# NEW YORK AMERICAN INN OF COURT

CLE Written Materials

Trial Tales

Wednesday, December 7, 2022

6:30 – 8:00 PM

NEW YORK AMERICAN INN OF COURT

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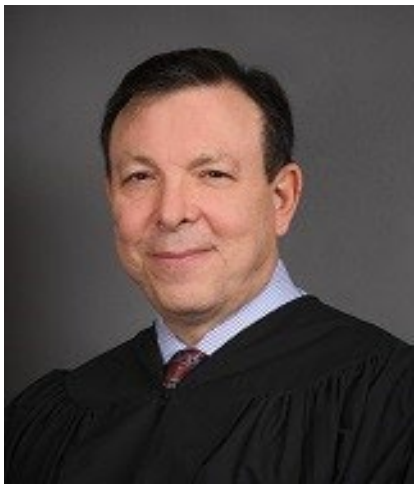
## Panelist Biographies

Trial Tales

Wednesday, December 7, 2022

6:30 – 8:00 PM

# Biography of Justice Joel M. Cohen



Judge Joel M. Cohen was appointed to the Court of Claims in June 2018 and was designated an Acting Supreme Court Justice in New York County. He has been assigned to the Commercial Division, New York County, since January 1, 2019.

He received his B.A. in Economics from Binghamton University in 1983 and his J.D. from Georgetown University Law Center in 1986. After law school, he served as a law clerk for Judge Thomas A. Clark of the United States Court of Appeals for the Eleventh Circuit. He is a member of the Harpur Law Alumni Council and a past member of the Georgetown Law Alumni Board.

Judge Cohen was a litigation partner at Davis Polk & Wardwell LLP from 1996 until June 2018, and was co-head of the firm's litigation department for five years. In connection with pro bono representations in private practice, he was a recipient of the Thurgood Marshall Award from the Association of the Bar of the City of New York for the successful representation of a death row inmate and a Pro Bono Achievement Award from Sanctuary for Families.

Since 2018, he has presided over a wide range of jury and non-jury trials (both in-person and via Microsoft Teams).

STROOCK

**New York**
Phone: 212.806.5660
Fax: 212.806.6006
sscheindlin@stroock.com

**Related Services**

- Government Affairs
- Litigation
- White Collar & Internal Investigations

**Education**

J.D., *cum laude*, Cornell Law School, 1975

M.A., Columbia University, 1969

B.A., University of Michigan, 1967

# Shira A. Scheindlin

## Of Counsel

The Hon. Shira A. Scheindlin was appointed by President Bill Clinton as a federal judge of the U.S. District Court for the Southern District of New York and served for 22 years. Judge Scheindlin also served in the mid-'70s as Chief Administrative United States Attorney and Deputy Chief of the Economic Crimes Unit in the U.S. Attorney's Office for the Eastern District of New York. She left to become the general counsel of the Department of Investigations of the City of New York. She then returned to the Eastern District as a Magistrate Judge for five years, followed by eight years in practice as a partner at two large New York City law firms, representing clients in both commercial litigation and products liability, in both state and federal court.

Her experience acquired over more than four decades in government service, private practice and on the bench makes her exceptionally well-qualified to assist parties and their counsel in resolving disputes through arbitration or mediation.

**Experience and Qualifications**

- Served for 22 years as a Federal District Judge — plus five as a Magistrate Judge — presiding over settlements, motions, discovery and trials, both civil and criminal.
- Sat by designation on the Second and Ninth Circuit Courts of Appeals.
- Served as Deputy Chief of the Economic Crimes Unit of the U.S. Attorney's Office for the Eastern District of New York.
- Arbitrated or mediated over 40 complex civil cases since leaving the bench in 2016.

**Arbitrations and Mediations**

Judge Scheindlin left the bench in May 2016. Since then she has arbitrated and mediated many cases, has heard mock arguments in several high-profile cases, has served as an expert witness and has been appointed as a Special Master by the federal court in Manhattan on two occasions.

Her significant arbitrations include, among others, the following:

- A large commercial/bankruptcy case in which a portion of a group of secured lenders, signatories to certain credit documents, sought millions of dollars, claiming that they were not allocated a fair share of the proceeds of the collateral that secured the loan following a sale of assets under section 363 of the Bankruptcy Code.

- A commercial transaction between two pharmaceutical companies with one claiming that a stream of payments (totaling millions of dollars) continued to be owed to the other based on an asset purchase agreement, despite the lack of success of the product.

- A catastrophic accident in which plaintiffs claimed they were injured as a result of a battery defect in a computer manufactured by a major computer manufacturer.

- Cybersecurity issues in the loss of funds by an investor in a cryptocurrency exchange.

- An attorneys' fees dispute among successful plaintiffs' counsel in a shareholder derivative action against a large pharmaceutical company.

Judge Scheindlin has also mediated a number of large cases including insurance coverage disputes, RMBS fraud litigation by investors against a major bank, intellectual property disputes and employment disputes. In addition, she has handled a number of general commercial disputes, real estate disputes and one construction dispute. Most reached a successful outcome.

As for mock arguments, Judge Scheindlin sat on an appellate argument involving a dispute between various insureds and their insurers regarding scope of coverage and tiers of coverage, a trial court argument regarding a large antitrust case against a major computer component manufacturer, and a Libor-related matter against a major U.S. bank.

Judge Scheindlin is now a Special Master in a securities fraud case pending in the Southern District of New York and in another such case that has already settled but involves disputes regarding claim entitlement that remain to be resolved.

Finally, Judge Scheindlin has served as an expert witness on issues of U.S. law in two cases involving major U.S. technology companies.

**Representative Matters**

Securities

- *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*: In a securities fraud class action, Judge Scheindlin issued two decisions granting the plaintiffs' motion for class certification, holding that plaintiffs were entitled to rely on the fraud-on-the-market presumption that satisfies Rule 23's predominance requirement. This ruling was affirmed by the Second Circuit in a landmark decision regarding the application of the well-known *Cammer* factors holding that an event study is not necessarily required in every case.

- *SEC v. Wyly (Wyly I-IV)*: In an SEC civil enforcement action, Judge Scheindlin held that the SEC could only seek civil penalties against the Wylys for alleged securities violations spanning 13 years for conduct occurring no more than five years before the Wylys signed a tolling agreement. After a six-week trial, the court ultimately found the Wylys liable for nine securities violations and ruled, in an issue of first impression, that the SEC could seek disgorgement in an amount equivalent to the taxes the defendants avoided paying.
- *Gamco Investors, Inc. v. Vivendi, S.A.; In re Vivendi Universal, S.A. Sec. Litig.*: In *Vivendi*, a securities fraud class action, Judge Scheindlin presided over a lengthy jury trial that resulted in a significant verdict for investors. In *Gamco,* Judge Scheindlin held that Vivendi successfully rebutted the investors' presumption of reliance on misstatements by showing that the investors would have transacted in securities notwithstanding any inflation in the market price caused by fraud. Both cases were affirmed in the Second Circuit.
- *The Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of Am. Sec., LLC.*: In this case, investors sued fund administrators and officers, seeking to recover losses stemming from liquidation of two British Virgin Islands-based hedge funds in which they held shares. The case involved claims under the Securities Act and the Exchange Act, and various common law claims under New York law.
- *In re Initial Public Offering Sec. Litig.*: In the investors' suits against underwriters of initial public offerings, Judge Scheindlin granted the plaintiffs' motion for an order of final approval of the settlement, plan of allocation and class certification. She awarded plaintiffs' counsel fees and reimbursement of expenses totaling over $46 million.
- *In re Optimal U.S. Litig.*: Judge Scheindlin dismissed securities fraud claims brought by a putative class of investors in Optimal, an investment fund that invested 100 percent of its assets with Bernie Madoff and his firm. Judge Scheindlin had issued an order to show cause why the plaintiffs' securities law claims should not be dismissed in light of the Second Circuit's decision in *Absolute Activist Value Master Fund, Ltd. v. Ficeto*, which clarified the scope of extraterritorial application of the Securities Exchange Act after the Supreme Court's decision in *Morrison v. National Australia Bank*.
- *Monroe Cnty. Employees' Retirement Sys. v. YPF Sociedad Anonima:* Judge Scheindlin dismissed a putative class action against an Argentine energy company, its underwriters and executives alleging violations of the Securities Act and Exchange Act. Judge Scheindlin held that the Securities Act claims were untimely, and the Exchange Act claims failed to adequately allege material misrepresentations or omissions, scienter, loss causation and reliance.

Intellectual Property

- *Verint Systems Inc. v. Red Box Recorders Ltd.:* Judge Scheindlin issued a complex *Markman* decision in a case where an analytics company brought action against a competitor. Issues at stake included infringement of patents and counterclaims of noninfringement and invalidity.
- *Katiroll Company v. Kati Junction Inc.*: This action involved trade dress infringement and unfair competition under the Lanham Act, as well as

state law claims for infringement, unfair competition, breach of loyalty, breach of contract and misappropriation of trade secrets. Judge Scheindlin denied the motion to dismiss, ruling that the plaintiff had successfully stated claims for trade dress infringement under the Lanham Act, trademark infringement, breach of duty of loyalty, breach of contract and misappropriation of trade secrets.

- *Eve of Milady v. Impression Bridal, Inc.*: In a copyright infringement action, Judge Scheindlin granted the plaintiff bridal dress manufacturer's motion for preliminary injunction against a competitor. Judge Scheindlin held that the competitor's revised lace patterns as used on bridal dresses were substantially similar to the plaintiff's lace patterns as used on bridal dresses.
- *American Stock Exchange, LLC v. Mopex, Inc.*: In a patent infringement action, Judge Scheindlin held that a patent for a type of security called "exchange-traded funds" (ETFs) was invalid as anticipated by a prior publication. The case also involved a complex claim construction under *Markman*.
- *Luv N' Care Ltd. v. Toys "R" Us, Inc.*: This complex case involved patent infringement, trade dress infringement and unfair competition under the Lanham Act, as well as unfair competition and trade dress dilution under New York law. Judge Scheindlin dismissed the plaintiff's claim for "contributory infringement" as vague and insufficient to state a claim under the *Iqbal* standard.

Environmental Law

- *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Action*: This was a multidistrict litigation (MDL) where many states and municipalities sued virtually all of the major oil and gas companies. The overriding issue in these cases was the alleged contamination of groundwater based on contamination by MTBE, an additive in gasoline meant to reduce toxic emissions. Judge Scheindlin supervised this MDL for more than a decade, issuing dozens of groundbreaking opinions. After a jury trial where the City of New York was awarded a $105 million judgment against Exxon Mobil, Judge Scheindlin ruled that Exxon Mobil should not be liable for punitive damages because it had not recklessly disregarded the risks posed by MTBE. The Second Circuit affirmed.

- *BG Recovery Litigation I, LLC v. Barrick Gold Corp., et al.*: In this suit, shareholders opted out of a securities fraud class action and brought suit individually. Among the issues Judge Scheindlin decided were whether the company was making false statements regarding its compliance with Argentine and Chilean environmental laws. She specifically evaluated whether the defendants' mining operations were impacting glaciers surrounding its operations, which would be a violation of environmental regulations. Judge Scheindlin held that the plaintiff adequately pleaded material misstatements regarding the defendants' compliance with Chilean environmental regulations.

Class Actions

- *Peoples v. Fischer; Peoples v. Annucci:* In 2016, Judge Scheindlin approved a historic class action settlement reducing the frequency,

duration and severity of solitary confinement conditions across all New York state prisons.

- *Laumann v. NHL (Laumann I-V)*: Judge Scheindlin certified an injunctive class under Rule 23(b)(2), holding that class members suffered an antitrust injury with respect to broadcasts of team sports, including, but not limited to, professional hockey and baseball leagues and the regional sports networks that televised their games. After this ruling and others on many *motions in limine,* the case settled on the eve of trial.
- *Finch v. New York State Office of Children and Family Services*: Judge Scheindlin's ruling that the plaintiffs, who were subjects of indicated reports of child abuse and maltreatment, possessed a protected liberty interest requiring prompt review of those allegations. The case eventually resolved in a landmark settlement that resulted in prompt administrative hearings.
- *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*: Judge Scheindlin certified the first-ever "opt-in" plaintiff class outside of the Fair Labor Standards Act context. Judge Scheindlin ruled that certifying an opt-in class was within her discretion as a matter of equity. This ruling was reversed in the Court of Appeals, although it generated substantial interest in scholarly journals.

Civil Rights

- *Floyd v. City of New York; Ligon v. City of New York*: Judge Scheindlin granted the *Ligon* plaintiffs' motion for a preliminary injunction in their complaint over Operation Clean Halls and ordered the NYPD to immediately cease its practice of conducting stops and frisks that were not based on reasonable suspicion of criminal conduct. After trial, the court found that the NYPD's stop-and-frisk practices violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment, ordering comprehensive remedies for both cases.
- *Betances v. Fischer*: Judge Scheindlin denied the defendant's motion to dismiss the plaintiffs' claim that the State Department of Corrections imposed unconstitutional post-release supervision (PRS). The court held that the officials' refusal to comply with the Court of Appeals decision holding administrative imposition of PRS violated prisoners' due process rights was not objectively reasonable.
- *The New York Times Co. v. United States Dep't of Labor*: The judge ruled that the newspaper, which was seeking to compel the Occupational Safety and Health Administration to disclose data regarding injury and illness rates for 13,000 worksites, had exhausted its administrative remedies following the Department of Labor's initial denial, and that since the information the newspaper sought was not confidential information within a FOIA exemption, the DOL had to disclose the requested information.

Labor and Employment

- *Tomka v. Seiler Corp.*: A female employee brought a suit against her former employer and three male co-employees asserting claims of sexual harassment and retaliation in violation of Title VII. Judge

Scheindlin, sitting by designation on the Second Circuit, held that the hostile work environment, retaliatory discharge and unequal pay claims should not have been dismissed on summary judgment by the district court. She also held that individuals were not subject to liability under Title VII.

- *Mullins v. City of New York*: Judge Scheindlin held that the plaintiffs, police sergeants, were exempt from the Fair Labor Standards Act and were therefore entitled to recover overtime compensation.
- *Rosenblum v. Thomson Reuters:* An employee brought action against Thomson Reuters claiming retaliation, harassment and termination as a result of whistleblowing, which is claimed as "protected activity" under the Dodd-Frank Act. In ruling on the defendant's motion to dismiss, Judge Scheindlin held that it was appropriate for the court to apply *Chevron* deference to the SEC's interpretation of the Dodd-Frank statute.
- *Gonder v. Dollar Tree Stores*: In a case involving racial discrimination and retaliation, the employer sought to dismiss and to compel arbitration. Judge Scheindlin held that there was sufficient consideration to support the arbitration agreement and the employer did not waive its right to arbitrate.

Electronic Discovery

- *Zubulake v. UBS Warburg*: Over the span of 15 months in 2003-04, Judge Scheindlin issued five critical rulings in the case *Zubulake v. UBS Warburg*. Four of the five rulings (*Zubulake I*, *III*, *IV* and *V*) defined requirements and/or established best practices for the e-discovery process. In *Zubulake V*, Judge Scheindlin imposed sanctions on the defendant as a result of the willful destruction of relevant information. Judge Scheindlin wrote that "counsel must take affirmative steps to monitor compliance" with regard to data preservation, essentially creating the mandate for proactive legal holds.
- *Pension Comm. of the Univ. of Montreal Pension Plan v. Back of Am. Sec., LLC*: In this case, the defendant moved for sanctions against plaintiffs, alleging that each plaintiff failed to preserve and produce documents, including ESI, and submitted false declarations about their document collection and preservation efforts. Judge Scheindlin held that the plaintiffs had a duty to preserve the documents upon the filing of the complaint. Grossly negligent plaintiffs were sanctioned with an adverse inference instruction, and both negligent and grossly negligent investors were subject to monetary sanctions.
- *National Day Laborer Org. Network v. Immigration and Customs Enforcement Agency*: This case involved the largest FOIA search in ICE's history, where the vastness of the search made it unclear whether certain search terms would actually capture all responsive documents. Judge Scheindlin held that methods beyond keyword searches were required, including "computer-assisted" and "predictive"-coding approaches like "latent semantic indexing, statistical probability methods and machine learning tools to find responsive documents."

- *SEC v. Collins & Aikman*: In this case, Judge Scheindlin held that the SEC was obliged to search its own electronic data to produce responsive documents, submit materials allegedly covered by the deliberative process privilege to the court for *in camera* review, and search its email and attachments after deciding on a search protocol with the defendants. Judge Scheindlin concluded that the SEC is subject to the "same discovery rules that govern private parties (albeit with the benefit of additional privileges such as deliberative process and state secrets)."
- *Sekisui Am. Corp. v. Hart*: In this case, the plaintiff failed to put a litigation hold in place until 15 months after it sent notice of claim to the defendant and waited another six months to notify its technology vendor to preserve relevant documents. Relying on the Second Circuit's decision in *Residential Funding*, Judge Scheindlin granted the defendant's sanctions motion, holding that an adverse inference sanction may be appropriate in cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.

**Honors & Awards**

- *The American Lawyer*'s Lifetime Achievement Award (2019)
- Francis McGovern Writing Award, Academy of Court Appointed Masters (2019).
- The Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation, New York State Bar Association (2014).
- Distinguished Jurist Award, National Association of Criminal Defense Lawyers (2008).
- William Nelson Cromwell Award for unselfish service to the profession and the community, New York County Lawyers Association (2007).
- Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice, New York County Lawyers (2005).
- William J. Brennan Award, Criminal Law Section, New York State Bar Association (2003).
- Robert L. Haig Award for Distinguished Public Service, Commercial & Federal Litigation Section, New York State Bar Association (2001).
- Special Achievement Award in Appreciation and Recognition of Sustained Superior Performance of Duty, U.S. Department of Justice (1980).

**Memberships**

- Chair, Federal Courts Subcommittee of the Standing Committee on the American Judicial System, American Bar Association.
- Member, Advisory Council, Cornell Law School.
- Former Member, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1998-2005.
- Member, former Chair, Commercial and Federal Litigation Section, New York State Bar Association.
- Member, Council on Judicial Administration, Association of the Bar of the City of New York.

- Board of Directors, Justice Resource Center (formerly Mentor).
- President's Council, Good Shepherd Services.
- Judicial Advisory Board, The Sedona Conference.
- Board of Directors (Executive Committee), Lawyers Committee for Civil Rights Under Law.
- Board of Directors, American Constitution Society.
- Board of Directors, Bronx Defenders.

**Speeches & Events**

- **Speaker**, Artificial Intelligence in the Courts and the Use of Special Masters, PREX Conference, September 17-19, 2019.
- **Speaker,** "Undermining the Courts: The Consequences for American Democracy," ABA Annual Meeting, August 9, 2019.
- **Speaker**, "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR"
    - Defense Research Institute, January 23-25, 2019.
    - Squire Patton Boggs, January 7, 2019.
    - UCLA Law School, October 23, 2018.
    - Deutsche Bank, September 12, 2018.
    - Defense Research Institute, June 13-15, 2018.
    - General Motors, June 13, 2018.
    - American Constitution Society, June 7-9, 2018.
    - American Bar Association, May 10-12, 2018.
    - Orlando Federal Bar Association, April 18, 2018.
    - Connecticut Federal Bar Association, April 18, 2018.
    - American International Group, April 3, 2018.
    - Reed Smith, March 21, 2018.
    - Conflict Prevention & Resolution (CPR), March 7, 2018.
    - New York State Bar Association, January 23, 2018. ?
- **Speaker**, "Undermining the Courts and the Media: The Consequences for American Democracy – Judges Roundtable," National Judiciary College, December 13, 2018
- **Speaker**, "E-Discovery Bootcamp CLE," Louisiana State Bar, December 5, 2018.
- **Speaker**, (Keynote), "A View From Male Attorneys and Women and Diverse Mentees," Philadelphia Diversity Law Group, November 16, 2018.
- **Speaker**, (Keynote), Keynote Address, ARIAS·US 2018 Fall Conference, November 8-9, 2018.
- **Speaker**, "Diversity and Inclusion: Let's Talk Diversity," New York International Arbitration Center, November 1, 2018.
- **Speaker**, "Implicit Bias Is Real: A Candid Discussion on Subconscious Stereotyping," College of Commercial Arbitrators, October 18-20, 2018.
- **Panelist**, "Public and Private Benefits: MDL Diversity in Appointments," NYU Center for Civic Justice, October 12-13.

- **Speaker,** American Employment Law Council, Employment Law, October 10-11, 2018.
- **Speaker**, “Implicit Bias Is Real: A Candid Discussion on Subconscious Stereotyping,” Westchester Bar Association, September 5, 2018.
- **Speaker**, American Bar Association, Border Searches, August 11, 2018.
- **Panelist**, “MDL and Class Action Cases,” Duke Law Judicial Studies Center, June 21-22, 2018.
- **Panelist**, “People Behaving Badly: Disassembling the Culture of Sexual Harassment,” American Arbitration Association, New York City, May 23, 2018.
- **Speaker**, Electronic Discovery, Sedona Conference, May 3-4, 2018.
- **Panelist**, “Rethinking Solitary Confinement: Where Do We Go From Here?” John Jay College’s Center on Media, Crime and Justice, and the Langeloth Foundation, April 26-27, 2018.
- **Speaker,** ABA Litigation Conference, Mass Torts, April 23, 2018.
- **Panelist,** “Implicit Bias Study/Juror Reactions to Attorney Gender,” Mass Torts Made Perfect, April 12, 2018
- **Moderator**, Symposium on Women Lawyers in the Courtroom, Chicago Bar Association, April 12, 2018.
- **Speaker**, “Prevent, Detect, Correct: Creating & Sustaining a Work Environment Free From Unlawful Harassment and Unwanted Lawsuits,” Practicing Law Institute Webinar, April 10, 2018.
- **Panelist**, “Recent Developments in Employment Law,” EEOC, South Asian Bar Association, March 15, 2018.
- **Scholar in Residence**, University of Cincinnati, February 25, 2018.
- **Speaker**, New York State Bar Association, Employment Law, January 27, 2018.
- **Speaker**, “Diversity – Women Lawyers in Leadership 2018,” Practicing Law Institute, January 26, 2018
- **Speaker**, “Diversity – Credible Roles in the Courtroom for Diverse & Women Attorneys,” Federal Bar Council, January 23, 2018.

**Publications**

- **Author**, "Democrats: Fill All Judicial Vacancies Now!," *Newsweek*, November 29, 2022
- **Author**, “Embracing Change: A Pioneer Reflects on Her Varied Career,” *The Litigation Journal*, Spring 2022
- **Author**, "Virtual v. in person ADR: What does the future hold?," *Reuters*, March 8, 2022
- **Author**, "A new ADR development: mass arbitrations," *Reuters,* December 22, 2021
- **Co-author**, “Electronic Discovery and Digital Evidence in a Nutshell,” West Academic Publishing, 2009; Second Edition, 2016.
- **Co-author**, “Electronic Discovery and Digital Evidence, Cases and Materials,” American Casebook Series, West Academic Publishing, 2008; Second Edition, 2012; Third Edition, 2016.

- **Author**, "Random Thoughts of a Federal District Judge, Fourth Annual Institute for Investor Protection Conference: The New Landscape of Securities Fraud Class Actions," *Loyola University Chicago Law Journal*, Spring 2015, Vol. 46, No. 3.
- **Author**, "Big Data and Privacy: Finding the Balance," *New York Law Journal*, February 10, 2014.
- **Co-author**, "Criminal Law Catches Up: New ESI Guidelines Issued," *New York Law Journal*, February 29, 2012.
- **Author**, "The Future of Litigation," *New York Law Journal*, February 5, 2010.
- **Co-author**, "Sanctions in Electronic Discovery Cases: Views from the Judges," 78 *Fordham Law Review* (2009).

**Admitted To Practice**

New York

U.S. Supreme Court


# Elisha Barron

## Partner

New York
(212) 729-2013
ebarron@susmangodfrey.com


## Overview

Elisha Barron litigates high-stakes cases across the country and, in the last five years alone, has secured over $1 Billion in jury verdicts and settlements for her clients. Elisha represents plaintiffs and defendants through every stage of litigation in complex commercial cases, including in intellectual property, antitrust, False Claims Act litigation, and general commercial litigation.

Elisha was named a Future Star by *Benchmark Litigation* for 2023 and included on its 40 and Under Hot List in 2022. She has also been named among *National aw Journal's* Plaintiffs Lawyer Trailblazers and called One to Watch in Commercial Litigation by *Best Lawyers* for 2021 and 2022. In 2019, *New York Law Journal* called her Rising Star.

Below are a few of Elisha's notable representations and successes:

- Won a $706.2 Million jury verdict for client HouseCanary after a 6+ week jury trial in state court in San Antonio, Texas. The case involved claims against Title Source, an affiliate of Quicken Loans, for misappropriation of trade secrets, fraud, and breach of contract. Elisha successfully argued a *Daubert* motion to admit the testimony of a key technical expert and examined that expert at trial, securing testimony pivotal to the jury's finding that HouseCanary's trade secrets had been misappropriated.
- Lead trial counsel to Van Leeuwen Ice Cream LLC in a Lanham Act trade dress infringement lawsuit against Rebel Creamery pending in the Eastern District of New York.
- Represented Joel and Mary Rich, the parents of a murdered son, Seth Rich, in a groundbreaking lawsuit against Fox News and individual defendants for intentional infliction of emotional distress claims and related torts. After the Second Circuit reversed the district court's dismissal of the Riches' claims, Elisha defeated a motion to dismiss for lack of personal jurisdiction, and argued numerous discovery motions, paving the way for a confidential settlement in November 2020.
- Delivered opening statements and cross-examining key witnesses to win a multi-million-dollar award (a complete victory) in a confidential technology and construction industry arbitration involving obligations under a written agreement.
- Secured a $450 million settlement – one of the largest ever in the United States by a single whistleblower– in a landmark False Claims Act lawsuit against the Swiss drug manufacturer Novartis Pharmaceuticals Corporation. Elisha deposed pharmacists and nurses across the country, securing key testimony which helped secure the award.
- Secured nearly $170 million in settlements before fees and expenses in the antitrust case *In re Animation Workers Antitrust Litigation* (N.D. Cal.) for a class of Hollywood animators and visual effects employees who accused several major movie studios of entering into an agreement not to "poach" each other's

employees. The case contributed to Susman Godfrey being named 'Class Action Group of the Year' by *Law360*.

- Represented wearable fitness pioneer Jawbone in patent litigation against Fitbit in numerous forums—two actions in the International Trade Commission and two actions in federal district court. Elisha briefed and argued motions regarding the invalidity of Fitbit's patents, securing favorable rulings for Jawbone on several patents. Elisha also argued at the federal court *Markman* hearing and secured favorable claim constructions for Jawbone.
- Represented an individual in a confidential AAA arbitration against a former employer for discrimination, and securing a favorable settlement after Susman Godfrey presented her case to a three-judge panel. Elisha examined two key fact witnesses, an expert witness, and conducted the only cross examination before settlement.

Elisha also devotes significant time to pro bono matters. Most recently, she represented the City of Baltimore *pro bono* in a challenge to a new Health of Human Services Rule allowing health care providers to deny health care services for religious or 'other" reasons. *City of Baltimore v. HHS*, 19-cv-1672 (D. Md.). The rule was vacated in 2019. In 2016 she received an award for outstanding pro bono service from the Legal Aid Society.

Before joining Susman Godfrey, Elisha clerked for Judge Shira Scheindlin on the U.S. District Court for the Southern District of New York, and Judge José Cabranes on the U.S. Court of Appeals for the Second Circuit. She graduated from Yale University with a degree in History of Science and Medicine, and received her J.D., *cum laude*, from Harvard Law School, where she was an editor on the Journal on Legislation.

## Education

- Yale University (B.A., History of Science and Medicine)
- Harvard Law School, *cum laude* (J.D)

## Clerkship

Law Clerk to the Honorable Shira Ann Scheindlin, United States District Court for the Southern District of New York

Law Clerk to the Honorable José A. Cabranes, United States Court of Appeals for the Second Circuit

## Honors and Distinctions

Future Star, *Benchmark Litigation* (2023 Euromoney)

40 and Under Hot List, *Benchmark Litigation* (2022)

Plaintiffs Lawyer Trailblazer, *National Law Journal* (2021, ALM)

One to Watch, Commercial Litigation *Best Lawyers* (2021, 2022, 2023 Woodward White, Inc.)

Rising Star, *New York Law Journal* (ALM, 2019)

Recipient of the 2016 Pro Bono Publico Award for Outstanding Service to The Legal Aid Society

Articles Editor, Harvard Journal on Legislation

Dean's Scholar, Legal Research and Writing

## Professional Associations and Memberships

New York State Bar

U.S. Court of Appeals for the Second Circuit

U.S. Court of Appeals for the Eighth Circuit

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the Southern District of New York

U.S. District Court for the Eastern District of New York

Co-Chair Trial Advocacy Program, American Inn of Court, New York Chapter

Trade Secret Committee Member, New York City Bar Association

## Publications

Note, Federal Law Requires HPV Vaccine For Green-Card Applicants, 37 J. L. Med. Eth. 149 (2009).

Recent Development, The DREAM Act, 48 Harv. J. on Legis. 623 (Summer 2011).

MANDEL BHANDARI LLP

# Rishi Bhandari

212 269 5600 Ext. 1001

rb@mandelbhandari.com

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Rishi Bhandari is a partner at Mandel Bhandari LLP, which he co-founded. He is an experienced litigator and problem solver. Rishi is a highly respected trial attorney who frequently takes cases just weeks or months before trial. He has been recognized by Super Lawyers magazine as a Rising Star from 2011-2014 and as a Super Lawyer from 2015 onward. He is certified as a Trial Advocacy Teacher by NITA and has been selected by the National Trial Lawyers as a member of the Top 100.

Rishi has been lead counsel or co-lead counsel in more than 25 lawsuits and arbitrations that have resulted in judgments or settled on very favorable terms shortly before or after opening statements.

## Education

**N.Y.U. School of Law**, J.D.; Vanderbilt Medal, Extraordinary Contribution to Law School Community; Student Bar

Rishi has achieved outstanding results for his clients, including a jury verdict that was more than nine times larger than the defendants' final settlement offer and another jury verdict that was $7 million more than the defendant's final settlement offer. Rishi has won judgments or settled cases with claims worth well over $100 million.

Rishi has also devoted considerable time to public interest causes. He was a Teach for America Corps member and teacher in Baltimore and Washington, D.C. and worked for the Democratic National Committee's voter protection unit. Rishi co-authored materials and led training sessions for over 1,200 attorneys who volunteered for Michigan's voter protection program.

Association, President

**Vassar College**, B.A.; First Place Speaker, Harvard, Stanford and Cambridge University Debates; Second-ranked "Speaker of the Year", American Parliamentary Debate Association

## Bar Admissions

- California
- New York
- SDNY
- EDNY
- ND Illinois
- Second Circuit
- United States Supreme Court

**Christopher Fraser** is a junior partner at The Dweck Law Firm, LLP, where he has spent the past decade representing individuals and businesses in federal and state court litigation at both the trial and appellate levels. Chris' diverse general litigation practice includes personal injury, employment matters, property damage claims, construction project litigation, RPAPL 881 proceedings, and shareholder and unit owner representation for cooperatives and condominiums. He has tried cases to verdict for the plaintiff and defense. Chris is a graduate of St. John's University Law School and Middlebury College, where he was a pitcher and two-year captain of the baseball team.

# Gabriella Giunta

Gabriella Giunta is an Assistant District Attorney at the Queens County District Attorney's Office, where she began her legal career in 2019. Gabriella is currently assigned to the Public Corruption Bureau, which handles the prosecution of law enforcement officers, attorneys, and other city employees. Prior to this assignment, Gabriella worked in the Criminal Court Bureau, the Intake and Case Assessment Bureau, and the Felony Trial Bureau. Gabriella graduated from Brooklyn Law School in May of 2019, where she was a member of the Brooklyn Law Review and the Moot Court Honor Society.

EUGENE D. KUBLANOVSKY, ESQ. | KUBLANOVSKY LAW LLC

Eugene is the founder and managing member of Kublanovsky Law, LLC with offices on Montclair, NJ and New York, NY. Eugene is admitted to practice in New York and New Jersey where he focuses primarily in the areas of intellectual property, complex commercial litigation and employment law. He has worked on matters across the United States, as well as for clients located in Canada, China, Europe, South America and the Middle East. He has litigated – whether in courts or through arbitration – a wide variety of business disputes, including numerous breach of contract actions, business separations, complicated intellectual property matters (*i.e.*, trade secret misappropriation, trademark, copyright and patent infringement cases) and employment disputes representing employers and executives. In 2019 Eugene was selected as one of the nation's top IP attorneys by The IP Lawyers. Eugene was also named by Super Lawyer Magazine as a New York Metro Rising Star for four successive years, having been recognized in two separate categories - Business Litigation for 2013 and Intellectual Property for 2014-2016, and was named to the list of Super Lawyers in the New York Metro Region in 2021 and 2022.

# Aaron H. Marks, P.C.

**Partner, Litigation**


Kirkland & Ellis LLP
New York
aaron.marks@kirkland.com
T + 1 212 446 4856


**EDUCATION**

Emory University School of Law, J.D., 1993
- Editor, *Emory Law Journal*

University of Pennsylvania, B.A.; B.S., 1990

**ADMISSIONS & QUALIFICATIONS**

New York

## "Aaron is a super talented attorney and a big-time litigator. He is a go-to for critical disputes."

*Chambers USA*, 2022

Aaron Marks is an accomplished trial lawyer focusing on complex commercial litigation relating to securities, financial products, real estate, entertainment, mass torts and trade secrets. He routinely ranks among the best trial lawyers and commercial litigators in the country by industry surveys. The prestigious *Chambers USA* describes Aaron as "outstanding," "an amazing lawyer," and as being an "excellent tactician," "very effective and well prepared," and "very understanding and sensitive to the needs of in-house counsel." Aaron has also been designated a "litigation star" by *Benchmark Litigation*, and *The Legal 500 U.S.* recognizes Aaron among the U.S.'s 50 leading trial lawyers and commercial litigators and named him to the publication's "Hall of Fame." Aaron was profiled by *The American Lawyer* magazine as one of the nation's 50 most accomplished litigators under the age of 45.

**REPRESENTATIVE MATTERS**

Aaron has been involved in the following representations:

- Blackstone affiliates in broken deal litigation as to sales of several hotel properties in which the purchasers sought to be excused due to the COVID-19 crisis. In one multi-jurisdictional matter, Aaron achieved precedent-setting rulings on summary judgment holding that purchaser's failure to close during the pandemic was not excused. Aaron also secured in that matter an anti-suit injunction enjoining parallel litigation in Puerto Rico.
- H.I.G. Capital and Lionbridge Technologies, Inc. in the defense of trade secret litigation brought by TransPerfect Global, Inc., arising from H.I.G. and Lionbridge's participation as a bidder in the auction sale of TransPerfect. In 2022, Aaron won summary judgement in full.
- Blackstone and affiliated funds in multi-jurisdictional litigation and arbitration concerning media conglomerate RCS Mediagroup's challenge to Blackstone's ownership of multiple commercial buildings in Milan. In 2021, the arbitration tribunal ruled in favor of Blackstone, dismissing attempts to reverse the 2013 sale and claim compensation. Ongoing state court litigation.
- FirstFire Capital in litigation with DarkPulse Inc. in New York federal court and the Delaware Court of Chancery concerning a defaulted note. Defeated a preliminary injunction motion in New York in 2022. Ongoing.
- Blackstone in two putative class actions in Illinois federal court alleging violations of the Illinois Genetic Privacy Act (GIPA) related to Blackstone's acquisition of Ancestry.com. Ongoing.

# Aaron H. Marks, P.C.

## Partner, Litigation

- Lime Rock Management managing directors in litigation in Connecticut federal court in their response to an application under Section 1782 seeking to obtain discovery for use in a foreign proceeding in Scotland. Ongoing.
- Blackstone affiliates in litigation concerning the J-51 property tax exemption and abatement status for Blackstone's StuyTown property in New York City. Ongoing.
- Confidential real estate company in an arbitration seeking dissolution of a joint venture and damages for alleged breaches of contract and fiduciary duties. Aaron successfully settled the matter in 2021.
- McCormick Foundation and Cantigny Foundation in litigation concerning Tribune's 2007 leveraged buyout and subsequent bankruptcy. A trustee filed suit seeking to recover LBO proceeds from more than $1 billion from the Foundations. In April 2019, the SDNY rejected the trustee's efforts to pursue a constructive fraudulent transfer claim. Dismissal of all claims affirmed on appeal.
- National counsel for a private equity firm in multiple state attorneys general and class actions concerning allegations of usury and RICO conspiracy in connection with consumer lending businesses.
- Various companies in litigations in which bondholders assert that company transactions, including spin-offs, debt exchanges and intellectual property transfers, breached the company's credit agreements and/or indentures.
- Coach, the luxury fashion brand, in the defense of several putative class actions alleging that the company used deceptive comparison pricing at the company's outlet stores.
- A large real estate private equity firm in multiple lawsuits and investigations relating to portfolio companies and other investment vehicles.
- A large hedge-fund administrator in a federal court action against a major software manufacturer for unfair competition and breach of contract.

Prior to joining Kirkland, Aaron was involved in the following representations:

- AMC Networks in the defense of a lawsuit brought by profit participants alleging, among other things, breach of contract, and seeking additional profit distributions from the AMC television series *The Walking Dead.*
- Peter Nygärd and the Nygärd Companies in multiple highly publicized defamation and other tort actions against Nygärd's nemesis, hedge fund manager Louis Bacon.
- National Australia Bank and Royal Park Investments, an entity created in connection with the Belgian State's sale of Fortis Bank to BNP Paribas, in three separate actions against Oppenheimer and its affiliates relating to defendants' misconduct as administrators of three structured finance vehicles, alleging damages of more than $2.5 billion.
- Hilton Worldwide in the defense of a trade secret misappropriation lawsuit brought by Hilton's competitor, Starwood Hotels & Resorts, and in a grand jury investigation conducted by the U.S. Attorney's Office (S.D.N.Y.) relating to the same underlying facts.
- MBIA, one of the world's largest monoline insurers, in litigation brought by 18 of the world's largest banks seeking to overturn MBIA's corporate restructuring which, with the approval of the New York Department of Insurance (now the Department of Financial Services), established a separate company for MBIA's municipal bond insurance business. After a several-week evidentiary proceeding, the New York Supreme Court ruled in favor of MBIA, upholding MBIA's restructuring.
- Purolite International, a specialty chemical manufacturer, in an action against competitor Thermax Ltd. (India) for misappropriation of trade secrets relating to formulae and production processes for ion-exchange resin. The case settled on the eve of trial with a $38 million payment by Thermax.
- Freescale Semiconductor in an expedited action by senior term lenders challenging Freescale's issuance of $1 billion of incremental term loans as barred by an occurrence of a material adverse change.
- Port Authority of New York and New Jersey as trial counsel in the trial concerning the Port Authority's alleged liability arising from the 1993 terrorist bombing of the World Trade Center. The New York Court of Appeals subsequently dismissed the action.
- Interstate Bakeries in litigation against certain lenders that balked on their commitment to provide financing to facilitate the company's exit from Chapter 11 bankruptcy.

# Aaron H. Marks, P.C.

## Partner, Litigation

- Apollo Management and its portfolio company, Hexion Specialty Chemicals, in litigation arising from Hexion's proposed $15 billion merger with Huntsman Chemicals. Representation involved the prosecution of an expedited proceeding against Credit Suisse and Deutsche Bank to compel specific performance of the banks' commitments to fund the acquisition. Successfully negotiated a settlement with Huntsman, bringing an end to one of the largest-ever battles over a leveraged buyout. *The Wall Street Journal* lauded the settlement as a "sweet deal" for Apollo and Hexion.
- Ernst & Young in a successful appeal and settlement of an accounting malpractice action brought by the creditors of CBI Holdings.
- Basic Element Company, a leading Russian industrial conglomerate, in the trial and appeal of securities fraud claims for insider trading and market manipulation against a major United States investment bank, stemming from the liquidation of a $1.5 billion stake in a Canadian auto parts manufacturer.
- Several of the nation's largest private-equity firms (Apollo Management, Bain Capital, Carlyle Group, Centerbridge Capital Partners, Clayton, Dubilier & Rice, Fortress Investment Group and TPG Capital) in disputes over acquisitions and acquisition financings for several large leveraged buyout transactions. These disputes involved the applicability of material adverse change clauses, post-merger insolvency, and specific performance of debt financing commitments. Most of these buyouts, including Home Depot Supply ($9 billion) and Harrah's Entertainment ($30 billion), funded and closed.
- BankUnited, Florida's largest bank, with respect to non-compete and trade secret lawsuits brought by Capital One.
- Safra National Bank in several arbitrations brought by clients alleging unsuitability and other claims regarding investment portfolios, and in a commercial fraud action brought by Bank of America.
- One of the nation's largest hotel owners in attorney general and putative class actions arising out of alleged consumer fraud, as well as ADA lawsuits as to certain of the owner's hotel properties.
- Real estate developers in litigation concerning ownership, financing disputes, and eminent domain.
- Cigarette manufacturer Liggett Group as lead trial counsel in 10 jury trials, including several in which Liggett was the sole defendant. One of the verdicts in favor of Liggett (returned in 90 minutes) is believed to be the fastest rendered jury verdict in the 60-year history of litigation against cigarette manufacturers. Also led Liggett's defense of the nine-month bench trial of the Department of Justice's RICO lawsuit against the tobacco industry, with the court awarding judgment in Liggett's favor (whereas substantial relief was ordered against all of the other major cigarette manufacturers).
- Video-game maker Take-Two Interactive Software in shareholder derivative actions arising out of alleged insider trading.
- Professional athletes in disputes concerning promotional contracts, endorsement deals and use of performance-enhancing drugs.

### PRIOR EXPERIENCE

Kasowitz Benson Torres LLP

### PUBLICATIONS

- "Defend Trade Secrets Act: Planning Ahead and Strategic Choices," Corporate Counsel, 2016.
- "The Application of Foreign Law When Litigating a Forum Selection Clause," New York Law Journal, 2015.

### MEMBERSHIPS & AFFILIATIONS

- Faculty Member, Emory University Law School Trial Techniques Program
- Board Member, New York American Inn of Court
- Board Member, CaringKind

# M. Todd Parker

Todd represents businesses and individuals in a variety of complex business and employment cases in federal and state court and in arbitration proceedings. Todd provides his clients with practical solutions to their most vexing, complicated legal problems.

Todd has achieved victories for both plaintiffs and defendants in a wide range of matters, including cases involving contract disputes, shareholder disputes, professional liability, partnership breakups, restrictive covenants, whistleblower claims, and discrimination and retaliation claims. Todd also regularly counsels individuals and businesses on employment-related matters and best practices.

Todd cuts through the "noise" of litigation and gets to the core determinative issues as efficiently as possible. He works tirelessly to master the relevant factual and legal issues in each case to best position his clients for a superior outcome at each stage of litigation, whether via settlement or at trial. Clients praise Todd's outstanding work product; creative, strategic approach; exceptional communication skills; and discerning judgment.

Before founding Parker Pohl in 2017, Todd worked at Moskowitz & Book, LLP, served as a law clerk to the Honorable Nicholas G. Garaufis in the Eastern District of New York, and was a Staff Attorney in the Court of Appeals for the Eighth Circuit. Todd has published law review articles in the Duke Journal of Comparative & International Law, the U.C. Davis Journal of International Law & Policy, and the Saint Louis University Law Journal. His law review article The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR has been cited in amicus briefs filed in the United States Supreme Court and the Constitutional Court of the Republic of Indonesia.

Todd has been recognized for distinction as a business litigator by Super Lawyers magazine every year since 2013, first as a Rising Star and then as a Super Lawyer, which is an honor given each year to no more than 5% of attorneys in New York. Todd is an active member of the New York Inn of Court, a lawyers' association focused on fostering community in the legal profession and continuing legal education for practicing attorneys.

**Lee Popkin** is a trial lawyer in Proskauer's Litigation Department and co-head of the firm's Product Liability Group. Lee represents clients in a wide range of industries in high-stakes trials in state and federal courts throughout the country. Lee's experience includes developing case themes, examining expert and fact witnesses at trial, preparing key witnesses for deposition and trial, taking and defending expert depositions, and drafting and arguing case-dispositive motions. Lee was named Young Lawyer of the Year (Litigation) by *The American Lawyer* for 2022, recognized as a "Future Star" by *Benchmark Litigation*, listed by *Chambers USA* for commercial litigation, and included on the *Best Lawyers in America* "Ones to Watch" list. Before joining Proskauer, Lee served as law clerk to the Honorable Sarah S. Vance of the United States District Court for the Eastern District of Louisiana. She received her J.D. *cum laude* from Harvard Law School.

FOLEY & LARDNER LLP

# Kevin J. Quaratino

**ASSOCIATE**
KQUARATINO@FOLEY.COM

**P 212.338.3445**
**90 PARK AVENUE**
**NEW YORK, NY 10016**

Kevin J. Quaratino is an associate and litigation lawyer with Foley & Lardner LLP. Kevin is based in the firm's New York office where he is a member of the firm's Business Litigation & Dispute Resolution Practice.

Prior to joining Foley, Kevin served as a law clerk to the Honorable Andrea Masley, J.S.C. in the New York State Supreme Court, Commercial Division where he drafted decisions concerning shareholder derivative actions (applying New York and Delaware law), transactions arising out of dealings with commercial banks and other financial institutions or involving commercial real property, sales of securities, the Securities Act of 1933, employment agreements with restrictive covenants, trade secrets, intellectual property, defamation, disparagement, injurious falsehood and other business torts. Kevin assisted in all aspects of managing Justice Masley's docket of hundreds of active complex commercial cases and reviewed proposed judgments, stipulations and orders for the production and exchange of confidential information, electronically stored information protocols and sealing motions. He also conducted discovery conferences to resolve discovery disputes and in camera reviews.

Earlier in his career, Kevin was a law clerk for the Honorable Eileen A. Rakower, J.S.C. in the New York State Supreme Court and drafted decisions involving state regulations and agencies, residential real estate disputes, breach of contract, attorney malpractice, medical malpractice, fraud and breach of fiduciary duty. As a mediator with Part 146 approved training, Kevin secured over $1 million dollars in settlements, and reviewed settlements involving the creation of trusts. Kevin also assisted Justice Rakower in creating CLE presentations given by the judge on topics such as motions in limine and expert testimony.

### Education

- Fordham University School of Law, New York, NY (J.D., 2016)
    - Business and Financial Law Concentration
    - Associate editor, *Intellectual Property Media and Entertainment Law Journal* (2016)
    - Associate competitions editor, *Moot Court* (2016)
    - Captain, Entertainment Law Competition Team, *Moot Court* (2015)
- Fordham University, New York, NY (B.A., *Summa Cum Laude*, 2013)
    - Phi Beta Kappa

## Publications and Presentations

- Moderator, "An Evening With The Justices of the Appellate Division First Department," New York State Bar Association virtual event (January 12, 2022)
- Moderator, "Remembering RBG: An Evening With The Honorable Robert Katzmann, Justice Ginsburg's Family and Former Law Clerks" *Webinar presentation* (2021)
- Contributor, Fifth Edition, *Commercial Litigation In New York State Courts* (2020)
- Author, "The Litigator's Guide To Sealing Documents In The Commercial Division" *NYLitigator*, VOL. 25,
  NO. 2 (2020)
- Speaker, "Becoming An Ally: Four Trailblazing Jurists Discuss Diversity and Inclusion" *CLE presentation* (2020)
- Presenter, "How To Seal Documents In The Commercial Division" *CLE presentation* (2020)

## Memberships and Community Involvement

- Co-Chair, New York State Bar Association Young Lawyers Committee (2022)
- Secretary, Executive Board of the Commercial and Federal Litigation Section (2022-2023)
- Chairperson for Mentorship and Social Engagement, Executive Committee of the New York American Inn of Court (2022-2023)
- Member, New York State Bar Association President's Task Force on the Post Pandemic Future of The Legal Profession (2021)
- Executive committee member, New York State Bar Association: Commercial and Federal Litigation Section
- Member, The LGBT Bar Association of New York
- Associate, The New York American Inn of Court
- Member, The New York City Bar Association
- Member, Fordham Law Alumni Reunion Committee
- Volunteer, PeerForward

## Admissions

- New York


# Shawn J. Rabin

## Partner

New York

srabin@susmangodfrey.com

212.471.8347


### Education

- The University of Texas, J.D. distinctions of Chancellor and Order of the Coif. Associate Editor of the Texas Law Review
- Georgetown University (B.S.F.S.)

### Clerkship

- Law Clerk to the Honorable Juan R. Torruella (Court of Appeals of the United States, First Circuit)

SUSMAN GODFREY

## Representative Clients

• Walmart • General Electric • Adam Neumann (WeWork founder) • Uber • Match.com

## Notable Representations

- Rabin was hired by WeWork founder Adam Neumann to serve as counsel for one of the largest individual claims to be litigated this century as part of a multi-firm trial team after SoftBank withdrew its offer to buy up to $3 billion in WeWork stock from Mr. Neumann and other shareholders. The litigation was placed on an expedited schedule in the Delaware Chancery Court. In 2021, a week before trial was set, the case settled as reported by media outlets throughout the world. The New York Times' coverage of the lawsuit can be accessed here and here.
- Rabin was hired months before trial to represent Uber in its legal battle against Google/Waymo. Although Waymo sought damages of almost $2 billion, Rabin and his team got all of Waymo's experts' damages opinions struck. The case, being litigated before a federal jury in San Francisco, settled two trial days before Rabin's cross-examination of the star witness Anthony Levandowski.
- Rabin successfully tried a contract case before a jury in the Southern District of New York on behalf of General Electric. Rabin handled the direct examination of the liability experts and cross-examined the defendants' main fact witness. The jury returned a verdict in favor of GE valued at more than $160 million.

## Honors and Distinctions

- Chambers USA included Rabin in their 2020, 2021 and 2022 exclusive rankings of Leading General Commercial Litigators in New York.
- Lawdragon included Rabin on the Lawdragon 500 List of the Country's Leading Litigators in 2019, 2020, 2021, and 2022 and ranked him as a Leading Plaintiff Financial Lawyer in 2019, 2020, 2021, and 2022.
- The National Law Journal named Rabin a Trailblazer for Plaintiff-side Litigation in 2022 and 2018 and Employment Litigation in 2020 (ALM).
- The Best Lawyers in America® recognized Rabin as a Top Commercial Litigation Lawyer in New York for Commercial Litigation in 2019, 2020 and 2021. (Woodward White Inc.).
- Super Lawyers recognized Rabin as a Super Lawyer in New York from 2019 to 2021 and previously ranked him as a Rising Star every year from 2007 to 2018 (Thomson Reuters).

# Justin M. Sher

## Partner & Co-founder

+1 212 202 2651
jsher@shertremonte.com

### Education

New York University School of Law, J.D., 2000, cum laude; Editor, *Journal of Legislation and Public Policy;* Federal Defender Clinic
Harvard College, A.B., 1996, cum laude

### Admissions

New York
U.S. Supreme Court
U.S. District Courts for the Eastern and Southern Districts of New York
U.S. District Court for the District of Columbia
U.S. Court of Appeals for the Second Circuit
U.S. Court of Appeals for the District of Columbia Circuit

### Clerkships

Hon. George B. Daniels, U.S. District Court for the Southern District of New York

Justin counsels and represents clients in complex commercial disputes as well as regulatory and criminal investigations. A thoughtful and tenacious advocate, he has served as lead counsel in multiple trials and regularly represents clients in federal and state courts, in arbitration proceedings, and before government agencies and regulatory bodies.

Justin has achieved victories on behalf of both plaintiffs and defendants in a wide range of high-stakes matters, including cases involving contract disputes, business breakups, professional liability allegations, breach of fiduciary duty claims, trust and estate issues, and allegations of securities fraud. He has also successfully defended clients against allegations of insider trading, market manipulation, government corruption, accounting fraud, antitrust violations, and tax fraud.

Justin thrives on complex issues, taking a strategic approach to finding solutions where others have failed. Clients laud his creativity, credibility among judges and opposing counsel, and unflagging commitment to achieving superior outcomes on their behalf.

# Justin M. Sher

## Partner & Co-founder

+1 212 202 2651
jsher@shertremonte.com

Before founding Sher Tremonte in 2011, Justin worked at Davis Polk & Wardwell LLP and Kobre & Kim LLP, served as a Special Assistant District Attorney for the Kings County District Attorney's Office, and, prior to law school, worked for the Financial Frauds Bureau of the New York County District Attorney's Office.

## Experience

**Prevailed in a high-stakes, high-profile global real estate battle:** Obtained a $50 million judgment for a Singapore-based investment advisory firm focused on sustainable development in the hospitality and real estate industries. The judgment followed five years of litigation in the Commercial Division of the New York Supreme Court over the client's claims of breach of contract, tortious interference, fraud, and unjust enrichment arising from the $358 million acquisition of an international luxury hotel chain.

**Defeated a motion to dismiss in a lawsuit against a seller of a residential building :** Represented a publicly traded real estate company in connection with litigation over its $81 million purchase of a residential building in Brooklyn. Despite a contract stating that the client was buying the building "as is," Sher Tremonte's team convinced the court that the company had viable claims against the seller and builder for fraud, breach of contract, and negligence.

**Defended a health care executive against multiple claims in Delaware court:** Represented an executive charged with trade secret misappropriation, fraud, and breach of restrictive covenants in a high-stakes matter before the U.S. District Court for the District of Delaware.

**Won summary judgment for a hedge fund/investment advisor and its principal:** The plaintiff, represented by Quinn Emanuel Urquhart & Sullivan LLP, alleged that Sher Tremonte's client had breached a partnership agreement and asserted claims of fraud, breach of contract, and breach of fiduciary duty. After Justin's cross-examination of the plaintiff, the Commercial Division dismissed all of the plaintiff's claims based on its core finding that no partnership agreement existed because the "parties were merely discussing an investment plan that was never launched."

**Prevailed in a jury trial on behalf of a corporate travel firm and its director:** The plaintiff, a competing travel agency, sued for misappropriation of trade secrets, unfair competition, and tortious interference, alleging that our clients had wrongfully taken client lists and had tampered with its email system for the purpose of diverting business. The jury accepted Justin's argument that the client lists in question were not trade secrets and delivered a complete victory to Justin's clients.

# Justin M. Sher

Partner & Co-founder

+1 212 202 2651
jsher@shertremonte.com


**Other notable work includes:**

- Obtained a complete victory in a federal jury trial on behalf of a private college and two of its administrators in action brought by a former employee in the U.S. District Court for the Southern District of New York.
- Prevailed in a case of first impression involving internet commerce and personal privacy issues. After hearing Justin's arguments, the U.S. Court of Appeals for the Second Circuit held that resellers of personal data contained in drivers' records are required to conduct a reasonable inquiry concerning a recipient's permissible purpose before disclosing such information. The case represented an important victory for individual privacy and had wide-ranging implications.
- Successfully defended three high-frequency traders in a criminal investigation under the Economic Espionage Act by the Southern District of New York.
- Represented several entities and their principal as targets of a large-scale, high-profile international criminal investigation and forfeiture proceedings arising from $4.5 billion in funds allegedly stolen from a Malaysian development agency.
- Successfully represented investors from China in a dispute with a New York-based real estate developer.

## Affiliations

Sustaining Member, Federal Bar Council (2016-present)

Climate Victory Council, League of Conservation Voters (2016-present)

White Collar Criminal Litigation Committee, New York State Bar Association (2007-present)

New York Chapter, American Inns of Court (2007-present)

Board of Directors, Legal Services of Hudson Valley (2017-2021)

Board of Directors, South Bronx Head Start (2017-2018)

## News and Publications

"Investment Advisers Beware the Broad Confidentiality Clause," *New York Law Journal* (December 5, 2016)

"Criminal Liability Under the Economic Espionage Act," *Atticus* , Volume 26, No. 2 (Summer 2014)

Justin M. Sher
Partner & Co-founder

+1 212 202 2651
jsher@shertremonte.com

"Travel At Your Own Risk: The Government Does Not Need a Warrant When It Investigates American Citizens Abroad," *American Bar Association White Collar Committee Newsletter* (March 2009)

# Nelson Edward Timken

Nelson Edward Timken, FCIArb has an LLM in International Dispute Resolution at Fordham School of Law, which he earned while working full-time as a Principal Law Clerk in the New York State Court System. He has held this position for almost 29 years and negotiated thousands of cases in a myriad of different areas of the law, such as commercial contract, real estate, business litigation, personal injury, medical malpractice, credit agreements and foreclosure matters; managed a Commercial Division part, and drafted motion and bench-trial decisions in Commercial Division cases. He assisted judges in conducting hundreds of jury and non-jury trials. His article "A Proposal to Establish an International Commercial Arbitration Ethics Panel and Hotline to Resolve Disclosure and Conflicts Issues" will appear in Volume 24, Cardozo Journal of Conflict Resolution. He speaks Spanish, some French and some Ukrainian. He is co-chair of the New York County Lawyers Association ADR Committee, a Fellow of the American Bar Foundation, and Member of the Denis McInerney NYCLA American Inn of Court, and Lawyers Assistance Program Committee of the New York City Bar Association. He has joined NAB's Communications Committee and its Social Media Subcommittee and is a member of NAB's Florida Chapter. Upon leaving the court system next year, he aspires to work in International Dispute Resolution as an arbitrator or party representative.

The foregoing may be considered attorney advertising, subject to the Rules of Professional Conduct.

# Implementing New York's Civil Voir Dire Law and Rules


**ANN PFAU**
CHIEF ADMINISTRATIVE JUDGE
NEW YORK STATE UNIFIED COURT SYSTEM

JANUARY 2009

## Message from the Chief Administrative Judge

As part of our continuing efforts to improve the jury system, we have prepared this guide to implementing New York law and rules for jury selection in civil trials. The purpose of this booklet is to provide an overview of the many legal and administrative requirements governing procedures for civil voir dire, including judicial supervision, selection methodologies, questioning of jurors and juror challenges. In addition, this booklet sets forth recommended approaches or "best practices" for ensuring that jury selection is conducted in a fair and efficient manner that balances the needs of courts, jurors and counsel. It is aimed both at achieving consistency in the implementation of applicable rules and honoring regional differences in practice.

For the last fifteen years, New York's judges and lawyers have led the nation in implementing reforms to enhance the effectiveness and fairness of our jury system. This booklet seeks to build on this outstanding partnership. I encourage you to visit us at www.nycourts.gov/ to obtain additional copies of this guide and to learn more about New York's jury improvement efforts.

Hon. Ann Pfau
Chief Administrative Judge
January 12, 2009

# IMPLEMENTING NEW YORK'S CIVIL VOIR DIRE LAW AND RULES

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## APPENDICES

## I. Introduction and Overview

The purpose of this booklet is to assist courts and counsel in properly implementing New York State law and rules governing civil voir dire, which are set forth in Civil Practice Law and Rules Article 41 (Sections 4101- 4113) and the Uniform Rules for the New York State Trial Courts (Section 202.33).[1]

Should questions arise regarding implementation of the procedures set forth in this booklet, or if the procedures are not being followed, please contact the New York Juror Hotline (1-800-NYJUROR). Calls to the hotline will be screened by management personnel in the Unified Court System's Central Jury Support Office and referred to the Office of the Chief Administrative Judge as appropriate.

In most civil trials, voir dire generally is conducted by counsel outside the immediate presence of the assigned trial judge, though the judge retains discretion to remain present during any or all parts of the process.[2] In many counties, voir dire is conducted in the assigned trial judge's courtroom after a meeting with counsel, with the judge often presiding over the beginning of voir dire and then leaving the room to perform other duties.

In some counties, the task of supervising voir dire is delegated to a Judicial Hearing Officer (JHO),[3] though counsel for either side may request that a judge be present during voir dire.[4] Counties where voir dire usually is supervised by JHOs are: Bronx, Erie, Kings, New York, Richmond, Queens, and Westchester.

In these counties, if the assigned trial judge does not supervise voir dire, or no trial judge has yet been assigned to the case, a JHO will supervise voir dire. The parties may consent to rulings by a JHO during voir dire.[5] Counsel are entitled to appeal a JHO's ruling to a judge who must hear and rule on challenges for cause.[6] Counsel always have the opportunity to contemporaneously appeal a JHO's ruling to a judge and to make a record.

Nonjudicial personnel are responsible for many important logistical and administrative tasks related to voir dire, including assuring juror comfort and convenience. They are not charged with supervising voir dire. The role of nonjudicial personnel in connection with civil voir dire is described in Section IV below.

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[1] Citations and references that are underlined are hyperlinked in the online version of this booklet. www.nycourts.gov/publications.

[2] Rules of the Trial Courts, section 202.33.

[3] Judicial Hearing Officers derive authority to supervise voir dire under CPLR 4001.

[4] CPLR R4107.

[5] CPLR 4317.

[6] CPLR 4108.

## II. Working with jurors

Depending on local practice, a judge or JHO may interact with jurors in two settings: greeting them in the jury assembly room when they start their service,[7] and introducing them to the voir dire process when they have been empaneled for an individual case. See Appendix A for suggested language covering both situations.

Whoever speaks to the jury panel at the beginning of jury selection – judge, JHO, or counsel – should follow certain general principles designed to get voir dire off to a good start.

**A. Get the jurors interested in the process.** Assure them that jury service is a meaningful, productive and satisfying experience.

B. **Thank the jurors.** Acknowledge that their service is valuable and important, whether or not they are ultimately seated on a jury.

**C. Assure jurors that their privacy will be protected**. Jurors who wish to do so may answer questions in private. Juror questionnaires will be returned to jurors or destroyed after voir dire if they are not seated.

**D. Describe the case to jurors at the outset.** The trial judge or JHO may briefly describe the case for jurors – based on either a written statement or oral summary provided by counsel. Whether or not the case has been described by a judge or JHO, each counsel should be encouraged to make a brief voir dire opening statement (3 - 5 minutes for each side) summarizing the case from their side's point of view as recommended by the Jury Trial Project. The Jury Trial Project's recommendation is included here as Appendix C. If jurors are provided with basic information about the case, they will be better prepared to answer questions in a meaningful manner.

**E. Explain the role of the judge or JHO**. Inform jurors that even though the judge or JHO may not be present during questioning, he or she remains responsible for ensuring a smooth, efficient process and is available to hear from counsel or individual jurors as needed.

[7] Rules of the Chief Administrative Judge, section 128.11.

## III. What does judicial supervision of civil voir dire involve?

Judicial supervision of voir dire involves three general areas: discussing voir dire procedures with counsel; hearing and resolving arguments concerning challenges for cause; and, monitoring the overall progress of voir dire.

### A. Discussing with counsel the voir dire process and procedures

1. **Who will introduce the case to the jurors?** Some judges or JHOs introduce themselves, counsel and the case to the jurors; others rely on the attorneys to make all introductions.

2. **Logistics of jury selection.** Topics to address with counsel include:
   - expected length of trial
   - anticipated time needed to select a jury
   - method of selection
   - size of jury panel (number of jurors needed for questioning)
   - number of alternates, and whether alternates will be non-designated
   - issues to cover during the general voir dire for cause, and
   - who will ask general cause questions (judge, JHO or counsel?).

### B. Being readily available to hear challenges for cause.

When the trial judge supervises voir dire the judge remains available to hear challenges for cause. When there is no trial judge available to supervise voir dire, JHOs may, with consent of counsel, hear and rule on challenges for cause, subject to final ruling by a judge. A JHO may question a challenged juror but may not rehabilitate that juror by eliciting a promise to be fair, to follow the judge's instructions or to be unbiased. Generally, JHOs should err on the side of caution and excuse jurors when there is a possibility of bias. Objections to a JHO's ruling are to be heard by a judge prior to resumption of voir dire, and, if requested by counsel, such objection will be contemporaneously placed on the record. The judge hearing objections may be the assigned trial judge, or any other designated judge depending on local practice. In no event will appeal of a JHO's ruling be heard by another JHO.

### C. Checking with counsel on the progress of voir dire.

The judge or JHO will consult with counsel concerning the anticipated time needed to complete jury selection. Instead of setting time limits for questioning, the recommended practice is for the judge or JHO, based on the consultation, to set only a general

time period after which counsel should report on the progress of voir dire.[8] In a routine case a reasonable time period to report on the progress of voir dire is after about two or three hours of actual voir dire and, if requested by the judge or JHO, periodically thereafter until jury selection is completed. In determining whether a case is routine, relevant factors to consider include case complexity, anticipated length of trial, pretrial publicity or the presence of unusual, emotionally charged or controversial issues. Counsel will be permitted to ask voir dire questions about jurors' attitudes on those topics.

## IV. The role of court and commissioner of jurors staff

Nonjudicial personnel assist the court, counsel, and jurors during jury selection. Sometimes the assigned trial judge asks nonjudicial personnel to act on the judge's behalf in monitoring voir dire.

Commissioner of Jurors staff qualify, postpone and excuse jurors. They assure that there are enough jurors for voir dire, and randomly select each panel of jurors sent to the empaneling room or court room for voir dire. They also monitor and protect jurors' comfort and convenience.

Commissioner of Jurors and/or court staff also fulfill other duties:

- distribute and collect juror background questionnaires, make copies available to counsel and ensure that jurors' questionnaires are returned to the jurors or destroyed when no longer needed for voir dire;
- facilitate communication between counsel and the assigned trial judge or JHO as needed;
- administer oaths prior to voir dire and after jurors are selected;
- assure that all court forms are properly completed;

Commissioner of Jurors and/or court staff do not: impose or enforce time limits, decide what method of jury selection will be used, hear arguments regarding cause challenges or require that counsel exercise challenges in their presence (except if ordered by the assigned trial judge).

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[8] The rules provide three options: "At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of Panels of jurors or individual jurors." Section 202.33(d).

## V. Selecting the jury

Jury selection begins with the seating in a courtroom or empaneling room of a panel of jurors randomly selected by the Commissioner of Jurors. The average size of a civil jury panel is 28. Most courts begin civil jury selection with an initial panel of anywhere from 20 to 34 jurors, depending on the nature and complexity of the case. In some courts, the size of the panel is constrained by space availability. [9]

### A. Number of jurors and alternates

Generally, eight jurors are seated (six jurors and two alternates).[10] The court may permit a greater number of alternates as needed. Non-designated alternates may be used with consent of the parties.[11] Under this approach, no distinction is made between "jurors" and "alternates" until deliberations, at which time six jurors are randomly selected to deliberate and decide the case. Some judges use "'undisclosed alternates:" the judge and the parties know which jurors are alternates, but the alternates are not so informed until the trial's conclusion.

### B. General questions for cause

Questioning begins with general questions to the prospective jurors as a group to determine whether any member of the panel has knowledge of the subject matter, the parties, the attorneys or prospective witnesses. These initial general questions may be posed by counsel or by the judge or, upon request of counsel, by the JHO. As a result of responses to these general questions, some prospective jurors may immediately be questioned individually and out of the presence of other jurors. Challenges for cause or consent excusal of jurors anywhere in the panel may occur after these general questions are asked.[12] As needed, counsel may question members of the panel individually and out of the presence of the other jurors.

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[9] In 1990 the Chief Administrator of the Courts announced Voir Dire Panel Size Guidelines. For civil cases the initial maximum panel size was set at 20 and with a supplemental panel multiple set at 4. The memo is available to court personnel on the UCS Intranet.

[10] CPLR §4104 (Jury) and §4106 (alternates).

[11] Trial Court. Rules §220.1.

[12] The parties may stipulate to excuse a juror. CPLR 4108

## C. Challenges

**1. Consent of parties**. "An objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him."[13] Unlike peremptory challenges, there is no limit on the number of jurors that may be excused by counsel on consent.

**2. Peremptory challenges**

**a. Number.** Plaintiffs collectively have three peremptory challenges plus one peremptory challenge for each two alternates. Defendants collectively (other than third party defendants) also have three peremptory challenges plus one for each two alternates.[14]

**b. Additional**. The court, before the examining of jurors, may grant an equal number of additional peremptory challenges to both sides. Where a side has two or more parties, the court may allocate that side's total peremptory challenges among those parties.[15]

**c. Exercise**. Peremptory challenges are exercised outside the presence of the panel, or against a list or ballot, so that jurors remain unaware of which side is excusing which jurors. [16] Exercise of peremptory challenges alternates one at a time between the parties.

**3. Challenges for cause**. The court must hear and decide whether to grant or deny challenges for cause.[17] The judge, or a JHO where counsel have consented, has broad discretion to excuse a juror whom the judge or JHO concludes is unable to fulfill the duties of a juror.[18]

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[13] CPLR 4108.

[14] CPLR 4109.

[15] CPLR 4109.

[16] Section 202.33, Appendix E(A)(5).

[17] CPLR 4108.

[18] Statutory grounds for a challenge for cause include but are not limited to that a juror is: an employee or stockholder of a corporate party; a stockholder, director, officer, or employee or has an interest in any liability insurance carrier; or related to a party within sixth degree of consanguinity. CPLR 4110.

4. **Making objections.** Objections should be made as unobtrusively as possible.[19] Similarly, challenges for cause should be unobtrusively made. Counsel should make every effort to settle disputes without court assistance. If such efforts fail, counsel shall bring the dispute to the attention of the assigned trial judge or JHO.

## D. Method of selection

The Uniform Rules for the Trial Courts provide for two methods of jury selection – White's or Struck.[20] Counsel shall be given the opportunity to select the method they prefer, provided that the court will select the method if the parties cannot agree.[21] Each county must adopt a default method to be used when the parties cannot agree and no judge or JHO is available to select the method. Regardless of which method is used, questioning of prospective jurors is conducted first by counsel for the plaintiff(s) and then by counsel for the defendant(s). In each round, the exercise of challenges always alternates between the parties, with each party exercising one challenge at a time.

### 1. White's

After the general questions to the full panel, counsel questions jurors in rounds. The jurors being questioned are characterized as being "in the box." Although in some counties the number of jurors questioned in round one is greater than six, the preferred practice is to question six jurors as set forth in Appendix E of Section 202.33 of the Uniform Rules for the Trial Courts.[22]

In each round, consent excusals and challenges for cause of jurors 'in the box' shall be exercised prior to exercise of peremptory challenges and as soon as the reason therefor becomes apparent. When a juror is removed from the box for cause or on consent, that juror is immediately replaced, and questioning reverts to counsel for the plaintiff.

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[19] Section 202.33, Appendix E(A)(8).

[20] Strike and replace or other methods may be used if approved by the Chief Administrative Judge.

[21] The rules authorize the judge to direct the method of selection to be used. Section 202.33 (c).

[22] Where counsel have consented to non-designated alternates, Section 220.1, the number in the box in the first round includes the equivalent number of alternates..

Once there are six[23] "cause-free"[24] jurors in the box, peremptory challenges shall be exercised.[25] In the first round peremptory challenges are exercised in the order in which the parties are listed in the case caption. In subsequent rounds, the first exercise of peremptory challenges alternates from side to side. In each round, peremptory challenges are exercised one at a time by removing a juror's name from a list or ballot from a board that is passed back and forth until no other peremptory challenges are exercised. Once a party waives a challenge, that party may not thereafter exercise another peremptory challenge in that round.

Jurors remaining 'in the box' after exercise of consent, cause and peremptory challenges are sworn and excused. They may be excused from court and told to return when the trial itself is expected to begin. If all jurors needed for the jury (or the jury plus alternates) have not been sworn after the first round, subsequent rounds are conducted until the full jury is selected and sworn. If alternates are designated, a separate round may be conducted to seat alternates.

For the second round, an effective approach is to place "in the box" a number of jurors equal to the number of unfilled juror seats plus the number of peremptory challenges remaining. With a six-person jury, the number of seats remaining to be filled and challenges remaining to be exercised will almost always be six.[26] With an eight-person jury (non-designated alternates) the number will almost always be eight.

If a panel is exhausted before jury selection is completed, an effective approach to determining the size of a new panel is to multiply by three or four the number of jurors and/or alternates yet to be selected.

### 2. Struck

The basic principle of the "Struck method" is that there is only one round of peremptory challenges exercised. Indeed, no peremptory challenges are exercised until the full number of persons needed for the jury, alternates and peremptory challenges – generally 16 – have survived all consent and cause challenges. It is

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[23] Plus a number equivalent to the number of alternate jurors where non-designated alternates are used.

[24] The phrase "cause-free" refers to those jurors who have been questioned and not excused for cause or by consent.

[25] If in any round there are fewer "cause-free" jurors "in the box" than there are jurors remaining to be selected and the panel of jurors has been exhausted, counsel may consent to exercise peremptory challenges before bringing in a new panel of jurors.

[26] The number of jurors needed in the box will be greater than six if, by consent, counsel exercised in the first round peremptory challenges against fewer than six jurors.

necessary to have 16 'cause-free' jurors in order to account for a six-person jury, three peremptory challenges for each side, two alternate jurors and one peremptory challenge for each side for the alternates.

After the general voir dire of the full panel, counsel's questions focus on the first 16 prospective jurors in the randomly selected panel. If any prospective jurors are excused by consent or cause challenge after both sides have questioned the first 16, the questioning proceeds with the prospective jurors occupying seats 17 and higher until there is a total of 16 'cause-free' jurors. For example, if four jurors are excused for cause or by consent, then the prospective jurors sitting in seats 17 through 20 are questioned. If one of those four is also excused, then the juror seated in seat 21 is questioned, and so forth.

Once the necessary number of "cause-free" jurors has been identified, counsel may exercise peremptory challenges one at a time by removing a juror's name from a list or ballot from a board that is passed back and forth between the parties. Where there is more than one party on either side, peremptory challenges are exercised by the parties in the order in which their names appear in the case caption.[27] Exercise of peremptory challenges continues until either all peremptory challenges are exhausted or both sides waive their challenges. The first six jurors remaining on the list or on the board are the jury and the next two are the alternates. If alternates are non-designated, then the first eight jurors become the jury.

## VI. Conducting the voir dire

### A. Juror questionnaires

In every county, the Commissioner of Jurors provides a standard background questionnaire (UCS-140) to be completed by all prospective jurors and used by counsel as a tool to facilitate voir dire.[28] A copy of the questionnaire is included here as Appendix B. The questionnaire has an original and three copies, allowing one copy each to be used by the judge, plaintiff(s) and defendant(s) and the juror. Counsel should be afforded adequate time to review the questionnaires. After voir dire questioning is completed, the questionnaire copies belonging to those jurors who are not seated must be returned to the jurors or destroyed by the court. With the court's approval, the parties may use an additional questionnaire that addresses concerns unique to a specific case.

[27] "Unless following that order would, in the opinion of the court, unduly favor a side." Section 202.33, Appendix E(C)(5).

[28] Section 202.33, Appendix E(A)(3).

## B. Introductions

All parties, attorneys and witnesses should be introduced to the jury panel, either in person or by reading a list of names (with identifying information) to the panel.[29] Introductions may be made by the judge, JHO, or by counsel.

## C. Description of the case

The trial judge or JHO may briefly describe the case for jurors – based on either a written statement or oral summary provided by counsel. Whether or not the case has been described by a judge or JHO, counsel should be encouraged to make a brief voir dire opening statement (3 - 5 minutes for each side) summarizing the case from their respective viewpoints.[30]

## D. Juror qualifications

The Commissioner of Jurors qualifies jurors.[31] Because some jurors are not completely forthcoming in juror questionnaires or during re-screening in the jury assembly room, qualification questions are generally asked again during voir dire. A person is qualified to serve as a juror under the Judiciary Law,[32] if he or she is:

- A citizen of the United States, and a resident of the county;
- at least eighteen years of age;
- has not have been convicted of a felony; and,
- is able to understand and communicate in the English language.[33]

In addition, anyone who has previously served as a juror in any state or federal court in New York is not eligible for service in the New York State courts for six years from the conclusion of the previous service.[34]

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[29] Section 202.33, Appendix E(A)(4).

[30] A brief voir dire opening by each party is recommended by the Jury Trial Project. See Appendix C for the Jury Trial Project's recommendation.

[31] Judiciary Law Section 509.

[32] Section 510.

[33] Guidelines for Assessing Potential Jurors' Ability to Understand and Communicate in the English Language instruct commissioners to leave such decisions to a judge whenever a juror's language abilities are unclear. The guidelines are reproduced here as Appendix D.

[34] Judiciary Law Section 524.

### E. Length of trial

Court rules allow counsel to advise jurors "if an unusual delay or a lengthy trial is anticipated."[35] At counsel's request, jurors may be informed of the expected length of the trial to avoid seating any juror who will not be available for the full length of trial.

### F. Other topics to cover

Counsel may state their clients' contentions and identify the parties, attorneys and witnesses likely to be called. Other relevant topics may be covered by counsel in voir dire, including discussion of injuries and damages in bifurcated trials. Counsel may not read from pleadings or inform jurors about monetary sums at issue and should avoid explaining legal concepts which are the province of the court.[36] Nothing in this booklet shall preclude the judge or JHO from curtailing argumentative or otherwise improper examination.

### G. Questioning out of the presence of other jurors

In order to protect juror privacy and avoid the risk that one juror's responses to questions will affect other jurors' attitudes or opinions, when there is an indication that a juror may have some bias or experience that could impact on service, the juror may be questioned at that time individually and out of the presence of others.

## VII. Related rules and policies

### A. Juror utilization

The court system tracks juror utilization with a standard Civil Voir Dire/Trial Data form (UCS-114), which must be completed each time a voir dire commences, regardless of the outcome. UCS-114 forms are provided by Commissioner of Jurors staff, who also provide instruction on how to complete the form. The form tracks the type of voir dire procedure used, number of jurors utilized, reasons why jurors were excused, and the outcome of the case. Usually, jury or court personnel complete a portion of the form and the remainder is completed by the judge or the judge's part clerk. If no judge or JHO is present during voir dire, counsel will answer questions regarding jury selection and settlement. If the case proceeds to trial, the part clerk or court clerk completes the form.

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[35] Section 202.33, Appendix E (A)(7).

[36] Section 202.33, Appendix E(A)(4) and Appendix E(A)(6).

## B. Juror oaths

**Before Voir Dire Questions.** "Do you swear or affirm to answer truthfully all questions relative to your qualifications to serve as a juror in this action?"

**After Selection.** "Do you swear or affirm to try this action in a just and impartial manner, to the best of your judgment, and to render a verdict according to the law and the evidence?"

## C. Five-day rule

A sworn juror may be released from service if the trial has not commenced within five days from the date the juror was sworn, subject to the discretion of the appropriate administrative judge.[37]

## D. Non-unanimous verdict

In New York State, a civil verdict can be reached by five out of six members of the jury.[38]

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[37] Section 128.8(a), Rules of the Chief Administrator.

[38] CPLR 4113(a).

## Appendix A
## Introductions by Judges or JHOs

**Welcoming New Jurors** Whenever possible, jurors should be welcomed to jury service by a judge or JHO (preferably wearing robes).[39] Here is a sample welcoming speech for new jurors.

Good morning jurors. Welcome to jury service. Our justice system could not function without your participation as jurors, and I can assure you that the judges, lawyers and parties in all the cases that come before our courts deeply appreciate your contributions and sacrifices.

I'm here to review a few aspects of your service.

First, I want to emphasize the importance of providing honest and complete answers to all the questions that will be asked of you, whether orally or in writing. Each question asked of you is designed to protect the integrity of our justice system and the fairness of our trials.

Second, court rules prohibit attorneys and parties from having any contact with jurors during the trial, including jury selection. If you happen to be in the same hallway or elevator with an attorney or a party from a case in which you are being questioned as a juror please do not talk to that attorney or party. And, please do not take offense if they do not acknowledge or speak to you.

This does not mean that you must be silent at all times. Any time you have a question about the process, court personnel in the jury assembly room and in the courtrooms are here to answer questions or assist you in finding the answers.

[39] Section 128.11, Rules of the Chief Administrator.

Finally, your participation is equally valuable whether or not you are actually selected to sit on a jury. Your presence here today means that you are ready and willing to serve on a trial. I cannot tell you how long any particular trial will last nor what any particular trial will be about. You will have to wait to hear from the judge and attorneys in the trial for which you are questioned.

If you are selected to serve on a jury, the judge will explain the rules of the trial to you and the attorneys. Court personnel will assist you with other information about your service, and if you are seated on a trial you can address any questions to court personnel in the judge's courtroom.

There may be times when you have to wait longer than you would like. Please understand that while you are waiting, the judge is resolving issues that need to be addressed outside of your presence. I want to thank you in advance for your patience in dealing with these occasional delays during your jury service, and please be assured that we will do our best to minimize them.

In conclusion, your valuable time as a juror assures that our justice system continues to be the best justice system in the world – relying on ordinary citizens to make important decisions. I think you will find that everyone in this court is committed to making your experience as productive and satisfying as possible.

With that, I will turn the [microphone][podium] back over to Ms./Mr. _____ from our _____ County Commissioner of Jurors office, who will tell you more about your role and responsibilities as a juror.

**Introducing Voir Dire** Before any questions are asked during voir dire, the judge or JHO welcomes the jury panel and explains the process to the panel members. A sample introduction is provided below. It is estimated that this introduction will take less than three minutes to deliver once bracketed materials are selected or rejected. Judges and JHOs are encouraged to tailor their voir dire introductions to their own style while keeping them brief and informative.

Welcome to _____. We are about to begin the jury selection for the case of _____ against _____. My name is _____ and I will be supervising this process.

This is a civil matter. In this case [one party who is called the plaintiff is suing another party who is called the defendant] [ ## parties who are called the plaintiffs are suing ## other parties who are called the defendants]. In this case the paintiff[s] [is][are] name[s] and the defendant[s] [is][are]name[s]. The trial involves: [Summarize very briefly. For example, "a dispute about a contract," "a medical malpractice claim," "claims arising out of an automobile accident,"]. The attorneys will tell you more about the case.

The jury selection process began when you completed the questionnaire. The questionnaire helps the attorneys plan what questions to ask you. Your answers are used only for selecting a jury in this case. When the oral questioning is completed, the questionnaires will be returned to you or collected and destroyed.

After my introductory remarks, the attorneys will tell you a little bit about this case. Then they will ask questions to learn if there is any reason why any of you should not sit as a juror in this case. The questions are not meant to pry or to be intrusive – only to give the attorneys the information they need to make decisions about whether or not you should sit as a juror in this case.

If you are asked a question that you would rather answer in private, or if there is anything you would like to explain to the attorneys in private, please do not hesitate to indicate that you would prefer privacy.

Some of you will be excused from this panel as a result of your answers to these general questions. If you are excused, you will return to the jury assembly room where the jury commissioner's staff will give you further instructions.

When jury selection is completed, the trial may proceed immediately or you may be asked to return for the start of the trial on another day. If you are excused from sitting on this case, please don't take this as a personal comment on you or your ability to be fair. It is often true that a particular juror is not well qualified to sit on a particular case but she or he *would be* well qualified to sit as a juror on a different case.

I want to thank all of you for your patience and cooperation. I will be leaving the room at this point. I will be available to consult with the attorneys at any time to make a decision as to whether or not any particular juror should be excused from sitting on this trial. With that, I will ask [Plaintiff's Attorney] to make a short statement describing what this case is about from the plaintiff's point of view.

## Appendix B
## Juror Questionnaire (UCS-140)

# JUROR QUESTIONNAIRE

**Please answer all questions. Your answers will be used to assist in selecting a jury. If there is anything you prefer to discuss in private, please ask to speak with the judge out of the hearing of other jurors by answering yes to Question 17. THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY.**

1. Name

2. Age

3. ☐ Male ☐ Female

4. Town/village or geographical area (neighborhood) where you live?

5. Number of years
   a. living at current address?
   b. living in this county?

6. Where were you born?

7. Are you currently:
   ☐ Single ☐ Married ☐ Other

8. What is the highest level of education you completed?
   ☐ Less than high school
   ☐ High school graduate
   ☐ More than high school
      a. number of years
      b. course of study

9. Are you currently employed? ☐ No
   ☐ Yes — If yes:
   a. who is your employer?
   b. what is your occupation?

10. Occupations and relationship to you of other adults in your household:

11. Gender and age of your children:

12. Did you ever sit on a jury before? ☐ No
    ☐ Yes — If yes:
    a. When?
    b. Where?
    c. Type of jury:
       ☐ Grand jury ☐ Trial Jury ☐ Both
    d. Type of case(s):
       ☐ Criminal ☐ Civil ☐ Both
    e. Did the jury reach a verdict?
       ☐ Yes ☐ No ☐ Both

13. Have you or someone close to you ever: *(check all that apply)*
    ☐ Been the victim of a crime
    ☐ Been accused of a crime
    ☐ Been convicted of a crime
    ☐ Been a witness to a crime
    ☐ Testified in court
    ☐ Sued someone else
    ☐ Been sued by someone else.

14. Have you or someone close to you (relative or close friend) ever been employed by: *(check all that apply)*
    ☐ Law Office
    ☐ Medical profession
    ☐ Law enforcement or criminal justice agency
    ☐ Insurance industry
    ☐ Local municipality (city/county worker)

15. Are you actively involved in any civic, social, union, professional or other organizations? ☐ No
    ☐ Yes:

16. What are your hobbies or recreational activities?

17. Is there anything relevant to your jury service that you prefer to discuss in private?
    ☐ Yes ☐ No

I affirm that the statements made on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law.

/ /

**Signature of Prospective Juror** **Date**

## Appendix C
## Procedures for Implementing Voir Dire Openings
## Recommended by the Jury Trial Project

1. Each counsel shall be given a brief period of time (about five minutes) to summarize the case from their side's point of view.[1] The time allotted for the voir dire openings should be added to the usual time allotted for voir dire.

2. Counsel should be given notice as early as possible of the court's intent to use the voir dire openings procedure. When counsel is first informed of the procedure at the start of jury selection, which is usually the case, reasonable time should be given to allow the attorneys to collect their thoughts and prepare.

3. Counsel can be invited to give voir dire openings to the entire panel.

4. The procedure should be used only with consent of counsel for both sides and with both sides' participation.

5. Special considerations for criminal matters:

   (1) *Rosario* material ought to be provided to the defense before counsel is asked to deliver a voir dire opening.

   (2) A defender's decision to make a voir dire opening does not preclude exercising the defendant's right not to make an opening statement at the start of the trial.

   (3) The People's voir dire should be first and there should be no rebuttal.

### Suggested Judge's Introduction

Before we begin the process of asking you questions about your qualifications to serve in this case, each attorney will give a brief statement about the case. I've asked them to limit their remarks to a brief presentation. Of course, what the attorneys say to you by way of their opening remarks both now, and again later just before we begin hearing from the witnesses, is not evidence. These statements are offered to you now as a kind of "preview" of the case. The purpose in doing so is to allow us a greater opportunity to explore with you anything that might impact your ability to serve fairly and impartially as a juror in this case.

[1] This recommendation is consistent with Section 202.33, Appendix E(A)(4).

## Appendix D
## Guidelines for Assessing Potential Jurors' Ability to Understand and Communicate in the English Language[2]

Jurors in New York State must "be able to understand and communicate in the English language." (Judiciary Law Section 510).

Permanent disqualifications from jury service based on a prospective juror's inability to understand and communicate in the English language are made only in rare instances where a prospective juror has had significant opportunity over many years to learn to understand and communicate in English and has not been able to do so. Generally, jurors who appear to be unable to understand and communicate in English are temporarily disqualified from jury service for three years.

Prospective jurors are not temporarily disqualified based solely upon a negative response in writing to the question in both the Juror Qualification Questionnaire and the Jury Summons asking: Can you understand and communicate in the English language? A decision concerning a potential juror's ability to understand and communicate in the English language is usually based on a personal interview conducted at the time that a potential juror appears in response to a summons. However, a juror can be disqualified without a personal interview if independent written proof is submitted demonstrating the individual's inability to adequately communicate in English.

A prospective juror who says that he or she is unable to understand or communicate in the English language should be interviewed. The interview *may* be conducted by telephone in small counties where there are small numbers of people whose primary language is not English. However, an in-person interview is preferred and should be conducted when the prospective juror responds to a summons.

An announcement can be made in the Juror Assembly Room asking those who have difficulty understanding and communicating in English to go to a designated location for an interview. Wherever possible the announcement should be made in English and in other languages. The announcement should say: "It is a requirement of jury service that jurors be able to understand and communicate in the English language. If English is not your first language and you believe that you will not be able to understand what the judge, attorneys and witnesses say during a trial, please come to..... so that we may interview you and decide whether you are able to serve as a juror."

The interview should be conducted in private and without assistance from an interpreter, wherever possible. Simple questions should be posed by the interviewer to assess the prospective juror's basic English language skills. The best approach is to ask questions about the juror's own background, a topic familiar to the prospective juror and therefore easy to discuss. The purpose of the questions is to make a judgment about the prospective juror's ability to understand and communicate in English, not to collect information about the juror. The questions *may* include but are not limited to: For how long have you been in this country? Are you currently employed? What kind of work do you do? For how long have you had this job? What other jobs have you

[2] Promulgated by the Chief Administrative Judge, May 2, 2005.

had? Where did you go to school? How far did you go in school? What subjects have you studied in school? How did you travel to court today? How long did it take you to travel here today? Are other members of your family in this country? Which members of your family are here?

The decision as to whether the prospective juror is able to understand and communicate in the English language is a subjective one based on the accuracy and completeness of the prospective juror's responses to straightforward questions of the type listed above. A prospective juror who can answer most of the questions in English should not be excused. A prospective juror who demonstrates limitations in understanding and/or responding to the questions should be given a three-year temporary disqualification from jury service.

If, after an interview, it remains unclear as to whether a juror's ability to understand and communicate in English is adequate for jury service, the jury commissioner should qualify the juror and let the trial judge decide whether the juror is qualified to serve. A judge who concludes that the juror's ability to understand and communicate in English is not adequate for jury service should be asked to send a written request to the commissioner indicating whether the juror should be temporarily or permanently disqualified due to inability to understand and communicate in English.

A juror who is temporarily excused from jury service due to inability to understand or communicate in English receives an R3 code in the centralized jury data base which prevents that individual's name from being selected from lists of potential jurors for a period of three years. A juror who is permanently disqualified from jury service due to inability to understand or communicate in English receives an R10 code which permanently prevents that individual's name from ever being selected.

## Appendix E

### Civil Procedure Law and Rules - Sections Cited in this Booklet

**Source:** http://public.leginfo.state.ny.us/frmload.cgi?BOT-06786703

**§ 4104. Number of jurors.** A jury shall be composed of six persons.

**§ 4105. Persons who constitute the jury.** The first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.

**§ 4106. Alternate jurors.** Unless the court, in its discretion, orders otherwise, one or two additional jurors, to be known as "alternate jurors", may be drawn upon the request of a party. Such jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as the regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors, except that after final submission of the case, the court shall discharge the alternate jurors. If, before the final submission of the case, a regular juror dies, or becomes ill, or for any other reason is unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall replace the discharged juror in the jury box, and be treated as if he had been selected as one of the regular jurors.

**Rule 4107. Judge present at examination of jurors.** On application of any party, a judge shall be present at the examination of the jurors.

**§ 4108. Challenges generally.** An objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him. A challenge of a juror, or a challenge to the panel or array of jurors, shall be tried and determined by the court.

**§ 4109. Peremptory challenges.** The plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate.

**§ 4110. Challenges for cause.** (a) Challenge to the favor. The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor as to such juror. The fact that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror. (b) Disqualification of juror for relationship. Persons shall be disqualified from sitting as jurors if

related within the sixth degree by consanguinity or affinity to a party. The party related to the juror must raise the objection before the case is opened; any other party must raise the objection no later than six months after the verdict.

**§ 4113. Disagreement by jury.** (a) Unanimous verdict not required. A verdict may be rendered by not less than five-sixths of the jurors constituting a jury. (b) Procedure where jurors disagree. Where five-sixths of the jurors constituting a jury cannot agree after being kept together for as long as is deemed reasonable by the court, the court shall discharge the jury and direct a new trial before another jury.

## Appendix F

## Uniform Civil Rules For The Supreme Court And The County Court

## Section 202.33 Conduct of the Voir Dire.

**Source:** http://www.nycourts.gov/rules/trialcourts/202.shtml#33

(a) Trial Judge. All references to the trial judge in this section shall include any judge designated by the administrative judge in those instances where the case processing system or other logistical considerations do not permit the trial judge to perform the acts set forth in this section.

(b) Pre-Voir Dire Settlement Conference. Where the court has directed that jury selection begin, the trial judge shall meet prior to the actual commencement of jury selection with counsel who will be conducting the voir dire and shall attempt to bring about a disposition of the action.

(c) Method of Jury Selection. The trial judge shall direct the method of jury selection that shall be used for the voir dire from among the methods specified in subdivision (f) of this section.

(d) Time Limitations. The trial judge shall establish time limitations for the questioning of prospective jurors during the voir dire. At the discretion of the judge, the limits established may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of Panels of jurors or individual jurors.

(e) Presence of Judge at the Voir Dire. In order to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge shall determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, preside over part of or all of the remainder of the voir dire.

(f) Methods of Jury Selection. Counsel shall select prospective jurors in accordance with the general principles applicable to jury selection set forth in subdivision (g) of this section and using the method designated by the judge pursuant to subdivision (c) of this section. The methods that may be selected are:

(1) "White's method," as set forth in subdivision (g) of this section;
(2) "struck method," as set forth in subdivision (g) of this section;
(3) "strike and replace method," in districts where the specifics of that method have been submitted to the Chief Administrator by the Administrative Judge and approved by the Chief Administrator for that district. The strike and replace method shall be approved only in those districts where the Chief Administrator, in his or her discretion, has determined that experience with the method in the district has resulted in an efficient and orderly selection process; or
(4) other methods that may be submitted to the Chief Administrator for use on an experimental basis by the appropriate Administrative Judge and approved by the Chief Administrator.

(g) Procedures for questioning, challenging and selecting jurors authorized by section 202.33 of the Rules of the Chief Administrator of the Courts.

**APPENDIX E**
Procedures for questioning, challenging and selecting jurors authorized by section 202.33 of the Rules of the Chief Administrator of the Courts.

**A. General principles applicable to jury selection.** Selection of jurors pursuant to any of the methods authorized by section 202.33(e) of the Rules of the Chief Administrator shall be governed by the following:

(1) If for any reason jury selection cannot proceed immediately, counsel shall return promptly to the courtroom of the assigned trial judge or the Trial Assignment Part or any other designated location for further instructions.

(2) Generally, a total of eight jurors, including two alternates, shall be selected. The court may permit a greater number of alternates if a lengthy trial is expected or for any appropriate reason. Counsel may consent to the use of "nondesignated" alternate jurors, in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.

(3) All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.

(4) During the voir dire each attorney may state generally the contentions of his or her client, and identify the parties, attorneys and the witnesses likely to be called. However, counsel may not read from any of the pleadings in the action or inform potential jurors of the amount of money at issue.

(5) Counsel shall exercise peremptory challenges outside of the presence of the Panel of prospective jurors.

(6) Counsel shall avoid discussing legal concepts such as burden of proof, which are the province of the court.

(7) If an unusual delay or a lengthy trial is anticipated, counsel may so advise prospective jurors.

(8) If counsel objects to anything said or done by any other counsel during the selection process, the objecting counsel shall unobtrusively request that all counsel step outside of the juror's presence, and counsel shall make a determined effort to resolve the problem. Should that effort fail, counsel shall immediately bring the problem to the attention of the assigned trial judge, the Trial Assignment Part judge or any other designated judge.

(9) After jury selection is completed, counsel shall advise the clerk of the assigned Trial Part or of the Trial Assignment Part or other designated part. If counsel anticipates the need during trial of special equipment (if available) or special assistance, such as an interpreter, counsel shall so inform the clerk at that time.

**B. "White's Method"**

(1) Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(2) After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each round. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).

(3) In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefor becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plaintiff.

(4) Following questioning and the exercise of challenges for cause, peremptory challenges shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in a round

is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.

(5) In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.

(6) At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commence.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

**C. "Struck Method"**

(1) Unless otherwise ordered by the Court, selection of jurors shall be made from an initial Panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the Panel may be decreased.

(2) Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(3) After the general questioning has been completed, in an action with one plaintiff and one defendant, counsel for the plaintiff initially shall question the prospective jurors, followed by questioning by defendant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefor becomes apparent. At the end of the period, all challenges for cause to any prospective juror on the Panel must have been exercised by respective counsel.

(4) After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates, where non-designated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised

by the parties (such sum shall be referred to as the "jury Panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury Panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph (3).

(5) After all prospective jurors in the Panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with counsel for the plaintiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In that event, the court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised in a manner that shall balance the interests of the parties. An attorney who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson or other objections shall be resolved by the court before any of the struck jurors are dismissed.

(6) After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the Panel.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner set forth in these rules, but with an initial Panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury Panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

Historical Note Sec. filed Dec. 7, 1995 eff. Jan. 1, 1996.

# Differences Between Opening Statements & Closing Arguments

*Each party in a jury trial has a right to speak directly to jurors once before and once after the evidence is presented.*

## Opening Statement

The opening statement at the beginning of the trial is limited to outlining facts. This is each party's opportunity to set the basic scene for the jurors, introduce them to the core dispute(s) in the case, and provide a general road map of how the trial is expected to unfold. Absent strategic reasons not to do so, parties should lay out for the jurors who their witnesses are, how they are related to the parties and to each other, and what each is expected to say on the witness stand. Opening statements include such phrases as, “Ms. Smith will testify under oath that she saw Mr. Johnson do X,” and “The evidence will show that Defendant did not do Y.” Although opening statements should be as persuasive as possible, they should not include arguments. They come at the end of the trial.

## Closing Argument

Only after the jury has seen and heard the factual evidence of the case are the parties allowed to try to persuade them about its overall significance. Closing arguments are the opportunity for each party to remind jurors about key evidence presented and to persuade them to adopt an interpretation favorable to their position. At this point, parties are free to use hypothetical analogies to make their points; to comment on the credibility of the witnesses, to discuss how they believe the various pieces of the puzzle fit into a compelling whole, and to advocate why jurors should decide the case in their favor.

## Key Difference

There is a critical difference between opening statements and closing arguments. In opening statements, parties are restricted to stating the evidence: (“Witness A will testify that Event X occurred”). In closing arguments, the parties are free to argue the merits: “As we know from Witness A’s compelling testimony, Event X occurred, which clearly established who should be held responsible in this case.”.

***DISCLAIMER:*** *These resources are created by the Administrative Office of the U.S. Courts for educational purposes only. They may not reflect the current state of the law, and are not intended to provide legal*

*advice, guidance on litigation, or commentary on any pending case or legislation.*

# Mindspirit, LLC v. Evalueserve Ltd.

Opening Statement

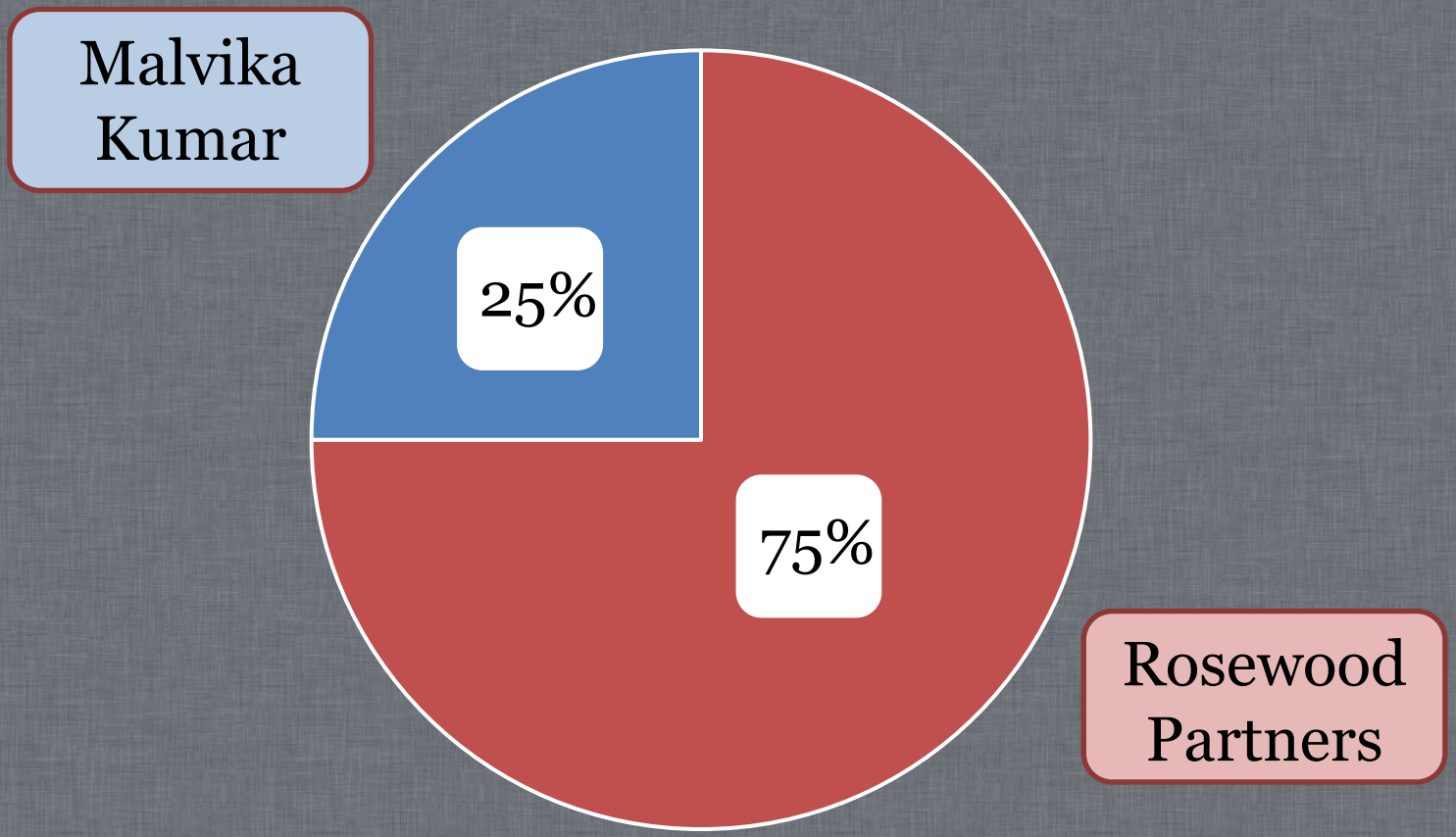
Simple Rule: The Four Cs

You Can't
Change
a Contract
without Consent

# Table of Contents

# Chapter 1 – Cast of Characters

# Mindspirit



# Malvika Kumar

# Rosewood Partners

Aditi Gupta

Deepali Gupta

Geetanjali Gupta

Megha Gupta

# Mindspirit

(Malvika, Aditi, Deepali, Geetanjali, Megha)

# Rajat Gupta and Anil Kumar


Created Mindspirit for Their Families

# Knowledge Process Outsourcing

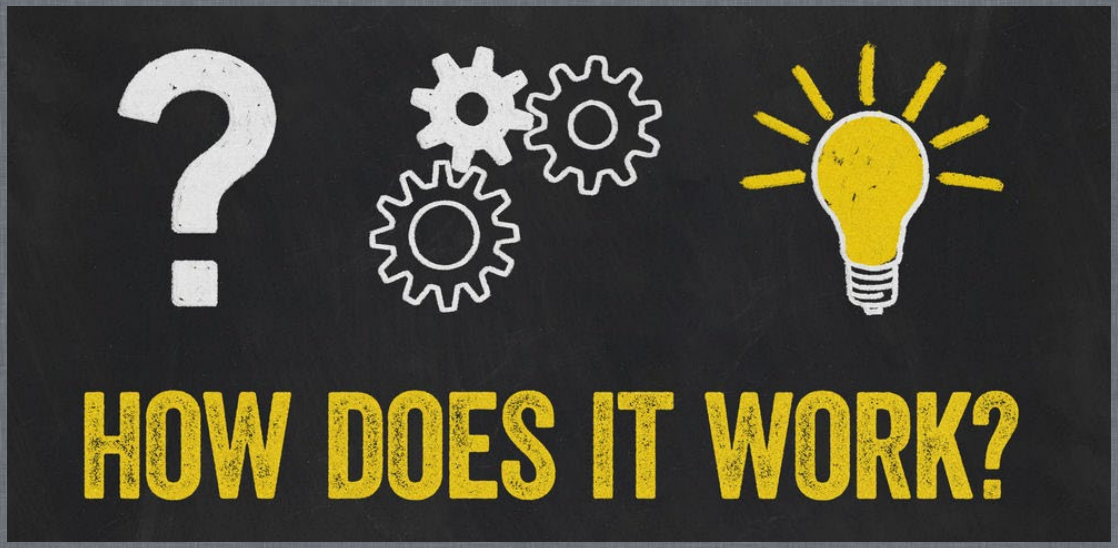
EVALUESERVE
POWERED BY MIND+MACHINE


Marc Vollenweider

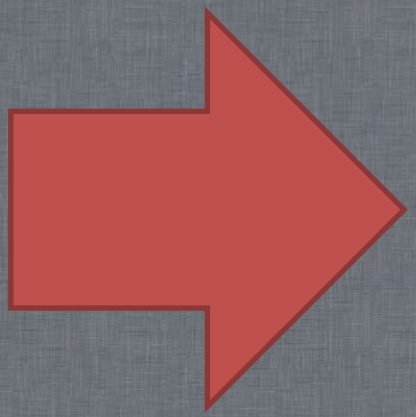

Alok Aggarwal

# Chapter 2 - Option Agreements


Option Contract


HOW DOES IT WORK?

- Pay Someone
- For the Right
- To Buy Something Later



# Stock Option Terminology

**Optionholder**
(person who has right to buy)

**Exercise Price**
(the amount someone pays to buy)

**Expiration**
(how long the person has to buy)

**Transferability**
(can the buyer give the option away)

**EVALUESERVE, LTD. 2001 EQUITY INCENTIVE PLAN**
**STOCK OPTION GRANT NOTICE**

Evalueserve, Ltd. (the "Company"), pursuant to its Evalueserve, Ltd. 2001 Equity Incentive Plan (the "Plan"), hereby grants to you (the "Optionholder") an option to purchase the number of shares of the Company's Common Stock set forth below. This option is subject to all of the terms and conditions as set forth herein and in the Stock Option Agreement between the Company and the Optionholder, the Plan and the Notice of Exercise, all of which are attached hereto and incorporated herein in their entirety.

| | |
|---|---|
| Optionholder: | Mindspirit LLC |
| Date of Grant: | April 17, 2001 |
| Vesting Commencement Date: | April 17, 2002 |
| Number of Shares Subject to Option: | 480,000 |
| Exercise Price (Per Share): | US$.56 |
| Total Exercise Price: | US$288,000 |
| Expiration Date: | April 16, 2006 |

**Type of Grant:**

| | |
|---|---|
| | Incentive Stock Option |
| X | Nonstatutory Stock Option |

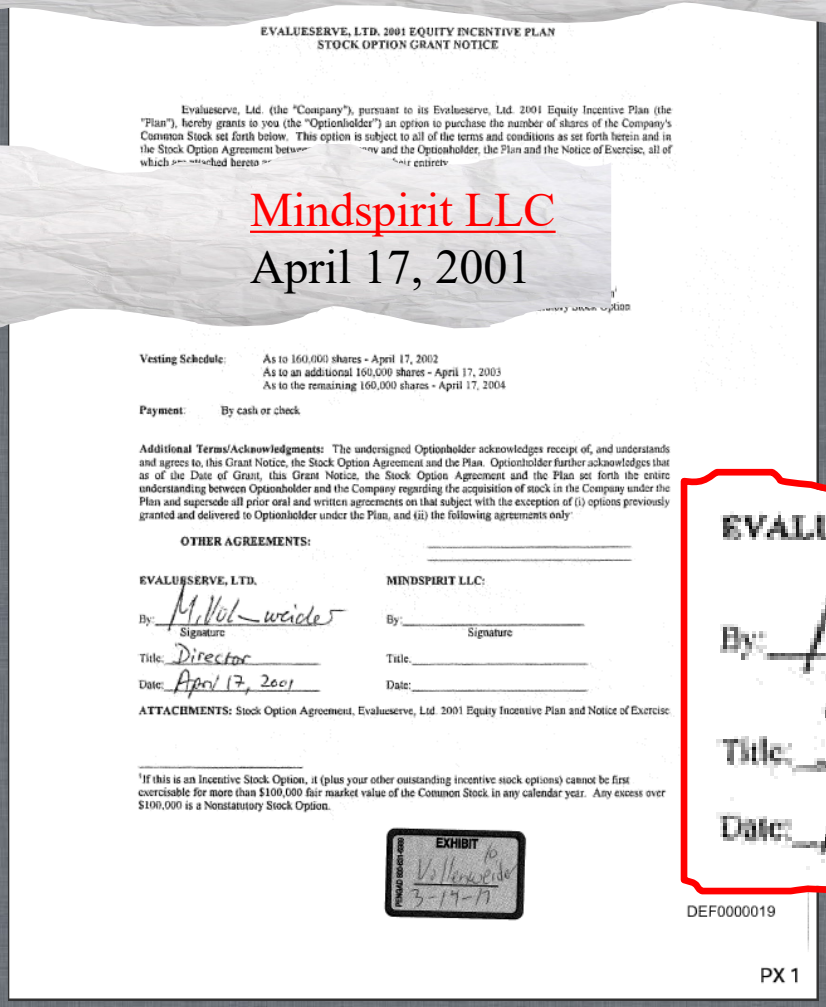
**Vesting Schedule:** As to 160,000 shares - April 17, 2002
As to an additional 160,000 shares - April 17, 2003
As to the remaining 160,000 shares - April 17, 2004

**Payment:** By cash or check

# Mindspirit's Option

**EVALUESERVE, LTD. 2001 EQUITY INCENTIVE PLAN**
**STOCK OPTION GRANT NOTICE**

Optionholder: Mindspirit LLC
Date of Grant: April 17, 2001



EVALUESERVE, LTD. 2001 EQUITY INCENTIVE PLAN
STOCK OPTION GRANT NOTICE

Evalueserve, Ltd. (the "Company"), pursuant to its Evalueserve, Ltd. 2001 Equity Incentive Plan (the "Plan"), hereby grants to you (the "Optionholder") an option to purchase the number of shares of the Company's Common Stock set forth below. This option is subject to all of the terms and conditions as set forth herein and in the Stock Option Agreement between ...ny and the Optionholder, the Plan and the Notice of Exercise, all of which are attached hereto a... their entirety.

Vesting Schedule: As to 160,000 shares - April 17, 2002
As to an additional 160,000 shares - April 17, 2003
As to the remaining 160,000 shares - April 17, 2004

Payment: By cash or check

Additional Terms/Acknowledgments: The undersigned Optionholder acknowledges receipt of, and understands and agrees to, this Grant Notice, the Stock Option Agreement and the Plan. Optionholder further acknowledges that as of the Date of Grant, this Grant Notice, the Stock Option Agreement and the Plan set forth the entire understanding between Optionholder and the Company regarding the acquisition of stock in the Company under the Plan and supersede all prior oral and written agreements on that subject with the exception of (i) options previously granted and delivered to Optionholder under the Plan, and (ii) the following agreements only:

OTHER AGREEMENTS:

EVALUESERVE, LTD.
By: M. Vol—weide5 Signature
Title: Director
Date: April 17, 2001

MINDSPIRIT LLC:
By: _____ Signature
Title: _____
Date: _____

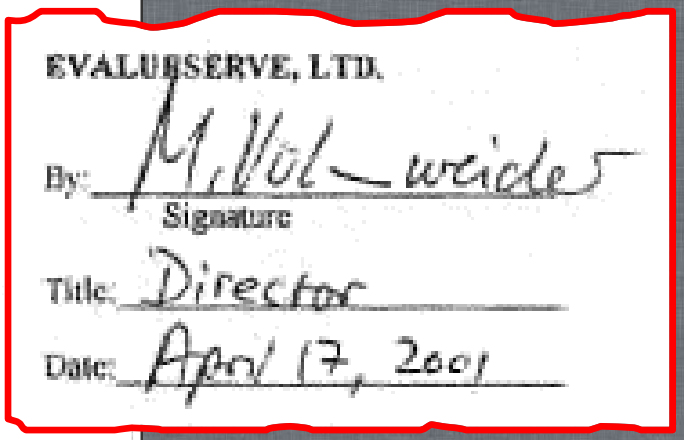
ATTACHMENTS: Stock Option Agreement, Evalueserve, Ltd. 2001 Equity Incentive Plan and Notice of Exercise

[1] If this is an Incentive Stock Option, it (plus your other outstanding incentive stock options) cannot be first exercisable for more than $100,000 fair market value of the Common Stock in any calendar year. Any excess over $100,000 is a Nonstatutory Stock Option.

EXHIBIT 16 Vollenweide 3-19-17

DEF0000019

PX 1



EVALUESERVE, LTD.
By: M. Vol—weide5 Signature
Title: Director
Date: April 17, 2001

# Not Transferable

1. **VESTING.** Subject to the limitations contained herein, your Option will vest as provided in your Grant Notice.

2. **NUMBER OF SHARES AND EXERCISE PRICE.** The number of shares of Common Stock subject to your Option and your exercise price per share referenced in your Grant Notice may be adjusted from time to time, as provided in the Plan.

3. **METHOD OF PAYMENT.** Payment of the exercise price is due in full upon exercise of all or any part of your Option. You may elect to make payment of the exercise price in cash or by check or in any other manner permitted by your Grant Notice.

4. **WHOLE SHARES.** You may exercise your Option only for whole shares of Common Stock.

5. **SECURITIES LAW COMPLIANCE.** Notwithstanding anything to the contrary contained herein, you may not exercise your Option unless the shares of Common Stock issuable upon such exercise are then registered under the Securities Act or, if such shares of Common Stock are not then so registered, the Company has determined that such exercise and issuance would be exempt from the registration requirements of the Securities Act. The exercise of your Option must also comply with other applicable laws and regulations governing your Option, and you may not exercise your Option if the Company determines that such exercise would not be in material compliance with such laws and regulations.

6. **TERM.** You may not exercise your Option before the commencement of its term or after its term expires. The term of your Option commences on the Date of Grant and expires upon the Expiration Date indicated in your Grant Notice.

7. **EXERCISE.**

7.1 You may exercise the vested portion of your Option during its term by delivering a Notice of Exercise (in a form designated by the Company) together with the exercise price to the Secretary of the Company, or to such other person as the Company may designate, during regular business hours, together with such additional documents as the Company may then require.

7.2 By exercising your Option you agree that the Company (or a representative of any underwriters engaged by the Company) may, in connection with the registration of the offering of [illegible] of the Company under the [illegible] for the [illegible] to enforce the provisions hereof [illegible]

**8. TRANSFERABILITY.** Your Option is not transferable.

8. **TRANSFERABILITY.** Your Option is not transferable.

9. **RIGHT OF FIRST REFUSAL UPON PROPOSED SALE.** The provisions of Sections 4 through 6 of that certain Securities Purchase Agreement of even date herewith between the Company and you shall be applicable to all shares of Common Stock acquired by you upon the exercise of an Option.

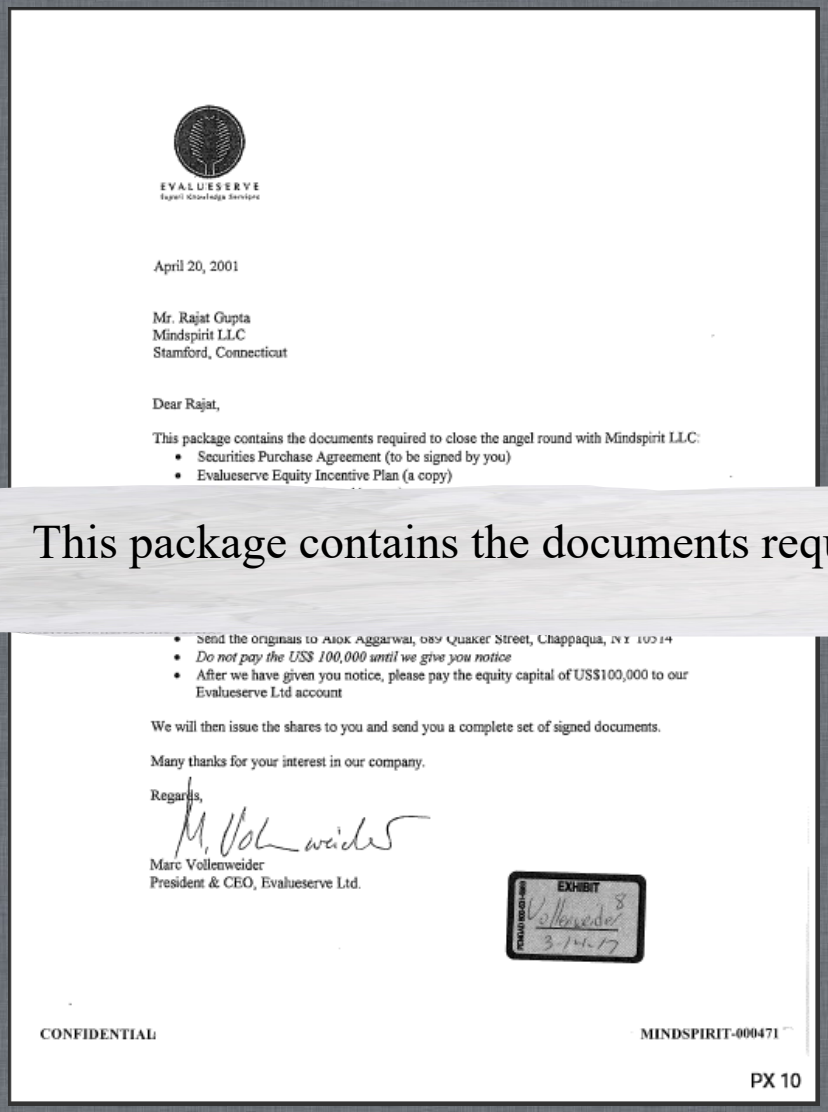
10. **NOTICES.** Any notices provided for in your Option or the Plan shall be given in writing and shall be delivered in person or by responsible overnight carrier and shall be deemed given when received by the Company and its registered office, attention: Chief Executive Officer and by you at the last address you provided to the Company.

11. **GOVERNING PLAN DOCUMENT.** Your Option is subject to all the provisions of the Plan, the provisions of which are hereby made a part of your Option, and is further subject to all interpretations, amendments, rules and regulations which may from time to time be promulgated and adopted pursuant to the Plan. In the event of any conflict between the provisions of your Option and those of the Plan, the provisions of the Plan shall control.

DEF0000022

# Chapter 3 - What Happened?

# Mindspirit Invested in Evalueserve



EVALUESERVE

April 20, 2001

Mr. Rajat Gupta
Mindspirit LLC
Stamford, Connecticut

Dear Rajat,

This package contains the documents required to close the angel round with Mindspirit LLC:

- Securities Purchase Agreement (to be signed by you)
- Evalueserve Equity Incentive Plan (a copy)

- Send the originals to Alok Aggarwal, 689 Quaker Street, Chappaqua, NY 10514
- *Do not pay the US$ 100,000 until we give you notice*
- After we have given you notice, please pay the equity capital of US$100,000 to our Evalueserve Ltd account

We will then issue the shares to you and send you a complete set of signed documents.

Many thanks for your interest in our company.

Regards,

Marc Vollenweider
President & CEO, Evalueserve Ltd.

EXHIBIT
Vollenweider 8
3/14/17

CONFIDENTIAL

MINDSPIRIT-000471

PX 10

Mr. Rajat Gupta
Mindspirit LLC
Stamford, Connecticut

This package contains the documents required to close the angel round with Mindspirit LLC

# Mindspirit Helped Evalueserve For Years

# Anil Kumar and Rajat Gupta Wanted to Take Care of Their Families

# Mindspirit

(Malvika, Aditi, Deepali, Geetanjali, Megha)

# Evalueserve Made a Mistake

**2001**

Mindspirit Gets Non-Transferable Options

**2006-2011**

Evalueserve sent emails saying the options are in Gupta's and Kumar's names

**2006-2011**

Rajat Gupta and Anil Kumar Have No Reason to Doubt Evalueserve But Ask Evalueserve for Confirmation

**April 15, 2011**

Alok Aggarwal tells Rajat Gupta and Anil Kumar that "Time is of the Essence" for them to Exercise the Options

**April 16 and 18, 2011**

Rajat Gupta and Anil Kumar Exercise Options in Their Own Names

**June 8, 2011**

Bermuda Monetary Authority Rejects Exercise of Options by Rajat Gupta and Anil Kumar.

**January 17, 2012**

Mindspirit Tells Evalueserve that it Made a Mistake


TRUST
SWOT
SUCCESS

# Excuse #3 – Rajat and Anil Tried to Exercise the Options

**NOTICE OF EXERCISE**

**Evalueserve, Ltd.**
**C/o Appleby**
**Canon's Court**
**22 Victoria Street**
**Hamilton, HM EX**
**Bermuda**

**Date of Exercise:**

Ladies and Gentlemen:

This constitutes notice under my stock option that I elect to purchase the number of shares for the price set forth below:

| | | |
|---|---|---|
| Type of option (check one): | X Non statutory | Incentive |
| Stock option dated: | November 7th, 2001 | |
| Number of Shares as to to which option is exercised | 360,000 | |
| Certificates to be issued in name of : | Rajat K. Gupta | |
| Total exercise price: | $200,016.00 | |
| Cash payment delivered herewith: | | |

By this exercise, I agree (i) to provide such additional documents as you may require pursuant to the terms of the Evalueserve, Ltd. 2001 Equity Incentive Plan, (ii) to provide for the payment by me to you (in the manner designated by you) of your withholding obligation, if any, relating to the exercise of this option, and (iii) if this exercise relates to an incentive stock option, to notify you in writing within 15 days after the date of any disposition of any of the shares of Common Stock issued upon exercise of this option that occurs within two years after the date of grant of this option or within one year after such shares of Common Stock are issued upon exercise of this option.

I hereby make the following certifications and representations with respect to the number of shares of Common Stock of the Company listed above (the "Shares"), which are being acquired by me for my own account upon exercise of the Option as set forth above:

DEF0000229

I acknowledge that the Shares have not been registered under the Securities Act of 1933, as amended (the "Securities Act"), and are deemed to constitute "restricted securities" under Rule 144 promulgated under the Securities Act. I warrant and represent to the Company that I have no present intention of distributing or selling said Shares, except as permitted under the Securities Act and any applicable state securities laws.

I further acknowledge that I will not be able to resell the Shares for at least 90 days after the Common Stock of the Company becomes publicly traded (i.e., subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934) under Rule 701 and that more restrictive conditions apply to affiliates of the Company under Rule 144.

I further acknowledge that all certificates representing any of the Shares subject to the provisions of the option shall have endorsed thereon- appropriate legends reflecting the forgoing limitations, as well as any legends reflecting restrictions pursuant to the Company's Memorandum of Association, Bylaws and/or applicable securities laws.

I further agree that, if required by the Company (or a representative of any underwriters ' engaged by the Company) in connection with the registration of the offering of any securities of the Company under the Securities Act, I will not sell, dispose of, transfer, make any short sale of, grant any option for the purchase of, or enter into any hedging or similar transaction with the same economic effect as a sale of, any Shares or other securities of the Company held by me, for a period of time specified by the Company or such underwriters not to exceed 180 days following the effective date of any registration statement of the Company filed under the Securities Act. I further agree to execute and deliver such other agreements as may be reasonably requested by the Company and/or such underwriters as are consistent with the foregoing or that are necessary to give further effect thereto. In order to enforce the foregoing covenant, the Company may impose stop-transfer instructions with respect to my Shares until the end of such period. Any such underwriters engaged by the Company are intended to be third party beneficiaries of this paragraph and shall have the right, power and authority to enforce the provisions hereof as though they were a party hereto.

Very truly yours,

Rajat K. Gupta

DEF0000230

# Mindspirit Points Out Evalueserve's Mistake

"It appears the original options were in mind spirit and I guess according to the option agreement should not have been transferred. I hope this gives Evalueserve what is needed to correct the mistake."
(PX 54)

**From:** Rajatkgupta <rajatkguptaus@yahoo.com>
**Date:** January 17, 2012 11:29:07 AM EST
**To:** "Mr. Marc Vollenweider" <Marc.Vollenweider@evalueserve.com>
**Subject: Fwd:**

Dear Marc,

We got disconnected that day and never completed our discussion. In the meantime I asked Aaron to dig up the paperwork we had specifically to find out the name under which the original options were issued. Attached please find his reply. It appears the original options were in mind spirit and I guess according to the option agreement should not have been transferred. I hope this gives Evalueserve what is needed to correct the mistake. Needless to say this will solve many problems for me. Please let me know the next steps. Hope all this works. Regards

Sent from my iPad

Begin forwarded message:


Do the Right
Thing

# Chapter 4 - Excuses

# Excuse #1 – The Options Expired???

March 2006 - The Options Were Extended to 2011

2009 - EV Said Options Expired (PX 23)

August 2010 – The Options Were Extended to 2016

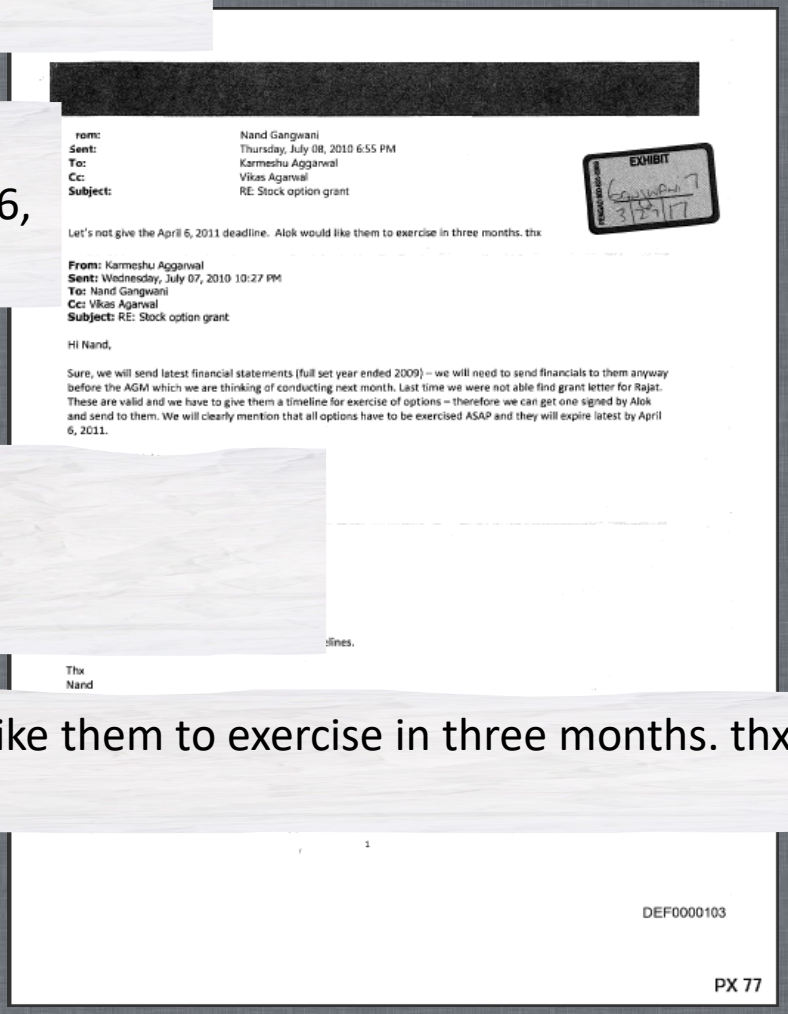
2011 - EV Said Options Expired (PX 53)

# Evalueserve Lied About Expiration A Third Time

**From:** Karmeshu Aggarwal
**Sent:** Wednesday, July 07, 2010 10:27 PM
**To:** Nand Gangwani

We will clearly mention that all options have to be exercised ASAP and they will expire latest by April 6, 2011.

**From:** Nand Gangwani
**Sent:** Thursday, July 08, 2010 6:55 PM
**To:** Karmeshu Aggarwal



rom: Nand Gangwani
Sent: Thursday, July 08, 2010 6:55 PM
To: Karmeshu Aggarwal
Cc: Vikas Agarwal
Subject: RE: Stock option grant

EXHIBIT

Let's not give the April 6, 2011 deadline. Alok would like them to exercise in three months. thx

From: Karmeshu Aggarwal
Sent: Wednesday, July 07, 2010 10:27 PM
To: Nand Gangwani
Cc: Vikas Agarwal
Subject: RE: Stock option grant

Hi Nand,

Sure, we will send latest financial statements (full set year ended 2009) – we will need to send financials to them anyway before the AGM which we are thinking of conducting next month. Last time we were not able find grant letter for Rajat. These are valid and we have to give them a timeline for exercise of options – therefore we can get one signed by Alok and send to them. We will clearly mention that all options have to be exercised ASAP and they will expire latest by April 6, 2011.

lines.

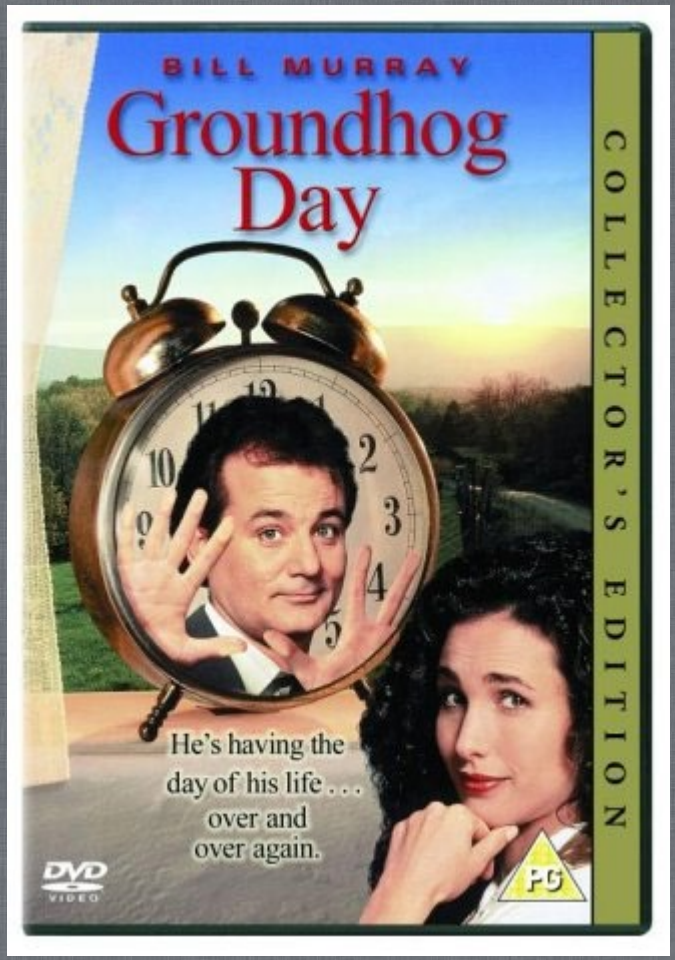
Thx
Nand

1

DEF0000103

PX 77

Let's not give the April 6, 2011 deadline. Alok would like them to exercise in three months. thx


BILL MURRAY
Groundhog Day
He's having the day of his life . . . over and over again.
COLLECTOR'S EDITION
DVD VIDEO
PG

# Excuse #2 – Evalueserve Never Got Approval for Mindspirit's Options from BMA in 2001??


SORRY
NOT
SORRY

# Excuse #3 – Options Were Transferred???

No email request
No email confirmation
No amendment
No option grant issued to Rajat Gupta
No option grant issued to Anil Kumar
No Evalueserve notes
No tax forms filled out
No new valuation was done
No transfers were allowed
No reason why Mindspirit would ever requested

# Excuse #4 – Mindspirit Never Tried to Exercise Its Options

Mindspirit repeatedly asked Evalueserve to exercise the options.

**From:** Rajatkgupta <rajatkguptaus@yahoo.com>
**Date:** January 17, 2012 11:29:07 AM EST
**To:** "Mr. Marc Vollenweider" <Marc.Vollenweider@evalueserve.com>
**Subject: Fwd:**

Dear Marc,

We got disconnected that day and never completed our discussion. In the meantime I asked Aaron to dig up the paperwork we had specifically to find out the name under which the original options were issued. Attached please find his reply. It appears the original options were in mind spirit and I guess according to the option agreement should not have been transferred. I hope this gives Evalueserve what is needed to correct the mistake. Needless to say this will solve many problems for me. Please let me know the next steps. Hope all this works. Regards

Sent from my iPad

Begin forwarded message:

# This is an Easy Case

1

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Nothing

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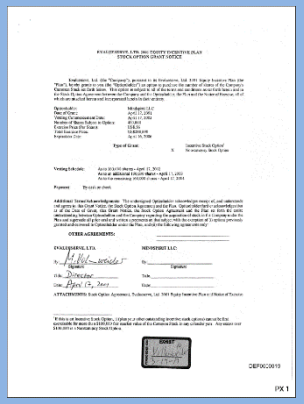

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No Transfer of the Option

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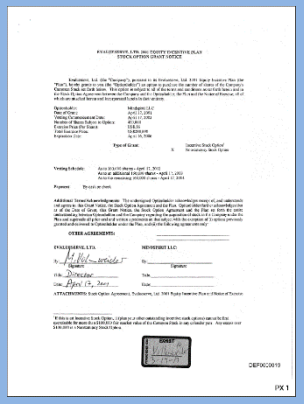

# Tri-State Closing Argument

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

AGREEMENT dated August 31st, 1999, by and between Point 4 Data Corporation [hereinafter "Point 4"], with an office address at 3303 Harbor Boulevard, Costa Mesa, California 92626, , and Tri-State Surgical Supply & Equipment, Ltd. [hereinafter "Tri-State"], with an office address at 409 Hoyt Street, Brooklyn, New York 11231.

1. The parties agree to execute the Purchase Agreement annexed hereto. The Purchase Agreement and the additional terms and conditions herein and any attachments are incorporated in and made a part of this Agreement. The parties acknowledge that they have read each document and agree to the terms and conditions stated therein.

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

AGREEMENT dated August 31st, 1999, by and between Point 4 Data Corporation [hereinafter "Point 4"], with an office address at 3303 Harbor Boulevard, Costa Mesa, California 92626, , and Tri-State Surgical Supply & Equipment, Ltd. [hereinafter "Tri-State"], with an office address at 409 Hoyt Street, Brooklyn, New York 11231.

WHEREAS, Tri-State desires to purchase hardware and software to update its current Genesys system in order to expand its capabilities and enable it to be Y2K compliant;

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... computer hardware, computer software, licenses or sublicenses required to use any of the software programs, and all necessary software design, programming, and implementation services so that the updated software with additional hardware properly operates the computer system of Tri-State at its headquaters and all branches.

3. Tri-State shall pay to Point 4 the sums stated in the Purchase Agreement annexed hereto and as modified herein.

-1-

EXHIBIT
2
Georgene K. Betts, CSR
12/12/11

X2

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

AGREEMENT dated August 31st, 1999, by and between Point 4 Data Corporation [hereinafter "Point 4"], with an office address at 3303 Harbor Boulevard, Costa Mesa, California 92626, , and Tri-State Surgical Supply & Equipment, Ltd. [hereinafter "Tri-State"], with an office address at 409 Hoyt Street, Brooklyn, New York 11231.

38. Point 4 for good and valuable consideration hereby grants Tri-State a non-exclusive, personal, non-transferable license to use and to copy in machine readable form its Software Product, for the internal use of Tri-State, subject to the terms and conditions hereof, Point 4 represents that it has the authority to enter into this License Agreement. "Software" as used herein means system software, utility programs, routines, related documentation and media. The term of this License with respect to the Software shall commence upon the delivery and installation of the software and payment in full of the license fee.

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

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WHEREAS, Tri-State desires to purchase hardware and software to update its current Genesys system in order to expand its capabilities and enable it to be Y2K compliant; and



X2

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

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27. Point 4 agrees to commence operations to correct any software problem within four hours after being given notice via telephone or telecopier of a problem with the computer's software. In the event Point 4 fails to initiate remedial measures within forty eight hours of notification, then customer may retain the services of an independent consultant and Point 4 shall be liable for the consultant's charges. Point 4 will be responsible for correcting all errors caused by machine or software malfunction or by Point 4's operational errors of any kind, including restoration of programs and/or data files.

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

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WHEREAS, Tri-State desires to purchase hardware and software to update its current Genesys system in order to expand its capabilities and enable it to be Y2K compliant; and

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EXHIBIT
2
Georgene K. Bert, CSR
12/12/11

X2

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

AGREEMENT dated August 31st, 1999, by and between Point 4 Data Corporation [hereinafter "Point 4"], with an office address at 3303 Harbor Boulevard, Costa Mesa, California 92626, , and Tri-State Surgical Supply & Equipment, Ltd. [hereinafter "Tri-State"], with an office address at 409 Hoyt Street, Brooklyn, New York 11231.

45. This Agreement may only be changed or amended by a writing, executed by officers of Point 4 and Tri-State.

EQUIPMENT PURCHASE, SOFTWARE LICENSE,
PROGRAMMING AND INSTALLATION SERVICES AGREEMENT

AGREEMENT dated August 31st, 1999, by and between Point 4 Data Corporation [hereinafter "Point 4"], with an office address at 3303 Harbor Boulevard, Costa Mesa, California 92626, , and Tri-State Surgical Supply & Equipment, Ltd. [hereinafter "Tri-State"], with an office address at 409 Hoyt Street, Brooklyn, New York 11231.

WHEREAS, Tri-State desires to purchase hardware and software to update its current Genesys system in order to expand its capabilities and enable it to be Y2K compliant; and

WHEREAS, Point 4 has represented that it can install hardware and software in Tri-State's computer system to meet Tri-State's goals; and

WHEREAS, Point 4 has submitted to Tri-State a purchase

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2. Point 4 agrees to sell, furnish, and install the Equipment and Software listed in the Purchase Agreement. This includes an integrated computer system comprising computer hardware, computer software, licenses or sublicenses required to use any of the software programs, and all necessary software design, programming, and implementation services so that the updated software with additional hardware properly operates the computer system of Tri-State at its headquaters and all branches.

3. Tri-State shall pay to Point 4 the sums stated in the Purchase Agreement annexed hereto and as modified herein.

-1-

EXHIBIT
2
Georgene K. Betts, CSR
12/2/11

X2

Q At any point in the half-hour conversation you had with Mr. Wolfe, did he mention any problem with Tri-State's dongle?

A He mentioned absolutely no problems with the dongle. **That never came up.**

Burden Direct Examination:
Page 81:15-18
August 13, 2018

Q Let's talk about that.
So you testified that the dongle never came up in that conversation with Perry Wolfe?

A What I testified to is a problem with the dongle never came up in the conversation**. I didn't say that the dongle didn't come up** in the conversation.

Q Oh, because the dongle did come up in the conversation; didn't it, Mr. Burden?

A Yes, it did.

Burden Cross Examination:
Page 131:16-24
August 13, 2018

And there didn’t seem to be any urgency on anybody's part. There was no mention of any problems. **No mention that they had a dongle problem.**

Burden Direct Examination:
Page 83:3-12
August 13, 2018

Q Now, on that call -- well, you testified a few moments ago that on the call with Mr. Kugler, there was no mention the dongle problem, correct?

A Yes, that's correct. There was no mention of the dongle problem.

Q But to be clear, on that call, sir, **you discussed a quote non-dongle solution** for Tri-State's business, correct?

A That's correct.

Burden Cross Examination:
Page 128:14-21
August 13, 2018

Q So instead of breaking the contract, Tri-State could have honored the contract, entered those three lines to fix its problem without spending a dime, correct?

A Yes. Absolutely.

Burden Cross Examination:
Page 166:14-17
August 13, 2018

Q Tri-State did not agree to provide Point 4 with 24/7 access to the server for other purposes, correct?

A Yeah, correct.

Q So you'd agree with me that Tri-State could potentially turn off the modem and then turn it back on when it had a problem so you could log in and fix it, correct?

A I guess they could have done that, yes.

Burden Cross Examination:
Page 124:13-19
August 13, 2018

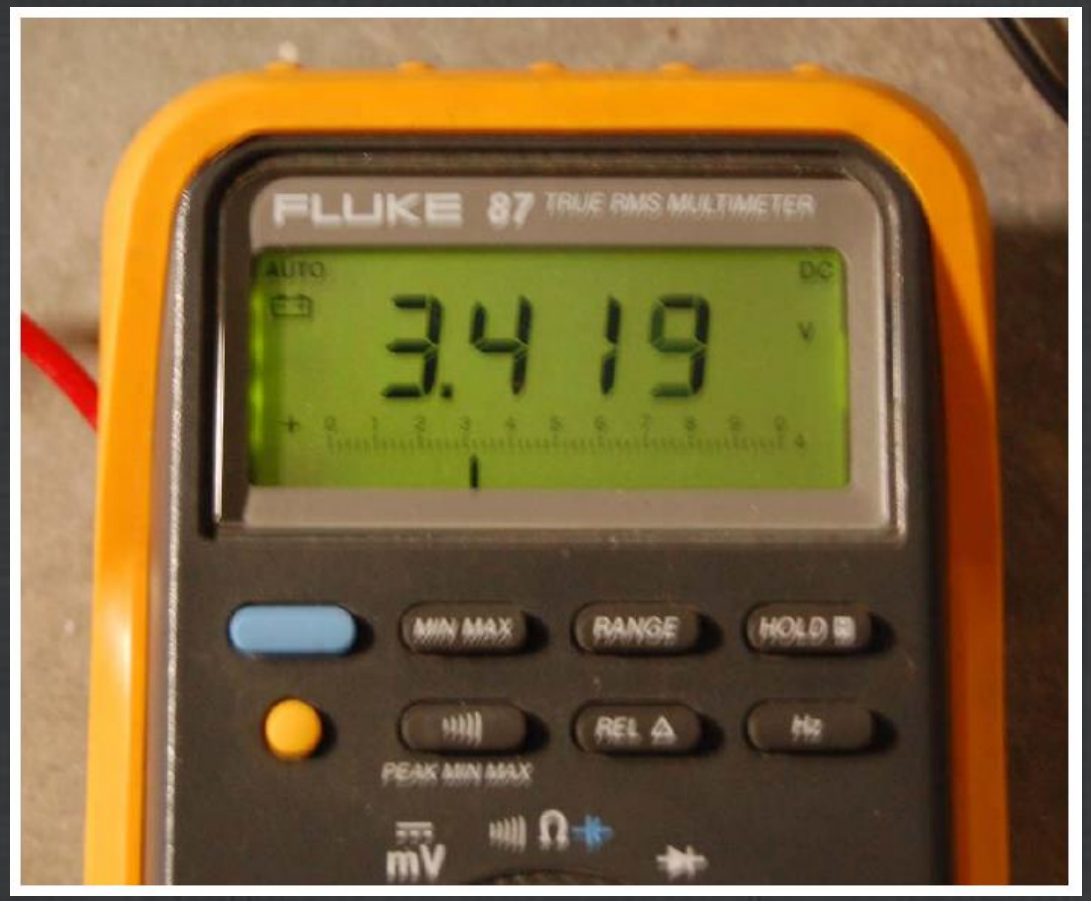
Q. If a customer of Point 4's only wants 48 of its employees to use the Genesys software, it would be **irrational** for that company to buy an unrestricted license; true or false?

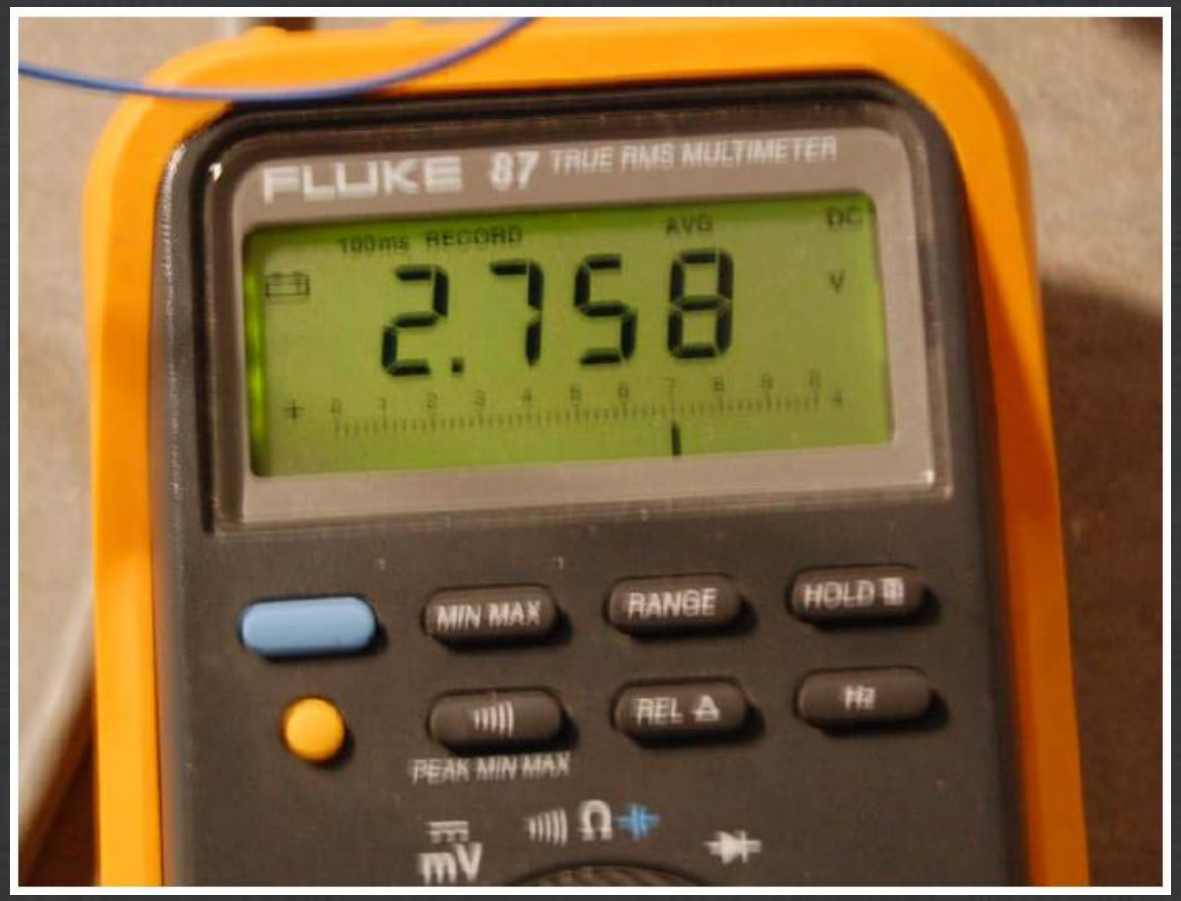
A. Yes.

Q. True, right?

A. Yeah.

Burden Deposition:
Page 112:1-7
March 8, 2012




Source: Jones Expert Report Pages 24 and 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ghislaine Maxwell,

Defendant.

20-CR-330 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

Attached are the Court's draft jury questionnaire—with changes adopted at yesterday's proceeding in redline—and draft voir dire.

In light of the District's COVID-19 protocols, the Court has proposed an additional question on page 6 of the questionnaire, which is also indicated in redline.

SO ORDERED.

Dated: October 22, 2021
New York, New York

ALISON J. NATHAN
United States District Judge

**DRAFT – October 21, 2021** **Juror ID: _____**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| -v- | : | 20 Cr. 330 (AJN) |
| GHISLAINE MAXWELL, | : | JURY QUESTIONNAIRE |
| Defendant. | : | |

## INSTRUCTION SHEET

Dear Juror:

Please call (212) 805 0158 on November 15, 2021 after 6:00 p.m. for further reporting instructions. Please bring this instruction sheet with you to the courthouse if you are instructed to return.

**Juror ID:** _____

**PLEASE ANSWER THE FOLLOWING QUESTIONS:**

| | |
|---|---|
| | **ABILITY TO SERVE**<br>**Please note:** In the event you are excused from service on this jury, you will likely not be excused from jury service in general. You will instead be required to report to the Court's Jury Clerk for placement on another panel for another case. |
| 1. | Do you have any unmovable commitments between November 16, 2021, and November 19, 2021, which is when jury selection will take place?<br>□ Yes □ No |
| 1a. | If yes, please explain (without indicating the name of where you work or the names of any family members or friends, or other personal information that might identify who you are):<br>_____<br>_____<br>_____<br>_____ |
| 2. | Do you have any unmovable commitments between November 29, 2021, and approximately January 15, 2022, which is the estimated length for trial?<br>□ Yes □ No |
| 2a. | If yes, please explain (without indicating the name of where you work or the names of any family members or friends, or other personal information that might identify who you are):<br>_____<br>_____<br>_____<br>_____ |
| 3. | Do you have any international travel plans between now and November 29, 2021?<br>□ Yes □ No |
| ~~3.~~4. | Do any circumstances exist such that serving on the jury in this case would entail serious hardship or extreme inconvenience?<br>□ Yes □ No |
| ~~3a.~~4a | If yes, please briefly describe the serious hardship or extreme inconvenience:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID:** _____

| | |
|---|---|
| ~~4.~~5. | Do you have any personal commitments that would make it difficult for you to get to court by 9:30 a.m., every day of trial, or remain at the courthouse until 5:00 p.m.? (Please note, the Court will arrange and provide transportation to and from the Courthouse each day for selected jurors).<br><br>□ Yes □ No |
| ~~4a.~~5a | If yes, please explain why you would be unable to get to court by 9:30 a.m. or remain until 5:00 p.m.:<br><br>_____<br>_____<br>_____<br>_____ |
| ~~5.~~6. | Do you have any difficulty reading, speaking, or understanding English?<br><br>□ Yes □ No |
| ~~6.~~7. | Do you have any medical, physical, or mental condition or illness that makes you unable to serve on a jury, including difficulty hearing, seeing, reading, or concentrating?<br><br>□ Yes □ No |
| ~~6a.~~7a | If yes, please briefly describe the condition or illness. If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation.<br><br>_____<br>_____<br>_____<br>_____ |
| ~~7.~~8. | Are you taking any medication which would prevent you from giving full attention to all the evidence at this trial?<br><br>□ Yes □ No |
| ~~7a.~~8a | If yes, please explain:<br><br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~8.~~9. | Do you have any religious, philosophical, or other beliefs that would make you unable to render a verdict in a criminal case?<br>□ Yes □ No |
| ~~8a.~~9a | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

| | **BASIC LEGAL PRINCIPLES AND MEDIA RESTRICTIONS** |
|---|---|
| ~~9.~~10. | Under the law, the facts are for the jury to determine and the law is for the Judge to determine. You are required to accept the law as the Judge explains it to you even if you do not like the law or disagree with it, and you must determine the facts according to those instructions. Do you accept this principle, and will you be able to follow the Judge's instructions if selected to serve on this jury?<br>□ Yes □ No |
| ~~9a.~~10a | If no, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~10.~~11 | The law provides that a defendant in a criminal case is presumed innocent at all stages of the trial and is not required to put on any defense at all. The Government is required to prove the defendant guilty beyond a reasonable doubt on each charge. Do you accept these principles, and will you be able to apply them if selected to serve on this jury?<br>□ Yes □ No |
| ~~10a.~~11a | If no, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~11.~~12 | The law provides that a defendant in a criminal case has an absolute right not to testify, and that a juror cannot hold it against the defendant if she chooses not to testify. Do you accept this principle, and will you be able to apply it if selected to serve on this jury?<br><br>□ Yes □ No |
| ~~11a.~~1 | If no, please explain:<br><br>_____<br>_____<br>_____<br>_____ |
| ~~12.~~13 | A juror is required by law to make his or her decision based solely on the evidence or lack of evidence presented in Court, and not on the basis of conjecture, suspicion, bias, sympathy, or prejudice. Do you accept this principle, and will you be able to apply it if selected to serve on this jury?<br><br>□ Yes □ No |
| ~~12a.~~1 | If no, please explain:<br><br>_____<br>_____<br>_____<br>_____ |
| ~~13.~~14 | Under the law, the question of punishment is for the Court alone to decide, and thus the issue of punishment must not enter into your deliberations as to whether the defendant is guilty or not guilty as charged. Do you accept this principle, and will you be able to apply it if selected to serve on this jury?<br><br>□ Yes □ No |
| ~~13a.~~1 | If no, please explain:<br><br>_____<br>_____<br>_____<br>_____ |

**Juror ID:** _____

| | |
|---|---|
| ~~14.~~15 | You may hear testimony in this case that law enforcement officers recovered certain evidence from searches. The Court will instruct you that those searches were legal and that the evidence obtained from those searches is admissible in this case. Do you have any feelings or opinions about searches conducted by law enforcement officers, or the use of evidence obtained from searches, that would affect your ability to be fair and impartial in this case?<br>□ Yes □ No |
| ~~14a.~~1 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~15.~~16 | You also may hear testimony in this case from expert witnesses. Have you had any experiences with experts, or do you have any general feelings about the use of experts, that would affect your ability to be fair and impartial in this case?<br>□ Yes □ No |
| ~~15a.~~1 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~16.~~17 | As instructed above, **from now and until your jury service is complete**, you are instructed to avoid all media coverage and not to go on the Internet with regard to this case for any purpose. That is, you are forbidden from consuming any news media or social media, or any discussion of this case (or of anyone participating in the case) outside of the courtroom whatsoever. You also must not discuss this case with anyone. This includes your family, friends, spouse, domestic partner, colleagues, and co-workers. These instructions apply from now and until you are either dismissed from jury selection or chosen as a juror and the trial is complete. When we return for the next step in jury selection, the Judge will ask you if you have followed this instruction.<br><br>Do you have any reservations or concerns about your ability or willingness to follow this instruction?<br>□ Yes □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~16a.~~1 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

| | **PRIOR JURY SERVICE** |
|---|---|
| ~~17.~~18 | Have you ever served as a juror in a trial in any court?<br>□ Yes □ No |
| ~~18.~~19 | Have you ever at any time served as a member of a grand jury, whether in federal, state, county, or city court?<br>□ Yes □ No |

| | **EXPERIENCE AS A WITNESS, DEFENDANT, OR CRIME VICTIM** |
|---|---|
| ~~19.~~20 | Have you, or has any relative or close friend, ever participated in a state or federal court case, whether criminal or civil, as a witness, plaintiff, or defendant?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~19a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~19b~~20b. | If yes to ~~19a~~20a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~20.~~21 | Have you or any relative or close friend ever been involved or appeared as a witness in any investigation by a federal or state grand jury or by a congressional or state legislative committee, licensing authority, or governmental agency, or been questioned in any matter by any federal, state, or local law enforcement agency?<br>□ Yes (self) □ Yes (friend or family member) □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~20a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~20b~~21b. | If yes to ~~20a~~21a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~21.~~22 | Have you, or has any relative or close friend, ever been subpoenaed for any inquiry or investigation?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~21a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~21b~~22b. | If yes to ~~21a~~22a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~22.~~23 | Have you, or has any relative or close friend, ever been arrested or charged with a crime?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~22a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~22b~~23b. | If yes to ~~22a~~23a, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~23.~~24 | Have you, or has any relative or close friend, ever been the subject of any investigation or accusation by any grand jury, state or federal, or any other investigation?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~23a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~23b~~24b. | If yes to ~~23a~~24a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~24.~~25 | Have you, or any of your relatives or close friends, ever been a victim of a crime?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~24a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~24b~~25b. | If yes to ~~24a~~25a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~25.~~26 | Have you, or has any member of your family or any of your close friends—either as individuals or in the course of their business affairs—ever been a party to a legal action or dispute with the United States, or with any of the officers, departments, agencies, or employees of the United States, including the United States Attorney's Office, the FBI, or the NYPD?<br>□ Yes (self) □ Yes (friend or family member) □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~25a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~25b~~26b. | If yes to ~~25a~~26a, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~26.~~27 | Have you, or has any member of your family, ever had a dispute concerning money owed to you by the Government or owed by you to the Government?<br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~26a.~~2 | If yes, is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~26b~~27b. | If yes to ~~26a~~27a, please explain:<br>_____<br>_____<br>_____<br>_____ |

| | |
|---|---|
| | **RELATIONSHIP WITH, AND VIEW OF, GOVERNMENT, DEFENSE, AND OTHERS** |
| ~~27.~~28 | Do you or any member of your family or a close friend work in law, law enforcement, the justice system, or the courts?<br>□ Yes □ No |
| ~~27a.~~2 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~27b~~28b. | If yes to ~~27~~28, would this affect your ability to serve as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~27c~~28c. | If yes to ~~27b~~28b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~28.~~29 | Do you know or have any association—professional, business, or social, direct or indirect—with any member of the staff of the United States Attorney's Office for the Southern District of New York?<br>□ Yes □ No |
| ~~28a.~~2 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~28b~~29b. | If yes to ~~28~~29, would this affect your ability to serve as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~28c~~29c. | If yes to ~~28b~~29b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~29.~~30 | Do you know or have any association—professional, business, or social, direct or indirect—with the Federal Bureau of Investigation, commonly known as the FBI?<br>□ Yes □ No |
| ~~29a.~~3 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~29b~~30b. | If yes to ~~29~~30, would this affect your ability to serve as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~29c~~30c. | If yes to ~~29b~~30b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~30.~~31 | Do you know or have any association—professional, business, or social, direct or indirect—with the New York City Police Department, commonly known as the NYPD?<br>□ Yes □ No |
| ~~30a.~~3 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~30b~~31b. | If yes to ~~30~~31, would this affect your ability to serve as a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~30c~~31c. | If yes to ~~30b~~31b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~31.~~32 | Do you have any opinion of the U.S. Attorney's Office for the Southern District of New York ~~or~~, the U.S. Attorney Damian Williams, or the former Acting U.S. Attorney Audrey Strauss that might make it difficult for you to be a fair and impartial juror in this case?<br>□ Yes □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~31a.~~3 | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

| | **PERSONAL RELATIONSHIP WITH CASE PARTICIPANTS** |
|---|---|
| ~~32.~~33 | The next subset of questions asks whether you or any member of your family or a close friend personally knows or has past or present dealings with individuals involved in this case. To "personally know" means to have some direct or personal knowledge or connection to the following individuals. If you have only heard the names through media or social media, for example, that is not personal knowledge. |
| ~~32a~~33a. | Do you or does any member of your family or a close friend personally know or have past or present dealings with the Defendant in this case, Ghislaine Maxwell, or her family members?<br>□ Yes □ No |
| ~~32b~~33b. | Do you or does any member of your family or a close friend personally know or have past or present dealings with Jeffrey Epstein?<br>□ Yes □ No |
| ~~32c~~33c. | Do you or does any member of your family or a close friend personally know or have past or present dealings with the U.S. Attorney for the Southern District of New York, Damian Williams, the former Acting U.S. Attorney for the Southern District of New York, Audrey Strauss, or anyone else who works for or used to work for the U.S. Attorney's Office for the Southern District of New York?<br>□ Yes □ No |
| ~~32d~~33d. | Do you or does any member of your family or a close friend personally know or have past or present dealings with any of the Assistant United States Attorneys who are prosecuting this case:<br>Maurene Comey □ Yes □ No<br>Alison Moe □ Yes □ No<br>Lara Pomerantz □ Yes □ No<br>Andrew Rohrbach □ Yes □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~32e~~33e. | Do you or does any member of your family or a close friend personally know or have past or present dealings with any of the defense attorneys or law firms who are representing the Defendant:<br><br>Christian Everdell of Cohen & Gresser LLP □ Yes □ No<br>Jeffrey Pagliuca of Haddon, Morgan and Foreman, P.C. □ Yes □ No<br>Laura Menninger of Haddon, Morgan and Foreman, P.C. □ Yes □ No<br>Bobbi Sternheim of Law Offices of Bobbi C. Sternheim □ Yes □ No |
| ~~32f~~33f. | Do you or does any member of your family or a close friend personally know or have past or present dealings with the United States District Court Judge who is presiding over this case, Alison J. Nathan, or anyone who works on her staff?<br><br>□ Yes □ No |
| ~~32g~~33g. | If you answered "yes" to any of the above sub-questions (~~32a, 32b, 32c, 32d, 32e~~33a, 33b, 33c, 33d, 33e, or ~~32f~~33f), please explain whom you know, how you know the individual(s), and whether your relationship with that person might make it difficult for you to be a fair and impartial juror in this case:<br><br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| | **KNOWLEDGE OF CASE AND PEOPLE** |
| | **This case has been widely reported in the national and local media. There is nothing wrong with having heard something about this case. It is important to answer all of the following questions truthfully and fully.** |
| ~~33.~~34 | Before today, had you read, seen, or heard anything about Ms. Maxwell?<br>□ Yes □ No □ Unsure |
| ~~33a~~34a. | If yes or unsure, please state what you remember hearing, and how or from whom you may have heard (*e.g.*, a friend, the newspaper, a website, social media). If you heard about Ms. Maxwell from a media source, please identify the media source by name:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |
| ~~34.~~35 | Have you personally formed an opinion about Ms. Maxwell's guilt or innocence of the crimes charged as a result of anything you have heard, read or seen?<br>□ Yes □ No □ Unsure<br>□ Not applicable, I have not read/seen/heard about Ms. Maxwell |
| ~~34a~~35a. | If yes or unsure, please summarize your opinion:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~35.~~36 | Based on anything that you have read, seen, or heard about Ms. Maxwell, including anything about criminal charges against Ms. Maxwell, have you formed any opinions about Ms. Maxwell that might make it difficult for you to be a fair and impartial juror in this case?<br>□ Yes □ No □ Unsure<br>□ Not applicable, I have not read/seen/heard about Ms. Maxwell |
| ~~35a~~36a. | If yes or unsure, please explain why it might be difficult for you to be a fair and impartial juror in this case:<br>_____<br>_____<br>_____<br>_____ |
| ~~36.~~37 | Before today, had you read, seen, or heard anything about Jeffrey Epstein?<br>□ Yes □ No □ Unsure |
| ~~36a~~37a. | If yes or unsure, please state what you remember hearing, and how or from whom you may have heard (*e.g.*, a friend, the newspaper, a website, social media). If you heard about Mr. Epstein from a media source, please identify the media source by name:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |
| ~~37.~~38 | Have you verbally stated or posted your opinion on social media or online about Ms. Maxwell or Mr. Epstein?<br>☐ Yes ☐ No<br>☐ Not applicable, I have not read/seen/heard about Mr. Epstein/Ms. Maxwell |
| ~~37a~~38a. | If yes, when and where did you state or post your opinion?<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~38.~~39 | Based on anything that you have read, seen, or heard about Jeffrey Epstein, have you formed any opinions about Mr. Epstein that might make it difficult for you to be a fair and impartial juror in this case?<br>□ Yes □ No □ Unsure<br>□ Not applicable, I have not read/seen/heard about Mr. Epstein |
| ~~38a~~39a. | If yes or unsure, please explain why it might be difficult for you to be a fair and impartial juror in this case:<br>_____<br>_____<br>_____<br>_____ |
| ~~39.~~40 | If you have heard about Jeffrey Epstein, do you think Ms. Maxwell's alleged association with Jeffrey Epstein will make it difficult for you to fairly and impartially consider the evidence presented at trial and render a verdict based solely on the evidence?<br>□ Yes □ No □ Unsure<br>□ Not applicable, I have not read/seen/heard about Ms. Maxwell and/or Jeffrey Epstein |
| ~~39a~~40a. | If yes or unsure, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~40.~~41 | Based on anything you have read, seen, or heard about Ms. Maxwell, including anything about criminal charges brought against Ms. Maxwell, would you be able to follow the Court's instruction to put that information out of your mind and decide this case based only on the evidence presented at trial?<br>□ Yes □ No □ Unsure<br>□ Not applicable, I have not read/seen/heard about Ms. Maxwell |

**Juror ID: _____**

| | |
|---|---|
| ~~40a~~41a. | If no or unsure, please explain:<br>_____<br>_____<br>_____<br>_____ |

| | **NATURE OF CHARGES** |
|---|---|
| ~~41.~~42 | During the trial, you will hear evidence alleging sex crimes against underage girls. Some of the evidence in this case will involve sexually suggestive or sexually explicit conduct. Is there anything about the nature of this case and the accusations as summarized at the beginning of this questionnaire that might make it difficult for you to be a fair and impartial juror in this case?<br>□ Yes □ No |
| ~~41a~~42a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |
| ~~42.~~43 | Do you have any specific views or feelings concerning laws regarding the age at which individuals can or cannot consent to sexual activity with other individuals that would affect your ability to serve as a fair and impartial juror?<br>□ Yes □ No |
| ~~42a~~43a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~43.~~44 | Do you have any opinion about the enforcement of the federal sex trafficking laws or the federal laws concerning sex crimes against minors that might prevent you from being fair and impartial in this case?<br>□ Yes □ No |

**Juror ID: _____**

| | |
|---|---|
| ~~43a~~44a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~44.~~45 | Have you or a family member ever supported, lobbied, petitioned, protested, or worked in any other manner for or against any laws ~~or~~, regulations, or organizations relating to sex trafficking, sex crimes against minors, ~~or~~ sex abuse ~~generally~~, or sexual harassment?<br>□ Yes □ No |
| ~~44a~~45a. | If yes, please explain when and what you or your family member did:<br>_____<br>_____<br>_____<br>_____ |
| ~~44b~~45b. | If your answer to ~~44~~45 was yes, do you believe that this would affect your ability to serve fairly and impartially as a juror in this case?<br>□ Yes □ No |
| ~~44c~~45c. | If yes to ~~44b~~45b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~45.~~46 | The witnesses in this case may include law enforcement witnesses. Would you have any difficulty assessing the credibility of a law enforcement officer just like you would any other witness?<br>□ Yes □ No |
| ~~45a~~46a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | |
|---|---|
| ~~46.~~47 | Witnesses in this case may testify claiming sexual abuse or sexual assault. Would you have any difficulty assessing the credibility of a witness claiming sexual assault or abuse just like you would any other witness?<br><br>□ Yes □ No |
| ~~46a~~47a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~47.~~48 | Have you or a friend or family member ever been the victim of sexual harassment, sexual abuse, or sexual assault? (This includes actual or attempted sexual assault or other unwanted sexual advance, including by a stranger, acquaintance, supervisor, teacher, or family member.)<br><br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~47a~~48a. | If yes, without listing names, please explain:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |
| ~~47b~~48b. | If your answer to ~~47~~48 was yes, do you believe that this would affect your ability to serve fairly and impartially as a juror in this case?<br><br>□ Yes □ No |
| ~~47c~~48c. | If yes to ~~47b~~48b, please explain:<br>_____<br>_____<br>_____<br>_____ |

**Juror ID:** _____

| | |
|---|---|
| ~~48.~~49 | Have you or a friend or family member ever been accused of sexual harassment, sexual abuse, or sexual assault? (This includes both formal accusations in a court of law or informal accusations in a social or work setting of actual or attempted sexual assault or other unwanted sexual advance, including by a stranger, acquaintance, supervisor, teacher, or family member.).<br><br>□ Yes (self) □ Yes (friend or family member) □ No |
| ~~48a~~49a. | If yes, without listing names, please explain:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |
| ~~48b~~49b. | If your answer to ~~48~~49 was yes, do you believe that this would affect your ability to serve fairly and impartially as a juror in this case?<br><br>□ Yes □ No |
| ~~48c~~49c. | If yes to ~~48b~~49b, please explain:<br>_____<br>_____<br>_____<br>_____ |
| ~~49.~~50 | Is there any other experience that you or anyone close to you has had that may affect your ability to serve fairly and impartially as a juror in this case?<br><br>□ Yes □ No |
| ~~49a~~50a. | If yes, please explain:<br>_____<br>_____<br>_____<br>_____<br>_____<br>_____ |

**Juror ID: _____**

| | **CLOSING QUESTION** |
|---|---|
| ~~50.~~51 | Do you wish for any particular answers to remain confidential and to not go beyond the Judge, counsel, and the Defendant, because the answer would embarrass you or otherwise seriously compromise your privacy?<br><br>□ Yes □ No<br><br>If yes, please list which question number(s):<br><br>_____<br><br>_____ |

**Juror ID: _____**

## DECLARATION

I, Juror Number ____ declare under penalty of perjury that the foregoing answers set forth in this Jury Questionnaire are true and correct to the best of my knowledge and belief. I have not discussed my answers with others, or received assistance in completing the questionnaire.

Signed this _____ day of November, 2021

**DO NOT WRITE YOUR NAME. PLEASE SIGN USING YOUR JUROR NUMBER.**

**Juror ID: _____**

**You may use these pages to finish any answers that you could not fit in the spaces provided above. If you write anything below, please indicate the number of the relevant question.**

**Juror ID: _____**

**Juror ID: _____**

**Juror ID: _____**

**DRAFT – October 20, 2021**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| - v. - | : | S2 20 Cr. 330 (AJN) |
| GHISLAINE MAXWELL, | : | |
| Defendant. | : | |

**[DRAFT] EXAMINATION OF PROSPECTIVE JURORS**

**Introduction**

[PLACEHOLDER FOR INTRODUCTORY REMARKS]

## INDIVIDUAL QUESTIONS

### Ability to Follow Instructions

1. As I instructed you earlier, one of the important principles of criminal law is that a defendant in a criminal case is presumed to be innocent. Like anyone accused of a crime in this country, Ms. Maxwell is, and must be, presumed innocent of any and all charges made against her unless and until the Government proves her guilt beyond a reasonable doubt. It is the Government's burden to prove guilt beyond a reasonable doubt and the Government's burden of proof alone. The defendant has no burden to prove her innocence or to present any evidence. Are you able to follow these instructions?
2. As I instructed you earlier, until you are excused from this case, you may not read, listen to, or watch any accounts of this case reported on television, the radio, or over the Internet or social media. Jurors are also not allowed to do any research regarding this case, whether over the Internet, on social media, or in any other manner. The case must be decided solely on the basis of the evidence presented in the courtroom. Would you have any difficulty following these rules, which are binding on every juror?
3. When you filled out your questionnaire, you were told not to research, read, or watch anything about the case or learn anything about the case. Have you, even though you were instructed not to do that, done that anyway? Have you looked things up on the internet, even if you just Googled it? If you have, now is the time to tell me.

### General Ability to Serve

4. On your questionnaire, you stated that you do not have any unmovable commitments between November 29 and approximately January 15. Does that continue to be accurate?

**Prior Knowledge of Ms. Maxwell**

5. [If Juror HAS HEARD of Ms. Maxwell] In your questionnaire, you reported that you had heard of Ms. Maxwell before starting this process. Have you formed an opinion or heard, read, or seen anything about Ms. Maxwell that might make it difficult for you to be a fair and impartial juror in this case?
6. [If Juror HAS NOT heard of Ms. Maxwell] In your questionnaire, you reported that you had not heard of Ms. Maxwell before starting this process. Is that accurate?

**Prior Knowledge of Jeffrey Epstein**

7. [If Juror HAS HEARD of Epstein] In your questionnaire, you reported that you had heard of Jeffrey Epstein before starting this process. Have you formed an opinion or heard, read, or seen anything about Mr. Epstein that might make it difficult for you to be a fair and impartial juror in this case?
8. [If Juror HAS NOT heard of Epstein] In your questionnaire, you reported that you had not heard of Jeffrey Epstein before starting this process. Is that accurate?

**Nature of Charges**

9. You reported in your questionnaire that [insert question number of any YES answers for question 47, 48, or 49]. Would that experience affect your ability to serve as a fair and impartial juror in this case?

**Knowledge of the Trial Participants**

10. In the questionnaire I listed the names of all the trial participants and you indicated that you did not know any of those individuals by name. I'll ask you to also look around now and let me know if you recognize anyone in the courtroom.

11. I will now read a list of individuals who may be mentioned during the trial, or who may be witnesses in this case:

[*Names to be supplied*]

Do you know any of those people? Have you had any dealings, directly or indirectly, with any of these individuals? To your knowledge, have any of your relatives, friends, or associates had any dealings with any of these individuals?

**Knowledge of Location**

12. Events in this case are alleged to have taken place at the following locations:

*[List to be supplied*]

Are you particularly familiar with any of those locations?

**Prior Jury Service**

13. [For jurors who answered YES to question 17] On your questionnaire you said that you have served as a juror. In what court did you serve and was it a civil or criminal case? What type of case was it? Without telling us what the verdict was, did the jury reach a verdict?

14. [For jurors who answered YES to question 18] On your questionnaire you said that you have served as a grand juror. When and where?

15. [For jurors who answered YES to either question] Is there anything about your prior experiences as a juror that would prevent you from acting as a fair and impartial juror in this case?

**Relationship with, and View of, Government, Defense, and Others**

16. Have you, either through any experience you have had or anything you have seen or read, developed any bias or prejudice or other feelings for or against the United States Department of Justice, the United States Attorney's Office for the Southern District of New York, the FBI, or the NYPD?
17. Do you have any opinions about prosecutors or criminal defense attorneys generally that might make it difficult for you to be a fair and impartial juror in this case?
18. Do you have any opinion about the criminal justice system generally or the federal criminal justice system in particular that might make it difficult for you to be a fair and impartial juror in this case?
19. Do you have any opinion about people who are wealthy or have luxurious lifestyles that might make it difficult for you to be a fair and impartial juror in this case?

**Experience as a Witness, Defendant, or Crime Victim**

20. [For jurors who answered YES to question 19] On your questionnaire you said that [you or a friend/family member] has/have participated in a state or federal court case. What kind of case? And, what was your/their role in that case? Is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?

21. [For jurors who answered YES to question 24] On your questionnaire you said that [you or a friend/family member] has/have been a victim of a crime. Please describe the circumstances, including the type of crime, when it happened, and the outcome of any law enforcement action. Is there anything about that experience that could affect your ability to be fair and impartial in this case?

**Juror's Background**

22. How old are you?
23. Please state your current county of residence and list each county of residence during the past ten years.
24. How far did you go in school? And what did you study?
25. If you work, what kind of work do you do? Describe the type of your employer (for example, a private company, government entity, non-profit organization, etc). (If retired or unemployed, describe your last employment.)
26. How long have you been employed in your current position? What work did you previously do?
27. Who are the members of your household?
28. If the members of your household work, what kind of work do they do?
29. What newspapers or magazines do you typically read and how often?
30. Do you typically read any websites? If so, do you post comments or information on these websites?
31. Do you regularly use social media? If so, what social media do you regularly use?
32. Do you regularly watch any television shows? If so, what shows?
33. Do you regularly listen to any radio programs or podcasts? If so, which?

34. What are your hobbies, major interests, recreational pastimes, and leisure-time activities?

35. Have you ever followed a criminal case in the media? If so, what case?

36. Are you a member of any clubs or organizations to which you contribute time or money?

**FINAL QUESTION**

37. I have tried to direct your attention in these questions and through the questionnaire you filled out to possible reasons why you might not be able to sit as a fair and impartial juror. Apart from any prior question, do you have the slightest doubt in your mind, for any reason whatsoever, that you will be able to serve conscientiously, fairly, and impartially in this case and to render a true and just verdict without fear, favor, sympathy, or prejudice, and according to the law as it will be explained?

**(Style of Case)**

# PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

| Item No. | Description | Agreed | Source of Agreement |
|---|---|---|---|
| 1. | As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. | | |
| 2. | Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. In jurisdictions where there is no limit to the length or number of depositions, each side gets 10 lasting for 6 hours each. | | |
| 3. | The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions. | | |
| 4. | All papers will be served on the opposing party by e-mail. | | |
| 5. | Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request. | | |
| 6. | Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After | | |

| Item No. | Description | Agreed | Source of Agreement |
|---|---|---|---|
| | analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated.<br><br>We will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. We will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension. | | |
| 7. | If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP. | | |
| 8. | All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial. | | |
| 9. | The parties will share the expense of imaging all deposition exhibits. | | |
| 10. | Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports. | | |
| 11. | The production of a privileged document does not waive the privilege as to other privileged documents. | | |

| Item No. | Description | Agreed | Source of Agreement |
|---|---|---|---|
| | Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent. | | |
| 12. | Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection. | | |
| 13. | Demonstrative exhibits need only be shown to the other side before shown to the jury and need not be listed in any pretrial order. | | |
| 14. | We will agree upon jury questionnaire. | | |
| 15. | We will ask the Court to allow the jurors to take notes and ask questions (by delivering the same to the Court anonymously) | | |
| 16. | We will agree upon a juror notebook possibly containing a cast of characters, list of witnesses (and their photos), time-line, glossary, dispositive documents, etc. | | |

# HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS

Prepared for the use of trial jurors serving in the United States district courts under the supervision of the Judicial Conference of the United States. Published by the Administrative Office of the United States Courts, Washington, D.C. 20544. www.uscourts.gov

## CONTENTS

## PURPOSE OF THIS HANDBOOK

The purpose of this handbook is to acquaint trial jurors with the general nature and importance of their role as jurors. It explains some of the language and procedures used in court, and it offers some suggestions helpful to jurors in performing this important public service.

Nothing in this handbook is to be regarded by jurors as instructions of law to be applied by them in any case in which they serve. The judge will instruct the jury in each separate case as to the law of that case. For example, in each criminal case, the judge will tell the jury, among other things, that a defendant charged with a crime is presumed to be innocent and the burden of proving his guilt beyond a reasonable doubt is upon the Government. Jurors must follow only the instructions of law given to them by the trial judge in each particular case.

## IMPORTANCE OF JURY SERVICE

Jurors perform a vital role in the American system of justice. The protection of our rights and liberties is largely achieved through the teamwork of judge and jury who, working together in a common effort, put into practice the principles of our great heritage of freedom. The judge determines the law to be applied in the case while the jury decides the facts. Thus, in a very important way, jurors become a part of the court itself.

Jurors must be men and women of sound judgment, absolute honesty, and a complete sense of fairness. Jury service is a high duty of citizenship. Jurors aid in the maintenance of law and order and uphold justice among their fellow citizens. Their greatest reward is the knowledge that they have discharged this

duty faithfully, honorably, and well. In addition to determining and adjusting property rights, jurors may also be asked to decide questions involving a crime for which a person may be fined, placed on probation, or confined in prison. In a very real sense, therefore, the people must rely on jurors for the protection of life, liberty, and the pursuit of happiness.

## THE COURTS

In this country, there are two systems of courts. They are the courts of the individual 50 states and the District of Columbia and the courts of the Federal Government. This book is written for jurors selected to serve in the trial court of the Federal Government, the United States District Court. The types of cases that can be brought in this court have been fixed by the United States Congress according to our Federal Constitution.

Cases in the United States District Courts are divided into two general classes. These are called criminal cases and civil cases.

Criminal cases are those in which individuals or organizations are charged with breaking the criminal laws. Typical criminal charges in a federal court are those involving violation of the federal income tax and narcotics laws, mail theft, and counterfeiting.

Civil cases are suits in which persons who disagree over their rights and duties come into court to settle the matter. A typical example of a civil case is one involving a broken contract. One party may claim that it should be paid under the terms of the contract, while the other side may assert a defense to the claim, such as the lack of a binding contract. The court is asked to decide who is right. This depends on the law as laid down by the judge and the facts as decided by the jury.

## THE CRIMINAL CASE

The person charged with a violation of the law is the defendant. The charge against the defendant may be brought in two ways. One way is by means of an indictment; the other is by an information.

An indictment is a written accusation by a grand jury that charges the defendant with committing an offense against the law. Each offense charged will usually be set forth in a separate count of the indictment.

An information is the name given to a written charge against the defendant filed by the United States Attorney and not by the grand jury. But even in cases where the defendant has the right to have a grand jury consider the charges presented, the defendant may agree to give up this right and consent to the filing of an information.

After the indictment or information is filed, the defendant appears in open court where the court advises the defendant of the charge and asks whether the defendant pleads "guilty" or "not guilty." This procedure is called the arraignment.

No trial is needed if the defendant pleads guilty and admits to committing the crime. But if the defendant pleads not guilty, he or she will then be placed on trial.

The judge in a criminal case tells the jury what the law is. The jury must determine what the true facts are. On that basis, the jury has only to determine whether the defendant is guilty or not guilty of each offense charged. The subsequent sentencing is the sole responsibility of the judge. In other words, in arriving at an impartial verdict as to guilt or innocence of a jury defendant, the jury is not to consider a sentence.

The jury must consider separately each of the charges against the defendant, after which it may find the person: not guilty of any of the charges, guilty of all the charges, or guilty of some of the charges and not guilty of others.

## THE CIVIL CASE

The following is an example of the kind of civil case jurors in a United States District Court will help decide.

Let us call the case John Smith v. XY Company. This means that John Smith has filed a case against the XY Company.

John Smith is called the plaintiff, the person who begins the case. The XY Company is the defendant. The plaintiff and the defendant are the parties.

The plaintiff, John Smith, states his claim in a paper called the complaint. The defendant, XY Company, replies to the complaint in a paper called the answer. The complaint and the answer are the main pleadings in the case. The points in the pleadings about which the parties disagree make up the issues of fact and law. Sometimes these issues are set forth in a pretrial order. This is an order drawn up by the judge after consulting with the attorneys for the parties.

## THE VOIR DIRE EXAMINATION

To begin a jury trial, a panel of prospective jurors is called into the courtroom. This panel will include a number of persons from whom a jury will be selected to try the case. In criminal trials, alternate jurors may be chosen to take the place of jurors who become ill during the trial.

The panel members are sworn to answer questions about their qualifications to sit as jurors in the case. This questioning

process is called the voir dire. This is an examination conducted by the judge and sometimes includes participation by counsel. A deliberately untruthful answer to any fair question could result in serious punishment to the person making it.

The voir dire examination opens with a short statement about the case. The purpose is to inform the jurors what the case is about and to identify the parties and their lawyers.

Questions are then asked to find out whether any individuals on the panel have any personal interest in the case or know of any reason why they cannot render an impartial verdict. The court also wants to know whether any member of the panel is related to or personally acquainted with the parties, their lawyers, or the witnesses who will appear during trial. Other questions will determine whether any panel members have a prejudice or a feeling that might influence them in rendering a verdict. Any juror having knowledge of the case should explain this to the judge.

Parties on either side may ask that a member of the panel be excused or exempted from service on a particular jury. These requests, or demands, are called challenges.

A person may be challenged for cause if the examination shows he or she might be prejudiced. The judge will excuse an individual from the panel if the cause raised in the challenge is sufficient. There is no limit to the number of challenges for cause, which either party may make.

The parties also have a right to a certain number of challenges for which no cause is necessary. These are called peremptory challenges. Each side usually has a predetermined number of peremptory

challenges. The peremptory challenge is a legal right long recognized by law as a means of giving both sides some choice in the make-up of a jury. Jurors should clearly understand that being eliminated from the jury panel by a peremptory challenge is no reflection upon their ability or integrity.

In some courts, the peremptory challenges are made openly in the hearing of the jury. In others, they are made from the jury list out of the jury's sight.

## THE JURORS' SOLEMN OATH

After the voir dire is completed, the jurors selected to try the case will be sworn in. The judge or the clerk will state to the jury:

"Members of the Jury, you will rise, hold up your right hands, and be sworn to try this case."

The jurors then rise and hold up their right hands. The jurors face the judge or the clerk who is to administer the oath. That official slowly, solemnly, and clearly repeats the oath. The jurors indicate by their responses and upraised hands that they take this solemn oath.

Jurors not wishing to take an oath may request to affirm instead of swear. In some districts the jury is sworn upon the Bible and not by uplifted hand.

## THE EIGHT STAGES OF TRIAL

The trial proceeds when the jury has been sworn. There are usually eight stages of trial in civil cases. They are:

(1) The lawyers present opening statements. Sometimes the opening statements on behalf of one or more parties are omitted.

(2) The plaintiff calls witnesses and produces evidence to prove its case.

(3) The defendant may call witnesses and produce evidence to disprove the plaintiffs' case and to prove the defendant's claims.

(4) The plaintiff may call rebuttal witnesses to disprove what was said by the defendant's witnesses.

(5) Closing arguments are made by the lawyer on each side.

(6) The judge instructs or charges the jury as to the law.

(7) The jury retires to deliberate.

(8) The jury reaches its verdict.

During the trial, witnesses called by either side may be cross-examined by the lawyers on the other side.

Throughout the trial, the judge may be asked in the presence of the jury to decide questions of law. Usually these questions concern objections to testimony that either side wants to present. Occasionally, the judge may ask jurors to leave the courtroom briefly while the lawyers present their legal arguments for and against such objections. The law requires that the judge decide such questions.

A ruling by the judge does not indicate that the judge is taking sides. He or she is merely saying, in effect, that the law does, or else does not, permit that question to be asked.

It is possible that the judge may decide every objection favorably to the plaintiff or the defendant. That does not mean the case should be decided by the jury for the plaintiff or the defendant. Even where the

judge decides every objection favorably to the plaintiff or the defendant, the jury should maintain its objectivity and base its verdict strictly upon the testimony and exhibits received in evidence at trial.

The juror takes an oath to decide the case "upon the law and the evidence." The law is what the presiding judge declares the law to be; not what a juror believes it to be or what a juror may have heard it to be from any source other than the presiding judge. The evidence that jurors consider consists of the testimony of witnesses and the exhibits admitted in evidence. What evidence is proper for the jury to consider is based upon the law of evidence.

## THE ARGUMENTS OF COUNSEL

After presentation of the evidence is completed, the lawyers have the opportunity to discuss the evidence in their closing arguments. This helps the jurors recall testimony that might have slipped their memory.

The chief purpose of the argument is to present the evidence in logical and comprehensible order. The lawyers fit the different parts of the testimony together and connect up the facts.

Each attorney presents the view of the case that is most favorable to his or her own client. Each lawyer's side appears to be right to that lawyer. Each lawyer's statement may be balanced by the statement of the lawyers on the other side.

## THE CHARGE TO THE JURY

The charge of a judge to a jury in a United States District Court frequently is much more than a statement of the rules of law. Sometimes it may contain a summary of the

facts or some of the facts.

It is the jury's duty to reach its own conclusion based on the evidence. The verdict is reached without regard to what may be the opinion of the judge as to the facts, though as to the law the judge's charge controls.

The judge may point out and may also explain basic facts in dispute, and facts that do not actually matter in the case. In other words, the judge may try to direct the jury's attention to the real merits of the case and impartially summarize the evidence bearing on the questions of fact. The judge will state the law related to the facts presented to the jury.

## THE JURY'S VERDICT

In both civil and criminal cases, it is the jury's duty to decide the facts in accordance with the principles of law laid down in the judge's charge to the jury. The decision is made on the evidence introduced, and the jury's decision on the facts is usually final.

## COURTROOM ETIQUETTE

A court session begins when the court official raps for order. Everyone in the court rises. The judge takes his or her place on the bench, and the court official announces the opening of court. A similar procedure is used when court adjourns.

Common courtesy and politeness are safe guides as to the way jurors should act. Of course, no juror will be permitted to read a newspaper or magazine in the courtroom. Nor should a juror carry on a conversation with another juror in the courtroom during the trial.

Jurors will be treated with consideration for their comfort and convenience. They should bring to the attention of the judge any matter affecting their service and should

notify the court of any emergencies. In the event of a personal emergency, a juror may send word to the judge through any court personnel, or may ask to see the judge privately.

## CONDUCT OF THE JURY DURING THE TRIAL

Jurors should give close attention to the testimony. They are sworn to disregard their prejudices and follow the court's instructions. They must render a verdict according to their best judgment.

Each juror should keep an open mind. Human experience shows that once persons come to a preliminary conclusion as to a set of facts, they hesitate to change their views. Therefore, it is wise for jurors not to even attempt to make up their mind on the facts of a case until all the evidence has been presented to them, and they have been instructed on the law applicable to the case. Similarly, jurors should not discuss the case even among themselves until it is concluded.

During the trial, the jury may hear references to the rules of evidence. Some of these rules may appear strange to a person who is not a lawyer. However, each rule has a purpose. The rules have evolved from hundreds of years of experience in the trial of cases.

The mere fact that a lawsuit was begun is not evidence in a case. The opening and closing statements of the lawyers are not evidence. A juror should disregard any statements made by a lawyer in argument that have not been proved by the evidence. A juror should also disregard any statement by a lawyer as to the law of the case if it is not in accord with the judge's instructions.

Jurors are expected to use all the experience, common sense, and common knowledge they possess. But they are not to rely on any private source of information. Thus, they should be careful during the trial not to discuss the case at home or elsewhere. Information that a juror gets from a private source may be only half true, or biased or inaccurate. It may be irrelevant to the case at hand. At any rate, it is only fair that the parties have a chance to know and comment on all the facts that matter in the case.

If during the trial a juror learns elsewhere of some fact about the case, he or she should inform the court. The juror should not mention any such matter in the jury room.

Individual jurors should never inspect (either in person or via Internet websites) the scene of an accident or of any event in the case. If an inspection is necessary, the judge will have the jurors go as a group to the scene.

Jurors must not talk about the case with others not on the jury, even their spouses or families, including via electronic communications and social networking on computers, netbooks, tablets, and smart phones. Jurors must not read about the case in the newspapers or on the Internet. They should avoid radio, television, and Internet broadcasts that might mention the case. Jurors should not conduct any outside research, including but not limited to, consulting dictionaries or reference materials, whether in paper form or on the Internet. Jurors may not use any of the following to obtain information about the case, about case processes or legal terms, or to conduct any research about the case: any electronic device or media, such as a telephone, cell phone, smart phone, or computer; the Internet, any Internet service, or any text

or instant messaging service, RSS feed, or other automatic alert that may transmit information regarding the case to the juror; or any Internet chat room, blog, or website, to communicate to anyone information about the case. The Sixth Amendment's guarantee of a trial by an impartial jury requires that a jury's verdict must be based on nothing else but the evidence and law presented to them in court. The words of Supreme Court Justice Oliver Wendell Holmes from over a century ago apply with equal force to jurors serving in this advanced technological age: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Breaking these rules is likely to confuse a juror. It may be hard to separate in one's mind the court testimony and reports coming from other sources.

Jurors should not loiter in the corridors or vestibules of the courthouse. Embarrassing and/or improper contacts may occur there with persons interested in the case. If juror identification badges are provided, they should be worn in the courthouse at all times.

If any outsider attempts to talk with a juror about a case in which he or she is sitting, the juror should do the following:

(1) Tell the person it is improper for a juror to discuss the case or receive any information except in the courtroom.

(2) Refuse to listen if the outsider persists.

(3) Report the incident at once to the judge.

Jurors have the duty to report to the judge any improper behavior by any juror. They also have the duty to inform the judge of any outside communication or improper conduct directed at the jury by any person.

Jurors on a case should refrain from talking on any subject—even if it is not related to the matter being tried—with any lawyer, witness, or party in the case. Such contact may make a new trial necessary, at significant additional expense to the parties, the court, and ultimately, taxpayers.

Some cases may arouse much public discussion. In that event, the jury may be kept together until the verdict is reached. This procedure is used to protect the jurors against outside influences.

## IN THE JURY ROOM

In some districts, the judge selects the foreperson of the jury. In other districts, the jurors elect their foreperson, and in still other districts, the first juror to enter the jury box becomes the foreperson automatically. The judge will inform jurors which method is used in the district.

The foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views.

Jurors must enter the discussion with open minds. They should freely exchange views. They should not hesitate to change their opinions if the deliberations have convinced them they were wrong initially.

In a criminal case, all jurors must agree on the verdict. This is also required in a civil case, unless the jury is otherwise instructed by the court.

The jurors have a duty to give full

consideration to the opinion of their fellow jurors. They have an obligation to reach a verdict whenever possible. However, no juror is required to give up any opinion which he or she is convinced is correct.

It would be dishonest for a judge to decide a case by tossing a coin. It would be just as dishonest for a juror to do so.

The members of the jury are sworn to pass judgment on the facts in a particular case. They have no concern beyond that case. They violate their oath if they render their decision on the basis of the effect their verdict may have on other situations.

## AFTER THE TRIAL

After the jurors return their verdict and are dismissed by the judge, they are free to go about their normal affairs, although in some districts jurors must check with jury office personnel to see if their service is concluded. They are under no obligation to speak to any person about the case and may refuse all requests for interviews or comments. Nevertheless, the court may enter an order in a specific case that during any such interview, jurors may not give any information with respect to the vote of any other juror.

## CONCLUSION

To decide cases correctly, jurors must be honest and intelligent. They must have both integrity and good judgment. The continued vitality of the jury system depends on these attributes.

To meet their responsibility, jurors must decide the facts and apply the law impartially. They must not favor the rich or the poor. They must treat alike all men and women, corporations and individuals. Justice should be

rendered to all persons without regard to race, color, religion, or sex.

The performance of jury service is the fulfillment of a high civic obligation. Conscientious service brings its own reward in the satisfaction of an important task well done. There is no more valuable work that the average citizen can perform in support of our Government than the full and honest discharge of jury duty.

The effectiveness of the democratic system itself is largely measured by the integrity, the intelligence, and the general quality of citizenship of the jurors who serve in our courts.


Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
www.uscourts.gov

**HB100 (Rev. 8/12)**

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# *Trial*

At a trial, the party that started the lawsuit tries to prove his or her case to the judge or jury and the other side tries to prove his or her defenses and counterclaims. Both sides testify and show their evidence to the judge. There are rules that must be followed at the trial. You can visit a Court Help Center to learn more, but remember court staff can't tell you what to say in your case.

At any time during the trial, both sides can agree to settle the case.

## Basic Steps

The case starts with opening statements by each side that tell the judge or jury something about the case and what they will be hearing. Each side says what their evidence will prove. Whoever started the case goes first.

After the opening statements, the party that started the case tries to prove his or her case first by having witnesses testify and submitting evidence. Then it is the other side's turn. The party that started the case gets one more chance to put on witnesses to respond. Everyone who testifies must swear to tell the truth. Both sides have a turn to ask each witness questions. Sometimes the judge asks questions.

After both sides rest their cases, the parties can make closing arguments to the judge or jury to point out the facts most favorable to the claims. If there is a jury, the judge tells the jury about the law that should be used to make its decision and what level of proof is needed. This is called the jury charge.

The jury's decision it is called the verdict. If the jury's verdict is for the plaintiff or petitioner, the jury may also say how much money the defendant or respondent must pay in damages, if this was a question for the jury to decide. After the jury is dismissed, it is possible for the judge to change or modify the verdict. If there is no jury, the judge makes a decision, but he or she may not make a decision right away. The decision can't be enforced until a judgment is entered. Read more about Judgments.

After the verdict and final judgment, the winning side can take steps to collect or enforce the judgment. The losing side can appeal if he or she thinks the judge made a mistake.

## Objections

A party can object if he or she thinks there is a reason why the testimony or the document should not be allowed by the Judge. A party should not object just because he or she disagrees with it. A party can object if:

- the witness is only repeating what someone else told him or her (this is called hearsay),
- the testimony or document has nothing to do with the case (this is called irrelevant),
- a document is not certified or an original or has been changed.

If a party has an objection he or she interrupts the trial and says, objection. The judge decides whether to grant or deny the **objection**. If the judge agrees with the objection, the judge says sustained. If the judge disagrees with the objection, the judge says overruled.

## Conduct in Court

At the trial, be yourself. When you testify, just say what happened and give complete answers. Don't argue with the judge or the other side. Speak to the judge, not the other side when saying your case. If you don't understand something, ask. If you don't understand the verdict, don't leave without making sure you know what it means.

Related Information:

- Basic Steps in a Court Case
- Preparing for Trial: Evidence
- Settlements
- After the Case is Over

Web page updated: June 2, 2015

## 6.06. Scope & Manner of Examination of Witnesses

**(1) Subject to subdivisions two and three, as well as rule 4.01 (Relevant Evidence) and a defendant's rights to confrontation and to present a defense in a criminal proceeding, the scope and manner of examining witnesses is committed to the sound discretion of the court.**

**(2) Cross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility. The court may in its discretion, however, permit examination into additional matters and may be required to do so in a criminal case.**

**(3) Redirect and re-cross-examination of a witness is limited to the matters covered on the witness's cross-examination or redirect examination, respectively.**

**(4) Leading Questions.**

**(a) A court should not permit leading questions during the direct examination of a witness, except a court may permit leading questions, for example, with respect to introductory matters; examination of a child; expediting a proceeding as to matters that are not in dispute; when necessary to clarify a witness's testimony; when examining a witness about a prior inconsistent statement; or as provided in paragraph (b).**

**(b) When a party calls (i) an adverse party, (ii) a witness identified with an adverse party, or (iii) a witness who is hostile or becomes hostile during examination, the court may permit leading questions in conducting the direct examination.**

**(c) A court shall permit leading questions during the cross-examination of a witness.**

**(d) When on cross-examination, a court permits inquiry into matters that were not covered on direct examination, the cross-examination is subject to the provisions of subdivisions (4) (a) and (b).**

**Note**

**Subdivision (1)** restates a rule often referred to by the Court of Appeals (*Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]; *Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352 [1947] ["Once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused"]; *People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]).

The scope of the trial court's discretion includes the responsibility to protect a witness from harassment, undue embarrassment, or physical danger (*People v Stanard*, 42 NY2d 74, 84 [1977] [There is a duty to protect a witness from questions which "harass, annoy, humiliate or endanger him"]).

In a criminal proceeding, the trial court in its exercise of sound discretion must respect the boundaries drawn by a defendant's constitutional right to present a defense (*e.g. Davis v Alaska*, 415 US 308, 316 [1974] ["Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Trial court erred in not permitting the defense to cross-examine a witness about possible bias]; *California v Trombetta*, 467 US 479, 485 [1984] ["Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Crane v Kentucky*, 476 US 683, 687 [1986] [An evidentiary ruling may not deprive a defendant "of his fundamental constitutional right to a fair opportunity to present a defense." Thus, it was error for the trial court to preclude the jury from considering the credibility of a confession that the trial judge found to be voluntary]; *People v Carroll*, 95 NY2d 375, 385 [2000] ["A court's discretion in evidentiary rulings is circumscribed by

the rules of evidence and the defendant's constitutional right to present a defense"]; *People v Robinson*, 89 NY2d 648, 650 [1997] [Defendant's "constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial," and "the hearsay testimony is material, exculpatory and has sufficient indicia of reliability"]; *People v Hudy*, 73 NY2d 40, 56 [1988] [While the ex post facto part of the decision was abrogated by *Carmell v Texas* (529 US 513 [2000]), the Court "also conclude(d) that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned"]).

**Subdivision (2)** in its first sentence restates New York law that cross-examination should ordinarily be limited to an examination into matters affecting the witness's credibility and matters testified to on direct examination (*e.g. People v Chin*, 67 NY2d 22, 28 [1986] ["(C)ross-examiner may delve deep in order to attack credibility and present an alternate view of the facts"]; *People v Giblin*, 115 NY 196, 199 [1889] ["It is an office of cross-examination to exhibit the improbabilities of the witness' story"]; *People ex rel. Phelps v Court of Oyer & Terminer of County of N.Y.*, 83 NY 436, 460 [1881] ["As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character"]).

A trial court's discretion should ordinarily be exercised to preclude examination into matters that were not elicited on direct examination (*see e.g. Goff v Paul*, 8 AD3d 971, 972 [4th Dept 2004]; *Hall v Allemannia Fire Ins. Co. of Pittsburgh*, 175 App Div 289, 292 [4th Dept 1916]). This rule exists primarily "to prevent the cross-examiner from cluttering up the direct examiner's case with unfavorable and extraneous facts when he could make the witness his own" (*People v Hadden*, 95 AD2d 725, 725-726 [1st Dept 1983]). The courts have, however, cautioned that cross-examination is not strictly limited "to the precise details brought out on direct examination" (*Crawford v Nilan*, 264 App Div 46, 51 [3d Dept 1942], *revd on other grounds* 289 NY 444 [1943]). Rather, the examination may seek an explanation and clarification of matters that were not fully disclosed on direct (*People v Ayala*, 194 AD2d 547, 547 [2d Dept 1993]). Thus, cross-examination into inferences, implications, and explanations suggested by or arising from the direct examination is permitted (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 6:72 at 628 [2d ed]).

The second sentence of subdivision (2) restates New York law that nonetheless permits a court in an appropriate case to allow inquiry into matters that were not at all the subject of direct examination (*Neil v Thorn*, 88 NY 270, 275-276 [1882]; *see White v McLean*, 57 NY 670 [1874] [abstract; text at 47 How Prac 193, 198 (1874) ("It makes no difference that the witness under examination

was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court")]).

In a civil proceeding, a court's exercise of discretion to permit a cross-examination to go beyond direct examination may be proper only when it relates to an issue in the case and examination into that issue does not frustrate the orderly presentation of a party's proof (*cf. American Motorists Ins. Co. v Schindler El. Corp.*, 291 AD2d 467, 468-469 [2d Dept 2002]; *Grcic v City of New York*, 139 AD2d 621, 626 [2d Dept 1988]).

In a criminal proceeding, the Appellate Division has indicated that a trial court should exercise its discretion to permit inquiry into a relevant issue, regardless whether the issue was raised on direct (*see People v Casiano*, 148 AD3d 1044, 1046 [2d Dept 2017] [The "defense is permitted to exceed the scope of a direct examination in order to prove a relevant proposition such as the justification defense"]; *People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013] ["(I)n a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination"]; *People v Kennedy*, 70 AD2d 181, 186 [2d Dept 1979] ["(I)t is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]).

Where cross-examination of the witness on matters not raised on direct is permitted, the court also has the discretion to rule that the cross-examiner has made the witness the cross-examiner's own witness to that extent. In that situation, the rules governing direct examination, including the restriction on leading questions set forth in subdivision (4) (a) and the rule limiting impeachment of one's own witness set forth in rule 6.11 (3) of the Guide to New York Evidence, apply (*see Bennett v Crescent Athletic-Hamilton Club*, 270 NY 456, 458 [1936]; *People ex rel. Phelps*, 83 NY at 459-460).

**Subdivision (3)** is derived from *People v Buchanan* (145 NY 1, 24 [1895] [A "witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination"]; *People v Zigouras*, 163 NY 250, 256 [1900] ["While the range in details to which the re-examination may extend should rest largely in the discretion of the court, to the end that immaterial issues may not arise, enough should be permitted to prevent a part of the truth from conveying a false impression"]; *People v Regina*, 19 NY2d 65, 78 [1966] ["(T)he prosecution's question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense"]; *accord People v Ochoa*, 14

NY3d 180, 186-187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 498 [1973]).

**Subdivision (4)** governs the use of leading questions in examining witnesses. The New York courts have traditionally considered a question to be leading if it suggests to the witness the answer the examiner wants (*see e.g. People v Mather*, 4 Wend 229, 247 [Sup Ct of Judicature 1830] ["A question is leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him"]). Whether a leading question may be used in examining a witness is committed to the court's discretion (*see Downs v New York Cent. R.R. Co.*, 47 NY 83, 88 [1871] ["It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put"]).

**Subdivision (4) (a)** restates New York's rule that leading questions are ordinarily not permitted on direct examination (*see e.g. People v Blauvelt*, 156 AD3d 1333, 1335 [4th Dept 2017]; *People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000]).

> "The general rule is that leading questions may not be used during the direct examination of a witness. This rule is explained by the likelihood that a witness will be friendly, or at least nonhostile, toward the party who called her and therefore susceptible to mouthing the version of events sought to be proved by that party. Thus, to help ensure that the fact-finder hears the facts as they are known by the witness, not by counsel, leading questions are generally prohibited on direct" (Barker & Alexander § 6:70 at 622).

A court may allow leading questions, however, when appropriate in particular circumstances, e.g., examination on introductory matters (*Mather*, 4 Wend at 247); examination of a child (*People v Martina*, 48 AD3d 1271, 1272 [2008] [sexual abuse case]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019]); expediting a trial as to matters that are not in dispute (*Cope v Sibley*, 12 Barb 521, 524-525 [Sup Ct General Term 1850]); when necessary to clarify a witness's testimony (*People v Brizen*, 118 AD3d 590, 590-591 [2014]; *People v Williams*, 242 AD2d 469, 469 [1st Dept 1997] [clarify testimony of person who had displayed a difficulty with the language]); and when examining a witness about an inconsistent statement (*Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871]). A court may also permit leading questions to avoid having the witness testify to matters the court has ruled inadmissible.

**Subdivision (4) (b)** restates New York law when the witness is an adverse party or closely identified with an adverse party or has demonstrated hostility to the party or the party's attorney. Leading questions may be used during the examination of such witnesses (*Becker v Koch*, 104 NY 394, 401 [1887]; *Jordan*

*v Parrinello*, 144 AD2d 540, 540 [2d Dept 1988]), but the court may disallow the use of leading questions when the witness shows no sign of hostility (*Matter of Argila v Edelman*, 174 AD3d 521, 524 [2d Dept 2019]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018]; *Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013]). Factors suggestive of hostility include reluctance to testify and evasiveness in answering questions (*e.g. Matter of Ostrander v Ostrander*, 280 AD2d 793, 793-794 [3d Dept 2001]).

**Subdivision (4) (c)** restates familiar New York law that permits leading questions during the cross-examination of a witness (Barker & Alexander § 6:70 at 622 ["(O)n cross-examination a witness usually is of an uncooperative frame of mind and is more likely to resist the suggestions of the cross-examiner. Therefore, leading questions ordinarily are allowed on cross-examination"]). When in a civil proceeding, however, one party on its direct case calls an adverse party, the court may preclude the attorney for that party-witness from asking leading questions on the "cross-examination" (*id.* § 6:70 at 622 n 6).

**Subdivision (4) (d)** restates New York law recognizing cross-examination into matters not the subject of direct examination, as permitted under subdivision (2), is in effect direct examination and therefore is subject to the rules governing leading questions on direct examination, as set forth in subdivision (4) (a) and (b) (*see People ex rel. Phelps*, 83 NY at 459).