to answer honestly, a party must demonstrate that: 1) a juror failed to answer honestly a material question on voir dire; and 2) a correct response would have provided a valid basis for a challenge for cause.[7]

In *Daugerdas*, the defendants argued that Conrad's behavior met the standard set forth in *McDonough*. First, they asserted that Conrad deliberately lied about her background in a calculated way. Distinguishing cases in which a juror may have misunderstood an arguably ambiguous voir dire question,[8] the defendants stated that the relevant questions put to Conrad were not "vague or ambiguous such that Conrad might not have known she was obligated to disclose the concealed information, particularly given her status as an attorney." Rather, the first prong of the *McDonough* test was satisfied because Conrad's lies were "deliberate, intentional, and material."

As for the second prong of the *McDonough* test, defendants argued that Conrad's persistent lies alone revealed an "impermissible partiality" and a valid basis for challenging her service on the jury. In support of this argument, the defendants cited a Second Circuit decision holding that "a juror's unrestrained willingness to lie about material aspects of her background 'leads to an inference' that she was not able to decide the case 'with entire impartiality,' thereby prejudicing a defendant's right to a fair trial."[9] Further, the defendants argued that the revelation of any of the undisclosed pieces of information during voir dire would have provided sufficient grounds to excuse Conrad from jury service, pointing specifically to Conrad's admitted alcoholism, her negative experience with law enforcement and a law licensing authority, and the outstanding warrant in Arizona.

The government opposed the defendants' motion and the "extraordinary remedy" sought. First and foremost, the government noted the strong judicial policy against post-verdict inquiries into alleged juror misconduct, opining that these types of inquiries undermined finality, a jury's willingness to return an unpopular verdict, and trust in the jury system.[10] Moreover, the government argued that the defendants had failed to meet the second prong of the *McDonough* test as they had not established that a valid challenge existed had Conrad answered accurately. Specifically, the government stated it was "aware of no case in which a juror's concealment of prior arrests, misdemeanor convictions, or civil judgments against the juror were deemed sufficient to sustain a challenge for cause."

Even though misrepresentations made by a prospective juror and misconduct by sitting jurors may impact a defendant's constitutional right to a trial by an impartial jury, to date, courts have been reluctant to reverse a conviction based on a juror's behavior.

Further, the government asserted that the fact that a party may have exercised a peremptory challenge to strike the juror had they known all the concealed facts was irrelevant, asserting instead that the court was required to determine only "whether an accurate response at voir dire would have *required* that the juror be excused for cause had a challenge been raised."[11] According to the government, no such grounds existed. Finally, the government insisted that the defense's claim of bias by Conrad—inferred by the length to which she went to cover up her true background in order to serve on the jury—was undermined by, and inconsistent with, Conrad's actual voting record at trial, citing Second Circuit case law that a split verdict supports the conclusion that the jury carefully weighed the evidence and reached a reasoned verdict.

In reply, the defendants asserted that the government was attempting to minimize Conrad's misconduct, arguing that the outstanding warrant for Conrad's arrest in Arizona likely rendered Conrad a fugitive or, at a minimum, sustained a challenge for cause. The defendants further rejected the government's characterization of the second prong of the *McDonough* test, arguing that they need not demonstrate that the court was required by law to dismiss Conrad based on her accurate answers, but that the court would have dismissed her had all facts been known.[12] An evidentiary hearing to examine whether a new trial is warranted because of Conrad's misconduct is scheduled to take place before Southern District Judge William H. Pauley III on Feb. 15, 2012.[13]

How Should a Court Respond?

A defendant's post-trial motion seeking review of the verdict as a result of juror misconduct may not specifically address the alleged misconduct, but may be aimed at the manner in which the trial court handled issues related to the juror's behavior. Just last month, the Second Circuit issued an opinion in another juror misconduct case, *United States v. Collins*.[14] *Collins* did not deal directly with whether a juror's misconduct deprived a defendant of an impartial trial, but considered whether the court's response to such misconduct might lead to a constitutional deprivation of the defendant's right to be present at all stages of a trial. Joseph P. Collins was found guilty by a jury in the Southern District of New York of conspiracy, securities fraud, and wire fraud. Collins appealed his conviction arguing that the trial court committed prejudicial error by failing to disclose the contents of a jury note and engaging in an ex parte conversation with a juror accused of attempting to barter his vote.

The note in question was the fourth in a series of notes received from the jury during its sixth day of contentious deliberations. Although prior notes from the jury had been read into the record, the trial judge did not publicly read the fourth note, which was a "private note" received from Juror #1 detailing the misconduct of Juror #4. The presiding trial judge told counsel, without further explanation, that he had received the note and would be speaking privately with Juror #4. Defense counsel stated on the record that he was "not consenting" to the ex parte meeting. Nevertheless, the court conferenced with Juror #4, discussed the juror's behavior, and encouraged him to keep an open mind.[15]

Reviewing the trial court's decision, the Second Circuit noted that the provision in Federal Rule of Criminal Procedure 43 that "[a] defendant in a criminal case has the right to be present at 'every trial stage'" is rooted in the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause.[16] To protect this right, the court set forth a specific procedure for the handling of jury inquiries, which

includes reading the written inquiry into the record and providing counsel with an opportunity to suggest a response. The court further stated that, "[i]n general, the trial court should not respond to a jury note in an ex parte manner" as such communications are "'pregnant with possibilities for error.'"[17]

The Second Circuit then concluded that Collins was deprived of his right to be present at trial on two occasions—when the district court chose not to disclose the contents of the note and when the court engaged in an ex parte exchange with Juror #4. Further, the court held that the deprivation did not constitute harmless error, finding it could not say with "fair assurance" that the trial court's errors did not "substantially sway" the judgment. In so finding, the court distinguished this case from other cases reviewing the trial court's handling of juror misconduct. For instance, in one case in which a trial judge failed to disclose the contents of a note alleging juror misconduct and conducted ex parte interviews with two jurors, reversible error was not found because the trial judge limited the interviews to a factual inquiry, asked counsel afterwards if they had further suggestions, and offered counsel the opportunity to interview the jurors themselves.[18]

Contrasting the case at hand, the Second Circuit observed that "[t]he [trial] court singled out a dissenting juror, and emphasized to him the importance of reaching a verdict. We cannot ignore the possibility that Juror 4 walked out of the ex parte conference with the impression that he should not stand in the way of a prompt resolution of the case. Had the court initially shared the Note with counsel and solicited counsel's input before responding, any mistaken impressions may have been avoided."[19] Accordingly, the conviction was vacated and the case was remanded for a new trial.

Conclusion

Even though misrepresentations made by a prospective juror and misconduct by sitting jurors may impact a defendant's constitutional right to a trial by an impartial jury, to date, courts have been reluctant to reverse a conviction based on a juror's behavior. Whether the outcome in *Daugerdas* goes against this trend given the breadth and magnitude of the lies told by the juror in that case will be important to observe. If the convictions are sustained, circumstances that would justify a reversal will be hard to imagine. Despite the uphill battle, counsel should always be alert for juror misconduct. Further, as evidenced by the Second Circuit's decision in *Collins*, trial courts must be diligent in responding to juror misconduct in a way that properly includes the parties.

Leader and Innovator

Bob Morvillo led the white-collar criminal defense bar for more than 40 years. He was an innovator and expert in the legal world and a mentor to many. I owe much of my development and insight into the profession to the 31 years I spent as his colleague. His partners, colleagues, many friends in the New York legal community, and the white-collar criminal defense bar around the country will miss him.

.....●●.....

1. *Tanner v. United States*, 483 U.S. 108, 120 (1987).

2. __F.3d__, 2012 WL 34044 (2d Cir. Jan. 9, 2012).

3. No. 09 Cr. 581 (WHP) (S.D.N.Y.).

4. Memorandum of Law in Support of Defendants' Motion for a New Trial or, in the Alternative, for an Evidentiary Hearing Concerning Juror No. 1 ("Defendants' Memorandum of Law"), *United States v. Daugerdas*, 09 Cr. 581 at pp. 2-3 (S.D.N.Y. Aug. 15, 2011).

5. Defendants' Memorandum of Law at pp. 3-4.

6. *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (internal citations omitted). In *Colombo*, a juror was alleged to have deliberately withheld the fact that her brother-in-law was a lawyer for the government during voir dire because she wanted to sit on the case. The Second Circuit held that if it was determined on remand that the juror's brother-in-law was in fact a government lawyer, the defendant's conviction should be vacated.

7. 104 S. Ct. 845, 850 (1984).

8. See, e.g., *McDonough*, 104 S. Ct. at 849 (juror did not respond affirmatively to question about previous injuries to members of juror's immediate family "that resulted in any disability or prolonged pain or suffering" because he did not believe son's broken leg sustained as a result of an exploding tire constituted such an injury); *United States v. Stewart*, 433 F.3d 273, 304 (2d Cir. 2006) (affirming decision by district court rejecting motion for new trial where "certain ambiguities in the voir dire questions developed by the parties made it unclear that [juror's] responses deliberately concealed the truth").

9. Defendants' Memorandum of Law at p. 27 (citing *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997)).

10. Memorandum of Law of United States in Opposition to Defendants' Motion for a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure ("Government's Opposition Memorandum"), *United States v. Daugerdas*, 09 Cr. 581 at pp. 4-5 (S.D.N.Y. Sept. 9, 2011).

11. Government's Opposition Memorandum at pp. 10, 13 (emphasis in original).

12. Defendants Daugerdas, Guerin and Field's Supplemental Reply in Support of Defendants' Motion for New Trial or, in the Alternative, for an Evidentiary Hearing Concerning Juror No. 1, *United States v. Daugerdas*, 09 Cr. 581 (S.D.N.Y. Oct. 27, 2011).

13. Order, *United States v. Daugerdas*, 09 Cr. 581 (S.D.N.Y. Nov. 29, 2011). Also at issue during the hearing is whether one of the defendants, David Parse, waived his right to challenge the apparent misconduct of Conrad because his attorneys had a copy of the 2010 opinion from the New York Supreme Court, Appellate Division, showing that a Catherine M. Conrad was a suspended attorney seeking reinstatement from a suspension due to an alcohol disability before jury voir dire began. Parse's attorneys did not reveal this to the court when it was first discovered as they found it "inconceivable" that the subject of the disciplinary decision was the same individual as the prospective juror.

14. __F.3d__, 2012 WL 34044 (2d Cir. Jan. 9, 2012).

15. Id. at **2-3 (detailing substance of conversation between trial judge and Juror #4).

16. Id. at *4.

17. Id. (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978)).

18. Id. at *7 (referring to *United States v. Chang An-Lo*, 851 F.2d 547 (2d Cir. 1988)).

19. Id. at *7.

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NEWS / CRIME & COURTS

Testimony begins in ex-Yankee's juror misconduct hearing

October 30, 2014
5:49 PM MST

Photo Credit: Mike Balsamo

Two former jurors who convicted ex-New York Yankee Rusty Torres of sexually abusing a young girl returned to court Thursday and said they voted to convict him because they wanted to go home and felt pressured by fellow jurors.

Nassau County Court Judge Tammy Robbins ordered a fact-finding hearing after former baseball journeyman Rosendo "Rusty" Torres, 66, claimed in court papers that he had evidence jurors at his sex abuse trial had "compromised" on the verdict. Torres had been accused of having inappropriate sexual contact with two girls – ages 8 and 9 – when he was a coach at an after-school baseball program in Plainview.

Torres claimed jurors were split – six of them believing he was guilty and six believing he was innocent – on every count. He alleges they came to a "trade agreement" and found him guilty of sexually abusing one of the alleged victims and not guilty for the other girl. The jury convicted him of five counts of first-degree sexual abuse and acquitted him of two other sex abuse charges and a charge of course of sexual conduct against a child.

"Someone would say, 'I'm not going for these charges, but I'll go for those,'" a juror, identified in court only as Maureen, told the judge. "Everyone wanted to go home."

The woman – whose last name court officials wouldn't provide – said she was the last holdout on the 12-member panel and caved after feeling pressured by fellow jurors. She says she believes there wasn't enough evidence to convict Torres.

"Why didn't you stand your ground?" defense lawyer Troy Smith asked.

"I don't know. I should have," she responded.

The woman told the court she came forward because she thought there was an injustice.

Assistant District Attorney D.J. Rosenbaum argued that jurors changed their minds during deliberations because of the evidence in the case – not because of an "agreement." During cross-examination, the woman admitted she only came forward after being contacted by Torres' private investigator who told her Torres has cancer and that Torres' wife suffered a stroke.

Rosenbaum also questioned the woman about a telephone conversation in which she allegedly told the prosecutor she didn't recall details from the deliberations.

"I was probably just saying that to get you off the phone," the juror quipped.

A second juror, Jean Sheehan-Kaim, of Hicksville, said she believed Torres was innocent, but changed her vote because she was afraid the trial was taking too long.

"I changed to guilty when I heard [another juror] say we're going to be here another two weeks," she said Thursday.

"Did she have a crystal ball?" Rosenbaum shot back.

"I voted guilty because I needed to leave," that juror later said. "I had a new job that I was afraid I was going to get let go from."

Sheehan-Kaim also admitted that she told the judge she had voted guilty when every juror was

polled after the verdict. "I said yes because I didn't know what would happen if I stood up and said 'not guilty.'"

Testimony in the hearing continues Monday. Torres' lawyer has said he hopes Robbins will order a new trial if she finds there was juror misconduct. Prosecutors have argued there is no legal ground to set aside his conviction.

Recommended

Mike Balsamo
Port Jefferson Crime Examiner

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NEWS / CRIME & COURTS

Judge denies ex-Yankee's jury misconduct claim

November 10, 2014
2:07 PM MST

Photo Credit: Mike Balsamo

A Nassau County judge said Monday she didn't find there was jury misconduct in the child sex abuse trial of a former Yankee who claimed jurors had changed their votes in order to end deliberations.

The former major-leaguer, Rosendo "Rusty" Torres, 66, had claimed that jurors at his sex abuse trial earlier this year had "compromised" on the verdict. Torres had been accused of having inappropriate sexual contact with two girls – ages 8 and 9 – while he was a coach at an after-school baseball program. He was convicted of five counts of first-degree sexual abuse and acquitted on two other sex abuse charges and a charge of course of sexual conduct against a child.

Torres claimed jurors had initially been split on every count – with six of them believe he was guilty and six of them believing he was innocent – when they first began deliberations. He alleged there was a "trade agreement" in the jury room that jurors had changed their votes in order to end deliberations. He also claimed some jurors were pressured to change their votes and that others failed to disclose that they or their relatives were the victims of a crime.

Eight former jurors testified during a three-day fact-finding hearing to determine whether there had been jury misconduct in the case. Torres' defense lawyer, Troy A. Smith, said he had hoped Nassau County Judge Tammy Robbins would give the former baseball journeyman a new trial. But Robbins ruled Monday that Smith failed to meet his burden of proof and denied his motion to set aside Torres' conviction. The judge said discussions about whether some jurors or their family members were the victims of sexual offenses did not appear to have an impact on the jury's final decision.

"This was a contaminated verdict," Smith argued. "[One of the jurors] testified the main reason she changed her vote was because she needed to get out of there." That juror had testified last week that she believed Torres was innocent, but changed her vote because she was afraid the trial was taking too long. "I voted guilty because I needed to leave," she said during the hearing. "I had a new job that I was afraid I was going to get let go from."

Assistant District Attorney D.J. Rosenbaum had argued that testimony by five jurors called by the prosecution proved there wasn't a "trade agreement" and that the jury's verdict was based on the evidence presented at the trial. "If a jury collectively compromises...that's not improper, that's our jury system," Rosenbaum said. "Several jurors have regret, a change of heart, and the courts are very clear – that's not grounds to set aside a verdict."

Smith said he "respectfully disagreed" with Robbins' ruling. "We believe we will prevail at the appellate level," he said. A spokesman for Nassau DA Kathleen Rice said the judge's decision "helps clear the way for this defendant to finally be held accountable for the crimes he committed against a defenseless child."

867 F.Supp.2d 445
United States District Court,
S.D. New York.

UNITED STATES of America,
v.
Paul M. DAUGERDAS, et al., Defendants.

No. S3 09 Cr. 581(WHP). | June 4, 2012.

Synopsis
Background: Defendants who were convicted of multiple tax-related offenses moved for a new trial based on juror misconduct.

Holdings: The District Court, William H. Pauley III, J., held that:

[1] three defendants were entitled to new trial due to violation of right to impartial jury, and

[2] fourth defendant waived his claim for new trial based on juror misconduct.

Motions granted in part and denied in part.

Attorneys and Law Firms

*448 Nanette Louise Davis, Stanley John Okula, Jr., Jason Peter Hernandez, Rachel Peter Kovner, U.S. Attorney's Office, New York, NY, for United States of America.

Brian Jason Fischer, Jenner & Block LLP, Alexandra A. E. Shapiro, Caroline Rule, Sharon Louise McCarthy, Christopher Michael Egleson, Douglass Bayley Maynard, Barry H. Berke, Dani R. James, Erin Anne Walter, Paul Henry Schoeman, Susan E. Brune, Theresa Marie Trzaskoma, Paul Lewis Shechtman, Zuckerman, Spaeder LLP, New York, NY, Charles B. Sklarsky, Nicole A. Allen, Chris C. Gair, Jenner & Block LLP, Daniel E. Reidy, Erin L. Shencopp, Jones Day, Mark L. Rotert, William P. Ziegelmueller, Stetler & Duffy, Ltd., Chicago, IL, Laura Joy Edelstein, Brune & Richard LLP, San Francisco, CA, for Defendants.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

The right to a jury trial is a bulwark of liberty enshrined in the Constitution. Because "justice must satisfy the appearance of justice," courts need to ensure that tainted jury verdicts—even those reached after long and costly trials—do not stand. But justice also demands that a defendant having reason to suspect juror misconduct not remain silent in order to secure a risk-free trial.

The sanctity of an oath is central to the sound administration of justice. An oath impresses on one's conscience the duty to testify truthfully. And attorneys, as officers of the court, owe an unflagging duty of candor to the tribunal. When these foundational duties are breached, the integrity of the judicial process is undermined and a free society imperiled. This case lays bare the damage that ensues when the obligation to be forthright is cast aside.

The trial of this tax shelter fraud prosecution spanned three months and included 9,200 pages of testimony from forty-one witnesses. The Government produced more than twenty-two million documents during discovery, and the Court received approximately 1,300 exhibits in evidence. No expense was spared. On the ninth day *449 of deliberations, a jury returned a split verdict convicting Paul M. Daugerdas, Donna M. Guerin, Denis M. Field, and David K. Parse (collectively, "Defendants") of multiple tax-related offenses and acquitting Raymond Craig Brubaker. Pursuant to Federal Rule of Criminal Procedure 33(a), Defendants move for a new trial based on juror misconduct. For the following reasons, Defendants Daugerdas, Guerin, and Field's motion for a new trial is granted, but Defendant Parse's motion is denied.

BACKGROUND

The facts underlying this motion are not in dispute, and are gleaned from transcripts of the trial and related proceedings and the parties' submissions.

I. *Voir Dire*

On February 23, 2011, 450 prospective jurors reported to the courthouse and completed a basic hardship questionnaire. Catherine M. Conrad ("Conrad") was among them. The questionnaire posed three questions: (1) whether "service as a juror on a 3–month trial [would] cause undue hardship or extreme inconvenience"; (2) whether each prospective juror had "any difficulty reading or understanding English"; and (3) whether each prospective juror suffered "any physical ailment or other limitation that would make it difficult to serve as a juror." (*See* Declaration of Theresa Trzaskoma in Support of Defendants' Motion for a New Trial, dated July 8, 2011 ("Trzaskoma Decl.") Ex. 2, at 2–1 to 2–2.) Conrad answered each question "no." Later that day, the Jury Department provided counsel with a jury roll identifying the prospective jurors in the venire, and listing a "Catherine M. Conrad" with a Bronxville residence. (*See* Trzaskoma Decl. Ex. 1.) The following day, copies of the juror questionnaires were distributed to counsel. (Trzaskoma Decl. Ex. 2, at 2–1 to 2–2.) During a final pretrial conference on February 28, the Court excused a number of prospective jurors who had claimed hardships on their questionnaires. (Feb. 28, 2011 Transcript ("2/28 Tr.") 6.)

On March 1, 2011, voir dire commenced, and approximately 175 jurors, including Conrad, swore the following oath: "Do each of you solemnly swear that you will give true answers to all questions as shall be put to you touching upon your qualifications to serve as jurors in this case?" The Court sought to qualify forty-two prospective jurors from whom a twelve-person jury and six alternates would be selected. [1] Conrad was present in the courtroom throughout the three-day voir dire and was among the first to be seated in the jury box. After the prospective jurors were sworn, the Court explained, *inter alia,* the function of voir dire and that it is a French term meaning "to speak the truth." (Trial Transcript dated Mar. 1, 2011 through May 24, 2011 ("Trial Tr.") 10.) This Court then posed a number of questions to the panel as a whole, including five that are relevant to this motion:

> 1. "Do any of you know or have you had any association, professional, business, social, direct or indirect, with any member of the staff of the United States Attorney's Office for the Southern District of New York, the United States Department of Justice, or the Internal Revenue Service? Has anybody had any dealings with the U.S. Attorney's ***450** Office, the Department of Justice, or the IRS?" (Trial Tr. 84–85.)
>
> 2. "Are you or [has] any member of your family ever been a party to [a] lawsuit, that is, a plaintiff or a defendant in a civil case or a criminal case?" (Trial Tr. 105.)
>
> 3. "Have any of you or a close relative ever been involved or appeared as a witness in any investigation by a federal or state grand jury or any congressional committees or state legislative bodies or licensing authorities or planning boards?" (Trial Tr. 107.)
>
> 4. "Have any of you ever been a witness or a complainant in any hearing or trial, whether it be in the state or federal courts?" (Trial Tr. 108.)
>
> 5. "[H]ave you or any member of your family or any very close personal friend ever been arrested or charged with a crime?" (Trial Tr. 118.)

Conrad responded affirmatively to only two of these questions. In response to the first question, Conrad offered that her father "works for DOJ across the street" as "an immigration officer." (Trial Tr. 85.) She then assured this Court that his position would not affect her ability to be fair and impartial. (Trial Tr. 85.) In response to the second question, Conrad stated that she "was a plaintiff in a personal injury negligence case ... pending" in Bronx Supreme Court. (Trial Tr. 105.) Again, she represented that her personal injury action would not interfere with her ability to serve as a juror. (Trial Tr. 106.) Conrad did not provide any additional information or any other affirmative answers to questions posed to the group. This Court informed prospective jurors that "if any of you have an answer to any question that you prefer not to give in public, just let me know, and the lawyers and I will hear you up here at the sidebar of the bench." (Trial Tr. 15–16.) Throughout voir dire, several prospective jurors offered sensitive or potentially embarrassing personal information at sidebar. (*See, e.g.,* Trial Tr. 31, 40, 47, 52, 79, 82, 112.) Conrad did not.

After posing questions generally to the venire, this Court made inquiries of each prospective juror individually. Conrad was present for all of the individual questioning, including each prospective juror's responses and all of the Court's follow-up inquiries. Importantly, Conrad listened to the Court's individual voir dire of two jurors on the first day of

jury selection and had the opportunity to reflect overnight on how she would answer the following morning. (Trial Tr. 133–39.) The individual voir dire of Conrad proceeded on March 2 as follows:

> THE COURT: Now I think what I'd like to do is to return to some individual questioning of jurors. I think Ms. Conrad, Juror No. 3, that I was about to begin with you when we suspended yesterday. So first would you tell us what neighborhood you reside in?
>
> CONRAD: Bronx Village [sic] [Bronxville] in Westchester.
>
> THE COURT: How long have you lived at your current address?
>
> CONRAD: My whole life.
>
> THE COURT: Do you own or rent?
>
> CONRAD: We own.
>
> THE COURT: Who are the other members of your household?
>
> CONRAD: I live with my husband. He's retired at this point.
>
> THE COURT: What is he retired from?
>
> CONRAD: He owns some bus companies.
>
> THE COURT: Do you work outside the home?
>
> CONRAD: No. I'm a stay-at-home wife.
>
> THE COURT: Do you have any children?
>
> CONRAD: No.
>
> ***451** THE COURT: All right. What is the highest level of education you've attained?
>
> CONRAD: I have a BA in English literature [and] classics, and I studied archeology abroad.
>
> THE COURT: What do you do in your spare time?
>
> CONRAD: I like to read. We travel. I take care of an elderly aunt.
>
> THE COURT: How generally do you get your news?
>
> CONRAD: Periodicals, magazines, newspapers, radio, cable, internet.
>
> THE COURT: Can you identify someone for us who we'd all know who you admire most?
>
> CONRAD: Probably dating myself, but the ex-grid [sic] great Lynn Swann from the Steelers. Unbeknownst to many people, he did study ballet, and I admire him because I think he combined grace and grit under pressure.
>
> THE COURT: All right. Is there anything that you think it would be important for us to know about you in making a decision as to whether you should serve as a juror in this case?
>
> CONRAD: If the trial lasts more than three months, I'm still available.
>
> THE COURT: All right. Thank you very much. Is there any reason that you feel you could not be fair and impartial in this case, Ms. Conrad?
>
> CONRAD: Not at all.
>
> THE COURT: Thank you, ma'am.

(Trial Tr. 203–05.)

During the course of voir dire, this Court excused 117 prospective jurors from the venire. (*See, e.g.*, Trial Tr. 113–15, 293–95.) At the conclusion of voir dire on March 3, this Court asked whether counsel wished that further inquiry be made of any particular juror or the panel as a whole. No counsel requested any further inquiries. (Trial Tr. 354.) Following the exercise of peremptory challenges, this Court empanelled the jury, and Conrad became Juror No. 1. (Trial Tr. 353.) Each empanelled juror swore the following oath: "Do each of you solemnly swear that you shall well and truly try this case now on trial and give a true verdict according to the law and the evidence?" As discussed below, it is now undisputed that Conrad lied extensively during voir dire and concealed important information about her background.

II. *The Verdict*

On May 24, 2011—after eight days of jury deliberations and forty-six jury notes—the jury returned a split verdict against the five defendants. The jury convicted Daugerdas of one count of conspiracy to defraud the United States and the IRS, to commit tax evasion, and to commit mail and wire fraud in violation of 18 U.S.C. § 371 ("the conspiracy count"); eighteen counts of tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2; three counts of personal income tax evasion in violation of 26 U.S.C. § 7201; one count of corruptly obstructing and impeding the due administration of the Internal Revenue Laws in violation of 26 U.S.C. § 7212(a); and one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. The jury convicted Guerin of the conspiracy count; nine counts of tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2; one count of corruptly obstructing and impeding the due administration of the Internal Revenue Laws in violation of 26 U.S.C. § 7212(a); and one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. The jury convicted Field of the conspiracy count; four counts of tax evasion in violation of 26 U.S.C. § 7201; one count of corruptly obstructing and impeding the due administration of the Internal Revenue Laws in violation of 26 U.S.C. § 7212(a); and one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. The ***452** jury convicted Parse of one count of corruptly obstructing and impeding the due administration of the Internal Revenue Laws in violation of 26 U.S.C. § 7212(a) and one count of mail fraud in violation of 18 U.S.C. §§ 1341 and 2, but acquitted him of the conspiracy count and three counts of tax evasion. The jury acquitted Brubaker of all charges.

III. *Conrad's May Letter and Her True Identity*

Conrad authored a two-page type-written letter dated May 25, 2011 to Assistant United States Attorney Stanley J. Okula, Jr. ("Okula") praising the Government's prosecution of the case (the "May Letter"). The May Letter was postmarked May 28. On June 22, the Government forwarded the May Letter to the Court and defense counsel. (ECF No. 458.) In her letter, Conrad wrote, "I thought that you [i.e., Okula], Ms. Davis and Mr. Hernandez [other members of the Government's trial team] did an outstanding job on behalf of Our Government." In describing the jury's role, she stated that "I did feel that we reached a fair and just verdict based on the case, facts and evidence presented to us." She further explained that "we did have qualms with Mr. David Parse. I solely held out for two days on the conspiracy charge for him I wanted to convict 100%, (not only on that charge)—but on Tuesday, May 24, 2011, we had asked for the Judge's clarification of 'willfully' and 'knowingly', I believe, and I had to throw in the towel." Conrad went on for an additional two paragraphs discussing the strengths and weaknesses of the Government's case against Parse, the effectiveness of expert witness testimony, the persuasiveness of certain evidence, and the credibility of fact witnesses. She concluded her letter by writing, "I have learned, the saying a 'federal case' is REALLY a 'federal case', and I feel privileged to have had the opportunity to observe la creme de la creme—KUDOS to you and your team! ! !" (All punctuation and emphasis in original.)

According to Defendants, the May Letter caused Parse's trial counsel Brune & Richard LLP to investigate Conrad's background. That inquiry led to the current motion for a new trial based on Conrad's numerous lies and omissions during voir dire. This Court now recounts Conrad's torrent of false and misleading testimony.

A. *Personal Background*

Conrad lied about her educational, professional, and personal background. While she informed the Court that her highest level of education was a bachelor's degree, she in fact obtained her juris doctorate from Brooklyn Law School in 1997 and was admitted to practice law in New York in January 2000. (Trzaskoma Decl. Ex. 4; Ex. 27 at 27–2 to 27–3.) Further, although she informed the Court that she was a "stay-at-home wife," she had practiced law for some time until the New York Supreme Court Appellate Division, First Department (the "Appellate Division") suspended her law license. (Trzaskoma Decl. Ex. 27 at 27–3.) And the day before she was sworn as a prospective juror, she sought to have her law license reinstated. Conrad answered under oath that she owned a home and lived in Bronxville in Westchester County "all my life." (Trial Tr. at 203.) That, too, was a lie. In fact, Conrad rented an apartment and lived on Barker Avenue in the Bronx for years.

B. *Prior Litigation Experience*

Conrad also failed to disclose during voir dire the disposition of her personal injury action and she concealed the fact that she was a witness in that litigation. While Conrad represented that she was a plaintiff in a "pending" personal injury action, she failed to disclose that in May 2007, the ***453** Bronx

Supreme Court dismissed her case for her failure to appear for a compliance conference. (Trzaskoma Decl. Ex. 22, at 22–4.) The Bronx Supreme Court later reinstated the case because Conrad claimed that her failure to prosecute was the result of a hospitalization for medical issues "unrelated" to the lawsuit. (Trzaskoma Decl. Ex. 23, at 23–4; Ex. 24.) After seven days of trial in June and July 2010, a jury returned a verdict against Conrad, finding that the defendants had not been negligent. (Trzaskoma Decl. Ex. 26, at 26–3.) On March 24, 2011, the Bronx Supreme Court denied Conrad's motion to set aside the verdict. (Trzaskoma Decl. Ex. 28, at 28–5.) While this Court asked directly whether any juror had ever been a trial witness, Conrad never revealed to this Court that she had testified as a witness, both at trial and deposition or that a jury rejected her person injury claim and the only aspect of the case still pending was her motion for a new trial and a judgment notwithstanding the verdict.

C. *Prior Investigation by State Licensing Authority*

Conrad also hid the fact that she was the subject of an investigation and disciplinary proceedings conducted by the Departmental Disciplinary Committee (the "Disciplinary Committee") of the Appellate Division. In December 2007, the Appellate Division suspended Conrad from the practice of law for failing "to cooperate with the [Disciplinary] Committee's investigation into two complaints alleging professional misconduct which threatens the public interest." *In the Matter of Catherine M. Conrad ("2007 Suspension Order"),* 48 A.D.3d 187, 188, 846 N.Y.S.2d 912 (1st Dep't 2007). According to one complaint, Conrad "violated court orders and failed to appear as directed, ultimately resulting in the dismissal of the action." *2007 Suspension Order,* 48 A.D.3d at 188, 846 N.Y.S.2d 912. According to the second complaint, she failed to oppose an order to show cause, resulting in an adverse ruling against her client. *2007 Suspension Order,* 48 A.D.3d at 188, 846 N.Y.S.2d 912. In response to her state bar suspension, on January 4, 2008, Conrad was suspended from the bar of the United States District Court for the Southern District of New York. *See In re Catherine M. Conrad,* No. M–2–238 (JSR) (S.D.N.Y. Jan. 4, 2008); *see also* Local Civ. Rule 1.5(b)(5) (violations of the New York State Rules of Professional Conduct are grounds for discipline, including suspension). On January 29, 2008, Conrad was suspended from the bar of the United States District Court for the Eastern District of New York. *See In re Catherine M. Conrad,* No. MC–08–010 (BMC) (E.D.N.Y. Jan. 29, 2008).

Shortly after her December 2007 suspension, Conrad began cooperating with the Disciplinary Committee's investigation and acknowledged an alcohol dependency. *In the Matter of Catherine M.Conrad ("2010 Suspension Order"),* 80 A.D.3d 168, 169–70, 913 N.Y.S.2d 187 (1st Dep't 2010). Conrad moved to convert her existing suspension to a medical suspension *nunc pro tunc* and sought an order vacating the suspension and reinstating her to the practice of law due to her yearlong sobriety. *2010 Suspension Order,* 80 A.D.3d at 169, 913 N.Y.S.2d 187. She attributed her earlier failure to cooperate with the investigation and her underlying professional misconduct to her alcohol dependence. *2010 Suspension Order,* 80 A.D.3d at 169–70, 913 N.Y.S.2d 187. As part of the Disciplinary Committee's investigation, Conrad submitted to a psychiatric evaluation in May 2010. The examining psychiatrist determined that Conrad was not yet "fit to re-commence the practice of law." *2010 Suspension Order,* 80 A.D.3d at 169, 913 N.Y.S.2d 187. As a result, on December 9, 2010, the Appellate Division modified the ***454** 2007 Suspension Order and indefinitely suspended Conrad from the practice of law because she suffered from a "disability by reason of physical or mental infirmity or illness." *2010 Suspension Order,* 80 A.D.3d at 170, 913 N.Y.S.2d 187.

On February 28, 2011, just days after she reported for jury service, and the day before voir dire commenced, Conrad filed an application for reinstatement to the bar. (Affirmation of Paul Shechtman, dated Oct. 26, 2011 ("Shechtman Aff'n") Ex. F: Notice of Motion for Reinstatement as Attorney, dated Feb. 26, 2011.) Conrad's application for reinstatement was riddled with falsehoods. She failed to report that she had not paid a fine imposed on her by the Eastern District of New York, even though the application required that disclosure. (*See* Shechtman Aff'n Ex. A: Letter from Chief Counsel Jorge Dopico of the Disciplinary Committee, dated Aug. 9, 2011 ("Dopico Letter"), at 3.) She also stated, in response to a direct question on the application, that she had not used any other names, even though she had used the name "Catherine Rosa" when arrested in May 2009. (Dopico Letter, at 5). Finally, she stated that she had no arrests or convictions since her suspension in 2007, when in fact she had pleaded guilty to shoplifting charges in October 2009. (Dopico Letter, at 5.) Because of this deceitful conduct, in August 2011, the

Disciplinary Counsel recommended that Conrad's application for reinstatement be denied and that she be disbarred *nunc pro tunc* to February 28, 2011. (Dopico Letter, at 9.)

D. *Criminal History*

During voir dire, Conrad also concealed her and her husband's extensive histories of criminal arrests and convictions. According to New York and Arizona criminal records, Conrad was arrested and charged with crimes on at least five occasions. Conrad's husband, Frank J. Rosa ("Rosa"), is a career criminal.

On April 17, 1998, Conrad was arrested in New York and charged with driving while intoxicated, reckless endangerment, leaving the scene of an accident, assault, resisting arrest, and harassment. (Trzaskoma Decl. Ex. 11, at 11–1.) On October 21, 1998, she pleaded guilty to the misdemeanor driving while intoxicated charge. (Trzaskoma Decl. Ex. 11, at 11–1.) Shortly before that plea, on September 23, 1998, she was arrested again and charged with criminal contempt and aggravated harassment. She pleaded guilty to these misdemeanors on May 17, 1999, and was sentenced to three years probation. (Trzaskoma Decl. Ex. 11, at 11–1.)

On August 4, 2007, Conrad was arrested in Arizona for disorderly conduct. (Trzaskoma Decl. Ex. 14.) At approximately 5:00 a.m., local police responded to a call from Conrad, complaining of a domestic dispute at a motel with Rosa, who she had married six weeks earlier. (Trzaskoma Decl. Ex. 14, at 14–10.) As the police investigated, she was highly disruptive, disturbed other hotel guests, and ignored the responding officers' requests to quiet down. Ultimately, the officers placed Conrad under arrest and booked her at the Navajo County Jail on charges of disorderly conduct. On August 7, 2007, Conrad was released on her own recognizance and ordered to appear for arraignment on August 14. (Trzaskoma Decl. Ex. 14, at 14–17.) She failed to appear and an arrest warrant was issued. (Trzaskoma Decl. Ex. 14, at 14–14 to 14–16.) It appears that warrant remains outstanding.

In May 2009, Conrad was arrested in New York on two separate occasions for shoplifting. (Trzaskoma Decl. Ex. 11, at 11–2 to 11–3.) On May 6, she was arrested for shoplifting $47 worth of groceries from a Yonkers supermarket. (Trzaskoma ***455** Decl. Ex. 15, at 15–2.) Days later, on May 14, she was arrested again for shoplifting approximately $27 worth of goods from a New Rochelle supermarket. (Trzaskoma Decl. Ex. 16, at 16–5.) Both charges were resolved by a plea to a single count of petit larceny. (Trzaskoma Decl. Ex. 15, at 15–1.) Under her plea agreement, Conrad was placed on probation for three years. (Trzaskoma Decl. Ex. 16, at 16–1.) A July 14 probation report noted that Conrad was in an outpatient treatment program for alcoholism. (Trzaskoma Decl. Ex. 16, at 16–11.) An October probation report indicated that the outpatient program expelled her because of her continued use of alcohol and recommended a four-week inpatient program. (Trzaskoma Decl. Ex. 16, at 16–4.) While it is unclear whether she participated in that program, Conrad was on probation during voir dire and throughout the entire trial of this case.

Conrad's fabrication that her husband was retired from "own[ing] some bus companies" was designed to conceal his criminal past. According to public records, from 1980 through the late 1990s, Rosa was convicted of at least nine criminal offenses. (Trzaskoma Decl. Ex. 17.) Among other crimes, he was convicted of receiving stolen property, criminal contempt, possession of a controlled substance, forgery, and illegal possession of a firearm. (Trzaskoma Decl. Ex. 17.) He has been incarcerated on numerous occasions and served a seven year sentence in Northern State Prison in New Jersey. (Trzaskoma Decl. Ex. 18, at 18–1.) When sentencing Rosa, the New Jersey Superior Court, Middlesex County, observed that Rosa "had substantial contacts with the justice system," "an extensive history of mental illness," and a "history of domestic violence." (Trzaskoma Decl. Ex. 17, at 17–45.) Like Conrad, he also has a history of alcoholism. (*See* Trzaskoma Decl. Ex. 17, at 17–40.)

IV. *The December 20 Advice of Rights Hearing*

On November 15, 2011, after briefing on Defendants' motion for a new trial was complete, this Court concluded that an evidentiary hearing was necessary. (ECF No. 499.) On November 29, this Court set the hearing for February 15–16 ("Hearing"). (ECF No. 500.) In anticipation of that hearing, this Court directed Conrad to appear in person on December 20, to instruct her regarding her constitutional rights and to appoint counsel for her if she could not afford an attorney. (ECF No. 502.) The Court directed the U.S. Marshals to serve Conrad with a copy of the order to appear. The marshals

served Conrad at her apartment in the Bronx, and on receiving the order, she stated, "I think I know what this is about, I failed to disclose that I'm a lawyer, but they never asked, so I didn't lie." Conrad recognized a photograph of herself that the marshals carried and said, "that picture must be from my rap sheet." (GX 3500–2, U.S. Marshals Report dated Dec. 16, 2011.)

At the December 20 hearing, this Court delivered its instructions to Conrad on the record, with a deputy clerk, two deputy U.S. marshals, and a Criminal Justice Act attorney present. All counsel and the parties consented to participate by telephone. At the hearing, Conrad's behavior was erratic and her remarks often incoherent. Several times the Court directed her to sit down, and deputy marshals blocked her attempts to leave the courtroom before the proceedings were concluded. (Dec. 20, 2011 Transcript ("12/20 Tr.") 11–12.) Conrad advised the Court that there was no reason for an evidentiary hearing because, in her view "[Defendants are] fricken crooks and they should be in jail and you know that." (12/20 Tr. 17.) She went on to opine: "come on, this is anything in favor of the defendants.... And they ***456** brought the motion against the prosecution .... It's ridiculous." (12/20 Tr. 17.)

V. *February 15–16 Juror Misconduct Hearing*

At the Hearing, Conrad admitted that she lied to the Court to make herself more "marketable" as a juror.[2] (Feb. 15 and 16, 2012 Hearing Transcript ("Hr'g Tr.") 153, 160, 208.) She also testified that she believed that if the truth were known, "the defense counsel would be wild to have me" on the jury. (Hr'g Tr. 210.) Conrad reasoned that Defendants would want "crooks" on the jury because they themselves were "crooks." (Hr'g Tr. 210, 229.) Indeed, Conrad admitted that she had used this to rationalize her conduct to herself at the time of voir dire. (Hr'g Tr. 229 ("Q. You told yourself at the time that it was OK from the defendants' perspective because, if anything, somebody who was married to a criminal would tend to favor other criminals, right? A. I guess it can be characterized as that.").) Conrad acknowledged that she made the conscious decision to perjure herself between the first and second day of voir dire. After hearing the questions posed to the first two prospective jurors, she conjured up a personal profile that she thought would be attractive. (Hr'g Tr. 185.) Throughout the trial she thought of the fact that she had lied to get on the jury, and she knew what she had done was wrong. (Hr'g Tr. 168.)

At the Hearing, Conrad opined that "most attorneys" are "career criminals." (Hr'g Tr. 148.) Daugerdas and Guerin are attorneys, and while Parse is licensed to practice law, he is an investment banker. She twice underlined the difference in financial success between herself and Daugerdas. When asked if she had about $14,000 in assets, Conrad retorted: "Correct. Much less than your client." (Hr'g Tr. 134.) When asked whether she was financially successful as a lawyer, Conrad testified: "I don't live an extravagant lifestyle like Mr. Daugerdas." (Hr'g Tr. 136–37.) She also lashed out at defense counsel. When asked whether her behavior at the December 20 hearing was irrational, she shot back, "I'm not University of Chicago trained"—a reference to her cross-examiner's law school alma matter. (Hr'g Tr. 105–06.) Similarly, when asked if failing to tell the Court that she was an attorney was a lie, Conrad responded, "You're the evidence professor"—a reference to defense counsel's adjunct teaching position at DePaul University College of Law. (Hr'g Tr. 143.) These responses, among others, indicate that contrary to the Court's instructions, Conrad may have accessed electronic databases to learn about the professional backgrounds of various trial participants.

When given a chance to explain her declaration that all the Defendants were "crooks" and that their motion for a new trial was "ridiculous," she claimed repeatedly that she did not recall what she meant to convey. She also claimed she did not know why she made those statements because "I'm not a psychologist." (Hr'g Tr. 115.)

Throughout the Hearing, Conrad behaved erratically and responded to questions ***457** evasively. She claimed repeatedly that she could neither understand the questions nor remember the facts. For instance:

- Conrad claimed that she did not recall why she told the Court on December 20 that the Defendants' motion was ridiculous because she was not a psychologist. (Hr'g Tr. 115; *see also* 12/20 Tr. at 17.)
- Conrad claimed that she did not recall telling the deputy clerk on December 20 that her time was being wasted by being ordered to appear and that she was going to leave

the courthouse. (Hr'g Tr. 117–18; *see also* 12/20 Tr. at 21.)

- Conrad said that based on her experience as a lawyer, she did not know whether it was unusual for a lawyer to defy a judge's instructions to appear for a hearing because she was not a psychologist. (Hr'g Tr. 119.)
- When asked what medications she takes, Conrad responded: "Water." (Hr'g Tr. 120.)
- When asked whether her attempt to reject a subpoena served on her in front of the Court on December 20 was irrational, Conrad quipped that it was "irrelevant." (Hr'g Tr. 122.)
- Conrad claimed not to know why she told the Court on December 20, "this is garbage." (Hr'g Tr. 127; *see also* 12/20 Tr. at 8, 18.)
- Conrad variously claimed that she had no idea whether she was a financial success as a lawyer, that one would need to ask her mother to ascertain the answer, and that she did not know what the question meant. (Hr'g Tr. 134–36.)
- Conrad claimed she did not remember telling the Court on December 20 that her finances were "[n]one of [the Court's] business," and that she would retain "[herself] or [her] husband, the convicted felon," to act as her attorney. (Hr'g Tr. 138–39; *see also* 12/20 Tr. at 12, 16.)

After lengthy examinations by counsel, this Court asked Conrad directly why she had committed perjury to make herself "marketable for the jury." Conrad replied:

> As I had mentioned, I knew I could be a fair, unbiased juror and substantivelywise [sic] it seemed as if it would be an interesting trial experience. And having been suspended for so long, I guess mentally I would think maybe I'm back in the swing of things now.
>
> I know misrepresenting myself and the perjury was wrong, and I apologize to the Court and to everybody else who has, I'm sure, devoted immeasurable amount of time, hours. Maybe it just wasn't for the $40. That's basically it. I know a lot of resources were spent because of this and I apologize to everybody. It wasn't a calculated folly, it was just maybe folly. But I know I served and I did my civic duty and I believe I was fair and just in rendering the verdict.
>
> I know my disclosures definitely would not have allowed me to sit as a juror. I also know that I could have requested a side bar to speak with your Honor and the other attorneys during the voir dire and I didn't do that. I apologize to everybody. (Hr'g Tr. 236–37.)

Conrad's attempt to express some degree of contrition reflects a jarring disconnect from reality. This was not mere folly. She made a calculated, criminal decision to get on the jury. Such a stratagem undermines the integrity of the jury system, the fair administration of justice, and is an affront to this Court. The human toll her deliberate lies inflicted on the parties, their counsel, the witnesses, and the jurors, who faithfully served, is inestimable. ***458** And there are myriad collateral consequences. For example, the Clerk of Court disbursed $110,569.85 for attendance and mileage fees and jury meals for this trial. (ECF No. 532.) Numerous witnesses face the prospect of having their lives interrupted again to testify at any retrial. And the fates of the cooperating witnesses continue in suspense.

Finally, it appears that Conrad's criminal conduct with respect to jury service began before voir dire. According to the records of the Jury Clerk, on November 2, 2010, Conrad declared under penalty of perjury, on a standard juror qualification questionnaire, that her permanent address was in Bronxville, New York. She also claimed two grounds for requesting to be excused: (1) prior jury service within the last four years and (2) true hardship if required to serve. (ECF No. 533.) Yet, this Court asked during voir dire "[h]ave any of you ever served on a grand jury or a trial jury, whether in federal, state, or local court prior to now?" (Trial Tr. 88.) Conrad said nothing about any prior jury service. She also volunteered that she was available to serve longer than three months. (Trial Tr. 204.) And because she lied about her permanent residence, she collected an additional $765 in travel expenses based on her use of a Westchester zip code. In fact, Conrad received a total of $3,777 in attendance and travel expenses from the Clerk of the Court as a result of her fraudulent conduct. (ECF Nos. 532, 534.) As these lies demonstrate, Conrad's startling dishonesty began before trial, persisted through the proceeding, and continued well after the verdict.

VI. *Brune & Richard's Pre–Verdict Investigation of Conrad*

In their memorandum of law in support of their motion for a new trial, filed July 8, 2011 ("Defendants' Brief"), counsel for Defendants[3] represented that "[t]he tone and content of [Conrad's May Letter], which were in sharp contrast to the image Conrad had projected through the trial ('always head down, taking notes!'), caused defendants concern and *prompted* them to investigate." (Memorandum of Law in Support of Defendants' Motion for a New Trial, dated July 8, 2011 ("Def. Br.") at 9 (emphasis added) (quoting the May Letter).) Defendants also stated they learned of, *inter alia,* Conrad's status as a suspended lawyer and the pending disciplinary proceedings against her by "conducting public records searches *in the wake of Conrad's May 25, 2011 post-verdict letter to the government[.]"* (Def. Br. at 3 (emphasis added).) They further stated that "Conrad's voir dire responses did not provide even a hint of bias and she exhibited no outward signs of any mental or emotional instability[.]" (Def. Br. at 8.) And they represented that they "had no basis to inquire whether Conrad was lying in response to each of the Court's questions [during voir dire]." (Def. Br. at 32 n. 13.) With no other disclosures by Defendants, the clear implication of these statements was that they had no idea of Conrad's true identity and background until their post-verdict investigation following the receipt of Conrad's May Letter.

On July 15, 2011, the Court convened a telephone conference with all parties and counsel to discuss Defendants' motion for anew trial.[4] (July 15, 2011 Transcript *459 ("7/15 Tr.").) During the conference, the Government stated that it "was unaware of any of the facts that were brought forth in connection with defendants' motion" and expressed its desire to unearth any potential waiver arguments. (7/15 Tr. 9.) In response, this Court announced: "I fully intend as part of the record on this motion to ascertain from each of the defendants ... whether any of them were aware of the disturbing things that have been revealed by defense on this motion concerning Juror Number One." (7/15 Tr. 11.) This Court added that it was "perfectly prepared to let defendants respond now or to provide a letter[.]" (7/15 Tr. 11.) This inquiry was not an invitation for counsel to engage in an iterative process testing the limits of how little could be revealed. Officers of the court are not adverse witnesses. *Cf. Bronston v. United States,* 409 U.S. 352, 362, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973) (holding that "any special problems arising from the literally true but unresponsive answers are to be remedied through the questioner's acuity[.]" (internal quotation marks omitted)). The Court's directive called for prompt and complete disclosure.

Without hesitation, Defendant Field's counsel responded, "On behalf of Mr. Field we can say we have no knowledge of the fact that she was an attorney or of the things that came to light now." (7/15 Tr. 11.) Then, counsel for Daugerdas chimed in, representing that "I can say the same with regard to defendant Daugerdas[.]" (7/15 Tr. 11.) Guerin's counsel did the same: "I will advise the court that no member of the Guerin defense team ... [or] the defendant herself were aware of any of the issues that have surfaced with regard to Juror Number One. Everything I thought I knew about Juror Number One was learned by us in the course of the voir dire proceedings in this case." (7/15 Tr. 11–12.) Lastly, Parse's counsel, Theresa Trzaskoma ("Trzaskoma"), responded, "Your Honor, we were not aware of the facts that have come to light and I think that if your Honor deems it appropriate, we can submit a letter." (7/15 Tr. 12.) This Court invited a submission from Parse's counsel to make certain that no jury consultant had any information about Conrad before the verdict. (7/15 Tr. 12.) The colloquy concluded with a seemingly innocuous feint by Parse's counsel: "The only thing additional that I would offer, your Honor, is—well, we can address this in the letter. I think it's more appropriate." (7/15 Tr. 12.)

After this initial salvo, counsel for Parse—Susan Brune ("Brune"), Trzaskoma, and Laurie Edelstein ("Edelstein"), each partners of the firm Brune & Richard LLP (collectively, "Brune & Richard" or "Parse's attorneys")—began to disclose in stages the full extent of their investigation into Conrad's background. Indeed, they acknowledged candidly that had the Court or the Government not inquired, Brune & Richard would never have disclosed any of their investigation into Conrad. (Hr'g Tr. 79 ("[HERNANDEZ:] Ms. Trzaskoma, if the government had not inquired about your firm's knowledge about certain facts that you had about Catherine Conrad, were you ever going to disclose that information to the Court? [TRZASKOMA:] I don't know I can answer that.... It didn't occur to me to disclose it. As I said, I regret that. But I can't say that it wouldn't have come up subsequently."); Hr'g Tr. 317 ("COURT: Ms. Brune, ... would your firm have disclosed the information in your firm's July 21 letter and the investigation into Juror No. 1 if the Court had not inquired or

the government failed to raise the waiver issue? [BRUNE]: I don't think we would have your Honor[.]"); Hr'g Tr. at 357 ("OKULA: [A]re you saying that you would have felt comfortable that you had fulfilled all your obligations if the Court had decided *460 this motion without learning of the facts concerning what your firm knew prior to receiving the [May Letter]? Yes or no. [EDELSTEIN]: Yes.").)

A. *The July 21 Brune & Richard Letter*

When Brune & Richard's promised letter did not materialize, the Government prodded them on July 19 to provide their letter by My 21. (*See* ECF No. 469.) On July 21, Brune submitted a letter revealing for the first time that prior to voir dire, Brune & Richard had conducted a Google search of the terms "Catherine Conrad" and "New York" and discovered the 2010 Suspension Order, suspending a Catherine M. Conrad from the practice of law. (Brune & Richard Letter dated July 21, 2011 ("July 21 Letter"), at 1, ECF No. 464.) But because Conrad stated during voir dire that her highest level of education was a B.A. in English Literature, the Brune & Richard trial team concluded that Conrad could not be the suspended lawyer. (July 21 Letter, at 2.) Despite the exact match of Conrad's name with the middle initial "M." on both the jury roll and the 2010 Suspension Order, Brune & Richard ruled out the possibility that Conrad lied during voir dire, and they did not raise their discovery of the 2010 Suspension Order with the Court. (July 21 Letter, at 2.)

While ruling out the possibility that Conrad was lying, Brune & Richard, along with other defense counsel, the Government, and the Court, raised far more minor issues during voir dire. Defense counsel for Daugerdas and Guerin had a juror excused because "he put his head on his fingers." (Trial Tr. 114.) Counsel for Field had a postal worker excused because the prospective juror "might be stressed." (Trial Tr. 126.) On the third day of voir dire, Brune & Richard challenged a prospective juror's impartiality on the grounds that he had contacts with law enforcement agencies and because he was "wearing an FBI turtleneck today." (Trial Tr. 337.) The Government had a juror removed for cause due to his "extreme lack of desire to serve." (Trial Tr. 175–77.) Based on a prospective juror's apparent ethnicity and residence in Rockland County, the Government asked the Court to investigate whether he used a Spring Valley tax preparer whom the Government prosecuted fifteen years ago, and whose clients were primarily Haitian. (Trial Tr. 245–46.) The Court ruled out that remote possibility in less than one minute with three direct voir dire questions. (Trial Tr. 318.) This Court removed one prospective juror because she supposedly found the subject matter of the case so "boring" that she could not focus on it. (Trial Tr. 29.) Similarly, the parties consented to the removal of other jurors based on their behavior or odd demeanor. (Trial Tr. 114–15, 294.)

In the July 21 Letter, Brune & Richard also disclosed for the first time that they had conducted additional research about Conrad following her submission of a note to the Court on May 11, 2011 (the "Juror Note"), in the midst of closing arguments. (July 21 Letter, at 2.) The Court shared the contents of the Juror Note with counsel at the end of the day after closing arguments concluded. (Trial Tr. 8832.) In the Juror Note, Conrad asked whether the Court would instruct the jury on the legal doctrine of *respondeat superior* and posed a question about vicarious liability. (Trial Tr. 8832.) No party had raised either term during trial, and neither term was germane to the questions at issue.

The Juror Note prompted Trzaskoma to direct a paralegal to conduct further research on Conrad early the next morning. The paralegal conducted a Google search and located the 2007 and 2010 Suspension Orders, which suspended "Catherine M. *461 Conrad" from the practice of law in New York. (July 21 Letter, at 2.) The paralegal also searched Westlaw for information on "Catherine M. Conrad," generated a report (the "Westlaw Report"), and provided it to Trzaskoma. (July 21 Letter, at 2; Ex. 1.) The Westlaw Report—in Brune & Richard's hands just after the start of jury deliberations—was freighted with information revealing Juror No. 1's hidden identity. The Westlaw Report lists a previous address for Catherine M. Conrad in Bronxville—the same exact name and town listed for Conrad on the jury roll—and also shows that Conrad was a suspended attorney with a Bronx address. It lists Robert J. Conrad[5] as a member of Conrad's household and indicates that Conrad was involved in a civil lawsuit in Bronx Supreme Court. The Westlaw Report links the Bronx civil suit to Conrad—the suspended attorney—with a "Confidence Level" of 99%.

According to the July 21 Letter, after receiving the Westlaw Report, "Trzaskoma had the initial thought that the lawyer and the juror were potentially one and the same, but she reviewed the report and found it confusing, internally

inconsistent and not reliable." (July 21 Letter, at 2.) Trzaskoma then conferred with Brune and Edelstein. They believed Conrad's use of legal terms in the Juror Note was consistent with her involvement in a personal injury action and thought that it was "inconceivable" that Conrad lied during voir dire. Thus, they concluded collectively that she could not be the suspended attorney. (July 21 Letter, at 2–3.) After reaching that conclusion, they did not bring any of the underlying information to the attention of the Court or the Government. Nor did they revisit the question between May 12 and May 24, when the jury returned its verdict.

After receiving Conrad's post-verdict May Letter, Parse's attorneys conducted another Google search of Conrad and once again located the 2010 Suspension Order. (July 21 Letter, at 3.) This time, they matched a telephone number Conrad provided in the May Letter with a telephone number associated with Conrad on the New York State Unified Court System's attorney registration website. (July 21 Letter, at 3.) At this point, Parse's trial team purportedly realized, for the first time, that it was no longer "inconceivable" that Conrad was not who she claimed to be during voir dire. (July 21 Letter, at 3.) Brune & Richard then conducted a two-week investigation, which unearthed Conrad's personal injury lawsuit filings, her property records, her criminal records, her husband's criminal records, and their marriage records. (July 21 Letter, at 3–4.) Only then did they apparently conclude that they had the metaphysical certainty necessary to alert this Court to Conrad's juror misconduct and to seek a new trial for Parse. (July 21 Letter, at 3–4.)

Upon receiving the July 21 Letter, this Court scheduled another conference call with the parties and counsel. During that call, this Court questioned Brune about the discrepancies between the version of events provided in the motion papers and the July 21 Letter. (*See* July 22, 2011 Transcript ("7/22 Tr.") 5.) Brune endeavored to explain:

> Your Honor, when we submitted the brief that we did we were submitting with the other three lawyers and as demonstrated by the statements that three of the firms made on the phone on the Friday [July 15th] conference, their ***462** level of knowledge is apparently non-existent and our situation is different and it is for that reason that Ms. Trzaskoma proposed to file the letter which we did as opposed to just responding on the call. We did not know that this juror was essentially posing as a different person at no point during the trial.
>
> We certainly anticipated that the government was going to raise the issue of waiver, it features prominently in the Supreme Court case that controls here, and we anticipated that when he inquired, which he inevitably was going to do, we were going to lay out the facts accurately as we have. And my sense of what we are trying to accomplish —but of course your Honor will guide me on this-is that Mr. Okula needed the facts so that he can make whatever waiver argument he proposes to make in his brief. And it is with that in mind, and I of course also responded to the Court, that I laid this out.
>
> But, I certainly didn't mean to suggest by our opening brief that we had no information about Ms. Conrad. We had the information that I've laid out but at no point did we know that she was perpetrating a fraud on this Court and unfortunately harming Mr. Parse in the way that she did.

(7/22 Tr. 5–6.)

B. ***Additional Disclosures by Parse's Attorneys***

In response to the revelations in Brune & Richard's July 21 Letter, the Government sought discovery from Defendants to determine precisely what they knew concerning Conrad prior to the jury verdict. Specifically, the Government sought, *inter alia,* "[a]ny and all documents concerning any and all research performed by the defendants, their counsel, and their counsel's employees, agents, and consultants, including any jury or trial consultant, or by anyone on their behalf, as to Juror # 1, Catherine M. Conrad (including but not limited to searches related to 'Catherine Conrad'), prior to the return of the verdict on May 24, 2011." (ECF No. 469.)

In a letter submission to the Court and during an August 8 telephone conference, Parse's attorneys resisted the Government's discovery requests. First, Brune urged this Court to decide the legal question of whether Parse could ever waive his Sixth Amendment right to an impartial jury before reaching any discovery issues. Second, Brune argued that most of the material sought by the Government was protected by the attorney work product doctrine. (Aug. 8, 2011 Transcript ("8/8 Tr.") 10–11.) This Court rejected both arguments during the August 8 teleconference. In ruling that the Government had the right to determine the extent

and timing of Parse's attorneys' knowledge of the facts relating to Conrad, this Court ordered Brune & Richard to comply with five out of six of the Government's document requests and directed counsel for Daugerdas, Guerin, Field, and Brubaker to submit affidavits with respect to their pre-verdict knowledge of Conrad.[6] (8/8 Tr. *463 12–14.) With respect to any claim of attorney work product privilege, the Court directed Brune & Richard to submit a detailed privilege log and alerted counsel that the Court would conduct an *in camera* review of any documents withheld as work product. (8/8 Tr. 14.) On August 30, Stillman Friedman & Shechtman, P.C.[7] appeared on behalf of Parse. (ECF No. 486.)

As a result of the Court's August 8 discovery ruling, significant new details emerged concerning Brune & Richard's knowledge and investigation of Conrad during trial. (*See* Brune Affidavit dated Sept. 15, 2011 and Attached Exhibits ("Brune Aff.").) Document discovery revealed that prior to voir dire, Parse's attorneys created a "juror snapshot" where they recorded Conrad's middle initial as M. (Brune Aff. ¶ 5, Ex. C). Thus, they knew Conrad's full name from the jury roll prior to voir dire, and incorporated that knowledge in their research. Conrad's full name matched the name on the 2010 Suspension Order, which was in their possession and should have set off an alarm.

Further, Brune & Richard e-mails reveal that on May 12 when the jury began its deliberations, Trzaskoma expressed her belief that the suspended attorney Catherine M. Conrad and Juror No. 1 were the same person. (Brune Aff., Ex. J (E-mails).) The e-mails pinpoint the precise sequence of exchanges on May 12 among Parse's trial team[8]:

7:25 a.m.: Trzaskoma requests that her team "send [her] all of our intelligence on juror # 1, including pre-voir dire info we thought we had."

7:54 a.m.: Paralegal David Benhamou e-mails Trzaskoma a summary of Conrad's answers during voir dire.

8:02 a.m.: Vivian Stapp, an associate at Brune & Richard, responds to Benhamou's email regarding the lack of information in their files. She observes: "We don't have Nardello[9] info gathered for her. She was initially given a 'Z' grade and then it looks like we gave a 'D' at some point, probably because we thought she was that lawyer.[10] Unfortunately we don't have anything else for her. I'll keep looking but that's what the spreadsheet is showing. A little more: 'is a plaintiff in a pending personal injury case in South Bronx Division.' "

*464 10:55 a.m.: Trzaskoma advises Benhamou, "What we found before voir dire was that maybe she was a suspended lawyer."

11:06 a.m.: Randall Kim, an associate at Brune & Richard, replies to Stapp: "We (I thought TT [Trzaskoma]) found something more, which more clearly suggested she has been/is and [sic] alcoholic."

11:07 a.m.: Benhamou sends Kim, Stapp, and Trzaskoma the link to the 2010 Suspension Order.

11:13 a.m.: Stapp then observes to Kim, "We have Conrad down as a 'Do Not Search.' I don't think she's that lawyer, unless she blatantly omitted information during voir dire when describing her educational background (or was able to become a lawyer without going to law school.)"

11:15 a.m.: Benhamou, at Trzaskoma's request, sends Trzaskoma, Kim, and Stapp an excerpt of Conrad's voir dire testimony.

11:17 a.m.: After reviewing Conrad's voir dire testimony, Trzaskoma instructs Benhamou, Kim, and Stapp to keep a dossier on Conrad, by noting: "Ok, unless Conrad totally lied about her highest level of education, it can't be the same person as the suspended lawyer. But let's keep a little dossier on her."

11:22 a.m.: Benhamou asks Trzaskoma if she wants him to "do a people search on Westlaw," and she responds less than one minute later, "Sure."

2:24 p.m.: Benhamou sends Trzaskoma the Westlaw Report with the following message: "Attached is a Westlaw report. I picked the Catherine M. Conrad who has an address in Bronxville, which seemed to match her testimony. Westlaw thinks this is

> the same suspended lawyer from the Bronx, but perhaps it's confusing two people or I picked the wrong one. If you really care about this, I suggest you have Nardello run this down as I'm not too sure what I'm doing here." Benhamou then went on to describe some of the information in the Westlaw Report, including the reference to a "Robert J. Conrad."
>
> 2:32 p.m.: Trzaskoma responds to Benhamou: "I think Robert Conrad is her father—he is an immigration judge."
>
> 2:36 p.m.: Trzaskoma shares with Benhamou: "*Jesus, I do think that it's her.* Can you please track down that lawsuit?" (Emphasis added).

Any fair reading of these e-mail exchanges shows that Parse's attorneys had actionable intelligence that Conrad was an imposter. That knowledge demanded swift action to bring the matter to the Court's attention. Further investigation would have been easy and prudent. But Parse's attorneys chose to do neither.

In her September 15 affidavit, Brune asserts that sometime after 2:36 p.m., Trzaskoma shared with her and Edelstein the possibility that the suspended lawyer and Juror No. 1 were the same person. (Brune Aff. ¶ 12.) While now armed with the Westlaw Report, Brune, Trzaskoma, and Edelstein nevertheless adhered to their earlier conclusion during voir dire, namely that "Ms. Conrad could be a suspended lawyer only if she had lied repeatedly during voir dire, and it seemed inconceivable that any juror, much less a lawyer, would perjure herself so brazenly." (Brune Aff. ¶ 12.) Through that rationalization, Parse's attorneys convinced themselves that "no additional research was warranted, and none was conducted." (Brune Aff. ¶ 12.) Missing from the Brune Affidavit are any particulars about Parse's attorneys' thought processes in the wake of the newly acquired Westlaw Report, ***465** Benhamou's professed uncertainty with his research and, most importantly, Trzaskoma's epiphany just hours earlier that Juror No. 1 was the suspended attorney with alcohol issues ("Jesus, I do think that it's her"). Moreover, Brune's Affidavit provides no details about whether Parse's attorneys discussed alerting the Court to their investigation, nor does it explain why they did not ask the Nardello firm to investigate Juror No. 1 immediately.

After digesting Brune's Affidavit, this Court concluded that an evidentiary hearing was needed on the Government's argument that Parse had waived his right to challenge Conrad's misconduct. By Order dated November 29, 2011, the Court fixed hearing dates of February 15 and 16, 2012. (ECF No. 500.)

C. *Parse's Attorneys' Testimony at the Juror Misconduct Hearing*

During the Hearing, Brune & Richard offered another layer of detail about the events of May 12. Trzaskoma acknowledged reviewing the Westlaw Report after Benhamou sent it to her that morning. (*See* Hr'g Tr. 49–50 ("It struck me that holy cow, it's possible that it's the same person, and I was looking at the Westlaw report to try to figure out is there some way that this tells me one way or the other, that gives me more information.").) But she testified that she did not look at the Westlaw Report until after sending the "Jesus" e-mail and she minimized its significance on her thought process. (Hr'g Tr. 55–56.) Citing her inexperience in reading such reports, Trzaskoma claimed that she questioned the Westlaw Report's accuracy and whether it had aggregated information about multiple Catherine Conrads. (Hr'g Tr. 49–55.) Trzaskoma offered no explanation for her failure to seek assistance from her colleagues. She also quibbled over whether Juror No. 1 physically appeared to be a woman in her early forties (maintaining that she believed Juror No. 1 to be "close to 50"). And even though she was looking for correlations to Juror No. 1, she "did not focus on the [middle initial] 'M' " and she "didn't think of it" as a way to help her narrow down the information in the Westlaw Report. (Hr'g Tr. 24, 50).

Trzaskoma also provided more details regarding her May 12 discussion with Brune and Edelstein about Conrad. The conversation was short, lasting "no longer than five minutes" and took place in Foley Square Plaza. (Hr'g Tr. 58.) Notwithstanding her Eureka e-mail a few hours earlier —"Jesus, I do think that it's her"—Trzaskoma claimed that when she met with her partners, she did not think that Conrad and the suspended attorney were the same person, but raised only the "possibility" that there might be a connection. (Hr'g Tr. 58, 92, 280.) Trzaskoma never shared the existence of the Westlaw Report or its contents with Brune or Edelstein. Indeed, all three Brune & Richard partners testified in unison that they never mentioned, let alone discussed, the Westlaw Report in their Foley Square conversation. (Hr'g Tr. at 58–

59, 281, 328.) Brune made the point emphatically: "I'm confident that [Trzaskoma made no mention whatsoever of the Westlaw Report], and here is why. Laurie Edelstein is the kind of person who will always kind of say, well, show me the case, show me the document. She is extremely thorough and if [Trzaskoma] had referenced the document in the conversation, that's what Ms. Edelstein would have said. So I know that there was no reference to [the Westlaw Report] in the conversation." (Hr'g Tr. 281.) In exploring the basis for Trzaskoma's rekindled belief that Conrad could be the suspended attorney, Parse's attorneys only considered the Juror Note and the transcript of Conrad's voir dire testimony. (Hr'g Tr. 58–59, 281, 328.) Further, according to Brune's and Edelstein's testimony, *466 Trzaskoma never mentioned the Westlaw Report or the May 12 internal e-mails about Brune & Richard's research of Conrad at any point during the eleven days of jury deliberations. (Hr'g Tr. 59, 281.)

Brune, Edelstein, and Trzaskoma all testified that, after Trzaskoma raised her concern about Conrad during their Foley Square conversation, they discussed Conrad's voir dire answers, and observed that Conrad's odd note about vicarious liability and *respondeat superior* could be explained as relating to her personal injury lawsuit, which Conrad had mentioned during voir dire. (Hr'g Tr. 38, 60, 280.) On that slender reed, they unilaterally decided that no further investigation was necessary—even though Trzaskoma recalled mentioning that they should have an investigator look at the issue: "what I thought at the time was that we would need to investigate." (Hr'g Tr. 60, 92.) Trzaskoma asked Brune whether they should keep looking at the issue, and Brune told her "no, just leave it." (Hr'g Tr. 60, 283.) According to Brune, she shut down further inquiry because she credited Conrad's voir dire responses. But she also acknowledged that Parse's trial team had not taken any additional steps to rule out that Conrad was the suspended lawyer. (Hr'g Tr. 282.) This Court cannot fathom how lawyers as thorough as Brune, Edelstein, and Trzaskoma would neglect to tie off such a glaring loose end.

Acting on Brune's instruction to "leave it," Trzaskoma directed Benhamou to "stand down" on his efforts to obtain records of the civil lawsuit referenced in the Westlaw Report. (Hr'g Tr. 93.) Edelstein added that she, Brune, and Trzaskoma specifically discussed whether they should bring the issue to the Court's attention, and decided against it because she thought it was "inconceivable" that Conrad had lied. (Hr'g Tr. 354–55.) This was another tragic misjudgment.

Paul Schoeman, Brubaker's counsel, testified that some time after the receipt of the Juror Note on May 11, and likely the Monday thereafter, Trzaskoma told him that there was a suspended attorney named Catherine Conrad, but that Parse's attorneys had concluded that Juror No. 1 was not that person. (Hr'g Tr. 362–65.) Trzaskoma did not mention the Westlaw Report or other information Brune & Richard unearthed. Barry Berke, another attorney for Brubaker, testified to a similar conversation with Brune. (Hr'g Tr. 368–69.)

In sum, prior to the start of voir dire, Parse's attorneys knew that (1) Juror No. 1 lived in Bronxville, was a plaintiff in a pending personal injury lawsuit, and had a father who was an immigration officer; and (2) a woman with the identical name of "Catherine M. Conrad" was a suspended New York attorney with an alcohol dependency.

Before jury deliberations began, Parse's attorneys knew that (1) Juror No. 1 had submitted a note to the Court referencing several legal concepts not mentioned during the trial; (2) the suspended New York attorney by the name of Catherine M. Conrad used a Bronxville address, the same small village given for Juror No. 1 on the jury roll, and (3) that living in the same household was a Robert J. Conrad, whom Trzaskoma believed to be Conrad's father, the immigration judge. And Trzaskoma had concluded that the Catherine M. Conrad in the Westlaw Report was the same person as Juror No. 1.

VII. *The Jury Deliberations*

The tragedy inherent in this motion is that there were many opportunities to avert it. Proceedings in the courtroom overlap the Brune & Richard e-mail timeline, and the Court Reporter's time notations *467 on the transcript tell that side of the story. At 9:55 a.m. on May 12, shortly after Trzaskoma directed her paralegal to investigate Conrad, the Court took up various objections regarding redactions in the indictment to be sent into the jury room. (Trial Tr. 8839.) While the Court delivered its instructions on the law to the jury (Trial Tr. 8854–8912), Parse's attorneys were busy exchanging e-mails and information concerning Conrad, including the 2010 Suspension Order, Conrad's voir dire testimony, and an instruction to conduct a Westlaw people search of Conrad. At 12:47 p.m., the jury retired to have lunch and begin

deliberations. (Trial Tr. 8922.) Thereafter, the Court ruled on contested redactions in the indictment and proceedings were adjourned until 2:40 p.m. (Trial Tr. 8936.) During that luncheon recess, Benhamou sent Trzaskoma the Westlaw Report. At the very time Trzaskoma e-mailed Benhamou her epiphany "Jesus, I do think that it's her," the Court sent its jury charge, a list of trial exhibits, and a redacted indictment into the jury room. (Trial Tr. 8937.) At 5:00 p.m., the jury returned to the courtroom, and the Court instructed them for the evening and sent them home. (Trial Tr. 8945–46.) On Friday, May 13, the jury deliberated until 1:30 p.m. and recessed so that a juror could keep an important medical appointment. (Trial Tr. 8957–58.)

On Monday, May 16, at the beginning of the third day of deliberations, the Court learned that Juror No. 11 required an emergency surgical procedure that would delay deliberations for at least one day. The Government opposed replacing Juror No. 11 with an alternate. (Trial Tr. 8974.) At that time, Brune argued persuasively that the risks of further delay from complications with the surgical procedure were too great, especially when "[w]e have plenty of alternates left. They have been very diligent about coming on time and all the rest." (Trial Tr. 8974–75.) The Court agreed with Defendants and excused Juror No. 11 from service over the Government's objection. (Trial Tr. 8975.)

This Court instructed the remaining jurors to suspend deliberations while Alternate No. 1 travelled to the courthouse. (Trial Tr. 8983–84.) At 2:00 p.m. on May 16, the jury reconvened with Alternate No. 1 seated as Juror No. 11. (Trial Tr. 8995.) The Court instructed the jury to disregard all earlier deliberations and begin anew. At 2:15 p.m., the newly constituted jury commenced deliberations. (Trial Tr. 8999.) The displacement of Juror No. 11 in the third day of deliberations was seamless, and the new jury reached a unanimous verdict after six days of deliberation. Even after the displacement of Juror No. 11, there were at least two qualified alternate jurors available.

At the end of the first day of jury deliberations, Parse's attorneys discussed Trzaskoma's reawakened unease that Conrad was not who she claimed to be during voir dire. But their discussion was superficial and never addressed any of the information accumulated over the last twelve hours, including the Westlaw Report and the intense exchange of e-mails among some members of the trial team. In a fateful decision, uncharacteristic of their conduct throughout the case, Parse's attorneys decided to call off any further investigation of Conrad. And worse, they withheld this information and precluded the Court from taking any ameliorative countermeasures. Through this unfortunate concatenation of events, Parse's attorneys permitted Conrad's egregious conduct to infect the largest tax fraud prosecution in U.S. history.

DISCUSSION

I. *Defendants' Motion For a New Trial*

A. *Legal Standard*

The Sixth Amendment guarantees a criminal defendant the right to a trial by ***468** an impartial jury. *See* U.S. Const. amend. VI. In *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court addressed juror dishonesty during voir dire and emphasized that "[o]ne touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.' " *McDonough,* 464 U.S. at 554, 104 S.Ct. 845 (quoting *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Voir dire plays an essential role in protecting the right to trial by an impartial jury. Defendants deserve "a full and fair opportunity to expose bias or prejudice on the part of veniremen," and "there must be sufficient information elicited on voir dire to permit a defendant to intelligently exercise not only his challenges for cause, but also his peremptory challenges." *United States v. Barnes,* 604 F.2d 121, 139 (2d Cir.1979) (internal quotations and citations omitted).

A juror's dishonesty during voir dire undermines a defendant's right to a fair trial. Writing for a unanimous Supreme Court, Justice Cardozo concluded: "If the answers to the questions [during voir dire] are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only.... His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." *Clark v. United States,* 289 U.S. 1, 11, 53 S.Ct. 465, 77 L.Ed. 993 (1933); *see also McDonough,* 464 U.S. at 554, 104 S.Ct. 845 ("The necessity of truthful answers by prospective jurors if [voir dire] is to serve its purpose is obvious."). Thus, a juror who lies her way onto a jury is not really a juror at all; she is

an interloper akin "to a stranger who sneaks into the jury room." *Dyer v. Calderon,* 151 F.3d 970, 983 (9th Cir.1998) (en banc). "Justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954). Accordingly, "courts cannot administer justice in circumstances in which a juror can commit a federal crime in order to serve as a juror in a criminal case and do so with no fear of sanction so long as a conviction results." *United States v. Colombo,* 869 F.2d 149, 152 (2d Cir.1989).

[1] [2] In *McDonough,* the Supreme Court held that to obtain a new trial where, as here, a juror lied during voir dire, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough,* 464 U.S. at 556, 104 S.Ct. 845. In *Colombo,* the Second Circuit held that where a juror deliberately conceals information that, if revealed, "might thwart her desire to sit" on the jury, any resulting conviction "cannot stand" because such conduct "obstruct[s] the voir dire and indicate[s] an impermissible partiality on the juror's part." *Colombo,* 869 F.2d at 151. While the Second Circuit "has never found reason to overturn a verdict on the basis of juror nondisclosure under *McDonough,*" *United States v. Stewart,* 433 F.3d 273, 303 (2d Cir.2006), the exceptional circumstances—deliberate lies engineered to create a fictitious, "marketable" juror—presented by this case warrant such extraordinary relief.

B. *Conrad Failed to Answer Truthfully the Court's Questions on Voir Dire*

Conrad's lies are breathtaking. In response to direct and unambiguous questions, she intentionally provided numerous false and misleading answers and omitted material information. Conrad's lies were calculated to prevent the Court and the ***469** parties from learning her true identity, which would have prevented her from serving on the jury. This is not a case where the relevant voir dire questions were somehow vague or ambiguous, particularly given Conrad's status as an attorney. *Cf. McDonough,* 464 U.S. at 555, 104 S.Ct. 845 (because jurors are called "from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges"); *see also Stewart,* 433 F.3d at 304 (noting the district court's finding that ambiguities in the voir dire questions drafted by the parties "made it unclear that [the juror's] responses deliberately concealed the truth"). The Court's questions to Conrad were clear, simple, and direct.

The events she lied about were recent, personally significant, and directly affected her qualifications to serve as a juror. Her arrests and suspensions from the practice of law were not the result of youthful indiscretions or errors on the part of police or courts. *Cf. United States v. McConnel,* 464 F.3d 1152, 1156 (10th Cir.2006) (juror failed to respond to voir dire question regarding involvement in criminal matter because prior indictment had been dismissed at a preliminary hearing); *cf. also United States v. Bishop,* 264 F.3d 535, 554–57 (5th Cir.2001) (juror failed to disclose prior felony conviction because she was told by her lawyer that she did not have to reveal it); *Brown v. Fisher,* No. 06 Civ. 2771(RJS)(JCF), 2010 WL 3452372, at *3 (S.D.N.Y. Apr. 29, 2010) (juror did not respond to question about being a victim of a crime because he did not believe a minor stab wound received during a teenage fight thirty years earlier in the Ukraine made him a "victim"). There is no dispute that Conrad was aware of her prior convictions, her attorney disciplinary problems, and her personal injury suit at the time she answered the Court's questions under oath. There is also no question that she made a conscious decision to hide them from the Court.

Conrad's concealment of these material facts is not attributable to personal embarrassment or shame. As Conrad herself acknowledged, "I know my disclosures definitely would not have allowed me to sit as a juror. I also know that I could have requested a side bar to speak with your Honor and the other attorneys during the voir dire and I didn't do that." (Hr'g Tr. 236–37.) *Cf. United States v. Langford,* 990 F.2d 65, 67 (2d Cir.1993) (juror failed to disclose two arrests for prostitution fifteen years earlier because of "substantial embarrassment" it would cause her in her current job). Conrad's misrepresentations were not "mistaken, though honest" answers. *McDonough,* 464 U.S. at 555, 104 S.Ct. 845; *see also Langford,* 990 F.2d at 67 (juror failed to disclose an arrest because she believed it did not result in a record of arrest or conviction.) They were deliberate and intentional lies. Conrad confessed that she purposefully lied and omitted material information in her voir dire testimony to make herself more "marketable" as a juror. She yearned for professional redemption or some psychic satisfaction: "And

having been suspended for so long, I guess mentally I would think maybe I'm back in the swing of things now." (Hr'g Tr. 236.) It is evident that Conrad's untruthful responses to the Court's voir dire questions were premeditated and deliberate. There is no innocent explanation.

C. *Conrad Would Have Been Excused for Cause*

[3] *McDonough* 's second prong requires a party moving for a new trial to show that the truthful answer to a question at voir dire would have provided a valid basis for a challenge for cause. *McDonough,* 464 U.S. at 556, 104 S.Ct. 845; ***470** *see also United States v. Greer,* 285 F.3d 158, 171 (2d Cir.2002). The Government urges this Court to adopt a narrow reading of *McDonough* unsupported by law. But contrary to the Government's contention, the test is not whether the true facts would compel the Court to remove a juror for cause, but rather whether a truthful response "would have provided a valid basis for a challenge for cause." *McDonough,* 464 U.S. at 556, 104 S.Ct. 845. This means that "the district court must determine if it would have granted the hypothetical challenge" if it had known the true facts. *Stewart,* 433 F.3d at 304; *Greer,* 285 F.3d at 171; *cf. also United States v. Shaoul,* 41 F.3d 811, 816 (2d Cir.1994) (noting that under the second prong of *McDonough.* a defendant must have a basis for arguing that the district court is required to sustain his challenge for cause). Under any reading of *McDonough,* Conrad's misconduct demonstrates that she was incapable of being an impartial juror and this Court would have struck her for cause.

[4] **[5]** **[6]** An impartial jury is one in which every juror is " 'capable and willing to decide the case solely on the evidence before [her].' " *McDonough,* 464 U.S. at 554, 104 S.Ct. 845 (quoting *Smith,* 455 U.S. at 217, 102 S.Ct. 940). Jurors are instructed that they are to decide the question of a defendant's guilt based solely on the evidence presented. *See United States v. Thomas,* 116 F.3d 606, 616–17 n. 10 (2d Cir.1997). A juror is biased—i.e., not impartial—if her experiences "would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.' " *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas,* 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)); *see also United States v. Torres,* 128 F.3d 38, 43 (2d Cir.1997) (juror properly excused for cause who had structured financial transactions, in case involving structuring of cash deposits). Challenges for cause can be based on actual bias, implied bias, or inferable bias. *See Torres,* 128 F.3d at 43; *see also United States v. Sampson,* 820 F.Supp.2d 151, 162–67 (D.Mass.2011) (discussing at length each type of bias). Conrad exhibited all three types of bias. Had Conrad revealed her history as a lawyer suspended on account of alcoholism, her criminal convictions, current probation, outstanding warrant, and the other salient facts-not to mention the perjurious application for reinstatement she filed the day before voir dire-this Court would have dismissed her.

1. *Actual Bias*

"Actual bias is 'bias in fact.' " *Torres,* 128 F.3d at 43 (quoting *United States v. Wood,* 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed. 78 (1936)); *see also Greer,* 285 F.3d at 171. Whether a juror is actually biased is a question of fact determined by the trial judge. *See Dyer,* 151 F.3d at 973 (citing *Patton v. Yount,* 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)); *see also Torres,* 128 F.3d at 43 (citing *Wood,* 299 U.S. at 133, 57 S.Ct. 177). "A juror is found by the judge to be partial either because the juror admits partiality ... or the judge finds actual partiality based upon the juror's voir dire answers." *Torres,* 128 F.3d at 43; *see also Hughes v. United States,* 258 F.3d 453, 456 (6th Cir.2001) (requiring a new trial after seated juror expressed during voir dire her bias against defense based on her relationships with law enforcement officers).

While Conrad claimed that she was a "fair and unbiased" juror (*see, e.g.,* Hr'g Tr. 236), this Court cannot credit that assertion. Conrad is a pathological liar and utterly untrustworthy. *See Gray v. Hutto,* 648 F.2d 210, 211 (4th Cir.1981) ("With the manifestly strong pressures on the juror to exculpate herself from a quite untenable ***471** position, her self-serving statements should not count for much.") Further, Conrad's own statements and demeanor belie her claim of impartiality. Her animus toward lawyers—like Defendants here—was evident not only in her comment that most attorneys are criminals but also in her attitude at the evidentiary hearing. Her comment that all attorneys are "crooks" was a direct statement of bias against the Defendants. Conrad's statement can only be understood as reflecting a pre-existing bias against lawyers.

Conrad's hostility toward lawyers is perhaps attributable to her own professional failures. Attorneys reported Conrad to the Disciplinary Committee, and the Appellate Division suspended her. Given her disciplinary problems, Conrad was plainly biased against the Defendant-lawyers in this case. As Conrad herself highlighted repeatedly and bitterly, the Defendant-lawyers in this case enjoyed far more professional success than she did. Her comment that she did not "live a lavish lifestyle like Mr. Daugerdas" demonstrates that she personalized the case and compared her success as a lawyer to that of Daugerdas, a consideration that is inherently improper. Because there was no evidence at trial about Daugerdas's "lifestyle," it is clear that Conrad simply concocted facts and did not limit her consideration of the case to the evidence presented. Moreover, Conrad knew from the very beginning of voir dire that this case involved illegal tax shelters used by clients of the law firm of Jenkins & Gilchrist P.C., the accounting firm BDO Seidman, LLP, and other law and accounting firms. (Trial Tr. 11–12.)

Conrad's May Letter to Okula buttresses the conclusion that she was actually biased. Written the day after the trial concluded, the May Letter indicates that Conrad identified with the Government. She expressed that bias in her emphasis on "Our Government"—a phrase she could not explain. (Hr'g Tr. at 202.) Her bias also bled through when she wrote that she "did fight the good fight" against acquitting Parse on any counts but eventually had to "throw in the towel." Her choice of words shows that Conrad saw herself not as a fact-finder, but as a partisan for "Our Government." In addition, Conrad included her cell phone number in the return address of the May Letter, and she testified that she was "very anxious" to talk to the prosecutors after the verdict. (Hr'g Tr. at 194.) By contrast, she testified that there was "no reason" for her to talk to the defense lawyers. (Hr'g Tr. at 195.) Whether conscious or subliminal, the entire tone of Conrad's May Letter reveals that Conrad ignored this Court's jury instructions, including its final instruction: "Remember at all times you are not partisans, you are judges, judges of the facts. Your sole interests are to seek the truth from the evidence in the case and to determine whether the government has proved or failed to prove beyond a reasonable doubt that the defendants in this case committed the crimes alleged against them in the indictment." (Trial Tr. 8911–12.) Accordingly, this Court finds that Conrad was actually biased against Defendants.

2. *Implied Bias*

[7] Because actual bias is often difficult to detect, courts imply bias when "certain circumstances create too great a risk of affecting a juror's decision making process, even if the juror is not, consciously, fully aware of the impact." *Fields v. Brown,* 503 F.3d 755, 806 (9th Cir.2007) (Berzon, J., dissenting). As explained long ago by the Supreme Court:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations ***472** with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

Crawford v. United States, 212 U.S. 183, 196, 29 S.Ct. 260, 53 L.Ed. 465 (1909); *see also McDonough,* 464 U.S. at 556, 104 S.Ct. 845 (Blackmun, J., concurring) (recognizing implied bias as a basis for relief); *Smith,* 455 U.S. at 221–22, 102 S.Ct. 940 (O'Connor, J., concurring) (same).

[8] [9] Implied bias is determined as a matter of law and "attributed to a prospective juror regardless of actual partiality." *Torres,* 128 F.3d at 45 (citing *Wood,* 299 U.S. at 133, 57 S.Ct. 177); *see also United States v. Tucker,* 243 F.3d 499, 509 (8th Cir.2001) (implied bias determined "without regard to [the juror's] subjective state of mind"). Where a juror is impliedly biased, disqualification of that juror is mandatory. *See United States v. Rhodes,* 177 F.3d 963, 965 (11th Cir.1999). Therefore, if a juror who participated in rendering a verdict was impliedly biased, the moving party is entitled to a new trial. *See, e.g., Hunley v. Godinez,* 975 F.2d 316, 319–20 (7th Cir.1992).

[10] [11] Courts imply bias in "extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person v. Miller,* 854 F.2d 656, 664 (4th Cir.1988); *see also Fields,* 503 F.3d at 770; *Sanders v. Norris,* 529 F.3d 787, 792 (8th Cir.2008). "Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith,* 455 U.S. at 222, 102 S.Ct. 940 (O'Connor, J., concurring); *see also United States v. Brazelton,* 557 F.3d 750, 753–54 (7th Cir.2009) (explaining that courts must imply bias if the juror is related to one of the principals in the case, regardless of whether the juror is objective in fact). Courts imply bias "when there are similarities between the personal experiences of the juror and the issues being litigated." *See Sampson,* 820 F.Supp.2d at 163–64 (quoting *Skaggs v. Otis Elevator Co.,* 164 F.3d 511, 517 (10th Cir.1998) and collecting cases where bias was implied based on the juror's experiences (internal quotation marks omitted)).

[12] Significantly, courts imply bias "where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury." *Fields,* 503 F.3d at 770 (citing *Dyer,* 151 F.3d at 982). "A juror ... who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process." *Dyer,* 151 F.3d at 983. As Judge Kozinski explained in *Dyer:*

> Jury service is a civic duty that citizens are expected to perform willingly when called upon to do so. But there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to *473 avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.
>
> If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Dyer, 151 F.3d at 983; *see also Green v. White,* 232 F.3d 671, 676–78 (9th Cir.2000) (finding implied bias where a juror's "pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced 'destructive uncertainties' into the fact-finding process").

The nature, scope and extent of the lies a juror tells may, in and of themselves, demonstrate an undue partiality or bias. *See, e.g., Colombo,* 869 F.2d at 151. Even when a prospective juror is dishonest for reasons other than a desire to serve on the jury, dishonest answers to voir dire questions indicate that a juror is unwilling or unable "to apply the law as instructed by the court to the evidence presented by the parties" and, therefore, suggest partiality. *Thomas,* 116 F.3d at 617 & n. 10. Therefore, dishonest answers are a factor that can contribute to a finding of implied bias. *See Skaggs,* 164 F.3d at 517.

The principle of implied bias applies with particular force here. Not only did Conrad lie, she created a totally fictitious persona in her drive to get on the jury. Few, if any, prospective jurors would willfully violate their oath, and knowingly subject themselves to prosecution for perjury, without a strong personal interest in the outcome of the case. *See Colombo,* 869 F.2d at 151. Conrad did not tell a discrete lie or two. Rather, she presented herself as an entirely different person and lied about virtually every detail of her life, including mundane subjects like her travel habits. As Conrad herself acknowledged, her deceit during voir dire was on her mind throughout the trial. (Hr'g Tr. 168.) And as a lawyer, she had to appreciate the consequences of lying under oath. Indeed, as a suspended lawyer seeking readmission, she undoubtedly wanted to show that she could be attentive for prolonged periods in court. Anyone so anxious to serve on a

jury that she would misrepresent who she is, and risk criminal prosecution by doing so, *see* 18 U.S.C. § 1621, cannot be considered impartial. Someone who commits fraud to get on a jury cannot evaluate the credibility of witnesses, much less sit in judgment of others who are accused of fraud.

Conrad's sweeping dishonesty demonstrates that she is incapable of weighing evidence, measuring credibility, and applying the law as instructed by this Court. Her inability to differentiate between truthful and untruthful statements was revealed on cross examination when counsel asked whether she could appreciate the fact that telling this Court her husband had "own[ed] some bus companies" was a lie.

> Q. Did you think you were misleading the Court when the judge said, "What is he retired from?" and you said, "He owned some bus companies"?
>
> A. No, of course not.
>
> Q. That wasn't misleading at all?
>
> *474 A. No.
>
> Q. Did you apply that same standard of what is or is not misleading in acquitting your function as a juror?
>
> A. I don't really know what your question means.
>
> Q. My question means you have an idea of what is misleading and what is not misleading, right?
>
> A. Of course.
>
> Q. You think that what you said here about the bus companies is not misleading, correct?
>
> A. Not at all. Maybe it's a transcription, "own" or "owned." That's it.
>
> Q. In fact, did you apply that same standard in your mind of what is or is not misleading in evaluating the evidence in this case?
>
> A. Of course we had to, and I had to, and I did.

(Hr'g Tr. at 163–64.)

The brazenness of Conrad's deliberate lies and her demonstrated inability to distinguish truth from falsehood added "destructive uncertainty" to the fact-finding process. *Dyer,* 151 F.3d at 983. Accordingly, this Court concludes that Conrad was impliedly biased.

3. *Inferable Bias*

[13] "Inferable" or "inferred" bias exists " 'when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias.' " *Greer,* 285 F.3d at 171 (quoting *Torres,* 128 F.3d at 47). As the Second Circuit reasoned:

> There is no *actual* bias because there is no finding of partiality based upon either the juror's own admission or the judge's evaluation of the juror's demeanor and credibility following voir dire questioning as to bias. And there is no *implied* bias because the disclosed fact does not establish the kind of relationship between the juror and the parties or issues in the case that mandates the juror's excusal for cause.
>
> Nonetheless, inferable bias is closely linked to both of these traditional categories. Just as the trial court's finding of actual bias must derive from voir dire questioning, so the court is allowed to dismiss a juror on the ground of inferable bias only after having received responses from the juror that permit an inference that the juror in question would not be able to decide the matter objectively. In other words, the judge's determination must be grounded in facts developed at voir dire. And this is so even though the juror need not be asked the specific question of whether he or she could decide the case impartially. Moreover, once facts are elicited that permit a finding of inferable bias, then, just as in the situation of implied bias, the juror's statements as to his or her ability to be impartial become irrelevant.

Torres, 128 F.3d at 47; *see also Greer,* 285 F.3d at 171; *United States v. Quinones,* 511 F.3d 289, 301 (2d Cir.2007).

[14] Although declining to define the "precise scope of a trial judge's discretion to infer bias," Judge Calabresi further explained:

> It is enough for the present to note that cases in which a juror has engaged in activities that closely approximate

> those of the defendant on trial are particularly apt. The exercise of the trial judge's discretion to grant challenges for cause on the basis of inferred bias is especially appropriate in such situations. "Because [in such cases] the bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it, [partiality] necessarily ***475** must be inferred from surrounding facts and circumstances." *McDonough,* 464 U.S. at 558, 104 S.Ct. 845 (Brennan, J., concurring) (internal quotation marks and citation omitted).

Torres, 128 F.3d at 47. Therefore, the doctrine of inferable bias, which courts have long "implicitly assumed to exist," *Torres,* 128 F.3d at 43, permits a court in its discretion to dismiss a juror because of an inference that the juror will not be able to decide the case based solely on the evidence.

Had this Court known the facts, Conrad would have been subject to a valid challenge for cause. She was manifestly incapable of performing the central functions of a juror—evaluating witness credibility and making a fair assessment of the evidence. Solely on the basis of her false voir dire testimony, the Court could easily infer that she is inherently unable to perform the crucial function of ascertaining the truth. The fact is, however, that there is a mountain of other evidence showing that not only did she lie to this Court on voir dire, but that she is a pathological liar who does not know the difference between truth and lie. The presence of such a tainted juror, who cannot appreciate the meaning of an oath is simply intolerable.

Conrad's actions in this case, as well as in other lawsuits in which she has participated, "evinces a shocking disregard for the judicial system [.]" *2007 Suspension Order,* 48 A.D.3d at 188, 846 N.Y.S.2d 912. In addition to her serial perjury, Conrad's direct defiance of the Court and its orders, as well as her statements at the December 20 and February 15 hearings, betray a fundamental contempt for the judicial process. She advised the Court at the December 20 hearing that there was no point in holding a hearing because the Defendants are "fricken crooks and they should be in jail." (12/20 Tr. at 17.) Conrad also repeatedly gave her unsolicited view at the Hearing that there was no point in inquiring into her erratic conduct or perjury because she and the jury had convicted the defendants. (*See, e.g.,* Hr'g Tr. 132, 134, 137, 148.) As she pointedly put it: "These are semantics, sir. Your client is still guilty as charged with our verdict, and that's it." (Hr'g Tr. 149.)

Conrad's erratic behavior at the December 20 and February 15 hearings indicates significant mental instability that would have disqualified her from service had it been known at the time of the trial. For instance, on December 20, when the Court asked her to sit down, she bizarrely responded, "Then I get a free hamburger?" (12/20 Tr. at 12.) When told that she should retain an attorney, she replied, "I'll retain myself or my husband, the convicted felon." (12/20 Tr. at 16.) None of this made the slightest bit of sense. Conrad had no explanation for this erratic behavior, and she did not know why she made those statements. (Hr'g Tr. 108, 112.) But she specifically denied that she was intoxicated at the time of the December 20 hearing. (Hr'g Tr. at 109–10.)

Her conduct on February 15 was just as bizarre. She refused to come to court as ordered, and she could not explain that conduct. (Hr'g Tr. 104–08.) Indeed, she was not even sure if she had a reason for telling this Court's deputy clerk that she would not come. (Hr'g Tr. 108.) Her defiance caused this Court to issue a warrant for her immediate arrest and direct the U.S. Marshals to take her into custody. She was arrested and transported to the courtroom. When asked if she had lied about not being a lawyer because no one specifically asked her about whether she was admitted to practice, Conrad responded, "Sir, that's posing the quantum theory, if the tree doesn't fall and nobody sees it. No, of course, the answer is no." (Hr'g Tr. 170–71.) She repeatedly refused to ***476** answer questions about whether her behavior at the earlier hearing was irrational and whether there was a logical connection between her actions and what was being discussed on December 20. Her testimony that she was not a psychologist is a non sequitur. (Hr'g Tr. 112–13.) Similarly, she testified that she did not know why she had said the Defendants' motion for a new trial was "ridiculous" because, "I'm not a psychologist." (Hr'g Tr. 115.) But of course, it does not take a psychologist to answer such questions, nor does it take a psychologist to know that someone whose behavior is so erratic, and who cannot explain her behavior, has a serious mental problem. No doubt these problems have been exacerbated by many years of alcohol abuse. Such a person has no business sitting on a jury in judgment of others. Accordingly, had this Court known the full extent of Conrad's character at voir dire, it would have exercised its discretion and inferred that she was biased.

Because Conrad lied during voir dire, and her honest answers would have caused this Court to strike her for cause, Daugerdas, Guerin, and Field are entitled to a new trial.

II. *Waiver*

[15] Parse waived his claim for a new trial based on Conrad's alleged misconduct. Prior to the verdict, Parse's attorneys knew—or with a modicum of diligence would have known—that Conrad's voir dire testimony was false and misleading.

A. *Legal Standard*

[16] **[17]** Like all constitutional rights, the right to challenge the partiality of a jury verdict based on a juror's alleged misconduct during voir dire may be waived. *See McDonough,* 464 U.S. at 551 n. 2, 104 S.Ct. 845 ("It is not clear from the opinion of the Court of Appeals whether the information stated in Greenwood's affidavit [about the juror] was known to respondents or their counsel at the time of the voir dire examination. If it were, of course, respondents would be barred from later challenging the composition of the jury when they had chosen not to interrogate [the] juror ... further upon receiving an answer which they thought to be factually incorrect." (citing *Johnson v. Hill,* 274 F.2d 110, 115–16 (8th Cir.1960))); *see also City of Richmond v. Madison Mgmt. Grp., Inc.,* 918 F.2d 438, 459 (4th Cir.1990) (counsel "could have discovered that [the juror's] answer was false before trial because they were given a list of the jurors' addresses. We cannot find that the district court abused its discretion by not excusing the Pipe Defendants' failure to act earlier on the information available to them. If 'the right to challenge a juror is waived by failure to object at the time the jury is empanelled if the bases for objection might have been discovered during voir dire,' such a right surely is waived if the basis could have been discovered before voir dire." (citation omitted)); *accord United States v. Steele,* 390 Fed.Appx. 6, 13–14 (2d Cir.2010) (summary order) (defendant not deprived of due process where judge did not excuse juror caught sleeping at various times; judge carefully observed and monitored juror and "[n]either party objected to district court's actions"). The Government bears the burden of proving a defendant's waiver by a preponderance of the evidence. *See United States v. Mastrangelo,* 693 F.2d 269, 273–74 (2d Cir.1982).

[18] It bears noting at the outset that a defendant can waive certain rights through the actions of his attorneys, even if the defendant himself was unaware of the circumstances and actions giving rise to the waiver. *See Gonzalez v. United States,* 553 U.S. 242, 248, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) ("As to many decisions ***477** pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." (internal quotation marks and citations omitted)). As the Supreme Court stated in *Gonzalez,* "[g]iving the attorney control of trial management matters is a practical necessity." 553 U.S. at 249, 128 S.Ct. 1765. "The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois,* 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Indeed, Parse does not dispute this basic legal principle, and he is bound by Brune & Richard's actions and decisions at trial. Moreover, this is not a case of total abandonment, where the consequences of lawyer neglect are not imputed to the client. *Cf. Maples v. Thomas,* — U.S. —, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012). Brune & Richard represented Parse zealously throughout trial and the attorney-client relationship was continuous.

The Supreme Court recently reiterated that constitutional rights can be waived, even in complex cases:

> We have recognized "the value of waiver and forfeiture rules" in "complex" cases, *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 487–488, n. 6, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), and this case is no exception. In such cases, as here, the consequences of "a litigant ... 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett v. United States,* 556 U.S. 129, [134], 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (some internal quotation marks omitted)—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly. *See United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it' " (quoting *Yakus v. United States,* 321 U.S.

> 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944))). Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

Stern v. Marshall, —— U.S. ——, 131 S.Ct. 2594, 2608, 180 L.Ed.2d 475 (2011).

The waiver doctrine as explicated in *McDonough* and *Stern* reflects courts' disfavor of litigants who fail to act on information in their possession only to claim later that such information resulted in a violation of their rights. For example, in *Brazelton*, 557 F.3d at 755, counsel for the defendant did not challenge for cause a juror who was the second cousin to the victim of a shooting by the defendant, which led to the defendant's arrest on the drug and weapons charges for which he was on trial. On appeal, the defendant argued that he was denied his right to an impartial jury, which he claimed was not waivable. The Seventh Circuit disagreed:

> In this circuit, there is no ambiguity on the question whether the right to an impartial jury can be waived. We have held that "[t]he Sixth Amendment right to an impartial jury, like any constitutional right, may be waived." *United States v. Zarnes*, 33 F.3d 1454, 1472 (7th Cir.1994); *accord United States v. Joshi*, 896 F.2d 1303, 1307 (11th Cir.1990). Brazelton's on-the-record decision to pass up not one, but two opportunities to ask that Juror Number Four be struck for cause was a waiver. If a defendant is allowed to twice forego challenges for- ***478** cause to a biased juror and then allowed to have the conviction reversed on appeal because of that juror's service, that would be equivalent to allowing the defendant to "plant an error and grow a risk-free trial." *United States v. Boyd*, 86 F.3d 719, 722–23 (7th Cir.1996).

Brazelton, 557 F.3d at 755.

The discussion in *United States v. Bolinger*, 837 F.2d 436, 438–39 (11th Cir.1988), is similarly instructive. In *Bolinger*, on a weekend break in the middle of jury deliberations, an attorney for the defense learned from a relative of a juror's neighbor that the juror had purportedly formed a view of the defendant's guilt prior to the close of evidence. The jury did not return a verdict until three days later. Rather than inform the court of what he had learned, defense counsel filed a post-verdict motion for a new trial based on the juror's bias and purported misconduct.

The Eleventh Circuit upheld the district court's denial of the new trial motion, explaining:

> Our cases teach that "a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct." *United States v. Jones*, 597 F.2d 485, 588 [488] n. 3 (5th Cir.1979). In *Jones*, the court explained that a motion for new trial based on juror misconduct is a form of new trial motion for newly discovered evidence. *Id.* at 488. As such, the motion must be supported by proof that the evidence of misconduct was not discovered until after the verdict was returned. In the particular context of juror misconduct, this rule serves to ensure that the trial court is given every available opportunity to attempt to salvage the trial by ridding the jury of prejudicial influences. Thus, where the defendant or defense counsel knows of juror misconduct or bias before the verdict is returned but fails to share this knowledge with the court until after the verdict is announced, the misconduct may not be raised as a ground for a new trial. *Id.*; *see also United States v. Edwards*, 696 F.2d 1277, 1282 (11th Cir.1983) (no abuse of discretion in refusing to interrogate jury about alleged juror misconduct where defendant waited to hear the verdict before contesting jury's impartiality); *United States v. Dean*, 667 F.2d 729, 732–34 (8th Cir.1982) (en banc) (untimely notification of juror misconduct waives right to new trial even where actual prejudice can be shown).

Bolinger, 837 F.2d at 438–39 (footnote and subsequent history omitted).

Importantly, the *Bolinger* court also found that defense counsel's ignorance of the full truth did not preclude a finding of waiver:

> Although the June 10 telephone call did not disclose the full extent of [the juror's] misconduct, enough information was relayed that counsel should have contacted the district court for instructions while counsel

> continued his investigation. It is up to the court, and not the parties, to determine the appropriate response when evidence of juror misconduct is discovered. *See United States v. Caldwell,* 776 F.2d 989, 997 (11th Cir.1985); *United States v. Carrodeguas,* 747 F.2d 1390, 1395 (11th Cir.1984). [The defendant's] decision to gamble on the jury rather than inform the court of the problem in time to allow the court to determine if corrective action was possible prior to verdict is fatal to his claims regarding juror Hunter.

Bolinger, 837 F.2d at 439.

Other courts agree that defense counsel may not remain silent at trial about known or suspected juror misconduct. *See United* *479 *States v. Breit,* 712 F.2d 81, 83 (4th Cir.1983) ("A defendant who remains silent about known juror misconduct—who, in effect, takes out an insurance policy against an unfavorable verdict—is toying with the court. To hold the government to an exacting burden of proof of the defendant's knowledge—a matter by definition best known to the defendant and his acquaintances rather than the government—is effectively to invite that policy to be cashed in at high value and little risk to the defendant, but at great cost to the finality of verdicts and the integrity of the trial process." (citing *Gray,* 648 F.2d at 212)); *see also Edwards,* 696 F.2d at 1282 ("The appropriate time to alert the court of the problem clearly would have been before the return of the verdict. At that point the judge could have investigated the charge, if necessary, and taken curative action as might be appropriate under the circumstances. The defendant learned of the problem at a stage in the proceedings when some corrective action might have been suitable.").

[19] Ultimately, a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence. To be sure, actual knowledge of facts disqualifying a juror is an absolute bar to any challenge to that juror after a verdict. *McDonough,* 464 U.S. at 551 n. 2, 104 S.Ct. 845 (party who had knowledge "would be barred from later challenging the composition of the jury when they had chosen not to interrogate [the suspected juror] further upon receiving an answer which they thought to be factually incorrect"). But a defendant cannot consciously avoid learning the truth in the hope the jury verdict will be in his favor. *See Johnson,* 274 F.2d at 115–16. In *Johnson,* a decision on which the Supreme Court relied in *McDonough,* the Eighth Circuit explained:

> The right to challenge the panel or to challenge a particular juror may be waived, and in fact is waived by failure to seasonably object. It is established that failure to object at the time the jury is empanelled operates as a conclusive waiver if the basis of the objection is known *or might have been known or discovered through the exercise of reasonable diligence,* or if the party is otherwise chargeable with knowledge of the ground of the objection.

274 F.2d at 115–16 (quoting *Batsell v. United States,* 217 F.2d 257, 260 (8th Cir.1954) (emphasis added, internal citations omitted)); *see also Gray,* 648 F.2d at 212 ("In short, however strong Gray's case for a mistrial might have been had the court been immediately notified, counsel's deliberate inaction amounted to a conscious decision to find out what the jury was going to do."); *Burden v. CSX Transp., Inc.,* No. 08–cv–04–DRH, 2011 WL 3793664, at *8–9 (S.D.Ill. Aug. 30, 2011) ("The Court agrees because all the information about Juror Nos. 2 and 9 submitted by defendant was found in public documents, primarily by internet searches. Consistent with *McDonough, Johnson,* and *Stanczak* [*v. Penn. RR Co.,* 174 F.2d 43, 48–49 (7th Cir.1949)] the Court finds that defendant waived its present objections because the basis of the objections might have been known or discovered through the exercise of reasonable diligence. Defendant gambled with the possibility of a verdict and now raises questions it might have raised earlier.")

In *Johnson,* a personal injury case arising from a multi-car accident, prospective jurors were asked whether they or their family members were involved in accidents of any kind. Juror Harry Strege answered "no" to those questions, when in fact his son had been in a car accident, and Strege had acted as a guardian ad litem in a property damage claim arising from the accident. In affirming the district court's

*480 rejection of the motion for a new trial, the Eighth Circuit noted that defense counsel, having "information from two sources that an individual by the name of 'Harry' or 'Harris' Strege had been involved in a property damage suit in Richland County ... was possessed of information which was sufficient to put him on notice as to the prior Strege incident." *Johnson,* 274 F.2d at 116. Defense counsel "made no request of the court for a further interrogation." *Johnson,* 274 F.2d at 116. The *Johnson* court further noted that the trial spanned a week, "which certainly afforded counsel ample time and opportunity to apprise the court of his knowledge with respect to juror Strege." *Johnson,* 274 F.2d at 116.

[20] As *Johnson* and subsequent cases make clear, litigants and their counsel must act with reasonable diligence based on information about juror misconduct in their possession, or they will be deemed to have waived their right to an impartial jury based on the challenged juror misconduct.

B. *Knowledge*

Here, the facts adduced at the Hearing and from Brune & Richard's serial disclosures show that counsel for Parse believed that Juror No. 1 was the suspended New York attorney named Catherine M. Conrad. First, Trzaskoma, the Brune & Richard partner who oversaw and coordinated juror research, demonstrated her knowledge through the simple, declarative language of her e-mail on May 12, 2011: "Jesus, I do think that it's her." Trzaskoma based her declaration on a considerable body of evidence: (1) the Appellate Division's 2010 Suspension Order suspending attorney "Catherine M. Conrad" for alcohol-related issues; and (2) the Westlaw Report describing a "Catherine M. Conrad" who (i) resided in Bronxville, among other places; (ii) was forty-one years of age; (iii) participated in a lawsuit involving "Saranta Foods Ltd., Unity Coffee," pending in Bronx Supreme Court; (iv) was associated with a Robert J. Conrad, whom Trzaskoma identified in an, email as "an immigration judge" (Hr'g Tr. 46–47); and (v) was a suspended New York attorney. This information—which Trzaskoma reviewed in a sustained back-and-forth with her colleagues at Brune & Richard—amply supports her vivid declaration that Juror No. 1 was suspended attorney Catherine M. Conrad.

Other Brune & Richard lawyers acknowledged that Trzaskoma had drawn a strong link between the Catherine M. Conrad described in the 2010 Suspension Order and the Catherine M. Conrad seated as Juror No. 1. In particular, Brune & Richard attorney Randy Kim noted in a May 12 e-mail that Trzaskoma had previously reviewed data that "clearly suggested" that Conrad was an alcoholic, which reflects Trzaskoma's pre-voir dire review of the 2010 Suspension Order. (*See* Brune Aff. Ex. J at 86: May 12, 2011 E-mail from Randy Kim to Vivian Stapp ("We (I thought TT [Theresa Trzaskoma]) found something more; which more clearly suggested she has been/is and [sic] alcoholic.").) And in yet another May 12 e-mail, Trzaskoma herself acknowledged the pre-voir dire connection she had drawn between Conrad and the person depicted in the 2010 Suspension Order. (*See* Brune Aff. Ex. J at 86: E-mail from Trzaskoma to paralegal David Benhamou ("What we found before voir dire was that maybe she was a suspended lawyer.").)

The actions of Parse's attorneys in connection with the new trial motion further support the conclusion that they knew that Conrad was the subject of the 2010 Suspension Order. First, Trzaskoma's statement to the Court on July 15, 2011 that "we were not aware of the facts that have *481 come to light" was not entirely candid. One of the facts that purportedly "came to light" was the 2010 Suspension Order, which Defendants identified as one basis for their new trial motion. Parse's attorneys possessed those facts prior to voir dire, and, indeed, Trzaskoma admitted that she had reviewed the 2010 Suspension Order, and discussed it with Brune and their jury consultant, prior to Conrad's individual voir dire. What is more, Trzaskoma's purported ignorance cannot be reconciled with the additional evidence that Parse's defense team uncovered and reviewed at Trzaskoma's behest.

Similarly, Defendants' Brief, which Trzaskoma drafted and Brune and Edelstein edited, contained two significant factual misstatements pertaining to their knowledge about Conrad. First, in its description of how the Defendants learned of Conrad's true identity, Defendants' Brief suggests that they began to collect and review documents and information pertaining to Conrad's background only after receiving Conrad's May Letter. (*See* Def. Br. at 9 ("The tone and content of [Conrad's May Letter], ... caused defendants concern and prompted them to investigate[.]").) Second, Defendants represented they "had no basis to inquire whether Conrad was lying in response to each of the Court's questions [during voir dire]." (Def. Br. at 32 n. 13.) But those statements are at odds with the facts that emerged after this Court inquired and the

Government pursued discovery. At a minimum, Trzaskoma had reviewed the 2010 Suspension Order prior to voir dire and thus possessed information indicating that a "Catherine M. Conrad" was a suspended attorney. That alone was a basis to inquire whether Conrad was lying during voir dire.

In addition, Parse's attorneys resisted the Court's and the Government's attempt to discover the full extent of their research into Conrad. In resisting that discovery, Brune raised a legal argument that directly contradicted her earlier representations to the Court. During the August 8, 2011 conference, Brune argued against well-settled law that "there is a split in the federal circuits about whether the fundamental right to an impartial jury can ever be waived," and asked the Court to address that legal issue before allowing any discovery. (8/8 Tr. 11.) Yet, in attempting to explain why Brune & Richard omitted their extensive pre-verdict investigation of Conrad from Defendants' Brief, Brune stated that "we certainly anticipated that the government was going to raise the issue of waiver, it features prominently in the Supreme Court case that controls here[.]" (7/15 Tr. 6.) Such cognitive dissonance is unsettling. It also belies Brune's characterization of their decision not to disclose their pre-verdict investigation in their brief. This Court declines to credit Brune's dismissive claims that her law firm "kind of missed it" and that she "never imagined that ... [it] was going to assume the debate level prominence that it has here. I missed the issue and I really regret that." (Hr'g Tr. 292–93.)

Only after this Court directed Parse's attorneys to comply with the Government's discovery requests and after this Court advised counsel that it would conduct an *in camera* review of their assertions of the attorney work product privilege, did Brune & Richard produce documents relating to their research of Conrad, including Trzaskoma's May 12 "Jesus" e-mail. The import of Parse's attorneys' conduct is that they attempted to foreclose an inquiry into their pre-verdict knowledge of Conrad and ward off any anticipated "due diligence" argument by the Government. Ultimately, their post-hoc explanations suggest an acute concern about the implications to their client's legal position if the Court were to learn the true facts.

*482 Finally, Trzaskoma's attempt during the Hearing to distance herself from the language of her own May 12 e-mail was unpersuasive. There is simply no convincing way to morph her vivid affirmation of belief—"Jesus, I do think that it's her"—into a statement of "possibility," "remote possibility," or "potential[ity]." (Hr'g Tr. 43, 59, 62.) Trzaskoma's knowledge of Conrad's identity was far deeper than a mere "possibility," as shown by her review of the 2007 and 2010 Suspension Orders and the Westlaw Report. That report, as noted above, contained a number of connections to Juror No. 1, including a Bronxville address, Conrad's age, the pendency of a lawsuit in Bronx Supreme Court, and a reference to a person Trzaskoma recognized as Conrad's father.

Moreover, Benhamou presented Trzaskoma with the information from the Westlaw Report just four minutes before she declared, "Jesus, I do think that it's her." Her immediate, unvarnished reaction is tantamount to an excited utterance. While usually employed as an exception to the hearsay rule, the well-recognized reliability of excited utterances applies equally in this context. *See United States v. Tocco,* 135 F.3d 116, 127 (2d Cir.1998) ("The rationale for this hearsay exception is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability."). Trzaskoma made her statement in reaction to the explosive information contained in the Westlaw Report and without the benefit of time to deliberate and reflect on the consequences of her statement. Thus, her spontaneous declaration is a reliable indication of her state of mind precisely when the Court was sending its instructions, a list of exhibits, and a redacted copy of the indictment into the jury room so that Conrad, and her fellow jurors, could begin their deliberations. [11]

In sum, the facts fully support that Trzaskoma, on behalf of Parse, was aware during trial that Juror No. 1 was the suspended New York attorney Catherine M. Conrad. That knowledge, possessed by Parse's attorney who acted as the point person in Brune & Richard's jury research process, waives Parse's claim of juror misconduct.

C. *Lack of Reasonable Diligence*

Even if this Court were to conclude that Parse's counsel did not know that Juror No. 1 was the suspended New York attorney Catherine M. Conrad, this Court would still find waiver appropriate because the facts overwhelmingly paint a picture of a glaring lack of reasonable diligence by Parse's attorneys.

As an initial matter, Parse's contention that a lack of reasonable diligence cannot constitute a waiver is wrong as a matter of law, and does not comport with basic principles of a fairly functioning judicial process. The waiver doctrine exists to ensure that the Court receives information in time to make inquiries, remedy potential prejudices, and save all concerned the time, expense, and efforts of a retrial. A waiver *483 standard predicated solely on actual knowledge, to a 100% certainty, would result in retrials where defense attorneys had substantial information of juror misconduct that put them on reasonable notice that the Court should be notified and additional inquiry undertaken. Parse's position is inconsistent with the institutional imperative of ensuring that "the trial court is given every available opportunity to attempt to salvage the trial by ridding the jury of prejudicial influences." *Bolinger,* 837 F.2d at 439. Stated simply, to avoid waiver, Parse's attorneys were required to act with reasonable diligence both after they learned about the 2010 Suspension Order prior to voir dire and after they obtained the Westlaw Report on May 12, 2011—the day jury deliberations started. But they did not. Parse's attorneys were on sufficient notice and they should have raised their concerns with the Court at voir dire and then again at the beginning of jury deliberations. At the very least, they should have taken additional steps to acquire sufficient information to make an informed decision. Their failure to do so constitutes a waiver.

Parse's attorneys argue that they reasonably relied on Conrad's voir dire answers, but this excuse is unpersuasive. First, with the 2010 Suspension Order in hand during voir dire, they could have asked the Court to pose a direct question to Juror No. 1 about whether she was the "Catherine M. Conrad" referenced in the order. Indeed, Brune acknowledged that if the person in the suspension opinion were the same person as Juror No. 1, that would be "very significant information" and "it was certainly going to be significant to Judge Pauley if it was the same person." (Hr'g Tr. 265). But Parse's attorneys chose not to ask the Court to inquire of Juror No. 1 about the 2010 Suspension Order. That decision flies in the face of Brune's argument at a pretrial conference about the need for an extensive juror questionnaire: "What's the harm in asking additional questions?" (Dec. 8, 2010 Transcript 35.) That Parse's attorneys failed to heed their own advice when it mattered most speaks volumes.

Second, on May 12, Parse's attorneys failed to exercise reasonable diligence by deciding not to do any additional research or investigation and deciding not to notify the Court when faced with mounting evidence that Juror No. 1 was a suspended New York attorney. Brune claims that, at that point in time, she did not know one way or the other whether Juror No. 1 was the suspended attorney. (Hr'g Tr. 283–84). But, at a minimum, Parse's attorneys possessed information that could not be reconciled without additional investigation. Trzaskoma recognized this on May 12 when she exclaimed, "Jesus, I do think that it's her," and she reasonably concluded that additional investigation was needed. (Hr'g Tr. 62, 92.) Specifically, she instructed Benhamou to gather information about the civil lawsuit referenced in the Westlaw Report.

Unfortunately, before Benhamou located information about the lawsuit, Brune, Edelstein, and Trzaskoma decided not to pursue it. During their May 12 conversation in Foley Square Plaza, they discussed at least two of the options available to them that could have reconciled the conflicting information in their possession—further investigation or alerting the Court. Together they rejected both options without first learning from Trzaskoma, much less discussing, the factual basis behind Trzaskoma's earlier conviction. Rather, they chose a course that was guaranteed to leave the issue unresolved. By choosing to do nothing, Parse's attorneys failed to exercise reasonable diligence in view of the information they possessed before the jury began deliberations.

*484 There were, of course, some simple steps that could easily have shed light on whether Juror No. 1 was the suspended attorney. Parse's attorneys could have compared Conrad's name on the jury selection panel report with the name listed in the Suspension Orders, which showed that Juror No. 1 shared the same middle initial as the suspended attorney. They could have visited the New York State Bar's website and located Catherine Conrad's listing, which would have shown that she had the same address as one of the addresses listed in the Westlaw Report. They could have consulted with the Government, whom Brune acknowledged had "pretty good investigators and ... access to more information than I do[.]" (Hr'g Tr. 320–21.) They could have requested that Nardello, their private investigator, make further inquiry. *See United States v. Rodriguez,* 182 F.3d 902 (2d Cir.1999) (table) (rejecting Rule 33 motion where defense counsel failed to investigate); *see also United States v. Slutsky,* 514 F.2d 1222, 1225 (2d Cir.1975) (denying motion for a new trial where defendants "knew, or at the very least with the exercise of due diligence should have

known, of the existence of ... exculpatory evidence and its ramifications").

Most important, they could have sought guidance from the Court. As in *Bolinger,* "enough information was relayed that counsel should have contacted the district court for instructions while counsel continued his investigation." 837 F.2d at 439. Instead, Parse's attorneys usurped the judicial prerogative by substituting their judgment for the Court's. Their stated reason—"we relied on voir dire answers"—is wholly inadequate in view of their awareness of information casting strong doubt on those answers. And it is especially deficient when much of the information relating to Conrad was reflected in public records that Parse's attorneys possessed prior to the jury verdict. In sum, Parse's attorneys' knowledge of Conrad's deception and their lack of reasonable diligence in acting on that knowledge warrants finding a waiver.

CONCLUSION

Oaths are sacred and their origins ancient. They acted as a self-curse, and those who swore to one believed dire consequences flowed from its violation. That belief undergirded the oath's effectiveness and validated its purpose. *See* Helen Silving. *The Oath: I (The Historical Evolution of the Judicial Oath in Various Legal Systems),* 68 Yale L.J. 1329, 1335 (1959). Today, the need to punish perjurers—through contempt proceedings, criminal prosecutions, or both—is no less acute. While the decision to prosecute Conrad for perjury is not this Court's, the Government should have a strong incentive to punish such conduct and deter others. The prospect of preserving a tainted jury verdict should not temper the Government's resolve to call Conrad to account for her egregious conduct.

Jury selection is integral to the organization of a trial. As officers of the court, attorneys share responsibility with a judge to ensure the integrity of the proceedings. In this respect, counsel and the court are joint venturers. An attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client. Any reluctance to disclose this information—even if it might jeopardize a client's position—cannot be squared with the duty of candor owed to the tribunal.

At a minimum, Parse's attorneys had a suspicion that Juror No. 1 was not the person she represented herself to be during voir dire. That suspicion leavened into tangible evidence that Conrad was a monstrous liar. And Parse's attorneys knew—or with a modicum of diligence would have ***485** known—of Conrad's misconduct before the jury rendered its verdict. But they gambled on the jury they had. Accordingly, Parse's attorneys' failure to bring Conrad's misconduct to the attention of the Court leads to the anomalous, but entirely just, result that Daugerdas, Guerin, and Field's motion for a new trial is granted, while Parse's is denied.

For the foregoing reasons, Paul M. Daugerdas, Donna M. Guerin, and Denis M. Field's motion for a new trial is granted. David K. Parse's motion for a new trial is denied. The Clerk of the Court is directed to terminate the motion pending at ECF No. 459.

SO ORDERED.

Footnotes

1 This Court employed the "struck panel method" for selecting jurors. *See, e.g., United States v. Rudaj,* No. 04 Cr. 1110(DLC), 2005 WL 2746564, at *1–*3 (S.D.N.Y. Oct. 25, 2005) (detailing the process of jury selection by the struck panel method). The Government exercised nine peremptory challenges, and Defendants exercised fifteen. (Trial Tr. 348–51.)

2 At the outset of her testimony, Conrad invoked her Fifth Amendment privilege against self-incrimination. On the Government's application pursuant to 18 U.S.C. §§ 6002 and 6003, this Court granted Conrad use immunity. (Hr'g Tr. 102; *see also* Order dated Feb. 15, 2012, ECF No. 518 ("[N]o testimony or other information compelled under this Order, or any information directly or indirectly derived from such testimony or other information, may be used against Catherine M. Conrad in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.").)

3 Brune & Richard drafted the memorandum of law, which was joined by the other defense counsel. (Hr'g Tr. 301 ("Because the resources were different, [Brune & Richard] took by far the laboring oar with the brief[.]").)

4 Defendants' counsel consented to conduct the conference by telephone and waived their clients' right to appear.

5 During voir dire, Conrad offered that her father was "an immigration officer" but did not provide his name. Without adequate explanation in the record, it was later revealed that Trzaskoma identified Robert J. Conrad as Conrad's father and an "immigration judge." (*See infra,* Background, Section VI B; *see also* Hr'g Tr. 46–48.)

6 Counsel for Defendants Daugerdas, Geurin and Field later swore by affidavit that they had no prior knowledge of Conrad's background. (ECF Nos. 481–85.) In their affidavit, counsel for Geurin stated that on a telephone call on or about June 23, 2011, Brune and Edelstein told Geurin's counsel that Conrad's May Letter had *prompted* Parse's attorneys to make inquiries about Juror No. 1. (ECF No. 484 (emphasis added).) In their affidavit, counsel for Brubaker disclosed that following the parties' summations and the disclosure of Conrad's Juror Note, Parse's attorneys told them during two brief conversations that Conrad had the same name as a disbarred New York lawyer but that based on Conrad's voir dire responses, Juror No. 1 and the lawyer were not the same person. (ECF No. 485.)

7 On October 24, 2011, Paul L. Shechtman noticed a change of address from the firm Stillman Friedman & Shechtman, P.C. to Zuckerman Spaeder LLP. (ECF No. 494.)

8 The time stamps on e-mails produced by Parse's attorneys are inconsistent. E-mail strings were produced several times and some of the same e-mails bear time stamps three hours apart. This appears to depend on whether the e-mail was printed from Brune & Richard's New York or San Francisco offices. In any event, Trzaskoma sent her initial e-mail at 7:25 a.m. and her epiphanous e-mail at 2:36 p.m.

9 "Nardello" is Nardello & Company, an investigative firm that performed database investigations of certain prospective jurors for Parse prior to the start of voir dire. (Brune Aff. ¶ 4.) It was not until Brune's September 15 affidavit that anyone at Brune & Richard disclosed that Nardello & Company had investigated potential members of the jury, albeit not Conrad, prior to the start of voir dire. (Supplemental Memorandum of Law of United States in Opposition to Defendants' Motion for a New Trial, dated Oct. 7, 2011, Ex. 1: Affidavit of Daniel Nardello, dated Sept. 28, 2011.)

10 Parse's attorneys apparently utilized during voir dire an "A" to "F" rating system for prospective jurors, with an "A" assigned to those most likely to be pro-defense and "F" most likely to be pro-Government. A "Z" rating was assigned where there was no meaningful information available to allow assignment of a letter within the A to F range. (Brune Aff. ¶¶ 5–6.) Ultimately, Conrad received a "C" rating. (Brune Aff. ¶ 8.)

11 Parse argues that to adopt this interpretation of Trzaskoma's state of mind would be to engage in what psychologists call "hindsight bias." (Parse's Post–Hearing Brief on the Issue of Waiver, dated Apr. 6, 2012 ("Waiver Br.") at 11 (citing Daniel Khaneman, *Thinking, Fast and Slow* 202 (2011) and Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight,* 65 U. Chi. L.Rev. 571, 572 (1998) ("In hindsight, people consistently exaggerate what could have been anticipated in foresight[.]")).) Of course, this argument presumes that even given what Trzaskoma had learned by May 12, it was "unimaginable" that Conrad had lied during voir dire. (Waiver Br. at 11.) But not only was that eventuality imaginable on May 12, there is clear and convincing evidence that Trzaskoma believed it to be so.

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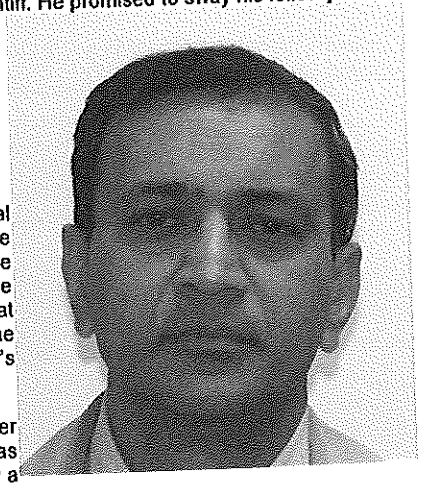
May 17, 2011

Juror Charged With Soliciting Bribe from Plaintiff; Promised to Sway Jury in Medical Malpractice Suit

Persaud, of Long Beach, sought 5% of financial award in exchange for influencing fellow jurors

MINEOLA, NY – Nassau County District Attorney Kathleen Rice announced today that a juror in a medical malpractice lawsuit has been arrested and charged with soliciting a bribe from the plaintiff. He promised to sway his fellow jurors to find in favor of the plaintiff in return for 5% of the financial award.



Deonarine Persaud, 53, of Long Beach, was arrested this morning by DA Investigators and charged with Bribe Receiving by a Juror, a Class D felony, and misdemeanor Misconduct by a Juror in the First Degree. Persaud faces up to seven years in prison if he is convicted and is due back in court May 19.

Rice said that on May 14, 2011, Persaud, a sworn juror in a civil medical malpractice trial being tried in Nassau County Supreme Court, called the plaintiff in that trial and indicated that he had crucial information about the defendant in the civil trial. During the telephone call, he did not disclose that he was a juror in the trial. Persaud spoke to the plaintiff's mother at the time and made arrangements to meet with the plaintiff's father on the following day. The plaintiff's parents immediately notified their daughter's civil lawyer about the telephone call.

On the following day, May 15, 2011, Persaud met with the plaintiff's father at a Freeport Home Depot. The plaintiff's father recognized Persaud as one of the jurors. Persaud told the father that he would assure the family a verdict in their favor in exchange for 5% of the verdict amount.

The plaintiff's father and her attorney relayed this information to the judge yesterday. The judge contacted the District Attorney's Office, which immediately conducted an investigation. Persaud was arrested when he returned to court this morning.

"Juror misconduct undermines the constitutional rights of plaintiffs and defendants and threatens the sanctity of our justice system," Rice said. "When we learned of these serious allegations, my office investigated immediately and arrested Mr. Persaud this morning."

Assistant District Attorney Andrew Garbarino of the Public Corruption Bureau is prosecuting the case for the DA's Office. Persaud is represented by the Legal Aid Society of Nassau County.

Rivera v. Albany Medical Center Hosp., 119 A.D.3d 1135 (2014)
990 N.Y.S.2d 310, 2014 N.Y. Slip Op. 05236

119 A.D.3d 1135
Supreme Court, Appellate Division,
Third Department, New York.

Raul RIVERA, Respondent,
v.
ALBANY MEDICAL CENTER HOSPITAL et al., Appellants.

July 10, 2014.

Synopsis

Background: Patient brought action against medical facility that performed surgery and physicians alleging medical malpractice and lack of informed consent. The Supreme Court, Montgomery County, J. Sise, J., denied defendants' motion for summary judgment. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, McCarthy, J., held that:

[1] movant's submission of medical expert's affidavit with expert's name redacted was incompetent evidence, and

[2] issue of material fact existed as to whether patient was warned of potential injuries to nerve cells before procedure.

Affirmed.

Attorneys and Law Firms

**311 Maynard, O'Connor, Smith & Catalinotto, LLP, Albany (Robert A. Rausch of counsel), for appellants.

Englert, Coffey, McHugh & Fantauzzi, LLP, Schenectady (Gregory E. Schaaf of counsel), for respondent.

Before: LAHTINEN, J.P., McCARTHY, GARRY, LYNCH and CLARK, JJ.

Opinion

McCARTHY, J.

*1135 Appeal from an order of the Supreme Court (J. Sise, J.), entered October 8, 2013 in Montgomery County, which denied defendants' motion for summary judgment dismissing the complaint.

Plaintiff was diagnosed with Hirschsprung's disease, a condition that affects the nerve cells embedded in the wall of the rectum and which can cause severe constipation. After two unsuccessful medical procedures, defendant underwent an open *1136 proctosigmoidectomy—the goal of which was to remove the diseased portion of plaintiff's rectum—performed by a physician at defendants' medical facility. Plaintiff thereafter commenced this action alleging medical malpractice and lack of informed consent, based upon, among other things, the claim that he now suffers permanent erectile dysfunction as a result of the surgery. Following discovery, defendants moved for summary judgment dismissing both causes of action. Supreme Court denied the motion in its entirety, prompting this appeal.

[1] [2] As an initial matter, defendants' submission of a medical expert's affidavit with the expert's name redacted is incompetent **312 evidence to support their summary judgment motion. In order to establish a prima facie entitlement to judgment as a matter of law, defendants were required to "tender [ ] sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact" (*Toomey v. Adirondack Surgical Assoc.*, 280 A.D.2d 754, 754, 720 N.Y.S.2d 229 [2001]). Among other submissions, defendants provided an affidavit from a medical expert whose identity was redacted and who opined on the appropriateness of plaintiff's medical care and the adequacy of the warnings given to plaintiff. Defendants also submitted an unredacted version of the affidavit for Supreme Court's in camera review. Because defendants were the movants for summary judgment, their submission of an anonymous expert affidavit was incompetent evidence not proper for consideration upon the motion (*see Sellino v. Kirtane*, 73 A.D.3d 728, 728, 901 N.Y.S.2d 299 [2010]; *Mackey v. Southampton Hosp.*, 264 A.D.2d 410, 410, 694 N.Y.S.2d 119 [1999]; *Henson v. Winthrop Univ. Hosp.*, 249 A.D.2d 510, 510, 672 N.Y.S.2d 124 [1998]; *Marano v. Mercy Hosp.*, 241 A.D.2d 48, 51, 670 N.Y.S.2d 570 [1998]; *see generally Morrison v. Hindley*, 221 A.D.2d 691, 693, 633 N.Y.S.2d 234 [1995] [leaving unanswered the question of whether the court could properly consider such evidence if signed affidavits were provided for in camera review]).

While the Legislature has allowed for some protection from disclosure of the identities of medical experts during "[t]rial preparation" (CPLR 3101[d][1] [i]), and, consistent with this intention, courts have found it appropriate to allow nonmovants in the summary judgment context to also withhold experts' identities from their adversaries upon the reasoning that such parties did not choose to abandon the disclosure protections provided during trial preparation (*see Cerny v. Williams,* 32 A.D.3d 881, 886, 822 N.Y.S.2d 548 [2006]; *McCarty v. Community Hosp. of Glen Cove,* 203 A.D.2d 432, 433, 610 N.Y.S.2d 588 [1994]), the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action. Further, we see ***1137** no compelling reason to allow for such anonymity that would outweigh the benefit that accountability provides in promoting candor (*see generally Marano v. Mercy Hosp.,* 241 A.D.2d at 51–52, 670 N.Y.S.2d 570). Requiring a movant to reveal an expert's identity in such circumstances would allow a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion (*see id.* at 51, 670 N.Y.S.2d 570). Further, any expert who anticipates a future opportunity to espouse a contradictory opinion would be on notice that public record could be used to hold him or her to account for any unwarranted discrepancy between such opinions. [1] For these reasons, we will not consider the incompetent affidavit of defendants' medical expert.

[3] **[4]** Turning to the evidence properly before this Court, defendants failed to meet their initial burden establishing that they were entitled to summary judgment ****313** dismissing the negligence-based medical malpractice cause of action. [2] To meet this initial burden, defendants were required to establish either that there was no departure from accepted standards of practice in plaintiff's treatment or that any such deviation did not injure plaintiff (*see Cole v. Champlain Val. Physicians' Hosp. Med. Ctr.,* 116 A.D.3d 1283, 1285, 984 N.Y.S.2d 225 [2014]; *Longtemps v. Oliva,* 110 A.D.3d 1316, 1317, 973 N.Y.S.2d 452 [2013]). A physician's sworn statements can be sufficient to meet this initial burden, provided that they are "detailed, specific and factual in nature" (*Toomey v. Adirondack Surgical Assoc.,* 280 A.D.2d at 755, 720 N.Y.S.2d 229; *accord Amodio v. Wolpert,* 52 A.D.3d 1078, 1079, 861 N.Y.S.2d 799 [2008]). Defendants' competent submissions, including, among other things, medical records and deposition testimony from the physician who treated plaintiff, fail to establish either that the physician provided care that did not depart from accepted standards of practice or that the care did not injure plaintiff, as the testimony cannot reasonably be interpreted to specifically reference the appropriate standard of care ***1138** in these circumstances or to otherwise even assert that plaintiff's injury was not caused by his actual care. Accordingly, Supreme Court properly denied defendants' motion for summary judgment on the negligence-based medical malpractice cause of action.

[5] **[6]** Further, defendants were not entitled to summary judgment on the cause of action for lack of informed consent. In order to meet their burden on this cause of action, defendants were required to establish either that the practitioner "disclose[d] the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed" or that "a reasonable person in the plaintiff's position, fully informed, would have elected ... to undergo the procedure or treatment" (*Orphan v. Pilnik,* 15 N.Y.3d 907, 908, 914 N.Y.S.2d 729, 940 N.E.2d 555 [2010]; *see* Public Health Law § 2805–d [1], [3]). The testimony provided by the physician who treated plaintiff did not specifically establish either that the risks, benefits and alternatives to the surgery that he claimed to have explained to plaintiff were also the ones that a reasonable practitioner would have disclosed or that a reasonable person, so informed, would have elected for the surgery rather than the other options described in the testimony, one of which included "leav[ing] everything alone." In any event, even if defendants had met their burden on either of these issues, plaintiff raised material issues of fact as to each. Contrary to defendants' contention, CPLR 4401–a, regarding plaintiff's burden of providing expert testimony at trial to support his cause of action, does not govern our review here; inasmuch as defendants' submissions conceded that a warning was necessary regarding the potential injuries to nerve cells that controlled the intimate function of the penis and asserted that such a warning was given to plaintiff, plaintiff's contradictory testimony that no such warning was ever given to him was sufficient to demonstrate a triable question of fact on that issue (*see Snyder v. Simon,* 49 A.D.3d 954, 956–957, 853

N.Y.S.2d 195 [2008]). Further, **314 plaintiff's testimony that he would not have chosen to have the surgery had he been properly informed of the risk of sexual dysfunction is sufficient to raise a triable issue of fact as to whether a fully informed reasonable person would have elected for the surgery (*see Schilling v. Ellis Hosp.*, 75 A.D.3d 1044, 1046, 906 N.Y.S.2d 187 [2010]; *Santilli v. CHP, Inc.*, 274 A.D.2d 905, 907–908, 711 N.Y.S.2d 249 [2000]). Accordingly, Supreme Court also properly denied defendants' motion for summary judgment on the lack of informed consent cause of action.

ORDERED that the order is affirmed, with costs.

LAHTINEN, J.P., GARRY, LYNCH and CLARK, JJ., concur.

Parallel Citations

119 A.D.3d 1135, 990 N.Y.S.2d 310, 2014 N.Y. Slip Op. 05236

Footnotes

1 A medical expert supporting a nonmovant in the summary judgment context could not reasonably believe that any temporary anonymity would keep his or her identity from the public record. A nonmovant presumably seeks a trial, where expert witnesses' identities would be revealed.

2 Although plaintiff's counsel, at argument, made concessions that plaintiff did not plan on proceeding to trial on this cause of action and did not have an expert witness who would support the cause of action, we do not believe that the record provides sufficiently clear evidence that plaintiff either requested or consented to a stipulation of discontinuance of that cause of action that would allow this Court to make such an order (*see* CPLR 3217[b]; *see generally Shamley v. ITT Corp.*, 67 N.Y.2d 910, 911–912, 501 N.Y.S.2d 810, 492 N.E.2d 1226 [1986]).

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Rivers v. Birnbaum, 102 A.D.3d 26 (2012)
953 N.Y.S.2d 232, 2012 N.Y. Slip Op. 06935

102 A.D.3d 26
Supreme Court, Appellate Division,
Second Department, New York.

Joanne Berrouet RIVERS, et al.,
plaintiffs-appellants-respondents,
v.
Eliot L. BIRNBAUM, etc., et al., defendants,
Robin Bliss, etc., et al., defendants-respondents,
Kim Rosary DeCastro, etc., defendant-appellant.

Oct. 17, 2012.

Synopsis

Background: Patient, and her husband, brought action against nurse practitioner, medical clinic, hospital, surgeons, and pathologist alleging medical malpractice, negligent hiring and supervision, and lack of informed consent for alleged failure to properly diagnose and advise of conditions that led to development of choriocarcinoma. The Supreme Court, Suffolk County, Robert T. Gazzillo, J., granted summary judgment in favor of pathologist, surgeon, and hospital, and denied nurse practitioner's motion for summary judgment.

Holdings: The Supreme Court, Appellate Division, Belen, J., held that:

[1] Supreme Court providently exercised its discretion in considering experts' affirmations submitted by defendants despite the fact that they did not disclose those experts prior to filing of note of issue and certificate of readiness;

[2] summary judgment affidavits of patient's experts were conclusory; and

[3] physician that removed staples was not liable for medical malpractice.

Affirmed in part and reversed in part.

Miller, J., filed opinion concurring in the result.

Attorneys and Law Firms

****235** Mark R. Bower, P.C., New York, N.Y., for plaintiffs-appellants-respondents.

Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. (Wayne E. Spaeth of counsel), for defendant-appellant.

Rogak & Gibbons, LLP, Uniondale, N.Y. (Louise H. Feffer and David B. De Siver of counsel), for defendant-respondent Robin Bliss.

Anthony P. Vardaro, P.C., Smithtown, N.Y. (Rosemary Martinson of counsel), for defendant-respondent Alan MacDonald.

Bower Monte & Greene, P.C., New York, N.Y. (Mitchell A. Greene of counsel), for defendant-respondent St. Catherine of Siena Medical Center.

RUTH C. BALKIN, J.P., ARIEL E. BELEN, L. PRISCILLA HALL, and ROBERT J. MILLER, JJ.

Opinion

BELEN, J.

***30** This case presents us with an opportunity to clarify the rule regarding a court's consideration of an expert's affirmation or affidavit submitted on a timely motion for summary judgment where the offering party did not disclose the expert during ***31** discovery pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness. We hold that a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment.

The plaintiffs allege that the defendants committed medical malpractice in failing to properly diagnose and advise the allegedly injured plaintiff, Joanne Berrouet Rivers (hereinafter the injured plaintiff), of conditions that led to the development in her of a gynecological cancer known as choriocarcinoma. On March 1, 2006, the injured plaintiff was seen by the defendant Kim Rosary DeCastro, a nurse practioner and an employee of the defendant Women's

Health Care of Suffolk County (hereinafter WHC), [1] during a healthcare visit. DeCastro conducted a pelvic exam, which proved to be within normal limits, and assessed that the injured plaintiff was 5 ½ weeks pregnant. The injured plaintiff was next seen by DeCastro on March 15, 2006. At this visit, the injured plaintiff complained of pain radiating to her back and shortness of breath, and was prescribed amoxicillin to treat chlamydia.

On March 22, 2006, after the injured plaintiff complained of cramping and a "pink, yogurty discharge," she underwent a sonogram, which showed that there were very faint fetal heart tones and that the fetus was at 7 weeks' gestation. A sonogram from March 29, 2006, showed that the fetus had died.

On April 3, 2006, the injured plaintiff went to the defendant St. Catherine of Siena Medical Center (hereinafter the Medical Center) for a dilation and curettage, which was performed by the defendant Eliot L. Birnbaum. The tissue that was recovered during the procedure was examined by the defendant Alan MacDonald, a pathologist.

**236 According to a Surgical Pathology Report written by MacDonald dated April 5, 2006, the tissue contained no fetal parts. MacDonald made the following diagnosis:

"Uterus, Uterine Contents:

* Immature chorionic villi, with focal zones of surface trophoblast hyperplasia noted.

*32 * Necrotic decidual tissue.

* Probable portions of placental implantation site."

MacDonald indicated in his report that he spoke with Birnbaum on April 4, 2006, about his findings.

At her deposition, DeCastro testified that the recognition and diagnosis of trophoblasic disease is outside her training, knowledge, and experience as a nurse practitioner. She further testified that she generally does not review pathology reports, as such a task is usually performed by Birnbaum or Bliss, or by whichever surgeon performed the dilation and curettage.

By August 2006, the injured plaintiff had become pregnant again. Sonograms during this pregnancy showed that the fetus was growing and developing normally. In February 2007, the injured plaintiff complained of back pain, and a renal ultrasound was ordered. The injured plaintiff underwent renal ultrasounds on February 2, 2007, and March 21, 2007, which were interpreted by nonparty Moses Williams, a radiologist at the Medical Center who prepared reports pertaining to his findings. Williams described in his reports the presence of an echogenic lesion in the mid-section of the right kidney, which he identified as "hyperechoic" and consistent with an angiomyolipoma, which is a benign tumor. On April 2, 2007, the injured plaintiff gave birth to a healthy baby boy by caesarean section. Soon thereafter, in June 2007, she was diagnosed with metastatic choriocarcinoma.

The injured plaintiff and her husband commenced this action in June 2008, asserting, on behalf of the injured plaintiff, causes of action to recover damages for medical malpractice, negligent hiring and supervision, and lack of informed consent, and a derivative cause of action on behalf of the injured plaintiff's husband. By demand dated August 26, 2008, the plaintiffs requested, pursuant to CPLR 3101(d)(1)(i), that the defendants disclose information regarding their expected expert trial witnesses. On or about January 26, 2010, the plaintiffs disclosed their expert trial witness information to the defendants. Before any of the defendants responded to the plaintiffs' CPLR 3101(d)(1)(i) request, on or about February 3, 2010, the plaintiffs filed a note of issue and certificate of readiness. [2]

*33 Thereafter, the defendants Bliss, MacDonald, the Medical Center, and DeCastro [3] (hereinafter collectively the moving **237 defendants) separately moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them, relying on, inter alia, affirmations from physicians-experts whose identity they had not disclosed during discovery. Bliss argued that she was entitled to judgment on the ground that she never provided any medical care to the plaintiff. [4]

The plaintiffs opposed the motions and cross-moved for summary judgment on the issue of liability against MacDonald. In opposing the motions of MacDonald, the Medical Center, and DeCastro, the plaintiffs argued, in pertinent part, that the expert affirmations submitted by those defendants should be precluded because they failed to respond to their request, made during discovery, for expert

disclosure pursuant to CPLR 3101(d)(1)(i) before the note of issue and certificate of readiness were filed.

In rejecting the plaintiffs' argument, the Supreme Court held that the failure of MacDonald, the Medical Center, and DeCastro to respond to the plaintiffs' CPLR 3101(d)(1)(i) request did not warrant preclusion of their expert affirmations since the statute does not require expert disclosure at any particular time and does not mandate preclusion for noncompliance. The Supreme Court also found no evidence that the failure of these ***34** defendants to disclose their expert information was intentional or willful, and there was no showing that their nondisclosure prejudiced the plaintiffs.

Turning to the merits of the moving defendants' motions, the Supreme Court determined that MacDonald, the Medical Center, and DeCastro each established their prima facie entitlement to judgment as a matter of law through the affirmations of their respective experts. The Supreme Court further determined that the affirmations[5] of the plaintiffs' experts submitted in opposition to the motions of MacDonald and the Medical Center were technically defective because the experts were not licensed to practice medicine in New York. However, the Supreme Court determined that the affirmation of the plaintiffs' expert submitted in opposition to DeCastro's motion raised a triable issue of fact as to whether DeCastro departed from accepted standards of medical care. Accordingly, the Supreme Court granted the motions of MacDonald and the Medical Center for summary judgment, and denied DeCastro's motion for summary judgment. The Supreme Court granted Bliss's motion for summary judgment, concluding that the plaintiffs did not raise a triable issue of fact in opposition to Bliss's prima facie case, since they submitted only the affirmation of their attorney (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

With respect to the plaintiffs' cross motion, in effect, for summary judgment on ****238** the issue of liability against MacDonald, the Supreme Court determined that the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law because their out-of-state expert's affirmation was technically defective.

The plaintiffs appeal from so much of the Supreme Court's order as granted those branches of the separate motions of MacDonald, the Medical Center, and Bliss which were for summary judgment dismissing the complaint insofar as asserted against each of them, and denied their cross motion, in effect, for summary judgment on the issue of liability against MacDonald. Among other things, the plaintiffs argue that the Supreme Court should not have considered the affirmations submitted by these defendants, since they failed to disclose their experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness. DeCastro separately appeals ***35** from so much of the same order as denied that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her, arguing that the plaintiffs failed to raise a triable issue of fact in opposition to her prima facie showing of entitlement to judgment as a matter of law. We affirm the order insofar as appealed from by the plaintiffs, and reverse the order insofar as appealed from by DeCastro.

CPLR 3101(d)(1)(i) provides as follows:

> "Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to *testify,* the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of *trial* to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the *trial* solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at *trial,* or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph" (emphasis added).

[1] Although the statute mandates that, "[u]pon request," a party "shall" identify the experts it "expects to call as an expert witness at trial" (CPLR 3101[d][1][i]), it does not specify when a party must disclose its expected trial experts upon receiving a demand (*compare* Fed. Rules Civ. Pro. rule 26[a][2][D] [requiring parties to disclose their experts "at the

times and in the sequence that the court orders"]). As such, a CPLR 3101(d)(1)(i) demand made during discovery "does not require a party to respond to a demand for expert witness information 'at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance ***36** with the statute' " (*Aversa v. Taubes,* 194 A.D.2d 580, 582, 598 N.Y.S.2d 801, quoting *Lillis v. D'Souza,* 174 A.D.2d 976, 976, 572 N.Y.S.2d 136; *see* David D. Siegel, New York Practice, § 348A, at 583 [5th ed.] [noting that CPLR 3101(d)(1)(i) "sets forth no particular time for the making of the request, and no particular time for responding to it"]).

[2] When interpreting a law, a court must always look to legislative intent, ****239** which "is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94). Further, where the Legislature " 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposefully in the disparate inclusion or exclusion' " (*INS v. Cardoza–Fonseca,* 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed.2d 434, quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 [internal quotation marks omitted]).

Of note, the next subdivision of the statute, CPLR 3101(d)(1)(ii), contains a specific provision requiring, in medical, dental, or podiatric malpractice actions, a party, "[w]*ithin twenty days* of service," to accept or reject an opponent's written "offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial" (emphasis added). Given the inclusion of a specific deadline in CPLR 3101(d)(1)(ii) and the omission of such a deadline in CPLR 3101(d)(1)(i), we presume that the Legislature purposefully omitted a deadline in CPLR 3101(d)(1)(i) (*see INS v. Cardoza–Fonseca,* 480 U.S. at 432, 107 S.Ct. 1207, 94 L.Ed.2d 434).

[3] We recognize that CPLR 3101(d)(1)(i) is part of CPLR article 31, which governs the discovery process. We further recognize that, generally, when a party files a note of issue and certificate of readiness, it must affirm that "[d]iscovery proceedings now known to be necessary [have been] completed" (22 NYCRR 202.21). However, as previously discussed, the Legislature omitted a specific deadline by which a party must respond to a CPLR 3101(d)(1)(i) request, and the statute itself specifically vests a trial court with the discretion to allow the testimony of an expert who was disclosed near the commencement of trial. Thus, the statutory scheme provides that, even where one party requests trial expert disclosure during discovery pursuant to ***37** CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony. Accordingly, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness will not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment.

Turning to the legislative history, as originally enacted in 1962, CPLR 3101 exempted expert witnesses from disclosure (*see* CPLR former 3101 [L. 1962, ch. 308]; Governor's Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 6). Through the 1985 amendment to CPLR 3101, of which subdivision (d)(1)(i) is a part, the Legislature intended to "expand disclosure" (David D. Siegel, 1986 Supp. Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:9, at 5), by requiring, for the first time, that parties disclose their experts, but deliberately did so only in the limited context of requiring a party, upon request, to make a pretrial disclosure of expected expert witnesses at trial.

CPLR 3101(d)(1)(i) was originally conceived as part of a major overhaul of medical malpractice litigation procedures. The new requirement in this overhaul that parties disclose their expert trial witnesses ****240** was intended to reduce the delay between the "medical malpractice event and the ultimate disposition," which was a major contributor to increased medical malpractice insurance premiums (Governor's Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 9). Therefore, the amendment was conceived as part of a multi-pronged effort "to expedite litigation, to encourage prompt settlements and to deter parties from asserting frivolous claims and defenses" (*id.* at 9).

Thereafter, the provision was "plucked out" of its place in the original medical malpractice litigation reform bill and made applicable to all forms of litigation (*see* David

D. Siegel, 1986 Supp. Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:9, at 4; Rep. No. 95 of Comm. on State Legis., Bill Jacket, L. 1985, ch. 294 at 16). Modeled on Rule 26 of the Federal Rules of Civil Procedure, the proposed amendment marked a departure from the prohibition on expert disclosure in civil litigation by generally allowing parties "to conduct basic disclosure regarding experts without court order" (1985 Rep. of the *38 Advisory Comm. on Civ. Prac. at 49). However, this expansion was relatively limited, as it only required, upon request, pretrial disclosure of the identity and qualifications of each person expected to be called at trial as an expert witness and the substance of their expected testimony, but did not require a party to disclose the experts it had retained but had not determined would be called at trial (*see id.;* Governor's Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 4 [noting that "(s)ection four (of the bill) would require the disclosure of the qualifications of experts and the substance of their testimony prior to trial in civil actions"]).

[4] Moreover, although the Legislature recognized that "the testimony of expert witnesses is often the single most important element of proof in malpractice and other personal injury actions" (Governor's Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 9), the Legislature limited disclosure inasmuch as it did not provide for examinations before trial of expert witnesses (*see* Rep. No. 95 of Comm. on State Legis., Bill Jacket, L. 1985, ch. 294 at 16; *compare id. with* Fed. Rules Civ. Pro. 26[b][4][A] ["A party may depose any person who has been identified as an expert whose opinions may be presented at trial"]).[6]

[5] In its current form, CPLR 3101(d)(1)(i) requires a party, upon request, to disclose information regarding each person it expects to call as an expert witness prior to trial, without specifying that such disclosure must be made prior to the filing of the note of issue and certificate of readiness. Further, the language of CPLR 3101(d)(1)(i) anticipates that the **241 disclosure of expert trial witnesses might not occur until near the commencement of trial. As such, the statute implicitly recognizes *39 that parties often delay the retaining of an expert until it is apparent that settlement is unlikely and a trial will be necessary. Significantly, even if a party has retained an expert during discovery and is the recipient of a CPLR 3101(d)(1)(i) request for trial expert disclosure, it has no affirmative obligation to disclose that expert during discovery unless it "expects to call [that expert] as an expert witness at trial" (CPLR 3101[d][1][i]; *see Vigilant Ins. Co. v. Barnes,* 199 A.D.2d 257, 604 N.Y.S.2d 248).

[6] Based on the plain language and intent of the statute, which do not automatically preclude experts disclosed near the commencement of trial from testifying at trial, there is no basis for concluding that a court must reject a party's submission of an expert's affidavit or affirmation in support of, or in opposition to, a timely motion for summary judgment solely because the expert was not disclosed pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness, or prior to the making of the motion.[7] We further note that a court has the discretion, under its general authority to supervise disclosure, to impose a specific deadline for expert disclosure under CPLR 3101(d)(1)(i), for example, prior to the filing of a note of issue and certificate of readiness or prior to a motion for summary judgment (*see Mauro v. Rosedale Enters.,* 60 A.D.3d 401, 873 N.Y.S.2d 627). Moreover, where a trial court sets a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline (*see MacDonald v. Leif,* 89 A.D.3d 995, 933 N.Y.S.2d 363; *Pirro Group, LLC v. One Point St., Inc.,* 71 A.D.3d 654, 896 N.Y.S.2d 152; *Bomzer v. Parke–Davis,* 41 A.D.3d 522, 839 N.Y.S.2d 110; *Maiorino v. City of New York,* 39 A.D.3d 601, 834 N.Y.S.2d 272).

We recognize that certain decisions of this Court may have been interpreted as standing for the proposition that a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness, by itself, requires preclusion of an expert's affirmation or affidavit submitted in support of a motion for summary judgment. For example, in *Construction by Singletree, Inc. v. Lowe,* 55 A.D.3d 861, 866 N.Y.S.2d 702, a subcontractor hired in a home construction project commenced an action against the general contractor, J.C. Construction Management Corp. (hereinafter J.C.), and J.C.'s *40 client, Sheldon Lowe, trustee under the Sheldon Lowe declaration of trust dated January 15, 1999 (hereinafter Lowe), to recover money it allegedly was owed in connection with the project. Lowe cross-claimed against J.C. seeking, inter alia, to recover damages for breach of warranty based on J.C.'s allegedly improper installation of the flooring and insulation systems

in the home, and seeking payment pursuant to a liquidated damages clause that had been added to the contract between himself and J.C.

After the completion of discovery, J.C. moved for summary judgment dismissing, inter alia, the aforementioned cross claims. In opposition, Lowe submitted, among other things, affidavits from purported experts in the flooring and air conditioning **242 industries, opining that the flooring and insulation systems in the home were faulty, and estimating the costs to repair each system. A majority of the panel of Justices affirmed the determination of the Supreme Court to grant J.C.'s motion for summary judgment, concluding that J.C. established its prima facie entitlement to judgment as a matter of law, and that Lowe failed to raise a triable issue of fact in opposition. As to Lowe's opposition, the majority stated that "[t]he Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe, *since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter* " (*id.* at 863, 866 N.Y.S.2d 702 [emphasis added]). The majority further explained:

> "As it is undisputed that Lowe failed to identify any experts in pretrial disclosure whom he intended to call to testify at trial concerning whether the work was faulty or the extent of his alleged compensatory damages arising from that breach of warranty, and did not proffer any explanation for such failure, it was not an improvident exercise of discretion for the Supreme Court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial" (*id.*).

Additionally, in addressing the dissent by Justice Carni, which concluded that CPLR "3101(d)(1)(i) applies only to an expert *41 whom a party intends to call at trial," and not an expert used in a motion for summary judgment, the majority indicated that the affidavits of Lowe's experts were inadmissible at trial (*id.*). The majority arguably found the affidavits of Lowe's experts inadmissible in part because of Lowe's failure to disclose its experts prior to the filing of the note of issue and certificate of readiness. Such a conclusion suggests, first, that Lowe's failure to disclose the experts prior to the filing of the note of issue and certificate of readiness rendered the disclosure untimely pursuant to CPLR 3101(d)(1)(i), and, second, that such untimely disclosure rendered the experts' affidavits inadmissible. Indeed, some of our decisions may be interpreted as so holding and as setting forth a bright-line rule in which expert disclosure pursuant to CPLR 3101(d)(1)(i) is untimely if it is made after the filing of the note of issue and certificate and readiness and, thus, in the absence of a valid excuse for such a delay, a court must preclude an affidavit or affirmation from an expert whose identity is disclosed for the first time as part of a motion for summary judgment (*see e.g., Stolarski v. DeSimone,* 83 A.D.3d 1042, 1044–1045, 922 N.Y.S.2d 151; *Ehrenberg v. Starbucks Coffee Co.,* 82 A.D.3d 829, 918 N.Y.S.2d 556; *Pellechia v. Partner Aviation Enters., Inc.,* 80 A.D.3d 740, 916 N.Y.S.2d 130; *Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit,* 72 A.D.3d 804, 898 N.Y.S.2d 856; *Gerardi v. Verizon N.Y., Inc.,* 66 A.D.3d 960, 888 N.Y.S.2d 136; *Wartski v. C.W. Post Campus of Long Is. Univ.,* 63 A.D.3d 916, 917, 882 N.Y.S.2d 192; *King v. Gregruss Mgt. Corp.,* 57 A.D.3d 851, 852–853, 870 N.Y.S.2d 103; *Colon v. Chelsea Piers Mgt., Inc.,* 50 A.D.3d 616, 855 N.Y.S.2d 201; *see also DeLeon v. State of New York,* 22 A.D.3d 786, 787, 803 N.Y.S.2d 692; *Herrera v. Lever,* 34 Misc.3d 1239[A], 2012 N.Y. Slip Op. 50477[U], *2–4, 2012 WL 874788).

We now clarify that the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness **243 does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction.

We further reiterate that a trial court, under its general authority to supervise disclosure deadlines, and consistent with *42 its discretion to supervise the substance of discovery, may impose a specific deadline (for example, prior to the filing of the note of issue and certificate of readiness or prior to the making of a motion for summary judgment), for the disclosure of experts to be used in support of a motion

for summary judgment, or who are expected to testify at trial, or both. Moreover, where a trial court has set a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline (*see MacDonald v. Leif,* 89 A.D.3d 995, 933 N.Y.S.2d 363; *Pirro Group, LLC v. One Point St., Inc.,* 71 A.D.3d 654, 896 N.Y.S.2d 152; *Bomzer v. Parke–Davis,* 41 A.D.3d 522, 839 N.Y.S.2d 110; *Maiorino v. City of New York,* 39 A.D.3d 601, 834 N.Y.S.2d 272).

[7] As clarified, this rule is consistent both with the statute and with the general purpose of summary judgment itself. Summary judgment is the procedural equivalent of a trial and "must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable" (*Dykeman v. Heht,* 52 A.D.3d 767, 769, 861 N.Y.S.2d 732). In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist (*see Gitlin v. Chirinkin,* 98 A.D.3d 561, 949 N.Y.S.2d 712; *Dykeman v. Heht,* 52 A.D.3d at 769, 861 N.Y.S.2d 732; *Tunison v. D.J. Stapleton, Inc.,* 43 A.D.3d 910, 841 N.Y.S.2d 615).

[8] The preclusion of an expert's affirmation or affidavit submitted in the context of a motion for summary judgment based solely on a party's failure to disclose the expert pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not necessarily advance the court's role of determining the existence of a triable issue of fact. In the context of a motion for summary judgment in a medical malpractice action, generally, a party must submit an affidavit or affirmation from an expert medical provider to meet its prima facie burden, or to raise a triable issue of fact in opposition (*see Post v. County of Suffolk,* 80 A.D.3d 682, 685, 915 N.Y.S.2d 124; *Dunn v. Khan,* 62 A.D.3d 828, 829, 880 N.Y.S.2d 653). Precluding an expert's affidavit solely on the ground that the offering party did not disclose the expert's identity pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness is not consistent with the purpose and procedural posture of a motion for summary judgment.

[9] In the matter at bar, the Supreme Court providently exercised its discretion in considering the experts' affirmations submitted by the moving defendants, and the additional affidavits submitted *43 by Bliss, in support of their respective motions for summary judgment, despite the fact that they did not disclose those experts pursuant to CPLR 3101(d)(1)(i) prior **244 to the filing of the note of issue and certificate of readiness. [8]

[10] [11] Turning to the merits of the moving defendants' respective motions, in a medical malpractice action, the requisite elements of proof are a deviation or departure from accepted community standards of medical care and evidence that such departure was a proximate cause of injury or damage (*see Orsi v. Haralabatos,* 89 A.D.3d 997, 998, 934 N.Y.S.2d 195, *lv. granted* 18 N.Y.3d 809, 2012 WL 996903; *Geffner v. North Shore Univ. Hosp.,* 57 A.D.3d 839, 842, 871 N.Y.S.2d 617; *Elliot v. Long Is. Home, Ltd.,* 12 A.D.3d 481, 482, 784 N.Y.S.2d 615). A defendant seeking summary judgment in a medical malpractice action bears the burden of establishing, prima facie, either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries (*see Swanson v. Raju,* 95 A.D.3d 1105, 1106, 945 N.Y.S.2d 101). In opposition, the plaintiff must demonstrate the existence of a triable issue of fact only as to the elements on which the defendant has met his or her initial burden (*see Stukas v. Streiter,* 83 A.D.3d 18, 23–24, 918 N.Y.S.2d 176).

Here, in support of their separate motions for summary judgment, MacDonald and the Medical Center demonstrated their prima facie entitlement to judgment as a matter of law by submitting, inter alia, affirmations from experts that established that these defendants did not depart from good and accepted standards of medical care and that, in any event, any departures were not a proximate cause of the injured plaintiff's injuries. MacDonald's expert, Leonard B. Kahn, a board-certified pathologist, opined that the pathology slides from the injured plaintiff's dilation and curettage confirm that the tissue specimen is a missed abortion with no evidence of a hydatidiform mole. Kahn observed that the slides showed the presence of immature chorionic villi, the majority of which were "well vascularized and normal in caliber," while other villi "showed hydropic changes without trophoblastic overgrowth," and that "[f]ocally, there is hyperplasia or overgrowth of syntrophoblastic and cytotrophoblastic *44 tissue noted to be polar in relation to the involved villi." Accordingly, Kahn opined that MacDonald's diagnosis, set forth in the pathology report, of "[i]mmature chorionic villi, with focal zones of surface trophoblast hyperplasia[,] [n]ecrotic decidual tissue[,] [and] [p]robable portions of

placental implantation site" was adequate, correct, and conformed with good and accepted medical practice. He further opined that MacDonald's diagnosis was not the proximate cause of the plaintiff's injuries.

In opposition to MacDonald's motion, the plaintiffs submitted, inter alia, an affidavit from pathologist Theonia Boyd, a board-certified pathologist licensed to practice in Massachusetts, which was notarized in Massachusetts but not accompanied by a certification in accordance with CPLR 2309(c). However, this defect was not fatal, as MacDonald was not prejudiced thereby (*see* CPLR 2001; *U.S. Bank N.A. v. Dellarmo,* 94 A.D.3d 746, 748, 942 N.Y.S.2d 122; *Betz v. Daniel Conti, Inc.,* 69 A.D.3d 545, 892 N.Y.S.2d 477). Accordingly, the Supreme Court improvidently ****245** exercised its discretion in not considering Boyd's affidavit.

[12] As to the substance of Boyd's affidavit, she opined that MacDonald departed from good and accepted medical practice by misinterpreting the injured plaintiff's pathology slides in light of the "unequivocal features of a hydatidiform molar pregnancy" allegedly revealed therein. Notably, however, Boyd failed to describe or quantify in any way the "unequivocal features of a hydatidiform molar pregnancy" that she alleged MacDonald failed to observe. Boyd's opinion is, therefore, conclusory and fails to raise a triable issue of fact as to whether MacDonald departed from good and accepted medical practice (*see Ahmed v. New York City Health & Hosps. Corp.,* 84 A.D.3d 709, 711, 922 N.Y.S.2d 202; *Dunn v. Khan,* 62 A.D.3d 828, 829, 880 N.Y.S.2d 653). In any event, Boyd's assertion that the correct diagnosis would have led to an appropriate follow-up plan is conclusory and speculative, and thus, fails to raise a triable issue of fact as to causation (*see Forrest v. Tierney,* 91 A.D.3d 707, 709, 936 N.Y.S.2d 295; *Graziano v. Cooling,* 79 A.D.3d 803, 805, 913 N.Y.S.2d 302). Accordingly, the Supreme Court properly granted that branch of MacDonald's motion which was for summary judgment dismissing the complaint insofar as asserted against him.

In support of its motion for summary judgment, the Medical Center demonstrated its prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affirmation from David A. Fisher, a board-certified diagnostic ***45** radiologist. In his affirmation, Fisher opined that the diagnosis by the Medical Center's radiologist, Moses Williams, based on the injured plaintiff's February 2, 2007, obstetrical and renal ultrasound studies, correctly interpreted a small echogenic lesion on the injured plaintiff's mid-right kidney as angiomyolipoma, and properly recommended follow-up evaluation of the lesion. Further, Williams's identical diagnosis, based on the injured plaintiff's March 21, 2007, renal ultrasound, was similarly correct. Fisher also opined, with a reasonable degree of medical certainty, that his own review of the renal ultrasound studies showed no evidence of metastatic choriocarcinoma. Based on the foregoing assertions, Fisher concluded that the Medical Center did not depart from good and accepted medical practice, and that, in any event, no action or inaction on the Medical Center's part was a proximate cause of the injured plaintiff's injuries.

[13] The record reflects that, in opposition to the Medical Center's motion, the plaintiffs submitted a redacted affirmation from an unnamed board-certified radiologist who is licensed to practice in Connecticut. Like Boyd's affirmation, this redacted affirmation, which indicates that it was drafted in Connecticut, was not accompanied by a certification in accordance with CPLR 2309(c). However, unlike Boyd's affirmation, the radiologist's affirmation was not signed, not dated, and not notarized, and therefore was inadmissible (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Fredette v. Town of Southampton,* 95 A.D.3d 940, 942, 944 N.Y.S.2d 206, *lv. denied* 19 N.Y.3d 811, 2012 WL 3930678).

[14] In any event, the affirmation is speculative and conclusory, as it opines that the Medical Center, through its radiologist, incorrectly interpreted the ultrasound studies as indicative of angiomyolipoma, rather than choriocarcinoma, without setting forth any basis for this opinion (*see Ahmed v. New York City Health & Hosps. Corp.,* 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan,* 62 A.D.3d at 829, 880 N.Y.S.2d 653). Further, ****246** the vague assertion that the Medical Center had a "duty to recommend an additional work-up, specifying studies that would more likely than not have resulted in the correct diagnosis," was speculative and failed to raise a triable issue of fact, as this opinion failed to set forth the rationale for such additional studies or the specific additional studies the Medical Center should have recommended (*see Ahmed v. New York City Health & Hosps. Corp.,* 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan,* 62 A.D.3d at 829, 880 N.Y.S.2d 653). Similarly, the affirmation's conclusion that, to the extent the Medical

Center's expert radiologist "avers otherwise, *46 ... he is mistaken" is insufficient to raise a triable issue of fact, as the affirmation again sets forth no basis for such opinion (*see Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Accordingly, the Supreme Court properly granted that branch of the Medical Center's motion which was for summary judgment dismissing the complaint insofar as asserted against it.

In support of her motion for summary judgment, DeCastro demonstrated her prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affirmation from John L. Lovecchio, who is board certified in obstetrics and gynecology, and the sub-specialty of gynecological oncology. Lovecchio's affirmation established that DeCastro did not depart from good and accepted standards of medical care. Specifically, Lovecchio averred that DeCastro provided the injured plaintiff with appropriate care and treatment during her visits on March 1, 2006, and March 15, 2006, "insofar as she obtained a proper medical history; conducted appropriate physical examinations; and arranged for appropriate follow up diagnostic test studies." Moreover, since MacDonald's pathology report, which was based on the dilation and curettage procedure performed at the Medical Center on April 13, 2006, indicated "essentially a normal finding" that did not indicate that the injured plaintiff "was in a potentially pre-cancerous state for development of choriocarcinoma," Lovecchio opined, with a reasonable degree of medical certainty, that DeCastro's failure to undertake any follow-up plan based on the pathology report was not a departure from good and accepted medical practice.

Lovecchio further averred that DeCastro's act of ordering a follow-up human chorionic gonadotropin (hereinafter HCG) test for the injured plaintiff during the injured plaintiff's May 17, 2006, visit was within good and accepted standards of medical care. HCG testing on July 26, 2006, revealed that the injured plaintiff had an HCG level of 5, which both showed that she was not pregnant and "definitely ruled out the possible existence of a molar pregnancy and/or a choriocarcinoma up to this point." Moreover, HCG testing between May and August 2006 followed a normal trajectory, inasmuch as the HCG levels decreased following the first pregnancy, which ended in a miscarriage, and increased at the beginning of the second pregnancy. Taken together, MacDonald's pathology report and the HCG testing between May 2006 and August 2006 "consistently demonstrated that the [injured] [p]laintiff did not have a *47 molar pregnancy as a precursor to potential development of choriocarcinoma during this time span." Furthermore, the injured plaintiff did not exhibit any signs or symptoms at any of the visits to DeCastro that should have caused DeCastro to suspect that the injured plaintiff was in a potentially pre-cancerous state. In sum, Lovecchio opined, with a reasonable degree of medical certainty, that DeCastro did not depart **247 from good and accepted medical practice in her care and treatment of the injured plaintiff.

[15] In opposition to DeCastro's motion, the plaintiffs submitted an affirmation from Lawrence Ross, who did not specify his qualifications, except to describe himself as a "physician licensed to practice in N.Y. ... with more than 50 years' experience," who was "familiar with the standards of care for nurse practitioners." Even assuming that Ross was a qualified expert on the practice of nurse practitioners, his affirmation was conclusory and speculative and, thus, failed to raise a triable issue of fact as to whether DeCastro departed from good and accepted medical practice. For example, although Ross opined that the statement in MacDonald's pathology report—"[r]esults of histologic findings are discussed with Dr. Birnbaum on April 4, 2006. A differential diagnosis is renewed to interpret the histologic findings. Options for the follow-up care of the patient are discussed[ ]"—which he asserts DeCastro admits to having read,[9] was a " 'red flag' that should alert the reader that something very unusual was going on," he failed to explain why the statement was a red flag or specify the accepted standard of care. Instead, he merely concluded that DeCastro's failure to follow up with a physician in light of the alleged red flag was an "obvious departure from the standard of care." Accordingly, Ross's opinion that DeCastro departed from good and accepted medical practice by not following up on the alleged red flag in the pathology report was speculative and conclusory, and, thus, did not raise a triable issue of fact (*see Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Consequently, the Supreme Court should have granted that branch of DeCastro's motion which was for summary judgment dismissing the complaint insofar as asserted against her.

[16] Finally, we turn to Bliss's motion for summary judgment. Bliss established, prima facie, through her affidavits and the affirmation of her expert, that she was not involved with *48 providing medical care to the injured plaintiff and, thus, did not depart from good and acceptable medical care with respect to the injured plaintiff (*see Leon v. Southside Hosp.*, 227 A.D.2d 384, 642 N.Y.S.2d 72; *Tessier v. New York City Health & Hosps. Corp.*, 177 A.D.2d 626, 576 N.Y.S.2d 331; *Latiff v. Wyckoff Hgts. Hosp.*, 144 A.D.2d 650, 535 N.Y.S.2d 2). In opposition, the plaintiffs did not raise a triable issue of fact as to whether Bliss provided medical care to the injured plaintiff or departed from good and accepted medical practice with respect to the injured plaintiff. The affirmation of the plaintiffs' counsel is of no probative value (*see Zuckerman v. City of New York*, 49 N.Y.2d at 563, 427 N.Y.S.2d 595, 404 N.E.2d 718). Moreover, to the extent the plaintiffs rely on the injured plaintiff's deposition, which Bliss submitted with her moving papers, in which she testified that she "believe[d]" that Bliss removed her staples following her cesarean section, such testimony does not raise a triable issue of fact as to whether Bliss treated her (*see Latiff v. Wyckoff Hgts. Hosp.*, 144 A.D.2d at 651, 535 N.Y.S.2d 2). Further, even if Bliss did remove the injured plaintiff's staples, the plaintiffs did not submit an affidavit or affirmation from an expert that could have raised a triable issue of fact as to whether Bliss's actions or inactions **248 proximately caused the injured plaintiff's injuries (*see Tessier v. New York City Health & Hosps. Corp.*, 177 A.D.2d 626, 576 N.Y.S.2d 331). Indeed, the plaintiffs do not allege that the staples were improperly removed following the injured plaintiff's cesarean section or that the injured plaintiff sustained any injuries resulting from the removal of her staples. Accordingly, the Supreme Court properly granted that branch of Bliss's motion which was for summary judgment dismissing the complaint insofar as asserted against her.

The plaintiffs' remaining contentions are without merit.

Accordingly, the order is affirmed insofar as appealed from by the plaintiffs. In addition, the order is reversed insofar as appealed from by DeCastro, on the law, and that branch of DeCastro's motion which was for summary judgment dismissing the complaint insofar as asserted against her is granted.

BALKIN, J.P., and HALL, J., concur.

MILLER, J., concurs in the result and votes to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by the defendant Kim Rosary DeCastro, on the law, and to grant that branch of the motion of the defendant Kim Rosary DeCastro which was for summary judgment dismissing the complaint insofar as asserted against her, with the following memorandum:

I concur in the result reached by my colleagues to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by the defendant Kim Rosary DeCastro. I write separately to express my views regarding the duty CPLR 3101(d)(1)(i) imposes on parties to provide pretrial expert disclosure and the extent to which a court has the discretion to fashion penalties for a party's failure to comply. *49 It is my belief that further analysis of CPLR 3101(d)(1)(i) and of this Court's case law will help clarify this area of the law and permit the application of the statute in a manner that is predictable for the bar, workable for the bench, and consistent with the Legislature's purpose in enacting it.

As enacted in 1962, CPLR 3101 provided that evidence pertaining to expert witnesses was generally exempt from pretrial disclosure unless certain exceptions applied which would result in injustice or undue hardship (*see* CPLR former 3101 [L. 1962, ch. 308]; *see also* Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 3101.52a [2012]; Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 6). An advisory committee's report shows that the decision to distinguish expert testimony from other forms of evidence was motivated, at least in part, by the desire to shield tactical considerations from adverse parties (1957 Rep. of Temporary Comm. on the Cts., First Prelim. Rep. of Advisory Comm. on Practice and Procedure, Title 34 at 120).

In 1985, the Legislature enacted legislation, known as the Medical Malpractice Reform Act, which was intended to "expedite the resolution of malpractice claims and thereby reduce the cost of malpractice litigation" (*Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 7, 550 N.Y.S.2d 572, 549 N.E.2d 1143; *see* L. 1985, ch. 294, § 1; *see also* Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 4). As one of the steps intended to expedite litigation and facilitate settlements, section four of the legislation "require[d] the

disclosure of the qualifications of experts and the substance of their testimony prior to trial in civil actions" (Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 4; *see* **249 *Tewari v. Tsoutsouras,* 75 N.Y.2d at 7, 550 N.Y.S.2d 572, 549 N.E.2d 1143; *see also* 1985 Rep. of the Advisory Comm. on Civ. Prac. at 43).

The rationale for expanding the scope of discovery to include experts was provided in the Governor's Approval Memorandum:

> "Although virtually all other information is now shared by litigants in civil practice, information concerning expert witnesses and their opinions remains shielded from disclosure. Since the testimony of expert witnesses is often the single most important element of proof in malpractice and other personal injury actions, sharing information concerning these opinions encourages prompt settlement by providing both parties an accurate measure *50 of the strength of their adversaries' case. In addition, both parties will be discouraged from asserting unsupportable claims or defenses, knowing that they will be required to disclose what, if any expert evidence will support their allegations" (Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 9–10).

Though the Legislature was specifically motivated to reduce the cost of litigating medical malpractice actions when it amended CPLR 3101, its provisions regarding disclosure, as relevant here, do not make reference to specific types of actions and are applicable to all kinds of experts. In its current form, CPLR 3101 provides that, once requested, "each party shall identify each person whom the party expects to call and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion" (CPLR 3101[d][1][i]).

Although the statute mandates that "[u]pon request" a party "shall" identify the experts it "expects to call as an expert witness at trial" (CPLR 3101 [d] [1] [i]), it does not specify a particular date by which a party must retain or disclose its expected trial experts (*compare* CPLR 3101[d][1][i] *with* Fed. Rules Civ. Pro. Rule 26[a][2][D] [requiring experts to be disclosed "at least 90 days before the date set for trial or for the case to be ready for trial" absent a stipulation or court order]).

Although, as it is often stated, CPLR 3101(d)(1)(i) "does not require a party to retain an expert at any *specific* time" (*Lillis v. D'Souza,* 174 A.D.2d 976, 976, 572 N.Y.S.2d 136 [emphasis added]; *see Saldivar v. I.J. White Corp.,* 46 A.D.3d 660, 661, 847 N.Y.S.2d 224), it nevertheless does indicate that noncompliance occurs when a party "retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof" (CPLR 3101[d] [1] [i]).

The statute provides little guidance as to how to determine when a failure to disclose is untimely, as it only makes reference to an "appropriate" amount of time (CPLR 3101[d] [1][i]). However, the fact that this time limitation has been left vague does not warrant the conclusion that the Legislature did not intend for there to be any time limitation. Indeed, such a reading *51 would be contrary to the purpose of the statute to expand pretrial disclosure so as to encompass the parties' experts.

It is evident from the plain language of the statute, which contemplates disclosure "before the commencement of trial" (CPLR 3101[d][1] [i]), that the disclosure must occur at some point prior to trial (*see Vigilant Ins. Co. v. Barnes,* 199 A.D.2d 257, 257–258, 604 N.Y.S.2d 248; *Bauernfeind v. Albany Med. Ctr. Hosp.,* 195 A.D.2d 819, 819–820, 600 N.Y.S.2d 516; *see also Mankowski v. Two Park Co.,* 225 A.D.2d 673, 673–674, 639 N.Y.S.2d 847). In determining whether there has been **250 compliance with CPLR 3101(d)(1)(i), this Court has consistently cited to the filing of a note of issue and certificate of readiness as the procedural event after which disclosure is untimely under the statute (*see e.g. Lombardi v. Alpine Overhead Doors, Inc.,* 92 A.D.3d 921, 921, 939 N.Y.S.2d 528; *Kopeloff v. Arctic Cat, Inc.,* 84 A.D.3d 890, 890–891, 923 N.Y.S.2d 168; *Ehrenberg v. Starbucks Coffee Co.,* 82 A.D.3d 829, 830–831, 918 N.Y.S.2d 556; *Pellechia v. Partner Aviation Enters., Inc.,* 80 A.D.3d 740, 741, 916 N.Y.S.2d 130; *Gerardi v. Verizon N.Y., Inc.,* 66 A.D.3d 960, 961, 888 N.Y.S.2d 136; *Dawson v. Cafiero,* 292 A.D.2d 488, 489, 739 N.Y.S.2d 190; *Blade v. Town of N. Hempstead,* 277 A.D.2d 268, 269, 715 N.Y.S.2d 735; *Ortega v. New York City Tr. Auth.,* 262 A.D.2d 470, 470, 692 N.Y.S.2d 131; *Martin v. NYRAC, Inc.,* 258 A.D.2d 443, 443–444, 684 N.Y.S.2d 605). Where a party has failed to provide expert disclosure prior to the filing of the note of issue and certificate of readiness, this Court has upheld penalties imposed for noncompliance with CPLR 3101(d)(1)(i), even where the penalties ultimately resulted in the dismissal of a

party's case (*see e.g. Lombardi v. Alpine Overhead Doors, Inc.*, 92 A.D.3d at 921, 939 N.Y.S.2d 528).

Indeed, the filing of a note of issue and certificate of readiness for trial requires a party to represent to the court that discovery is complete and that there are no outstanding requests for discovery (*see* Uniform Rules for Trial Cts. [22 NYCRR] § 202.21[b]). A party that certifies that discovery is complete or that does not move to vacate the note of issue within 20 days (*see* Uniform Rules for Trial Cts. [22 NYCRR] § 202.21[e]) has effectively represented to the court that the additional disclosure of experts is unnecessary. To require expert disclosure prior to the completion of discovery is consistent with the Legislature's purpose of expanding the scope of discovery.

A court has the discretionary authority to impose a penalty on a party for its failure to comply with discovery deadlines imposed by CPLR 3101(d)(1)(i) or in a discovery order issued by the court overseeing discovery (*see* CPLR 3126, 3406 [b]; *see also* Uniform Rules for Trial Cts. [22 NYCRR] §§ 202.12[f]; ***52** 202.56[b][2]). These enforcement mechanisms are vital to the integrity of the discovery process and to the court's responsibility to oversee discovery (*cf. Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431), and are therefore necessary to effectuate the Legislature's goal, in enacting CPLR 3101(d)(1)(i), of expanding pretrial discovery to encompass experts.

However, CPLR 3101(d)(1)(i) contains provisions which, if triggered, serve to limit a court's discretion to preclude expert evidence which has not been timely disclosed. A plain reading of this portion of the statute indicates that an expert's testimony shall not be precluded solely for noncompliance where good cause is shown as to why an expert was not retained far enough in advance of trial to give appropriate notice (*see* CPLR 3101[d][1][i]; *Benedict v. Seasille Equities Corp.*, 190 A.D.2d 649, 649–650, 593 N.Y.S.2d 67; *Simpson v. Bellew*, 161 A.D.2d 693, 693, 555 N.Y.S.2d 829; *see also Corning v. Carlin*, 178 A.D.2d 576, 576, 577 N.Y.S.2d 474). As such, a showing of good cause limits the court's discretion to sanction a noncomplying party with preclusion. The party seeking to limit the court's discretion (i.e., the noncomplying party) has the burden of demonstrating good cause so as to invoke the protection of CPLR 3101(d)(1)(i). If this burden is not met, preclusion as a penalty for noncompliance is an available remedy for the court to consider in the exercise of its discretion ****251** and in light of the other circumstances of the case.

However, as it is often stated, " 'CPLR 3101(d)(1)(i) does not ... "mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute" ' " (*Saldivar v. I.J. White Corp.*, 46 A.D.3d at 661, 847 N.Y.S.2d 224, quoting *Aversa v. Taubes*, 194 A.D.2d 580, 582, 598 N.Y.S.2d 801, quoting *Lillis v. D'Souza*, 174 A.D.2d at 976, 572 N.Y.S.2d 136). In other words, the statute does not require preclusion for noncompliance, and the decision of whether and to what extent a court should impose the penalty of preclusion or some lesser penalty for noncompliance, is still left to the providently exercised discretion of the court.

Some commentators may have interpreted this Court's case law as standing for the proposition that a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness requires a court to preclude an expert's affirmation or affidavit submitted in support of a motion for summary judgment (*see e.g.* Robert Tolchin, Concerns Over Adoption Of 'Singletree' on Expert Affidavits, NYLJ, [online] July 26, 2012). However, this Court has never so held, and in cases where this Court has approved of the penalty ***53** of preclusion, this Court has consistently done so on the ground that the trial court "did not improvidently exercise its discretion" in imposing such a penalty for noncompliance with the disclosure deadlines imposed under CPLR 3101(d)(1)(i) (*Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702; *see e.g. Liang v. Yi Jing Tan*, 98 A.D.3d 653, 949 N.Y.S.2d 761; *Crawford v. Village of Millbrook*, 94 A.D.3d 1036, 1037, 943 N.Y.S.2d 180; *Mohamed v. New York City Tr. Auth.*, 80 A.D.3d 677, 678–679, 915 N.Y.S.2d 599; *Parlante v. Cavallero*, 73 A.D.3d 1001, 1003, 900 N.Y.S.2d 749; *Safrin v. DST Russian & Turkish Bath, Inc.*, 16 A.D.3d 656, 656, 791 N.Y.S.2d 443; *cf. Bernardis v. Town of Islip*, 95 A.D.3d 1050, 1051, 944 N.Y.S.2d 626; *Hayden v. Gordon*, 91 A.D.3d 819, 820, 937 N.Y.S.2d 299). Although this Court may have referred to an expert's affidavit as "not admissible," it was only rendered inadmissible by a preclusion order, imposed as a penalty for noncompliance by a trial court in the provident exercise of its discretion (*Colon v. Chelsea Piers Mgt., Inc.*, 50 A.D.3d 616, 617, 855 N.Y.S.2d 201).

In sum, under this Court's precedent, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness constitutes noncompliance under the statute. However, such a failure does not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a motion for summary judgment (*accord. Bernardis v. Town of Islip,* 95 A.D.3d at 1051, 944 N.Y.S.2d 626; *Hayden v. Gordon,* 91 A.D.3d at 820, 937 N.Y.S.2d 299). Rather, the determination of whether and to what extent a penalty should be imposed upon a party for its failure to comply with CPLR 3101(d)(1)(i) is left to the providently exercised discretion of the court. In considering whether preclusion is an appropriate penalty for noncompliance, a court should look to whether the party seeking to avoid preclusion has demonstrated good cause for its noncompliance, whether the noncompliance was willful or whether it served to prejudice the other party, and any other circumstances which may bear on the appropriateness of preclusion. These may include, but are not limited to, the length of time that has passed since the commencement of the litigation, the amount of time that has passed since expert disclosure ****252** was demanded, and the extent to which the nature of the case or the relevant theories asserted therein rendered it apparent that expert testimony would be necessary to prosecute or defend the matter.

Where, in the provident exercise of its discretion, a court determines that preclusion is an appropriate remedy, such a determination ***54** may impact the disposition of a motion for summary judgment, inasmuch as "a preclusion order may serve as a basis for summary judgment dismissing the complaint" (*Anderson v. RC Dolner, Inc.,* 43 A.D.3d 837, 838, 842 N.Y.S.2d 50; *see e.g. Parker v. Mobil Oil Corp.,* 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114; *Rahman v. MacDonald,* 17 A.D.3d 438, 438–439, 793 N.Y.S.2d 144; *Contarino v. North Shore Univ. Hosp. at Glen Cove,* 13 A.D.3d 571, 572, 786 N.Y.S.2d 326). It is appropriate to consider an argument that expert evidence should be precluded in the context of a motion for summary judgment because such a motion is "the procedural equivalent of a trial" (*Dykeman v. Heht,* 52 A.D.3d 767, 769, 861 N.Y.S.2d 732). Where a party is precluded from tendering evidence necessary to establish an essential element of a cause of action, or to raise a triable issue of fact in opposition to a prima facie case, judgment as a matter of law is warranted with respect to that cause of action (*see generally Parker v. Mobil Oil Corp.,* 7 N.Y.3d at 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114; *Rahman v. MacDonald,* 17 A.D.3d at 438–439, 793 N.Y.S.2d 144; *Contarino v. North Shore Univ. Hosp. at Glen Cove,* 13 A.D.3d at 572, 786 N.Y.S.2d 326).

As set forth in the majority opinion, given the circumstances of this case, the Supreme Court providently exercised its discretion when it declined to preclude the experts' affirmations submitted by Bliss, MacDonald, the Medical Center, and DeCastro in support of their respective motions for summary judgment. Accordingly, I concur in the result reached by my colleagues to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by DeCastro.

ORDERED that the order is affirmed insofar as appealed from by the plaintiffs; and it is further,

ORDERED that the order is reversed insofar as appealed from by the defendant Kim Rosary DeCastro, on the law, and that branch of the motion of the defendant Kim Rosary DeCastro which was for summary judgment dismissing the complaint insofar as asserted against her is granted; and it is further,

ORDERED that one bill of costs is awarded to the defendants appearing separately and filing separate briefs, payable by the plaintiffs.

Parallel Citations

102 A.D.3d 26, 953 N.Y.S.2d 232, 2012 N.Y. Slip Op. 06935

Footnotes

1 In his deposition testimony, the defendant Eliot L. Birnbaum testified that WHC is a professional corporation, of which he and the defendant Robin Bliss are shareholders. The official name of WHC is Eliot L. Birnbaum, MD, PC, and it does business as WHC.

2 The preliminary conference order dated October 14, 2008, in this action directed the parties as follows: "Expert Disclosure shall be provided by all parties pursuant to CPLR 3101." Notably, the order did not set a specific deadline for the filing of a note of issue and certificate of readiness and specifically exempted expert disclosure from the other discovery deadlines set forth in the order.

3 We note that DeCastro moved for summary judgment on or about June 1, 2010. Thereafter, on or about June 11, 2010, she disclosed her expected expert trial witness, John L. Lovecchio, in response to the plaintiffs' request pursuant to CPLR 3101(d)(1)(i). Although DeCastro's disclosure was prior to the plaintiffs' deadline for opposing her motion for summary judgment, it was after the filing of the note of issue and certificate of readiness. Thus, under the circumstances, we find no reason to differentiate her procedural posture with respect to expert disclosure from that of the other defendants, none of whom disclosed their experts to the plaintiffs in response to the plaintiffs' CPLR 3101(d)(1)(i) request prior to the filing of the note of issue and certificate of readiness.

4 The defendant Genevieve Kraus, a nurse practitioner, moved pursuant to CPLR 3211 to dismiss the derivative cause of action asserted by the injured plaintiff's husband insofar as asserted against her on the ground that he lacked standing to bring the cause of action, since the plaintiffs were not married during the period Kraus rendered treatment to the injured plaintiff. The plaintiffs did not oppose Kraus's motion. In the order appealed from, the Supreme Court treated this motion as one, in effect, for summary judgment dismissing the complaint insofar as asserted against Kraus, and granted the motion. The plaintiffs do not appeal from this portion of the order.

5 We disregard the plaintiffs' error in denominating their expert's affirmations as affidavits (*see* CPLR 2001).

6 As noted previously, the next subdivision of the statute, CPLR 3101(d)(1)(ii), contained in a subsequent amendment to CPLR 3101, governs the procedures by which expert witnesses may be examined before trial. We note that discovery of expert witnesses continues to be limited, since, unlike notice or fact witnesses, an expert witness is not automatically subject to deposition (*see* CPLR 3101[d][1][ii]; *Kane v. Triborough Bridge & Tunnel Auth.*, 40 A.D.3d 1040, 1042, 837 N.Y.S.2d 245; *Columbia Telecommunications Group v. General Acc. Ins. Co. of Am.*, 275 A.D.2d 340, 712 N.Y.S.2d 426; *North Shore Towers Apts. v. Zurich Ins. Co.*, 262 A.D.2d 468, 691 N.Y.S.2d 327). Rather, where special circumstances exist, a party may obtain an order permitting it to depose its adversary's expert (*see e.g. Dixon v. City of Yonkers*, 16 A.D.3d 542, 792 N.Y.S.2d 514 [trial court providently exercised its discretion in denying defendants' motion to quash subpoena directing defendants' expert to appear for a deposition where expert examined key evidence before it was rendered unavailable to the plaintiff]).

7 In light of the deadlines for motions for summary judgment to which parties must strictly adhere (*see Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431), a motion for summary judgment made near the commencement of trial generally will not be considered.

8 The plaintiffs do not assert that the motions for summary judgment were untimely or that the experts' affirmations are infirm on procedural or technical grounds. Notably, the record does not indicate that the trial court, pursuant to its general authority to supervise disclosure, directed the parties to disclose, prior to the filing of the note of issue and certificate of readiness, or prior to moving for summary judgment, any experts they anticipated using in the context of the motion for summary judgment.

9 In fact, DeCastro testified at her deposition that it was not her practice as a nurse practitioner to read such pathology reports.

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