Individual Rules & Practices in Civil Cases for Judge Sullivan

HONORABLE RICHARD J. SULLIVAN

CONDUCT OF COUNSEL AT TRIAL

When appearing in this Court, unless excused by the presiding judge, all counsel (including, where the context applies, all persons at counsel table) shall:

1. Stand as Court is opened, recessed or adjourned.

2. Stand when the jury enters or exits the courtroom.

3. Stand when addressing, or being addressed by, the Court.

4. Stand at the lectern while examining any witness; except that counsel may approach the Clerk's desk or the witness for purposes of handling or tendering exhibits. Commence your cross-examination without preliminaries.

5. Address all remarks to the Court, not to opposing counsel.

6. Be respectful of opposing counsel and the litigants or witnesses.

7. Refer to all persons, including witnesses, other counsel and parties by their surnames and not by their first or given names.

8. Only one attorney for each party shall examine, or cross-examine, each witness. The attorney stating objections, if any, during direct-examination, shall be the attorney recognized for cross-examination.

9. Request permission before approaching the bench; and any document counsel wish to have the Court examine should be handed to the Clerk.

10. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel. At the end of trial, counsel should make sure they have all of their exhibits. The Clerk is not responsible for them.

11. If you intend to question a witness about a group of documents, avoid delay by having all the documents with you when you start examination.

12. In making objections counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court.

13. In advance of each trial session, counsel for the party

going forward at that session should show opposing counsel the exhibits he/she intends to introduce at the session. The opponent shall indicate those exhibits to which he/she has no objection, and the Court will admit them when offered at the session. Those exhibits to which there is an objection shall be presented to the Court for ruling before the opening of the session. If possible, the Court will rule on the objection then, thereby eliminating the necessity for a sidebar conference when the exhibit is offered.

14. In examining a witness, counsel shall not repeat or echo the answer given by the witness.

15. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury.

16. Do not face or otherwise appear to address yourself to jurors when questioning a witness.

17. Sidebar conferences will presumptively not be tolerated except in extraordinary and unforeseen circumstances. This Court agrees with Standard 5.9 of the Standards suggested by the American Bar Association Advisory Committee on the Judge's Function (1972):

> The trial judge should be alert to the distracting effect on the jury during the taking of evidence of frequent bench conferences between counsel and the judge out of the hearing of the jury, and should postpone the requested conference to the next recess except when an immediate conference appears necessary to avoid prejudice.

18. Parties shall provide to the Court three copies of the witness list and a marked exhibit list.

19. In opening statements and in argument to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.

20. Parties may bring bottled water into the Courtroom during court proceedings but shall drink from the cups on counsel tables and not out of the bottles.

Current as of April 25, 2012

INDIVIDUAL PRACTICES OF RICHARD J. SULLIVAN

Chambers Contact Information:

United States District Court
Southern District of New York
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Unless otherwise ordered, matters before Judge Sullivan shall be conducted in accordance with the following practices:

1. Communications with Chambers

A. Letters. Except as otherwise provided below, communications with chambers shall be by letter, with copies simultaneously delivered to all counsel. Copies of correspondence between counsel shall not be sent to the Court. Letters on behalf of parties represented by counsel must be e-mailed as a .pdf attachment to the following address: sullivannysdchambers@nysd.uscourts.gov. *Pro se* litigants may send letters via e-mail or regular mail. Other than orders to show cause, documents should not be delivered directly to chambers without prior permission, including by Assistant United States Attorneys and Federal Defenders.

Counsel shall include the case caption and docket number in the subject line of every e-mail sent to chambers. Counsel shall not provide a hard copy of correspondence e-mailed to chambers.

B. Telephone Calls. Telephone calls to chambers are permitted only in emergency situations requiring immediate attention. In such situations only, call (212) 805-0264.

C. Faxes. Faxes to chambers are not permitted without express prior permission, and only in cases of unforeseeable emergencies. Requests for extensions of time and pre-motion letters, for example, are very rarely considered unforeseeable or emergencies. In any fax to chambers, include the name of the person who granted permission for the fax to be sent.

D. Requests for Extensions. Requests for adjournments, extensions of time, extensions of page lengths in memoranda, etc., shall be made by letter sent directly to chambers, and not by stipulation sent through the Orders and Judgments Clerk. Absent an absolute emergency, such requests must be received in chambers at least 48 hours prior to the scheduled appearance or deadline. All requests for adjournments or extensions of time must state (1) the original date, (2) the number of previous requests for adjournment or extension, (3) whether these previous

requests were granted or denied, and (4) whether the adversary consents, and, if not, the reasons given by the adversary for refusing to consent. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order must be attached.

E. Proposed Stipulations and Orders. Proposed stipulations and orders are to be submitted through the Orders and Judgments Clerk at orders_and_judgments@nysd.uscourts.gov. Courtesy copies need not be sent to chambers.

F. Related Cases. After an action has been accepted as related to a prior filing, all future court papers and correspondence must contain the docket number of the new filing, as well as the docket number of the case to which it is related (e.g., 10 Civ. 1234 [rel. 09 Civ. 4321]).

2. Motions

A. Pre-Motion Conferences in Civil Cases. For discovery motions, follow Local Civil Rule 37.2; to raise a discovery dispute with the Court, follow Rule 2.G. below. For motions other than discovery motions, a pre-motion conference with the Court is required for making any motion, except motions brought on by order to show cause, motions by incarcerated *pro se* litigants, motions for admission pro hac vice, motions for reargument or reconsideration, motions for appointment of lead plaintiffs and counsel in class actions, motions for remand, motions brought pursuant to Local Rule 6.3, and motions described in Rule 6(b) of the Federal Rules of Civil Procedure and Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure.

To arrange a pre-motion conference, the moving party shall submit a letter not to exceed three pages in length setting forth the basis for the anticipated motion. The letter shall include citations to relevant authority and should provide a brief overview of the anticipated motion. All parties so served **must** submit a letter response, not to exceed three pages, within three business days from service of the notification letter. Response letters shall directly address the arguments and authorities set forth in the moving party's letter. No party shall submit a reply letter. As a general matter, affidavits or exhibits are **not** permitted in connection with pre-motion letters without prior written request and permission. However, when submitting a pre-motion letter regarding a request to amend a pleading, the moving party shall attach the proposed amended pleading.

A party's submission of a pre-motion letter seeking leave to file a pre-answer motion to dismiss will stay that party's obligation to answer or move against the complaint through the date of the pre-motion conference.

B. Memoranda of Law. Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents. All memoranda of law shall (1) be produced in a font of twelve or higher, (2) be double-spaced, and

(3) have one-inch margins on all sides. Footnotes shall (1) be produced in a font of twelve or higher, and (2) be single-spaced with a twelve point space between footnotes appearing on the same page. A copy of the complaint should accompany the moving papers. Sur-reply memoranda will not be accepted without prior permission of the Court.

C. Unpublished Cases. Westlaw citations shall be provided, if available, to cases not available in an official reporter. Parties need not provide copies of unpublished cases that are available on Westlaw.

D. Courtesy Copies. One courtesy copy of all pleadings and motion papers, marked as such, shall be submitted to chambers at the time the papers are served, in accordance with the SDNY policies regarding mail deliveries. Courtesy copies shall be submitted to chambers for both ECF and non-ECF designated cases.

E. Filing of Motion Papers. Motion papers shall be filed promptly after service.

F. Oral Argument on Motions. Oral argument will be held where the parties are represented by counsel and where oral argument would assist the Court. The notice of motion shall state that oral argument will be "on a date and at a time designated by the Court." The Court will contact the parties to set the specific date and time for oral argument, if any.

G. Discovery Disputes. Unless otherwise directed, counsel should describe their discovery disputes in a single letter, jointly composed, not to exceed five pages. Separate and successive letters will be returned, unread. Strict adherence to Fed. R. Civ. P. 37(a)(1), the "meet and confer" rule, is required, and should be described in the joint submission as to time, place and duration, naming the counsel involved in the discussion. The joint letter shall describe concisely the issues in dispute and the respective position of each party, citing the applicable authority that the respective parties claim for support. As a general matter, affidavits or exhibits are **not** permitted in connection with discovery dispute letters without prior written request and permission. However, when the dispute concerns the refusal to respond to a specific written request, the parties shall attach that request.

H. Affidavits and Exhibits. Parties are limited to a total of five affidavits each in support of or in opposition to a motion. Affidavits may not exceed ten double-spaced pages. Parties are limited to a total of fifteen exhibits, including exhibits attached to an affidavit, in support of or in opposition to any motion. Each exhibit — other than the complaint — is limited to fifteen pages. If possible, the exhibits should be excerpted to include only the relevant material. As noted above, no affidavits or exhibits are permitted in connection with pre-motion letters or discovery dispute letters without prior written request and permission.

3. Pretrial Procedures

A. Joint Pretrial Orders in Civil Cases. Prior to trial, the Court will direct the parties to submit to the Court for its approval a Joint Pretrial Order that includes the information required by Federal Rule of Civil Procedure 26(a)(3), and the following:

i. The full caption of the action.

ii. The names, addresses (including firm names), and telephone and fax numbers of trial counsel.

iii. A brief statement by plaintiff as to the basis of subject-matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject-matter jurisdiction. Such statements shall include citations to all authority relied on and relevant facts as to citizenship and jurisdictional amount.

iv. A brief summary by each party of the claims and defenses that party has asserted which remain to be tried, without recital of evidentiary matters but including citations to all statutes relied on. Such summaries shall identify all claims and defenses previously asserted which are not to be tried.

v. A statement by each party as to whether the case is to be tried with or without a jury, and the number of trial days needed.

vi. A statement as to whether all parties have consented to trial of the case by a magistrate judge (without identifying which party or parties have or have not so consented).

vii. Any stipulations of fact or law that have been agreed to by the parties.

viii. A statement by each party as to the witnesses whose testimony is to be offered in its case in chief, indicating whether such witnesses will testify in person or by deposition.

ix. A designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations and objections by any other party.

x. A list by each party of exhibits to be offered in its case in chief, with an indication of whether any party objects to the exhibit and a *brief* statement

of the nature of the objection (e.g., "relevance," "authenticity," "hearsay").

xi. A statement of whether the parties consent to less than a unanimous verdict.

B. Filings Prior to Trial in Civil Cases. Unless otherwise ordered by the Court, the parties shall file with the Joint Pretrial Order:

i. In jury cases, *joint* proposed voir dire questions, verdict form, and jury instructions. These joint submissions should consist of single documents, jointly composed, noting any areas of disagreement between the parties. The voir dire questions and jury instructions shall include both the text of any requested question or instruction as well a citation, if relevant, to the authority from which it derives. These documents shall also be submitted on a CD in either Word or Wordperfect format.

ii. In non-jury cases, proposed findings of fact and conclusions of law. Proposed findings of fact should be detailed and should be submitted on a CD in Word or WordPerfect format.

iii. In all cases, motions addressing any evidentiary or other issues which should be resolved *in limine*.

iv. In any case where a party believes it would be useful, a pretrial memorandum.

C. Additional Submissions in Non-Jury Cases. At the time the joint pretrial order is filed, each party shall serve, but not file, the following:

i. Affidavits constituting the direct testimony of each trial witness, except for testimony of an adverse party, a person whose attendance must be compelled by subpoena, or a person for whom a party has requested and the court has agreed to hear direct testimony during the trial. Three business days after submission of such affidavits, counsel for each party shall submit a list of all affiants whom he or she intends to cross-examine at the trial. Only those witnesses who will be cross-examined need appear at trial. The original affidavit shall be marked as an exhibit at trial.

ii. All deposition excerpts which will be offered as substantive evidence, as well as a one-page synopsis (with page references) of those excerpts for each deposition.

iii. All documentary evidence.

D. Filings in Opposition. Any party may file the following documents within one week of the filing of the pretrial order, but in no event less than two days before the trial date:

i. Objections to another party's requests to charge or proposed voir dire questions.

ii. Oppositions to any motions *in limine*.

iii. Oppositions to any legal argument in a pretrial memorandum.

E. Courtesy Copies of Documentary Evidence. Three days prior to trial each party shall submit tabbed binders containing all documentary exhibits organized by exhibit number. If the number of exhibits is so voluminous as to make compliance with this rule impractical, the parties shall contact the Court for guidance.

Two courtesy copies of the joint pretrial order and all documents filed or served with the pretrial order should be submitted to chambers on the date of filing or service.

4. Conferences

A. Principal Trial Counsel. The attorney who will serve as principal trial counsel **must** appear at all conferences with the Court. Any attorney appearing before the Court must file a notice of appearance with the Clerk of the Court.

B. Initial Case Management Conference. The Court will generally schedule a Fed. R. Civ. P. 16(c) conference within three months of the filing of the Complaint. The Notice of Initial Pretrial Conference will be sent to plaintiff's counsel, who will be responsible for distributing copies to all parties.

5. Default Judgments. A party who wishes to obtain a default judgment must proceed by way of an order to show cause and use the procedure set forth in Attachment A.

6. Bankruptcy Appeals. Briefs must be submitted in accordance with Bankr. Rule 8009. Counsel may extend these dates by joint request submitted to the Court no later than two business days before the brief is due.

7. Criminal Cases. Upon assignment of a criminal case to Judge Sullivan, the parties shall immediately call chambers to arrange for a prompt conference, at which the defendant will be present, in order to set a discovery and motion schedule. The Assistant United States Attorney shall e-mail a courtesy copy of the indictment and the criminal complaint, if one exists, to chambers as soon as practicable.

“On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice,” The New York Times, February 3, 2013.

The New York Times

February 3, 2013

On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice

By JODI KANTOR

CHICAGO — At her Wednesday night book talk here, Justice Sonia Sotomayor glided through her audience of 700, dispensing homespun wisdom through a cordless microphone, interrupted by impromptu applause.

When the moderator read a question from Tabbie Major, age 7, about which books Justice Sotomayor loved as a child, she found the girl, locked her in an embrace, held on while reminiscing about Nancy Drew mysteries and then called out for a photographer to capture the moment. No need: a good portion of the crowd was already snapping pictures.

Welcome to another night in the life of Sonia Sotomayor, Supreme Court justice, current queen of the best-seller list and suddenly the nation's most high-profile Hispanic figure. She may be a relative newcomer to national life, plucked from circuit-court obscurity less than four years ago. But the release of her new memoir, "My Beloved World," suggests that she has broader ambitions than her colleagues, to play a larger and more personal role on the public stage.

Prior generations of justices mostly hid behind their robes to preserve their authority, and some current members of the court seem more like legal technicians, dispassionately adjusting the law. Justice Sotomayor "makes it harder for the justices to appear neutral and detached, but that was always a fiction," said Geoffrey Stone, a law professor at the University of Chicago.

To say that Justice Sotomayor is less cloistered than most of her predecessors and colleagues may be an understatement: among many other appearances to promote her book, she salsa-danced with the Univision anchor Jorge Ramos in her chambers.

Other justices draw large crowds (particularly Antonin Scalia, known for his cheerfully pugnacious pronouncements) and have written No. 1 best sellers (as Clarence Thomas did in 2007). But Justice Sotomayor's readings have the air of celebratory happenings, attended by entire families, people who left work early to line up for tickets and acolytes who quote her recent interviews from memory.

Excerpts from her book appeared in both People and People en Español magazines, and inauguration events were scheduled around her book tour. On Jan. 20, she administered the oath of office to Vice President Joseph R. Biden Jr. at the early hour of 8:15 a.m., rather than just before noon as guided by the Constitution, because Justice Sotomayor had to appear that afternoon at a Barnes & Noble in Manhattan.

In a backstage interview at the library where she appeared here, Justice Sotomayor said that encouraging others through her personal story — the diabetic child of a poor, non-English-speaking alcoholic, the first Hispanic member of the Court — was an even more important contribution than her jurisprudence.

“It is my great hope that I’ll be a great justice, and that I’ll write opinions that will last the ages,” she said as she signed her way through giant stalagmites of books. “But that doesn’t always happen. More importantly, it’s only one measure of meaning in life. To me, the more important one is my values and my impact on people who feel inspired in any way by me.”

Serving as a role model “is the most valuable thing I can do,” she added.

The cornerstone of her effort is her memoir, which she said she modeled after President Obama’s “Dreams From My Father,” the book that helped make him a national figure. Her book, written with the assistance of Zara Houshmand, a poet, and published simultaneously in English and Spanish, has won praise for its emotional pull.

Justice Sotomayor received a seven-figure advance for the book, and this coming Sunday it will appear atop the New York Times hardcover nonfiction best-seller list for the second straight week. Though her book has sold well by the standards of these dark days for hardcovers — 36,000 copies as of last Wednesday, according to BookScan — if it is incorporated into school curriculums, she could recoup her advance and earn royalties for years. (Unlike some members of the court, she did not come to the job with a large fortune.)

Justice Sotomayor’s memoir is unusually frank by the standards of what government officials typically write. She emphasizes the fear and shame she has often felt: as a young child, she once heard relatives say her parents’ apartment was filthy. She began routinely scrubbing it so that no one could ever say that again.

Years later, when she visited Harvard’s admissions office, she was so intimidated that she fled mid-appointment for a train back to New York, even though the school had already admitted her.

“I disclose every fear I’ve ever had in this book,” Justice Sotomayor told her audience on Wednesday night.

A brief highlight reel of audience responses: in Austin, Tex., about 1,500 people waited in the rain to see her, and rival booksellers combined their inventory to supply them with enough copies. Pamela Campos, an Air Force intelligence analyst and student at Portland State University in Oregon, drove 11 hours to an appearance in Northern California; at a networking meeting for Latina women beforehand, the group posed for a photo with books in hand.

Watching the justice in television interviews, “You want to just reach out and be her friend,” Ana Flores, 40, who blogs about Latinos and child-rearing from Los Angeles, said in a telephone interview. “It doesn’t feel like she’s totally become part of the system.”

Justice Sotomayor, in the interview, said that being the child of an alcoholic made her especially good at reading emotions, a skill she now uses to assess her audiences. She began her event at the University of San Diego by dedicating the evening to Rosibel Mancillas Lopez, a law student she had met backstage, and her mother, Rosa Mancillas, who worked a paper route to help pay for her daughter’s education. The audience gasped and cheered.

It is not entirely clear where the justice and her newfound popularity go from here. Her book tour pauses after Tuesday, with just two more stops (Baltimore and Philadelphia) scheduled in coming weeks, and she has not yet decided how to handle her large pile of new invitations.

Asked if she would be the first justice with a Twitter account, she laughed and said no. But the public demand for her is “really big,” she said, and she wants to focus in particular on speaking to students.

“I would like there to be no child in America who grows up not knowing what the Supreme Court is,” she said. (She did not know it existed until she snatched minutes from her work-study job at the Princeton library to read reports of the 1978 Bakke case, in which the court struck down an affirmative action program at the University of California.)

She also seems aware that she is perhaps the foremost face of what might be called the current Latino moment, when the demographic group has received credit for helping re-elect Mr. Obama, who is now pushing for an overhaul of immigration laws.

“Was I thinking this book was going to affect the debate? No,” Justice Sotomayor said in the interview. “But I might have hoped, or do hope, that it helps inform the debate on some level,” she said, by allowing readers to see through the eyes of an outsider.

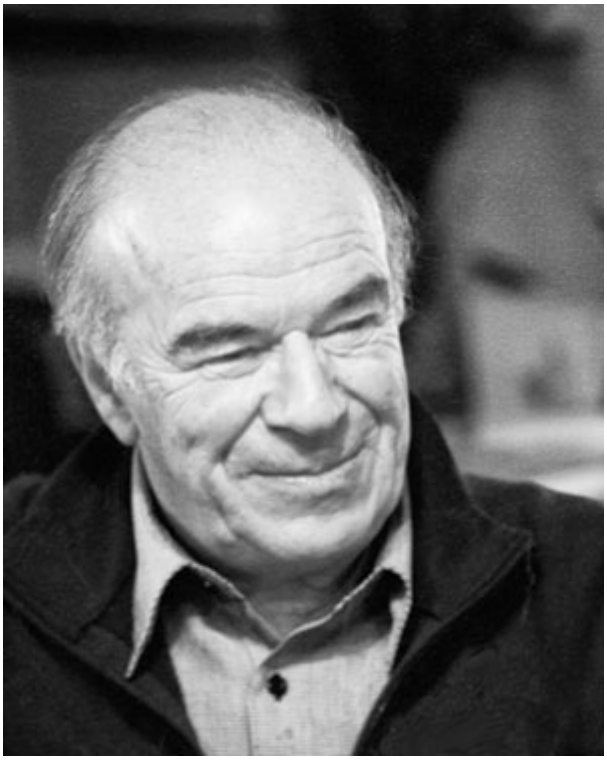
A moment later, Justice Sotomayor ended the interview to effusively greet the family of Mayor Rahm Emanuel of Chicago, who was to introduce her at the event — the latest politician to stress his claim to her. However, first she had a question for the booksellers. She had signed hundreds of books already, but she wanted to know if there were any more left in the box.

“Judge’s book gives an insider’s view of life on the bench,”
The Villager, July 19, 2012.

The Villager

Judge's book gives an insider's view of life on the bench

July 19, 2012 | Filed under: Community | Posted by: admin



BY JERRY TALLMER | The author of "Disrobed" was indeed disrobed. On this Saturday morning the honorable Frederic Block, senior judge of the United States District Court for the Eastern District of New York (which covers Brooklyn and Long Island), had set aside his black robes in favor of a light-blue, bicycle-imprinted T-shirt and white shorts.

The traffic on the West Side Drive had thrown him for a loop.

"Cyanide on the rocks with a twist," he said to a waiting waitress, but then settled for a bagel and coffee.

"So? Did you read the book? How'd you like it?" Judge Block asked this reader. I said I liked it fine but that its index was all screwed up. He said they were working to fix that in the next edition.

Judge Frederic Block

"Disrobed" (published by Thomson Reuters Westlaw) is in fact just what its subtitle says it is: "An inside look at the life and work of a federal judge." Its 454 jam-packed pages carry Greenwich Villager Frederic Block from cradle in Brooklyn (June 6, 1934) through an upward-rising 30-year law career on Long Island to appointment (July 22, 1994) by President Bill Clinton to the federal bench, and everything before and since.

On the back cover of "Disrobed" there is even a nice blurb by President Bill Clinton — "No," says the bagel-eater, "we've never actually met" — regarding Judge Block's "engaging, often humorous… introduction to the world of a federal judge whose decisions are subject to plenty of public scrutiny but whose decision-making process remains a mystery for most Americans."

Plenty of public scrutiny? How about the Crown Heights race riots of August 1991, which set the entire city boiling and ended up a dozen years later in Judge Block's courtroom with the third trial of Lemrick Nelson for the murder of rabbinical student Yankel Rosenbaum.

After four days of fruitless deliberations by the jurors, with Judge Block thinking, "My God, don't tell me there's going to be yet another trial," he sent them home one last time. The next day — August 20, 2003 — they came in with a verdict: Lemrick Nelson guilty, not of murder but of violating Yankel Rosenbaum's civil rights.

From the "Disrobed" chapter on Race Riots: "I sentenced Nelson to 10 years. It was the maximum under the law…[and] an easy call."

Not so easy was Judge Block's reaction when he opened the newspapers the next day and saw that "I was vilified by a columnist for the New York Post… [I]n his article…Steve Dunleavy wrote that he was 'still reeling from the message given by wacky jurors and a judge who sent them up a blind alley… spitting in the face of a more sensible jurist.'

"I have no idea what he was talking about," says Frederic Block in his book — and now, over his Saturday-morning bagel and coffee, was interested to hear from this former New York Post slave that Steve Dunleavy was, or had been in my time, one of publisher Rupert Murdoch's jovial, unscrupulous Australian pets. In short, that any opinions uttered by Dunleavy could be considered Murdoch's opinions.

"Stupid comments," the judge now muttered, half under his breath. "Stupid and irresponsible."

But maybe not as, shall we say, irresponsible as the front-page "wood" — the huge, front-page, 72-point headline — in the New York Daily News the morning after Judge Block's declaration during the 2007 murder trial of a Queens-based thug named Kenneth ("Supreme") McGriff that for the government "to seek McGriff's execution" would be "absurd" and "a total misappropriation" of taxpayer funds.

That Daily News wood, the next day: "JUDGE BLOCKHEAD."

"It's stupid and dangerous," says that judge again, "but what are you supposed to do? You have to live with it."

Does any of this work — your decisions — ever get to you? I ask the judge.

"No… Well, sometimes. If you have a doubt, your mind keeps working. It bothers you. But as a general proposition, no."

Pauses. Then: "I gave that Carreto boy [convicted of overlording the white slavery of young Mexican-born prostitutes] 50 years. I was going to give him 35 years, but he showed no remorse for his victims, so I tacked on 15 years. Just could not tolerate the way he behaved. It was a proper sentence, but...a little on the heavy side... ."

A little on the light side are sentences that bring out the quality of mercy, strained or unstrained. For instance in the matter of Aaron Myvett, a wrongo who'd never known a father or had any other break in life. Myvett had made the government happy by turning state's evidence in a drug case, but could still have received up to 20 years in prison. On sentencing day he showed up in court with astonishing drawings of Mother Teresa and some of Myvett's fellow inmates.

"Everyone did a double take... . I was intrigued. I adjourned the sentence to explore with the Probation Department whether there might be some way to give Myvett an opportunity to exploit his talent during [a five-year] term of supervised release."

The way was found: a Catholic school where Aaron Myvett would decorate the kindergarten with Disney cartoons. He also gave Judge Block a likeness of Judge Block. It hangs by the Judge's desk to this day.

What are the risks — of violent assault, up to and including murder, in or out of the courtroom — faced by federal and other judges every day, every night?

Not many, but enough. After he'd been visited one day by an F.B.I. agent "who looked like he came right out of central casting" and conveyed to the judge the news that a mobster named Anthony (Gaspipe) Casso "had sworn to kill me," Frederic Block thought he'd better do a little research into "whether I would be the first federal judge who would be assassinated."

And found out that "if Gaspipe had his way, I would be the fourth during the last two decades."

So what do you do, mentally, in the face of such risks? Like Samuel Beckett's two eternal tramps in "Waiting for Godot," you just go on.

"I feel badly about only one thing. My innocent grandchildren, Jordan, Kyra, Kelsey, Brandon and Ryan, have to go through school being called Little Blockheads."

The great-grandfather of those five children — the judge's father — was Norman Louis Block, "always just called Lou," and their great-grandmother was Florence Ferman Block.

Lou Block started out "in the clothing business, inexpensive men's clothing," and then went into the more fruitful telephone-answering business, which took the family out to Long Island.

One of the judge's two brothers, Leonard, is still alive and kicking at 87. Their brother Sheldon died far too young at 39.

Frederic Block got his B.A. from Indiana University in 1956, his L.L.B. from Cornell University in 1959. From 1961 to 1994 — 33 years — he practiced law on an ascending scale at Patchogue, Port Jefferson, Centereach and Smithtown. Indeed the first 120 pages of "Disrobed" may teach you more about 33 years of Long Island law offices, law cases and (mostly Republican) politics than you ever wanted to know, climaxing in Senator Daniel Patrick Moynihan (D-N.Y.) recommending Frederic Block's appointment to the federal bench, on the advice of highly respected New York legal eagle Judah Gribetz.

But that section of "Disrobed" will also surprise you — or did me — with the information that from May 22 to June 15, 1984, an amiable, suburbia-slanted, little Off Broadway show called

"Professionally Speaking," music by Frederic Block, lyrics by Frederic Block, produced by Frederic Block, ran for 37 performances at St. Peter's Church, Lexington Avenue at 55th Street, where the York Players are presently ensconced. The press agent had been my old acquaintance Shirley Herz.

"We tried it out first in Port Jefferson," says the Frederic Block who looks rather like a onetime professional wrestler some years on. "We got good reviews. Then one day I received a call from Tony Tanner" — the British-born actor-director. "I put on a suit and went to see him. He met me in an orange bathrobe" — and became the director of 1984's "Professionally Speaking."

It was when Frederick Block was appointed to the bench that he moved to Manhattan — first to West 77th Street, across from the side entrance of the Museum of Natural History, then to King Street in Greenwich Village, then (and ever since) to the far West Village near where I first lived many years ago.

Frederic Block's children — variously the parents of those grandchildren — are Neil, age 50, a labor lawyer on Long Island, and Nancy, 49, a social worker in Oregon. He is divorced from their mother after 47 years of marriage — and, according to the book, after sessions over many of those years with no fewer than seven marriage counselors and several shrinks.

Yes, he has a girlfriend — Betsy, "the wonderful Greek-American girl" to whom the book is dedicated. Indeed, even as we talked, Judge Block was preparing to visit Greece "and meet the U.S. ambassador there and give him a copy of the book."

There is a United States courthouse smack at each end of the Brooklyn Bridge, Judge Block works on the Brooklyn side — in addition, of course, to the home in Greenwich Village where he will often start writing at 2 or 3 o'clock in a sleepless morning.

He gave forth with this book, he says, all by computer and all by himself. The vast source material was "newspapers, my opinions, transcripts of trials, decisions that I wrote." Not to mention sheer memory. He draws breath, then says, à la Proust: "I was able to recapture my past."

No, he says, you didn't have to be a registered Democrat to get Pat Moynihan's nod, or Justice Judah Gribetz's boost, or Bill Clinton's stamp on one's appointment to the federal bench, but "Yes, I'm an Obama supporter, and yes, I think some of the attacks on him are racist in some parts of the country, yes."

This is a book that, for my money, picks up steam as it goes along, with sections on "Getting There" and "Being There" all leading up to the eminently readable last 200 pages of "Being There," broken into eight subsections. These are:

Death — i.e., death-penalty headaches, verdicts and entanglements, notably the case of — see above — Kenneth ("Supreme") McGriff.

Racketeering — with focus on the paparazzi-blanketed trial of Peter Gotti, older brother of the late John Gotti — "the most difficult and lengthy trial which I…ever had."

Those paparazzi woke up the day that Judge Block's girlfriend Betsy, turning up as a courtroom spectator in Cartier aviator sunglasses, high heels and short skirt, unknowingly sat herself down among the similarly garbed Gotti female support fringe. But comedy gives way to tragedy when, after Gotti's conviction, one of that support fringe — Peter Gotti's own most loyal lover, Marjorie Alexander — checks into a Nassau County motel, ties a bag over her head, and kills herself.

Marjorie Alexander? One couldn't help thinking of Susan Alexander — the second Mrs. Charles Foster Kane — as so brilliantly portrayed by Dorothy Comingore in you know what greatest of movies.

Guns — a long and far-ranging expository chapter that perhaps may be summed up by its citing from Bob Herbert in The New York Times "that there are 283 million privately owned firearms in America, that someone is killed by a gun in this country every 17 minutes, that eight American children are shot to death every day, and that since September 11, 2001, 'nearly 120,000 Americans have been killed in non-terror homicides, most of them committed with guns,' which is 'nearly 25 times the number of Americans killed in Iraq and Afghanistan.' "

Drugs — a chapter built around the prosecution — or persecution? — and ultimate acquittal of Peter Gatien, movie producer and impresario of the strobe-lit, Ecstasy-wreathed, Limelight nightclub in the beautiful, old, onetime Church off the Holy Communion, Sixth Avenue at 20th Street.

It was, as it happens, piratically eye-patched Canadian-born Peter Gatien who'd won my admiration for first producing the then unknown Chazz Palminteri's one-man 1989 autobiographical play, "A Bronx Tale," and subsequently backing the 1993 movie made from it, starring Palminteri and (as actor/director) Robert De Niro. The judge nodded, said yes, but that he'd never seen play or movie.

Discrimination — of all sorts, race, creed, color, age, gender, sexual orientation, birthplace (ah there, Donald Trump!), what have you, with special emphasis on the unequal-pay case of Molly Perdue, Brooklyn College women's sports administrator and women's basketball coach, 1991-92. Ms. Perdue thought she was worth at least as much as the men's basketball coach and men's sports administrator, and the jury — and then Judge Block — agreed with her. She got a healthy settlement.

Race Riots — notably Crown Heights, see above.

Terrorism — among other cases, that of Afghanistan-born, Queens-based Imam Ahmed Wais Afzali, 39, "a large man in a beige suit and white skullcap," who on March 4, 2010, wept as he "pled guilty before me for lying to the feds about his relationship with [15 years younger] Najibullah Zazi, who had recently pled guilty to participating in an al Qaeda plot to bomb the New York City subways."

It is worth noting that the politically circumspect Frederic Block takes occasion in this chapter to remark that Guantanamo Bay "[has dealt] a black eye to the American system of justice."

Foreign Affairs — notably overseeing the distribution to victims of the Holocaust and their heirs, of billions of dollars of looted money and property salted away in Swiss banks by the Nazis.

So, Mr. Judge Block, what advice, if any, can you tender to would-be wearers of the black robe?

"Aaahhh," he says, and then stops and thinks a long, long thought. Finally:

"You can't live your life with expectations of being a judge. That's foolhardy. You just want to be an interesting person in a broad way. Not Broadway," he instantly edits himself — can't resist it — "but a broad way. Don't let money be the center of your life. All paths lead to Rome, but some paths lead more directly. In other words, do it exactly as I did."

Court's adjourned.

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“Judge Medina's 100th Birthday: Time for Tributes,” The New York Times, February 16, 1988.

The New York Times

Archives

Judge Medina's 100th Birthday: Time for Tributes

By STACEY OKUN
Published: February 16, 1988

When Amanda Medina Murray meets history professors at Cornell University, where she is a freshman, they ask if she is related to Harold Raymond Medina, the Federal judge who presided over a landmark trial of Communists in the United States.

"My great-grandfather is the judge that everyone knows," Miss Murray said. "Having the name Medina is a badge of honor that you wear on your sleeve."

The two sons, six grandchildren and 10 great-grandchildren of Judge Medina say they are used to having their name recognized - certainly for its prominence, but lately for its longevity. Today, the family patriarch will celebrate his 100th birthday, and colleagues and friends will gather at the United States Court House on Foley Square to honor him.

Although the oldest living Federal judge - who is also the oldest living Princeton University alumnus - is confined to his bed at home, he will watch a videotape of the celebration. "And no doubt he will say, 'Boy, oh boy, this is such fun,' " said Maurice Rosenberg, the Medina Professor of Procedural Jurisprudence at Columbia University Law School. "Life to Judge Medina is a rousing, rambunctious game." A Vast Workload

Until he retired at the age of 92 as a senior judge of the United States Court of Appeals for the Second Circuit, Judge Medina was famed for the vast workload he enthusiastically took on. For years, he presided over both courtroom and classroom as a professor of law at Columbia University, delivering opinions and lectures in a speaking style peppered with homespun colloquialisms. Until three years ago, he continued to go to his Foley Square chambers each day to answer mail and meet visitors.

As a young law student at Columbia, he tutored, sold course notes, participated on the Law Review board and won the school prize for highest scholastic achievement. When he set up his own law practice in 1918, he began a daily schedule that for more than 25 years included lecturing at Columbia in the morning, practicing law until late afternoon, and teaching cram courses at night for aspiring lawyers preparing for the bar exam.

It was once estimated by The New Yorker that the Medina cram course was part of the education of 90 percent of the lawyers in New York City. "Medina was a household name - at least in lawyer's houses - in the 1930's and 1940's," Professor Rosenberg said. "He zipped through the whole body of New York law." Appointed by Truman

When he was appointed to a Federal judgeship in 1947 by President Harry S. Truman, he left a $100,000-a-year law practice to take the $15,000-a-year job on the bench. And there were trials during the following decades when those who knew him wondered if he ever rose from the bench.

For nine months, he listened to testimony in the 1949 Smith Act trial, in which 11 American Communist leaders were accused of conspiracy to advocate the overthrow of the Government by violence. Five million words of testimony were taken during the boisterous trial, including barbs at Judge Medina from the defense attorneys.

The trial ended with convictions, later upheld by the United States Supreme Court, and the defense attorneys were held in contempt. Judge Medina received 50,000 letters from the public; some were letters of admiration, but others called him a McCarthyite.

The judge's grandchildren recall the "Commie case" with vivid descriptions of F.B.I. agents and police cars surrounding his apartment building in the East 70's in Manhattan.

"Every year he took us to the circus at Madison Square Garden," said Meredith Medina Murray, his granddaughter. "But that year, the F.B.I. man came along, and he had a gun in his pocket. Well, we thought that was terribly more exciting than anything going on in the three rings."

The judge, who had seven books published during his career, considered himself an expert at cases he called "the stinkers" - long, complex trials. During one such case, in which the Federal Government accused 17 leading investment banking firms of monopolizing the issuing of securities, things grew so tense between both sides in the trial that Judge Medina took all the lawyers to a baseball game. 'Real Impact'

"It was a real afternoon off," said Judge James L. Oaks, who sat with Judge Medina at the Court of Appeals. "But the case, in the end, had real impact on the securities industry. I think if he were judging now, he'd take a hard stance on insider trading."

With all of Judge Medina's accomplishments, his career did not dominate his life. "The law was never part of our family life, but sailing, golf putting, playing games were," said his son, Harold, now retired from his own law career and living in Florida.

"It is a good thing to take one's work seriously," Judge Medina once said. "It is a fatal mistake to take oneself seriously."

In 1911 - the same year he married Ethel Forde Hillyear - he started a correspondence course in Latin that lasted 45 years. In the evenings, during the Communist trial, he read Charles Dickens to relax. When Edward N. Costikyan, now a lawyer with the Paul, Weiss, Rifkind firm, was his clerk, the judge arrived late every Wednesday because he was taking billiard lessons.

Most often, Judge Medina wore a made-to-order Brooks Brothers suit with a bow tie, and sported the same style mustache he had since graduating from Princeton in 1909. He puffed cigars until having a heart attack in 1976, but continued to drink two martinis each day after that.

Each summer until recently, he gathered his family and trekked to Westhampton, L.I., where he had bought 55 acres of land and built a house for each son and grandson. Every night at 6 P.M., he would collect the children at his feet and tell the next chapter in the continuing saga of Francois.

"Francois is this great little boy that he made up who had adventures and learned how to duel," Amanda Murray recalled. "Francois was like him, I guess, brought up to be a hero."

1-1-1992

Judges on Judging: A Bibliography

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JUDGES ON JUDGING: A BIBLIOGRAPHY[1]

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I. INTRODUCTION

The genesis of this bibliography was Judge Henry J. Friendly's observation that "the question how judges go about the business of judging continues to hold interest—although apparently more for lawyers and law professors than for judges."[2] Although decision-making has traditionally been viewed as a mysterious phenomenon not amenable to precise description, both trial and appellate judges have long been exploring the mental processes through which they reach judgment. Judges have been examining the "is" and the "ought"—how they actually reach decisions and how they believe they should be doing it.

Of course, judging and decision-making are not activities limited to judges and courts of law. They are pervasive, recurring human exper-

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1. The *Ohio State Law Journal* periodically runs a column entitled "Judges on Judging," which researchers may find useful. This project is unrelated to the column.

2. Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 229 (1961).

iences. Over the years, the processes of judging and decision-making have been studied in disciplines as diverse as accounting, economics, education, engineering, law, management science, marketing, medicine, philosophy, political science, and psychology. Indeed, in psychology, behavioral decision research has emerged as a separate field of study and a recognized subdiscipline.

Several themes appear in the literature on decision-making, regardless of the arena of decision-making or the identity of the decision-maker. First, decisions fall along a continuum of difficulty. Second, decision-making requires information processing and, as information becomes more plentiful and more complex, decision-making becomes increasingly difficult. Third, decision-making involves choice and uncertainty. Fourth, intuition appears to be a major component of many decisions. Finally, the effect of individual bias on decisions is a problem for decision-makers and decision researchers alike. Not surprisingly, we uncovered these major themes of behavioral decision research in the writings of judges themselves and in social scientists' studies of decision-making by trial and appellate judges, especially the United States Supreme Court, which some researchers view as having the attributes of small-group decision-makers.

While working on the companion piece, the Rosenfield Family Lecture, "Judging in the Quiet of the Storm," we increasingly felt a need for a bibliography of writings by judges on judging. Not finding one, we decided to compile our own. As we entered the task, we understood why others had not undertaken the project. There is a huge body of writings on judicial decision-making, and it is not possible to tell at a glance which authors are judges.

To narrow the task, we made some preliminary decisions: We would begin our search for judges' writings with the year 1921, with the publication of *The Nature of the Judicial Process* by Benjamin N. Cardozo. Our bibliography would supplement Cardozo's work, reflecting his influence on subsequent decision-makers' thinking. We would not seek out collections of the correspondence or personal papers of individual judges, biographies of judges by other judges, annual reports on the state of the judiciary, book reviews, tributes, or eulogies. We would, however, include these items when we encountered them by chance, if they contained relevant information.

To begin the collection process, we searched the computerized *Legal Resource Index*, published by Information Access Company, for articles published since 1980, and the *Index to Legal Periodicals*,

published by the H.W. Wilson Company, for articles published before 1980. We searched for books through the online card catalogues of the University of Wisconsin—Madison and the Wisconsin State Law Library.

Because we also expected judges to publish in "non-law" periodicals, we went to the *Readers' Guide to Periodical Literature*, which proved a useful resource. We also explored the *Social Science Index*. Our preliminary research indicated, however, that an in-depth search of the *Social Science Index* would not be fruitful, because judges rarely publish in social science journals. As we searched, some writings led us to others. For example, the bibliography from Henry J. Abraham's *The Judicial Process* (Oxford University Press 1986) was very helpful.

In compiling this bibliography, our greatest difficulty was in delineating the subject matter. Although it is arguable that anything written by a judge sheds light upon that judge's thinking and decision-making, we recognized a need to draw some lines in our selection of materials. Nevertheless, it will quickly become apparent to users of the bibliography that we have taken an inclusive approach to the writings. Although many entries deal directly with the decision-making process, others cover it in a tangential way, and still others require the reader to draw inferences about the author's philosophy of decision-making. We tried to err on the side of inclusiveness; however, we would not be surprised if some relevant works have been missed.

Despite errors of both inclusion and exclusion, we hope this bibliography will be useful to those interested in decision-making, particularly judicial decision-making. We enjoyed observing how "hot" judicial issues, and the style and substance of judges' writings, changed over the years. If our broad-brush approach seems to place demands on the user, that is our intention. We do not want to limit each user's opportunity to determine what he or she may find of interest.

We encourage readers to apprise us of new writings or those we may have overlooked. Perhaps our bibliography will be the springboard for more focused collections of writings on judicial decision-making and a starting place for judges and non-judges who seek further insight into the judicial decision-making process.

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“Social Media DiscoverÙ and ESI in Motion Practice, “ New York Law Journal, January 8, 2013.

STATE E-DISCOVERY

Social Media Discovery And ESI in Motion Practice

By **Mark A. Berman**

New York courts are refining what is required to be asserted in order for a party to be entitled to the production of social media evidence concerning one's opposition. Courts often require that the requesting party first depose the witness and ask detailed questions concerning the witness' use of social media services, such as Facebook; the type and nature of postings made; and the postings themselves as they relate to the events and claims at issue. Courts are requiring that, prior to an initial deposition of an opposing party, counsel must seek to uncover and then review a party's postings that are available to the public, and counsel must then inquire about such postings at the deposition. Courts are increasingly inclined to permit a follow-up deposition after a timely-filed, tailored demand for documents and authorizations seeking non-public social network postings that would appear to contradict a party's claims. As for non-public postings, counsel should be aware that ethical rules proscribe an attorney from using "false pretenses" to cause an opposing party

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to accept counsel as a Facebook "friend," and thereby gain access to such non-public postings.[1] Counsel should be prepared for an in camera review of the social media evidence

Use of electronically stored information (ESI) in dispositive motions has its own unique nuances, and the decisions below address certain of them. Lastly, this article discusses concerns associated with the production of iPhone ESI.[2]

Counsel should be aware that ethical rules proscribe an attorney from using "false pretenses" to cause an opposing party to accept counsel as a Facebook "friend," and thereby gain access to non-public postings.

Facebook ESI

The Second Department in *Richards v. Hertz*,[3] recently held that defendants demonstrated that plaintiff's

> Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. Thus, with respect to [plaintiff's] Facebook profile, ... defendants made a showing that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim.

Plaintiff's Facebook profile "may" contain items such as "status reports, e-mails, and videos that are relevant to the extent of her alleged injuries." However, due to the "likely presence" in plaintiff's Facebook profile of irrelevant "material of a private nature," the motion court was directed to conduct an in camera inspection of plaintiff's postings since the date of the accident to determine what is relevant to plaintiff's alleged injuries.

In *Caban v. Plaza Constr.*,[4] a personal injury action, plaintiff opposed defendant's request for his Facebook screen name and passwords and objected to a request for social media evidence on the ground that defendant's request for access to his "entire" Facebook record is a "fishing expedition." The court denied without prejudice defendant's motion seeking a "downloaded zip or compressed file of the plaintiff's Facebook page or any other social media accounts," subject to serving a new demand that seeks "more specific identification" of plaintiff's Facebook information that "is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." The court directed that plaintiff appear for an additional deposition with respect to the "types of information" which he posted so that defendant may establish a factual predicate with respect to the relevancy of the information.

Plaintiff in *Cuomo v. 53rd & 2nd Associates*[5] returned to work following surgery to both knees, and testified at his deposition that he cannot play sports or do any physical activities and cannot dance. Where plaintiff made reference to his Facebook account at his deposition, the court held that "[t]o the extent the Facebook account contains information that is relevant and contradicts or conflicts with his alleged restrictions, disabilities and losses, this information is discoverable."

Defendants requested production of plaintiff's "Internet and/or web based social networking sites maintained or used by [plaintiff] including all photographs, video recordings, statements, emails, blogs, or other written communication concerning the allegations in the complaint," as well as authorizations for plaintiff's electronic communications maintained by such social networking sites. The court in *Heins v. Vanbourgondien*,[6] ruled:

> Plaintiff shall comply with the demand served on behalf of defendant...with one exception. The plaintiff need not provide a list of all social networking accounts maintained or used, or the User ID and password for each of these accounts. After the plaintiff has been deposed, the defendants may renew their request for properly executed consent and authorizations as may be required by the operators of the social networking sites to which the plaintiff has subscribed since the day of the accident, per-

mitting the defendants to gain access to such sites, including any records that may be have been previously deleted or archived by such operators.

In *Abizeid v. Turner Const.*,[7] an action seeking damages for emotional distress and chronic pain as a result of a slip and fall, plaintiff claimed "I am constantly in pain, very, very depressed.... I don't want to do anything." Defendants asserted that before they served plaintiff with their notice to admit and demand for authorizations, they accessed the public portion of plaintiff's Facebook page and obtained several pictures of plaintiff on vacation, engaged in strenuous activities, such as off-road ATV riding, participating in a wedding as a bridesmaid and drinking a large cocktail in a restaurant. The court noted that "[a]lthough it is clear...that many of the postings and pictures may...relate to the events which gave rise to the plaintiff's claims and the conditions from which she now suffers, her mere use of Facebook should not give rise to an online 'fishing expedition.'" The court directed that to the extent defendants were able to identify plaintiff's presence on Facebook and the images and comments "appear to contradict claims made by the plaintiff, those areas of the plaintiff's Facebook account should be accessible to the defendants." The court ruled to "avoid overreaching" that it would review the contents of the Facebook page in camera and disclose "images and text that are relevant to the conditions the plaintiff has put in controversy."

In *Winchell v. Lopiccolo*,[8] a trial court recently noted the fact that while, "every bit of information Plaintiff enters onto her Facebook page demonstrates some level of cognitive functioning," decisions have not disclosed instances where "unfettered access was allowed, unless the requesting party first showed that information on the other party's public page contradicted their claims of injury or damages." The court noted the example that "if Plaintiff posted a message on Facebook saying that she has difficulty formulating the words to express her thoughts, the substance of the message is what should be considered to determine whether the message is relevant."

ESI in Dispositive Motions

In *Charles v. Charles*,[9] the motion court held that plaintiffs' verified complaint annexing emails served as proper authentication for them, and that circumstantial evidence could:

> verify the emails just as such evidence authenticates a voice heard over the telephone when the message reveals the speaker had knowledge of the facts that only the speaker would likely know. [citation omitted] More importantly, though, courts have applied the same rule when judging whether instant messages are properly authenticated (*People v. Pierre*, 41 AD3d 289, 291-292 [2007], lv denied 9 NY3d 880 [2007], habeas corpus denied sub nom *Pierre v. Ercole*, 2012 WL 3029903, *9-10, 2012 U.S. Dist LEXIS 103874, *23-25 [S.D N.Y.2012] ["instant message was properly authenticated, through circumstantial evidence, as emanating from defendant"]). Here, the emails contain sufficient circumstantial evidence to authenticate defendant Charles as recipient and sender.... Enough circumstantial evidence therefore exists in the record, when taking these facts into account, to authenticate relevant emails as written and received by defendant Charles. Consequently, email authentication and admissibility exists to support the motion even if the plaintiffs' verified complaint proved insufficient.

In *Bank of America v. Friedman Furs & Fashion*,[10] the court denied plaintiff's motion for summary judgment under a line of credit, where, among other grounds: (i) "there was no indication that the [loan history report upon which plaintiff was relying] was made in the regular course of business," since the report was not generated until after the action was commenced, and thus is "not a record of the transactions...as they occurred, but is instead a summary prepared for the purpose of this litigation"; and (ii) the loan history report was "not self explanatory, since the entries are confusing" and the accompanying affidavit was not from an individual with "'personal knowledge of the care and maintenance' of plaintiff's electronic business records," and therefore plaintiff was unable to satisfy its burden, under State Technology Law 306 and CPLR 4539(b), of laying a proper foundation for submitting the subject "reproductions."

In *Hakim v. Hakim*,[11] the First Department held that plaintiff's otherwise barred claims were "revived," by defendant's in-house counsel's

emails referring to defendant's intent to provide plaintiff with an accounting of what he owed to his uncle. The court held that "[v]iewing the emails in the light most favorable to [plaintiff] and drawing all reasonable inferences therefrom, they constitute an acknowledged obligation to furnish the accounting required for Isaac's purchase of his membership in the LLC."

iPhone ESI

In *AllianceBernstein v. Atha*,[12] the First Department held that the trial court's order directing defendant to turn over his iPhone was beyond the scope of plaintiff's request, which was for the "iPhone's call logs from the date he left plaintiff's employ."[13] The court found the order was "too broad for the needs of this case" holding:

> [O]rdering production of defendant's iPhone, which has built-in applications and Internet access, is tantamount to ordering the production of his computer. The iPhone would disclose irrelevant information that might include privileged communications or confidential information. Accordingly, the iPhone and a record of the device's contents shall be delivered to the court for an in camera review to determine what if any information contained on the iPhone is responsive to plaintiff's discovery request. In camera review will ensure that only relevant, non-privileged information will be disclosed.

.....●●.....

1. See New York City Bar on Professional Ethics, Formal Opinion 2010-2.

2. The authors recently addressed social media discovery in "Getting and Using That ESI," NYLJ, Vol. 248 No. 84 and "Metadata Meets Facebook E-Discovery," NYLJ, Vol. 247 No. 83. In addition, the use of ESI in dispositive motions was addressed by the authors in "Overbroad Demand and Improper Denials," NYLJ, Vo. 245. No. 39, and "N.Y. Courts Embrace Use of E-Communication Discovery," NYLJ, Vol. 243 No. 39.

3. 100 A.D.3d 728, 953 N.Y.S.2d 654, 656-57 (2d Dept. 2012).

4. Index No. 15557/2007, at 3-4 (Sup. Ct. Queens Co. Sept. 24, 2012).

5. Index No. 111320/2010 at 2 (Sup. Ct. N.Y. Co. Aug. 27, 2012).

6. Index No. 003967/2011 (Sup. Ct. Suffolk Co. Sept. 25, 2012).

7. Index No. 23538/2010, at 3-5 (Sup. Ct. Nassau Co. Sept. 13, 2012).

8. 954 N.Y.S.2d 421, 424, 2012 N.Y. Slip Op. 22337 (Sup. Ct. Orange Co. Oct. 19, 2012).

9. 37 Misc. 3d 1229(A), 2012 WL 6097680, 2012 N.Y. Slip Op. 52226(U) (Sup. Ct. Kings Co. Dec. 5, 2012).

10. 2012 WL 6619203 at *9, 2012 N.Y. Slip Op. 52306(U) (Sup. Ct. Kings Co. Dec. 18, 2012).

11. 99 A.D.3d 498, 501, 953 N.Y.S.2d 1, 4 (1st Dept. 2012).

12. 100 A.D.3d 499, 954 N.Y.S.2d 44 (1st Dept. 2012).

13. After a failure to produce the information sought from defendant, the trial court ordered defendant to deliver the iPhone to plaintiff's counsel to enable it "to obtain the contact information it requested" at defendant's deposition [Doc. No. 29] (emphasis added), which order was predicated on plaintiff's letter application seeking the production from defendant's iPhone of: (1) the contact list; (2) the call log; and (3) all communications between defendant and plaintiff's clients.VVV

“ Who Can Get Your Tweets, And Can You Object?” New York Law Journal, July 3, 2012.

STATE E-DISCOVERY

Who Can Get Your Tweets, And Can You Object?

By **Mark A. Berman**

Twitter "Tweets" can reveal a great deal of information about a person including, identification information, the location where the Tweet was made (often referred to as "geolocational" information), who was Tweeted and, of course, the contents of such Tweets. This information, depending on what is needed to be proved, no doubt, could be of assistance in a criminal or civil action.

Discussed below is the recent case of *People v. Harris*, where a criminal court, in the context of a disorderly conduct prosecution arising out of the Occupy Wall Street protests, was asked to address the complex issue of whether a criminal defendant and/or Twitter has standing, under either a constitutional analysis or the Stored Communications Act (SCA)[1] to quash a subpoena issued without a warrant to a third-party online social networking service which sought to obtain defendant's "user information" and the substance of his Tweets.

After conferring with the D.A.'s office, Twitter informed defendant that his Twitter account had been subpoenaed. Defendant thereafter notified Twitter of his intention to file a motion to quash the subpoena.

As a result, Twitter took the position that it would not comply with the subpoena until the court ruled on the motion. On April 20, 2012, the court denied defendant standing to object to the subpoena and directed that the requested information be produced.

Thereafter, Twitter moved to quash the subpoena.[2] Just a few days ago, on June 30, the court ruled on Twitter's motion and directed that Twitter produce all "non-content" information and certain of defendant's Tweets, also known as "content" information, and that all materials are to be provided to the court for in camera inspection.

Defendant's Standing

The court found that "defendant's contention that he has privacy interests in his Tweets to be understandable, but without merit." The court described Twitter as:

> a public, real-time social and information network that enables people to share, communicate, and receive news. Users can create a Twitter profile that contains a profile image, background image, and status updates called tweets, which can be up to 140-characters in length on the website. Twitter provides its services to the public at large. Anyone can sign up to use Twitter's services as long as they agree to Twitter's terms.

The court noted that Twitter's Terms of Service,[3] include a privacy policy, which:

> informs users about the information that Twitter collects upon registration of an account and also whenever a user uses Twitter's services. Twitter collects many types of user information, including IP address, physical location, browser type, mobile carrier among other types. By design, Twitter has an open method of communication. It allows its users to quickly broadcast up-to-the-second information around the world. The Tweets can even become public information searchable by the use of many search engines. Twitter's Privacy Policy informs the users that, '[w]hat you say on Twitter may be viewed all around the world instantly.' (See https://twitter.com/privacy). With over 140 million active users and the posting of approximately 340 million Tweets a day (see http://blog.twitter.com/), it is evident that Twitter has become a significant method of communication for millions of people across the world.

No Undue Burden

Twitter argued that denying "defendant standing placed an undue burden on Twitter... [forcing] Twitter to choose between either providing user communications and account information in response to all subpoenas or attempting to vindicate its users' rights by moving to quash these subpoenas itself."

However, the court noted that such burden is carried by every third-party recipient of a subpoena, and this argument "cannot be used to create standing for a defendant where none exists."

Although the SCA affords a court the power to quash a subpoena if compliance therewith would create an "undue burden" on the provider, the court found that Twitter's compliance would not be unduly burdensome as it "does not take much to search and provide the data to the court."

The court analogized Twitter's obligation to produce the disputed Tweets to that of a witness to an altercation on the street who could be compelled to testify and stated that "today, the street is an online, information superhighway, and the witnesses can be the third party providers like Twitter, Facebook, Instragram, Pinterest, or the next hot social media application." The court stated that:

> Tweets are not e-mails sent to a single party. At best, the defense may argue that this is more akin to an e-mail that is sent to a party and carbon copied to hundreds of others. There can be no reasonable expectation of privacy in a tweet sent around the world. The court order is not unreasonably burdensome to Twitter, as it does not take much to search and provide the data to the court. So long as the third party is in possession of the materials, the court may issue an order for the materials from the third party when the materials are relevant and evidentiary.[4]

Fourth Amendment Rights

The court noted that the U.S. Supreme Court has "repeatedly" held that the Fourth Amendment[5] "does not protect information revealed by third parties" and that courts "have applied this rationale and held that internet users do not retain a reasonable expectation of privacy."[6] The court found that there is no reasonable expectation of privacy in information intentionally broadcast to the world, and stated that:

> If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversa-

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tion via the internet that now exist. Those private dialogues would require a warrant based on probable cause in order to access the relevant information.

There is no reasonable expectation of privacy for tweets that the user has made public. It is the act of tweeting or disseminating communications to the public that controls. Even when a user deletes his or her tweets there are search engines available such as "Untweetable," "Tweleted" and "Politwoops" that hold users accountable for everything they had publicly tweeted and later deleted.

'Harris' addressed the issue of whether a criminal defendant has standing to quash a subpoena, issued to third-party Twitter, that sought defendant's "user information" and Tweets.

The court further noted that the information sought was "relevant and material" to the ongoing criminal investigation.[7] As such, in accordance with the SCA, Twitter was directed to disclose all "non-content" information and Tweets from Sept. 15, 2011 through Dec. 30, 2011, for in camera inspection.[8]

In its conclusion, the court observed the challenges, and the balancing act, faced by courts in applying unchanging statutes to an ever-evolving technological landscape. The court stated that courts:

> must weigh the interests of society against the inalienable rights of the individual who gave away some rights when entering into the social contract that created our government and the laws that we have agreed to follow. Therefore, while the law regarding social media is clearly still developing, it can neither be said that this court does not understand or appreciate the place that social media has in our society nor that it does not appreciate the importance of this ruling and future rulings of courts that may agree or disagree with this decision. In recent years, social media has become one of the most prominent methods of exercising free speech, particularly in countries that do not have very many freedoms at all. ...
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> While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.

It is thus important when advising a client of her rights where her social media is sought from a provider of electronic communication services in either a criminal or civil[9] action, to examine whether, in the first instance, the client or the electronic communication provider, or both, have standing to object to same, and then to determine if the requesting party, whether it is a private individual or entity or the government, has fully complied with the SCA and any other relevant state or federal statute, as well as, of course, whether an argument can be made that the ESI sought is confidential or private, and thus somehow not subject to disclosure.

1. Congress enacted the SCA as Title II of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. §§2701-2711 (2010)).

2. See *Greenbaum v. Google*, 18 Misc. 3d 185, 186-87, 845 N.Y.S.2d 695, 698 (Sup. Ct. N.Y. Co. 2007) ("Google confirmed... that because many people seek information from Google, "Google leaves it to those people to come in and protect their own interests. However, Google always requests that they be given notice so they can appear [and i]t is thus clear that Google does not represent the interests of people who anonymously operate blogs or anonymously make comments on blogs maintained on Google's website").

3. The court noted that to register for a Twitter account, a person had to have agreed to Twitter's Terms of Service, including its Privacy Policy. The court noted that "every single time the defendant used Twitter's services the defendant was granting a license for Twitter to use, display and distribute the defendant's Tweets to anyone and for any purpose it may have. Twitter's license to use the defendant's Tweets means that the Tweets the defendant posted were not his [and the] defendant's inability to preclude Twitter's use of his Tweets demonstrates a lack of proprietary interests in his Tweets."

The court cited Twitter's Privacy Policy, which states that Twitter is "primarily designed to help you share information with the world..." because, "[m]ost of the information you provide...is information you are asking [Twitter] to make public." The court also noted that "public Tweets are even searchable by many search engines" and noted that "Twitter informs its users that any of their information that is posted will be Twitter's and it will use that information for any reason it may have."

4. On the defendant's motion to quash, the court found that "an analogy may be drawn to the bank record cases where courts have consistently held that an individual has no right to challenge a subpoena issued against the third-party bank. New York law precludes an individual's motion to quash a subpoena seeking the production of the individual's bank records directly from the third-party bank as the defendant lacks standing." The court in Harris noted that in general, the New York rule is that only the recipient of a subpoena in a criminal case has standing to quash it. However, the court in *Mancuso v. Florida Metropolitan University*, 2011 WL 310726 *1-2 (S.D. Fla. Jan. 28, 2011), stated that "[g]enerally, a party does not have standing to challenge a subpoena served on a non-party, unless that party has a personal right or privilege with respect to the subject matter of the materials subpoenaed... [O]ne district court recently held that an individual had standing to challenge a subpoena issued to social networking websites." The court in *Crispin v. Christian Audiger*, 717 F. Supp.2d 965 (C.D. Cal. 2010) explained:

> [A]n individual has a personal right in information in his or her profile and inbox on a social networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and banking records. As with bank and employment records, this personal right is sufficient to confer standing to move to quash a subpoena seeking such information. Id. at 974.

5. See *People v. Hall*, 14 Misc. 3d 245, 257, 823 N.Y.S.2d 334, 343 (Sup. Ct. N.Y. Co. 2006) ("Thus, this Court finds that there is no Fourth Amendment infirmity to the SCA. The Fourth Amendment does not apply to disclosures thereunder because the information, having been gathered by T-Mobile for its own legitimate business purposes belongs to T-Mobile, not Hall, and because the Fourth Amendment does not apply to the interception of electromagnetic waves outside of a person's home, so as to constitute the acquisition of such information as a search or seizure."). See also *In re Application of the United States for an Order Pursuant to 18 U.S.C. §2703(d)*, 830 F. Supp.2d 114, 132-33, 136, 138 (E.D. Va. 2011)("The recording of IP address information by Twitter and subsequent access by the government cannot by itself violate the Fourth Amendment," where it was Twitter that decided to record or retain this information, and thus any privacy concerns were the "consequence of private action, not government action"; "If the user is communicating over the Internet, intermediary computers and the destination computer must know the IP address as a condition of communication. Under the Fourth Amendment, that fact renders unreasonable any expectation of privacy in the IP address" and thus because the order "did not invade Petitioners' reasonable expectations of privacy, it cannot constitute a search in violation of the Fourth Amendment").

6. See *Patterson v. Turner Const.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311, 312 (1st Dept. 2011) ("The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access.") In *Romano v. Steelcase*, 30 Misc. 3d 426, 433, 907 N.Y.S.2d 650, 656 (Sup. Ct. Suffolk Co. 2010), the court noted that "New York courts have yet to address whether there exists a right to privacy regarding what one posts on their on-line social networking pages... However, whether one has a reasonable expectation of privacy in internet posting or e-mails that have received their recipients has been addressed by the Second Circuit, which has held that individuals may not enjoy such an expectation of privacy." The court in *Romano* found there was no legitimate reasonable expectation of privacy and

> [t]hus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking." Id. at 434, 907 N.Y.S.2d at 657.

7. In its first decision, the court in *Harris* ordered Twitter to disclose the "contents" of defendant's Tweets, finding them "by definition public." The court also held that the subpoena was not overbroad.

> Section 2703 [of the SCA] distinguishes between 'contents' and non-content "records." 18 U.S.C. §2703; see *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). If the government seeks content information about a communication, that is, "information concerning the substance, purport, or meaning of that communication," paragraphs (a) and (b) apply. 18 U.S.C. §§2510(8), 2703(a)-(b), 2711. If the government seeks non-content records, as it does here, paragraph (c) controls, and provides different procedural protections. 18 U.S.C. §2703(c). The earlier Twitter Order was issued under paragraph (c), which enumerates particular records subject to disclosure, including the subscriber or customer's name, address, telephone connection records or records of session times and durations, length and type of service used, telephone number or temporarily assigned network address, and method of payment. Id. The government need not notify the customer or subscriber of a records request under paragraph (c).
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> *In re Application 2703(d)*, 830 F. Supp.2d at 127-28.

8. However, pursuant to the SCA, as to the substantive Tweets less than 180 days old, the court ordered that the government obtain a search warrant. See 18 U.S.C. §2703(a)(b)(d).

9. See *Romano*, 30 Misc. 3d at 427, 907 N.Y.S.2d at 652 ("The Court has reviewed the submissions both in favor of and in opposition to the relief sought, as well as the applicable federal statutory law, specifically the [SCA], which prohibits an entity, such as Facebook and MySpace from disclosing such information without the consent of the owner of the account").