APPROACHING THE MILLENNIUM

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When I was invited to draft a paper for possible inclusion in the Seton Hall Law Review, the subject matter was left to my discretion with the understanding that it would be considered within the generic term "Perspective." Having been engaged in the active practice of law in New Jersey for 42 years, I enjoy (together with a dwindling number of my contemporaries) a suitable vantage point from which I may look backward a considerable distance and still have some prospect of the future.

Law Review articles are primarily concerned with the body of the law; tightly written pieces often upon arcane subjects studded with citations and quotations and stabilized by the ballast of microscopic footnotes. Such pieces are valuable resources for lawyers engaged in research but have only a limited utility to law students, the majority of which will shortly be admitted to practice and turned loose upon an unsuspecting public.

I therefore endeavored to address myself to those matters that do not lend themselves readily to pedagogical treatment in the manner, I suppose, of those "How to Succeed" books that burden bookstands. This discourse is intended for the benefit of law students and those recently admitted to the bar. I hope that the reader will find an occasional observation that he or she may regard as sage.

I am presently one-third as old as the Constitution of the United States. When I was admitted in 1950, there were less than 15,000 lawyers in New Jersey. Tribunals such as Oyer and Terminer had just been supplanted under the 1947 New Jersey Constitution, the Judicial Article which became effective in 1948. The felony charge of adultery applied only to married women — the same substantive offense if committed by a married man was only a misdemeanor carrying a penalty, if memory serves, of $50. There was no Administrative Procedure Act, there were no codified regulations and the state was itself immune from suit in contract and tort.

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Jackie Robinson broke the color barrier in major league baseball in 1947, the year in which I commenced law school, and many of my fellow students attended class wearing parts of uniforms that they had worn in World War II.

In the decades since 1950, however, the pace of human affairs has quickened. While the world has shrunk by virtue of communications technology and advances in transportation, the complexity of society has grown exponentially. It is therefore not surprising that the absolute number of lawyers in New Jersey has trebled in 42 years, since it has become quite literally impossible for individuals and businesses to cope with the statutes and regulations (both federal and state), not to mention municipal ordinances, by which we are daily bound. The Promethean task of keeping people from being caught in the web falls, of course, to lawyers.

In my opinion, the day of the generalist is over. Those who venture into the legal profession today must ultimately specialize. It is impossible for a citizen to plan his activities in and around this web without the guidance of a lawyer. In fact, it is my opinion that by the turn of the century the small firm and the solo practitioner will no longer exist in megalopolitan areas, and the large firms will have become larger, simply because of the need for sophisticated and specialized advice to which the client is entitled and which should ideally be largely available in-house. There will, of course, be the boutique firms practicing in very narrow areas such as trademark and copyright law, international law and the like, but even these may well be assimilated into the super-firms seeking to afford full service to their clients.

The lawyer who elects to become an associate in a large firm begins, of course, at the bottom of the totem pole. He will not want for work, because there is something in the nature of gravity which makes the more deadly drudgery find its way to the lowest stratum. The associate will be preoccupied with concern about how the firm perceives him as a present and prospective contributor to the strength and growth of the firm. He needs no report card. People have a way of learning very quickly which of the young lawyers in the current class of new associates may be depended upon to carry out the assigned work most efficiently. Accordingly, before the end of the first year with the firm, each lawyer will complain that he or she is overburdened, and working nights and weekends or, alternatively, that he or she has not enough to do. Those who find themselves in the latter group will

be well advised to go elsewhere; those in the first group are well on their way to being considered for partnership.

Many a brilliant lawyer labors in obscurity as a senior associate or nominal partner in a large firm, or nursing out a modest living in pedagogy. Such relative anonymity is entirely due to our social chemistry. That same chemistry regularly generates highly successful practitioners whose technical skills — and even raw knowledge — are modest. The first group, those afflicted with the Miniver Cheevy[1] syndrome, simply lack those characteristics of personality that subtly invite others to rely upon them, and to feel comfortable and secure in such reliance. The second group will attract clients without much effort, and will succeed by hiring members of the first group to do the bulk of the work, with only an occasional personal cameo appearance required by the "rainmaker" to maintain his image.

There is no injustice in this arrangement. People come to lawyers because they need a safe place to deposit a heavy burden, and if the client sleeps soundly in the conviction that his lawyer has the problem under close management and control, the lawyer has performed a real service, regardless of the outcome. If you will reflect for just a moment, I am sure you will realize that there are very few people upon whose loyalty, wisdom and diligence you would absolutely rely. Your doctor is one, your lawyer another, but you may overestimate their skills.

Once the euphoria of having passed the bar examination has dissipated, the fledgling lawyer must now try to support himself. Before he can address the difficulties of client management, he needs to have some clients to manage. The secret is visibility.

Despite the recent advent of lawyer advertising, direct solicitation of business remains unethical, and media advertising in the formal sense is, in my opinion, of doubtful value. The "visibility" of which I speak is the product of involvement in community affairs in general and politics in particular. It is essential that your name become and remain current in the business and social conversations of the community. It is difficult to accelerate this process; involvement in, for example, the local board of education, municipal government and the like demands a tremendous investment of time and energy with no immediate yield of direct economic advantage. If, however, the young lawyer is diligent in

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[1] *See* Edwin A. Robinson, *Miniver Cheevy*, in THE NORTON ANTHOLOGY OF MODERN POETRY 174-75 (Richard Ellman & Robert O'Clair eds., 1973); LOUIS COXE, EDWIN ARLINGTON ROBINSON: THE LIFE OF POETRY 83 (1969).

keeping himself exposed to people, ultimately some of these people will seek advice and he will begin to develop a client base. These "seed" clients will hopefully germinate and they will certainly spread their opinions as to the service they receive. At the same time, as the lawyer deals with other lawyers in handling the matters entrusted to him by these "seed" clients, he will begin to develop his reputation and, because lawyers are a gregarious group by nature, that reputation will spread in the fraternity. The reputation of the lawyer in the community is the index which the community will use in choosing a lawyer, and his success will bear a direct relationship to that reputation.

To those who are intent upon becoming a lawyer, I would suggest that, upon admission to the bar, you consider spending a few years in the public sector. Government has a continuous need for lawyers. Where the particular position is not protected by civil service tenure, the job is subject to the political spoils system, and a new administration usually "cleans house" to provide rewards for the deserving — those who supported the party during the campaign. In any election year, the office of a United States Attorney, for example, loses a large number of lawyers because the good ones seek and secure private opportunities rather than gamble upon the ballot box results.

There are two central reasons why a short stint of government work is desirable. First, the government will entrust you with heavy responsibility in cases of such importance that no private firm would think of delegating the burden to you. This heady experience accelerates your professional maturity, and leads directly to the second virtue of government work — you will perforce deal directly with attorneys in the private sector who have primary responsibility in these cases. From such visibility and communication your capabilities will shortly be recognized by private lawyers, for good or ill.

Let us return, however, to considerations of private practice. Law firms have no option to remain at any given size; they must either grow or disappear. In the process of growth, there is much blatherskite written about the establishment of "definitive criteria" for partnership eligibility. When all is said and done, such "criteria" amount to nothing more than a listing of the components which, taken together, suggest that the associate will probably contribute to the firm's growth. If I am correct, it is a sheer waste of time to go through a quantitative analysis of the elements that bond to form that compound.

Among those ingredients, however, the relationship which the associate has been able to develop with clients is perhaps paramount, because the firm cannot grow unless the senior business-getters are able to wean the clients away from direct personal reliance upon themselves; the rainmakers cannot be expected to personally perform all of the work they bring to the firm and still have the time available to attract more business. This transfer of client allegiance is a delicate matter and the associate upon whom clients come to rely forms his own client base within the firm. Once again, these may be regarded as "seed" clients. Partnership status for such an associate will make him more acceptable to the "seed" clients upon whom both the lawyer and the firm now depend to pollinate the field, all to the end that the young partner will himself become a business-getter.

Few relationships outside the family are as intimate and as fragile as that of lawyer and client. The trust and confidence upon which the relationship is based must be nurtured constantly. Simple things such as the return of telephone calls, letters informing the client of the status of his case and the like are of critical importance. Availability is of the essence; I am available to my clients seven days a week and twenty-four hours a day, or at least I give them every reason to believe that this is the case. A lawyer is literally the alter ego of the client, and the client must feel free to communicate with the lawyer with the same assurance of confidentiality that he enjoys in his personal ruminations. Good clients become good friends, and friendship enriches our lives. But what about the fact that the lawyer depends economically upon the client?

Lawyer's fees are a material part of the relationship. The dollar that the client pays to the lawyer is just as important to the client as the dollar he pays for rent, heat or food, and the lawyer's duty to the client includes an obligation to conserve his client's assets. The most sensible arrangement, and the most common, is the regular invoice to the client for time spent by the lawyer working on the client's affairs, usually calculated on an hourly basis. This arrangement, indeed any fee arrangement, should be established in advance and reflected in a written agreement, often a letter, explaining the terms in detail. The invoice itself should be supported by sufficient detail to inform fully the client as to the basis for the charges. The client should be expected to remit promptly, for the lawyer has no duty to continue to serve the client without compensation.

It is often difficult and sometimes impossible to forecast with precision an estimate of ultimate legal costs, frequently because there is an adversary whose conduct lies beyond the control of either the client or his lawyer. This unpredictability should be thoroughly explained to the client at the outset. Here again, the communication between lawyer and client serves to foster the relationship. If the lawyer has been candid, and if his bills are regular and meticulous, the client will have more confidence in his belief that the lawyer is equally punctual and thorough in attending to the affairs of the client.

If the fee arrangements are agreed to in detail when the lawyer undertakes the matter, there should be no basis for discontent thereafter, although, as I recall the children's story, the town burghers in Hamelin were of the opinion that the Pied Piper's agreed fee of twenty guilders was excessive — after the rats were gone!

There is no free lunch, and the laborer is worthy of his hire. The lawyer who can be engaged for, say, $40.00 per hour may well come up with the wrong answer in ten hours at a cost of $400.00; the lawyer who commands $200.00 per hour will certainly complete the work in a much shorter time (say, one hour) and is more likely to have the correct answer at a total cost of $200.00. In the nature of things, the lawyer who regularly charges and collects $200.00 per hour has a waiting list and cannot squander time. The economics are perfectly clear.

The client seeks and is entitled to the judgment of his lawyer, but the ultimate decision is always the client's. If the client refuses to accept the advice, the lawyer is free to withdraw and must sometimes do so where, in his opinion, the position of his client is simply untenable. In all other instances, however, the lawyer is bound to use his best efforts to achieve the result sought by the client. The prudent lawyer must sometimes disagree with his client and he is bound to make clear the basis for his disagreement, or to share responsibility for the unhappy result. How does one argue with a client and retain his confidence? The answer is the same as the secret of a happy marriage — no more can be said.

Prophecy is of the essence of the practice of law. Forecasting the probable reaction of others in response to stimuli is the primary function of counsel, whether in negotiation or in tribunals. There is no room for emotion on the part of the lawyer; one can

be ardent but never hysterical because sound judgment is the ideal.

With very few exceptions, litigation is the result of the lawyers' failure to properly perform their primary function. Trials are not cost effective and, more often than not, come about as the result of hubris rather than good judgment.

THE NERVOUS NUMBER

Virtually all differences are resolved by compromise. If it were not so, society would not function. In Anglo-Saxon countries, the courthouse is the ultimate anvil against which the parties are free to bang their heads, but the result is always a compromise anyway, because of the sheer cost of litigation. There are certainly some disputes that do not lend themselves to negotiation — some criminal cases, for example (though most of these are plea bargained). Nonetheless, in substantially more than ninety percent of all litigated matters, common sense guided by sound legal advice produces what is euphemistically called an "amicable" settlement, one in which each side is equally unhappy.

People are less than perfect, and I suspect that circumstance, misunderstanding or common ordinary bad faith makes a valid claim for a dollar worth not more than about eighty-eight cents. Conversely, a worthless claim in the amount of a dollar is probably worth about twelve cents. The twelve cents is the friction loss attributable to the mechanism necessary to resolve the argument by peaceable means.

Evaluation of the relative strength of a client's position is one of the most demanding tasks a lawyer is called upon to perform, and the client is frequently the lawyer's most difficult adversary. The client's conviction as to the absolute probity of his conduct, often buttressed by pompous proclamations of principle, must be gently deflated. The process takes time and requires a degree of delicate firmness to avoid provoking misgivings as to the attorney's loyalty and dedication. One of the redeeming values of the delays in court proceedings is that it affords a "cooling off" period during which the competent lawyer can restore his client's objectivity.

The idea that lawyers actively promote courtroom showdowns is greatly exaggerated. The experienced, competent lawyer has outgrown any youthful "O.K. Corral" notions of the proper practice of law, and his devotion to his client's best inter-

ests absolutely requires that he use his best efforts to avoid the ultimate confrontation. Seeking to find out who wins and who loses is a sucker's game. At the same time, the lawyer must be equipped to go to the mat if the other side proves to be unreasonable. More importantly, the lawyer must be perceived by the enemy to be so equipped — largely a matter of past record and reputation — for it is unfortunately true that A is a better trial lawyer than B, and often much better. It is a rare thing for two or more superstar litigators to try a case against each other, partly because they are so skillful at the evaluation of the case's relative strengths and weaknesses that they are able to settle the case, usually to the clear advantage of all disputing parties.

Why don't all cases settle? Well, there are a few differences that must be decided by a court because the answer is simply unknown. This is only a tiny percentage of all cases, and often there is no bitterness or rancor between the contesting parties — merely a good faith doubt as to where justice lies. In the balance of matters that actually go to trial and verdict[2] obviously someone has made an error in judgment. This leads me to the point.

In civil cases, the subject matter is almost always a claim of a property right, either money or things which can be converted into money. There are exceptions, such as custody fights, but for our present purposes let us use an ordinary argument over money as the typical case. What are the factors to be considered in evaluating your client's position in order of importance? First, what is the law, right? Wrong. The question of overriding importance is the economic balance of power. We are not here concerned in the slightest with Olympian considerations of truth and justice — we are trying to protect the economic interests of the client. If Pollyanna protests this callous remark, I remind her that we are, after all, talking about money.

Victory most likely goes to the swiftest with the wallet. He is more likely to engage the more capable lawyer, less likely to suffer from the attrition of expensive discovery and pretrial proceedings and — most critically — better able to stand the gaff of defeat! This painful truth eludes many lawyers and consequently some of their clients.

If we turn the coin over and look at it from the obverse side, it will perhaps be more clearly appreciated. If a wealthy defendant, say an insurance company, offers an individual plaintiff

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[2] Most cases in which trials commence are settled before conclusion of the trial.

$100,000 to settle a personal injury case, the question is not whether the case is really worth $250,000, assuming equal bargaining power — because the parties do not have equal bargaining power. The plaintiff must decide whether he can afford to *risk* $100,000, for if the jury decides for the defendant, he will be out the $100,000 which he can presently put in his pocket without risk.

The second factor in importance — no, still not the law — is the facts, and by "facts" I include everything that goes into the bouillabaisse of a trial, not only the sterile things such as hospital records and claimed lost wages, but the characters in the play. Who is the plaintiff — who is the defendant — what sort of impression will the witnesses be likely to make? What is the likely socio-economic makeup of the jury — with which party is the composite jury likely to identify?

Finally, the law. More precisely, whether it is probable that plaintiff's evidence will prove sufficient to get to the jury and, if so, whether the judge's charge to the jury — his instructions as to the law — will, when applied to the facts, make it more likely than not that the plaintiff will recover a judgment. In almost every case it is the plaintiff's responsibility to introduce enough evidence to permit the theoretical "reasonable man" to conclude that he has met the required burden. After the plaintiff's attorney announces that he "rests," meaning that he has no further evidence that he cares to offer on his affirmative case at this time,[3] the defense is entitled to move for dismissal of the case on the ground that plaintiff has fallen short of sustaining his burden of proof. The judge then must decide whether a reasonable man could conclude that the plaintiff is entitled to a victory.

Because the plaintiff has the benefit of every doubt at this stage, such motions are rarely granted, but the risk of falling short — even with an "airtight" case — always exists; witnesses sometimes fall apart or become unavailable at the last minute.

If the motion to dismiss is denied, then the defendant's proofs begin, and these are subject to the same degree of uncertainty as was the case with the plaintiff's proofs. Next, both counsel sum up, make their closing arguments to the jury, followed by the judge's charge as to the applicable law and ultimately the jury's deliberations and verdict.

Throughout trial the tide of battle shifts. The judge's rul-

[3] Sometimes it is wise to save some telling evidence for use later in the trial, though not if there is any doubt whether the initial burden has been carried.

ings on the admissibility of evidence tip the scales first one way, then another. Witnesses thought to be strong and convincing come unglued on cross-examination. The judge charges the jury in a mistaken perception of the law; a hundred unforeseen and largely unforeseeable twists and turns affect the trial's direction and mood. These instances simply reflect that evaluation of the outcome of a trial does not lend itself to scientific, or for that matter, empirical method; the combinations and permutations are infinite, and the forecast of result lies nearer the realm of conjecture than opinion.

Nonetheless, the lawyer's task is to assign appropriate values to each of these variables, all to the end of arriving at what I call the "nervous number." In this uncertain world, there are few constants. It is an ineluctable fact that no dispute can be settled unless each side believes itself to be in a state of jeopardy roughly equal to that of the opponent's perception of his own risk. Both sides must be nervous. If the risk perceived by A is perfectly acceptable to him, he has no motive to compromise with B. Before A will become negotiable, the scale must be adjusted so as to step up A's risk to the point where A is uncomfortable with his risk.

There are no absolute values, and imagination often leads to finding solutions when situations appear hopeless. My father resolved the disputes between my brother and me over the last remaining piece of cake by handing one of us a knife and saying "[o]ne cuts and the other picks." I used this device to settle a bitter dispute between two partners whose business assets consisted of a number of computer leases, each of different terms, covering different equipment and with different customers. It was agreed, on my suggestion, that they flip a coin, with the winner to make in effect two piles of leases which he thought to be equal in value, and the loser of the toss to select one of the piles. Settled.

Matrimonial disputes are difficult to manage, because the parties cannot be objective. In the division of personal property, furniture, art works, crystal, silverware and the like, I have sometimes succeeded with the help of opposing counsel in persuading the parties to jointly inventory the disputed items acquired during marriage, and in then having one of them assign dollar values to the items with the other choosing items equal to fifty percent of the total assigned values (if fifty percent is the pre-agreed or appropriate apportionment).

Time is often a factor that can be employed to make a settlement possible, often coupled with tax considerations. One-hun-

dred thousand dollars paid to my client after January 1 may be more desirable than $125,000 paid before January 1, and the converse may also be true if my client is doing the paying and has had an extremely profitable year in which the deduction is badly needed and the next year looks to be less profitable. Payments over time may be of benefit to both parties,[4] and settlements in kind using property rather than money may offer very real tax advantages to both.

A good lawyer is not a willing gladiator. His efforts to persuade his client to settle should not be regarded as evidence of weakness or disloyalty, but rather as proof of his dedication and wisdom. It is far easier for a lawyer simply to carry out his client's sanguine demand to go to the lists as a champion of his patron's cause, and he will be paid a great deal more in the bargain, but it is hardly the badge of courage.

I have often reflected upon the fact that the three classic professions (doctors, the clergy and lawyers) have a common denominator — none would exist but for the frailty of man. Where lawyers are concerned, no endeavor is more consistently reviled, but there is a reason for this. Lawyers could be put out of business tomorrow; all that people need do is act reasonably toward one another, and I say this secure in the knowledge that it will never happen. Consequently, the sheer need for lawyers subconsciously embarrasses people, and they therefore resent lawyers, whose mere existence reflects their weakness. The redeeming virtue of the lawyer therefore lies in the contribution he can make toward the peaceful settlement of human controversy.

After the vast majority of matters have been distilled by the process of negotiation and compromise, there remains a residue of disputes to be resolved by resort to the courts. Courts are administered by judges, and a few words upon this subject may be helpful to the fledgling lawyer.

JUDGES

The appointed judge really comes out of the political process almost as directly as the elected judge. The appointing authority, usually the Governor, has no dearth of applicants, and the criteria upon which he makes his appointments to the bench include, at a high order of value, the political background and

[4] So-called "structured settlements" in the nature of annuities are very much in vogue.

stance of the supplicant. I use that term advisedly. He wants and sometimes needs the job, as we shall see hereafter.

In New Jersey, something more than mere lip service is given to the concept of a political balance in the judicial branch of government. No organic document mandates that New Jersey courts ought to be composed of a rough balance of Republican and Democrat, but every Governor in history has substantially adhered to an unwritten rule to this effect. Now, if a Democratic vacancy occurs on, say, the superior court in Camden County, during the term of a Republican Governor, he will certainly appoint a nominal Democrat but probably not an active Democrat politician. The choice must, as a practical matter, be acceptable to the Senator from Camden County regardless of his party because, by virtue of a practice often condemned and known as "Senatorial Courtesy," a nomination will never reach the floor for confirmation without his okay.

In sum, with these tribal variations, judges are generated by the political process. Occasionally, they leave a lucrative private practice to ascend the bench, moved by changing personal circumstances, such as a grown family, a loss of interest in the clamor of daily practice or a waning enthusiasm for combat. Much more often, the aspirant for the robe is quite plainly a jobseeker. The majority of judges did not give up a successful practice, though in many cases they would have you believe otherwise. Some never really practiced private law to any material extent, but in a few cases, some perfectly marvelous lawyers become wonderful judges at considerable economic sacrifice.

Public law offices, particularly those that attract media attention, such as prosecutors and United States Attorneys, form a natural ladder toward the bench. A large percentage of judges graduate from such offices, and this is a perfectly logical sequence in our political machinery. Such men are important in the operations of our government and are well attuned to the political realities. Even if their actual performance has been pedestrian, assuming they have not had any black marks in the press, a Governor may designate them for judicial office without having to make any excuses. It should also be noted that such positions (i.e., Prosecutor, U.S. Attorney, etc.) are temporary in the nature of things and are useful only as a springboard. Established private law firms are very rarely interested in taking in members from such offices because the firm would then be

barred, by virtue of ethical rules, from handling matters against the office in question for a substantial period of time.

Another pool of lawyers which yields a fair number of judges will be found at the local or municipal level. Practicing either alone or with one or two others, a zealous young lawyer can accumulate a respectable number of "markers" over the years and thus place himself in a position to have them redeemed by an appointment by the time he is, say, forty. This requires nothing more or less than loyalty and participation in party politics at the local level, attendance at party functions and generally making oneself known — coupled, of course, with having picked the right horse.

All of this may lead one to the conclusion that the best lawyers only rarely become judges. Though this assertion may be true, the best lawyers do not necessarily make the best judges. If you would conclude that political gestation and parturition is an unhealthy production system, I am not so sure you would be right. "Compared to what?" as the old joke goes. In certain other societies judges were never lawyers — they were educated and trained exclusively to be judges. Such a sterilized concept is foreign to our social heritage. After all, the science of government in a republic is the molding of people, and the only question worth debating is which is the matrix and which the clay. The Chief Executive declaims in his commencement address that, in our democracy, the government is responsive to the will of the people, while his cabinet and speech writers work to shape the people into his political mold. The audience applauds politely while apprehending perfectly the fact that such bromides are pure ritual mouthing, uttered by a man whose central concern is with his own image and future, while he lives in daily concern lest the beast unseat him.

There is a certain felicity in this arrangement and men who become judges by virtue of this system are particularly well equipped to understand its nuances. The delicate tuning which is necessary maintenance perhaps should be best entrusted to those born of its workings, though one who conceives himself competent to be a law-giver perforce lacks the requisite humility to serve in such a capacity.

CARE AND FEEDING OF THE BLACK-ROBED JURIST

The judge is one of the most personally sensitized creatures in captivity. Foreclosed by law from receiving emoluments be-

yond his pay check, the judge subsists upon a relatively modest salary, with a limited economic horizon dependent upon a legislature or the Congress. Subject to social restrictions in terms of association and conduct far greater than those imposed upon his former colleagues still enjoying the bonhomie (which is no mean part of the practice of law), he tends to be a bit touchy. He regards lawyers much as a married man regards bachelors.

One is well advised, therefore, to observe faithfully the protocol of the courtroom. Rising, when addressing the court or when the judge enters or leaves, is not only courteous but prudent. It is not necessary or sensible to fawn upon the court, because such conduct is offensive to both other counsel and to the judge, but deference to his Honor is absolutely essential to the success of a trial lawyer. The art of deferential disagreement is the highest form of forensic terpsichore.

In the course of oral argument, it will quickly become apparent that the court leans in a particular direction. If it is in your direction, cut short your remarks and sit down before you say something that may give your adversary a better purchase upon the matter. When the judge is inclined toward the other direction, however, some fast footwork is called for to shift the situation to your advantage. There are no guidelines for this recurrent situation, except to maintain "due respect" (a perfectly beautiful expression, when you think about it) for the court.

Remember, you are not writing upon a blank slate. Each judge is a product of his own background, and it is useful to learn what you can about the particular judge before whom you are to appear. A given case may be an uphill struggle before Judge A, and a piece of cake before Judge B, depending upon the personal, and not purely philosophical, predilections of each. A judge may dislike you, or your adversary or your client, or women, blacks, Esquimaux, Republicans — the whole perverse range of prejudices exists in judges as it does in all of us to some extent, and without doubt these prejudices find expression in rulings and decisions of the courts at every level. Discreet "forum shopping" is therefore an important ingredient in preparing any case.

At the outset, there is sometimes a choice between federal and state court, and this decision may be important since there are relatively few federal judges and the "steering" process is simplified.

If jurisdictional considerations are such that only state courts

are available, the plaintiff usually has certain "venue" options that may allow for commencement of the suit in any one of two or sometimes three different counties, and the judges sitting in each county can be evaluated against the peculiarities of the case. Even within a county, there may be a means of pleading an "equitable" issue, thereby getting the case before a particular judge and perhaps even denying the defendant a jury trial. For a classic example of this particular gambit, see the series of cases entitled *Associated Metals & Minerals v. Dixon Chemical & Research, Inc.*, 68 N.J. Super. 305, 172 A.2d 237 (Ch. Div. 1961); 82 N.J. Super. 281, 197 A.2d 569 (App. Div. 1963); 83 N.J. Super. 263, 199 A.2d 394 (Ch. Div. 1964), in which I tried, unsuccessfully, to fight free of this web and to get before a jury, convinced that a jury would not accept the plaintiff's version of the facts. My adversary and good friend, the late Charles Danzig, struggled mightily to keep the case in chancery court and without a jury, doubtless for exactly the same reasons. I lost this skirmish and ultimately the case. Perhaps I was wrong, and would have done no better with a jury, but Mr. Danzig and I then regarded this issue as potentially critical to the outcome, and I suspect we would still believe it to have been the key to the case.

"Judge shopping," or "forum shopping," is not always an affirmative matter. Sometimes a particular judge is to be avoided if at all possible. One former Federal Judge, who was my senior partner before he ascended to the federal bench (where he achieved some notoriety by releasing the so-called "Mafia tapes" in the 1960's), was a jurist to be avoided at all costs in criminal cases. The judge was a very careful judge who rarely made technical mistakes in rulings or in his charge to the jury and thus was seldom reversed on appeal. Persons accused of crime, however, who went to trial before this judge and a jury, were rarely ever acquitted, and his sentences were viewed as severe by even the most puritanical observers.

But if there were juries in these cases, how could the judge have influenced the verdict? The answer is — subtly. This judge had been a skillful trial lawyer. It is reversible error for a judge to suggest to a jury how he thinks it ought to decide a case, and the transcripts of criminal jury trials conducted before him are devoid of any evidence that he did so — but you may rest assured that the jury knew his sentiments. The raised eyebrow at the testimony of a defense witness; the tone of voice during the charge to the jury; a shade of solicitude for a prosecution witness — by

such means a judge can give direction to the flow and result of a jury trial.

Can the trial lawyer, whose case is on the receiving end of such judicial helmsmanship, overcome the judge's suggestions? The answer is a qualified "yes," with the degree of qualification directly proportional to the comparative skill of the judge and the lawyer. In every courtroom situation the judge has the clear advantage. Where a jury is in the box, it is entirely natural for the jurors to respect the judge and his office, and to warily regard the advocates as paid partisans. It sometimes happens that the judge, early on, exhibits a partisan position in the trial, sometimes inadvertently. Prompt, albeit polite, remonstrance from the offended attorney occasionally will cause the sensitive judge to shift the ballast to the other side, to overcompensate as it were out of sheer embarrassment and a wholesome desire not to unduly influence the trial. In some cases, however, an unfortunate sniping may begin between the court and counsel, and out of this situation only the most able lawyer can turn the dispute to his advantage.

When all else fails, and it is evident that the trial judge is a dedicated foe, a Draconian measure may still save the day, but it is a remedy not to be essayed by any save the most experienced and adroit counsel. It is called "trying for the record," and involves considerable risk, for it consists in some part of "baiting" the judge into imprudent actions and rulings. The heavy-handed lawyer not only invites the wrath of the trial judge and even the possibility of being held in contempt, but he awakens the most ruminant jurist from his reveries, and alerts him to the game.

In addition to creating possible reversible error on appeal, the technique offers a long-shot chance of winning over the jury. It requires at least a two-day trial for this to happen, because it takes at least that long to expose the human frailty of the judge to the jurors, but in an extended trial at least some of the jurors can identify with that poor lawyer, who, despite the most courteous arguments to the court, regularly has the gavel brought down upon him. The ageless battle of the "little guy" against established authority is sometimes a last refuge and (shocking?) can mask the lack of merit in a case.

THE VIEW FROM THE BENCH

What does a judge do when not on the bench? Probably the most important parts of his job. Given that trials are costly,

wasteful and useful only when all else fails to end the dispute, the time spent by a judge actually presiding over trials is less valuable to society than perhaps any other of his contributions.

In this age of computers, judges are held strictly accountable in an Orwellian sense for all of their time. Unlike lawyers, they have fixed holiday and vacation schedules, regular "business hours," generally from 9:00 a.m. to 4:00 p.m., and are subject to all of the bureaucratic annoyances of filling out forms on a daily basis as to their activities, attending required judicial seminars and the like.

A degree of circumspection necessarily places limits upon their social life; companions and activities must be chosen with proper regard for the image of the bench. A lawyer can get drunk with amiable consorts; judges are less likely to become stupefied by booze than by bores.

Each day's mail brings a new onslaught of moving papers. Motions seeking all sorts of pretrial relief, affidavits and briefs in support of and in opposition to the myriad of applications by which lawyers on each side of a controversy seek to gain strategic advantage or to head off some flanking movement by the other side. While some of these motions (summary judgment is a good example) involve stereotypes of well-established law, virtually every one requires that the judge familiarize himself with the factual complex to decide the motion. Often the decision is a difficult one requiring oral argument. Other motions, such as those addressed to interrogatories in a complicated case, are merely tedious and time-consuming, though of importance to the litigants and sometimes to the very outcome of the case.

Settlement conferences with counsel take up a substantial amount of time. Such conferences are necessarily conducted in the relative privacy of chambers, where the aid of an experienced and respected judge can often bring about a reconciliation of the differences separating the parties. Approximately ninety percent of all civil litigation is settled before trial commences and still our judicial system creaks under an increasing burden of litigation. Hence it is of critical importance that judges assist the negotiating process to maintain the system.

Lawyers often fail to appreciate the fact that the judge in most cases has never heard of the matter before it was assigned to him for trial. He has only a few minutes to glance over the pleadings, and if it is an involved case with multiple parties, each represented by counsel, the lawyers are far ahead of him at the

beginning, having lived with the case for upwards of two years and prepared for the trial over the immediately preceding days.

Any trial judge will confirm that a majority of lawyers appearing before him are incompetent to try the case, either because of lack of preparation, lack of training, skill and knowledge, or more commonly a combination of these factors which generally are found together. Once in a great while a judge will be blessed by having before him a case to be tried by lawyers all of whom are excellent. Although the case may be complicated, important and sharply contested, the job of the trial judge will be an easy one, because such lawyers know how to try a case. The proofs will be orderly, and the battles which will arise during the trial will be projected in clear focus for rulings by the court. Wherever counsel differ, it will be for a reason and not mere fluthering over collateral matters.

As I have said, such classic situations are few and far between. If there is one really good lawyer in a case it is an exception to the rule, and as a result the trial judge works hard from the bench to maintain some degree of discipline. He casts about to determine which of the lawyers is most likely to know what he is talking about, and quite understandably looks to that lawyer for guidance and assistance. That lawyer has the edge, and it is a satisfying experience to watch an old trial hand maneuver his way into that vacuum at the earliest possible moment in the trial. The trial judge knows that the lawyer will not mislead him into committing an egregious blunder (we are dealing with judge and lawyer *en rapport*; not at swords point) and the trial judge has no wish to be reversed on appeal. A few words upon the environment and habits of the appellate judge are necessary here.

The promotional ladder for judges extends upward through the appellate courts to the highest court of the jurisdiction. As elsewhere, the money is better nearer the top, as are the intangibles of reputation, prestige, etc. The trial judge whose rulings are regularly reversed by the appellate courts is likely to stay mired at the trial level. No matter what his political pull may have been before his appointment, he has lost some muscle by being away from the daily struggle for a while and, in addition, no Governor wants to be charged with having promoted a demonstrable hoople. Accordingly, for very practical reasons, a trial judge earnestly strives to make the correct rulings.

Appellate court judges live a very different professional life from that of their brothers on the trial bench. Except for oral

arguments on appeals, which may be heard on one or at the most two days a week, they are prisoners of the library and desk. Working with law clerks and their colleagues they bore through vast and often turgid briefs and records of cases decided at the trial level from which a disappointed party has taken an appeal. A monastic life at best.

At the highest level, the court of last resort, usually but not always called the Supreme Court, the rule-making power ordinarily resides. "Procedural" rules governing the practice have their genesis at this level, even in jurisdictions where legislative enactment of procedural rules is thought to be necessary or desirable. The rules constitute the lawyer's armory — weapons to be employed in the combat of litigation are drawn from this source and employed as prescribed. The sheer complexity of the system and its administrative functions imposes upon this court a heavy and continuous burden which must be discharged by the judicial branch. The independence of the judicial branch would be seriously undermined if the rule-making power were to be left to the executive or to the legislature.

As to the substance of the law, the highest appellate tribunal has the responsibility for setting the law's course, changing the rigging to adapt to the winds of social and economic change. Some people will complain that the judicial branch intrudes into the making of social policy—invading the province of the legislative branch and thereby watering down the principles of democratic government. While isolated examples of such action may be submitted, in every case an argument may be made in support of the judicial action as having been reaction to an existing stimulus as distinguished from the initiation of policy. The head of this and other such pins may provide work for the ticket taker at an angels' ball, but cannot profitably be examined here. The point is made.

Perspective — this is the rubric under which I have been invited to offer these random thoughts as we approach the millennium. Time is not a constant, but a variable. When I was a kid Christmas came about every three years; now it comes about every five months. Most people used to be older from my perspective — now most people are younger.

When I was admitted in 1950, television was a novelty, computers as we know them did not exist, abortion was not seriously debated, nor were environmental issues on the front burner. In those halcyon days, the New Jersey Highway Department (now

DOT) made do with two lawyers, career Deputy Attorney Generals who mainly handled eminent domain (condemnation) cases. In those days, however, the state was held to be immune from suit.

Over the course of the last forty two years, I have been fortunate in having been involved in almost one hundred reported state and federal court decisions, many of which involved important questions. I hope I may be forgiven for referring to a few of these cases as illustrations of the dramatic changes in our society and as a sort of preamble to my concluding observations.

One such case (really a trilogy of cases) bears the name *P.T. & L. Construction Co., Inc. v. The Commissioner*, 55 N.J. 341, 262 A.2d 195 (1970); 57 N.J. 439, 273 A.2d 353 (1971); 60 N.J. 308, 288 A.2d 574 (1972). Every decision of any consequence is the product of evolutionary changes in the perception of society at a given point in time. Let me use this case to illustrate the proposition.

CHARLES THE SECOND WAS A DEADBEAT

The de facto insolvency of republican governments has been so long accepted that it would be considered gauche to express concern over the legacy of debt which succeeding generations must, at least on paper, assume. In the formation and maintenance of governmental apparatus, the primary consideration is how to raise the green. There seems to be a principle of economics which requires that the debts of government always exceed its capacity to raise the necessary revenue to pay the debts.

It is, therefore, not surprising that the political organism, confronted by a demand from one who has the bad taste to expect payment, generates a protective shield to insulate it, as a practical matter, from the prospect of de jure bankruptcy. Nor is the implementation of such a device very difficult, for the ordinary supplicant must look to the processes of the debtor government to compel payment of the debt. Accordingly, the pompous declaration by the sovereign debtor that it enjoys a magical "immunity" from suit in its own courts on account of the debt is entirely predictable. One need only apply biological laws to the political organism. Morality, like flowers that bloom in the spring, has nothing to do with the case.

Of course, it follows that there must be a symbiotic relationship between the ermine and the shylock to maintain this ridiculous process. The bankers, taken collectively, uniquely enjoy the

leverage to require the sovereign to keep current its obligations; if the bankers turn off the spigot, the structure collapses. But this essential truth does not in any way depend upon invoking the judicial processes of the sovereign to enforce the contract. It is a simple matter of self-preservation on the part of the borrowing sovereign. Consequently, when a State undertakes to borrow the odd two hundred or three hundred million, learned and venerable Bond Counsel, having labored long with scissors and paste to generate a labyrinthine document called The Indenture (I.O.U.), reverently proclaim to prospective investors that they have examined the entire transaction and that everything is jake, secure in the knowledge that the State will jack the necessary revenue out of the taxpayers to meet the interest and principal payments because default would impair or prevent future borrowing.

Oddly enough, I have never seen an opinion of Bond Counsel that contained the caveat that the borrower would not be subject to suit in the event of a default; that the borrower had in fact proclaimed itself to be "immune" from suits upon its contracts. No, that defense is especially reserved for use against the little guy, the casual contractor whose economic demise is not material to the continued well-being of the sovereign. Charles II was a big spender and ran the Crown into hock in the seventeenth century. Chuckles abused a good thing by overdoing it, and threatened the harmony of the perpetual spiral. He ran out of the ready, bought some time by pledging annuities out of the hereditary revenues of the Crown but defaulted again, then shuffled off the mortal coil and left the problem for William.

The money lenders presented a Petition in the Exchequer to which the attorney general demurred, but a majority of the Exchequer gave judgment against the Crown, holding that the proceeding was a proper one. The Exchequer Chamber reversed, but the House of Lords affirmed the original judgment of the Exchequer in a case appropriately called *The Bankers Case*, which you will find thoroughly analyzed and followed in the case of *Thomas v. The Queen*, L.R. 10 Q.B. 31 (1874). The proceeding in *The Bankers Case* was technically called a Petition of Right, and was a judicial proceeding "to be tried like suits between subject and subject."[5] The House of Lords' decision in *The Bankers Case* was issued in the late 1600's and therefore gives lie to the proposition that the sovereign in England was immune from suits in contract

[5] U.S. v. O'Keefe, 78 U.S. 178, 183 (1870).

cases. The majesty of the law will not, I think, be seriously tarnished if I suggest the possibility that the Bankers may well have held personal markers of several members of the House of Lords.

Incidentally, the language used in the case of *Thomas v. The Queen*, referred to above, draws a careful distinction between a suit based upon a contract with the sovereign and suits against the sovereign sounding in tort. The "immunity" of the sovereign from suits in tort was always maintained in the absence of legislative waiver of such "immunity." Despite such puerile utterances in support of the doctrine as "the king can do no wrong," the non-liability of government for its accidental mistakes can be supported because it does not involve conscious, deliberate conduct, and one who voluntarily accepts the services of that government may perhaps fairly be said to have voluntarily accepted the incidental risks of injury or harm by the action or inaction of that government.

Philadelphia, in the summer of 1787, was mostly hot. The loose Confederation of thirteen sovereigns became an alloy in that kiln. Representatives at the Constitutional Convention, without the benefit of air conditioning, copiers and the like, hammered out what was to become the Constitution of the United States. In pertinent part, the organic document provides "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[6] Vital to an understanding of the significance of the Contract Clause is an appreciation of the gloomy economic and political status of the confederated States as they existed for eleven years prior to the Constitutional Convention. We still employ the phrase "not worth a continental" to express extreme lack of value, and the reference is, of course, to the paper currency issued at the time of the American Revolution.

As the delegates drifted into Philadelphia, the thirteen states conceived that they had very little in common; several states maintained their own navies, and New Jersey actually had its own customs service. In the beginning, Rhode Island did not bother to send any delegates.

Those who were dedicated to the Federal principle were acutely aware of the absolute necessity that the credit of the New Government be guaranteed absolutely. We hear little of the

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[6] U.S. CONST. art. I, § 10.

Contract Clause today, but it was then believed to be of central importance in selling the virtues of a Federal system.

In more recent times, the continued viability of the nation was severely threatened by an economic debacle. The great boughs of the Constitution which had thickened without severe stress over nearly a century and a half were sorely taxed by the winds of the Great Depression. Draconian measures instituted by the Congress at the behest of the Chief Executive were tested in the Supreme Court against the constitutional blueprint.

In the welter of decisions which emerged from this constitutional storm and strife, the Supreme Court, in *Home Building and Loan Association v. Blaisdell*,[7] was obliged to address a challenge to a Minnesota statute. Passed in 1933, the statute's terms limited its life to the period of the economic emergency's existence, and in no event beyond May 1, 1935. Beside providing other relief for a distressed mortgagor, the statute also authorized courts to extend the redemption period from foreclosure sales for such period as the court deemed just and equitable, but in no event beyond May 1, 1935.

Mr. Justice Sutherland, writing for the four dissenting justices, was obliged to concede at the very outset that, on its face, the statute offended the Contract Clause. He freely acknowledged that:

> A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress. Indeed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 518, 644-45.[8]

A full set of footnote references leads the interested scholar to the pertinent historical sources. At any rate, the majority in the *Blaisdell* opinion concluded that the act in question, since it provided for compensation to the mortgagee, did not offend the Contract Clause, distinguishing between an invalid impairment of the obligation of a contract and a valid change in the remedy to enforce it. In

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[7] 290 U.S. 398 (1934).

[8] *Blaisdell*, 290 U.S. at 453-54 (Sutherland, J., dissenting).

so doing, the opinion recognized the proposition that contracts are subject to the exercise of the power of eminent domain, conditioned upon the payment of just compensation for the property so taken.

The principle was recognized in *West River Bridge Company v. Dix*.[9] While the duty to pay just compensation for the taking of private property for public use is a Fifth Amendment guarantee applicable to the federal government, the requirement is made applicable to the States by the Fourteenth Amendment.[10]

If you will forgive the momentary lapse into stylized legal writing, let me get back to the point. What happened to the principle of *The Bankers Case*? There is a fixed and immutable constant; the borrowing capacity of the sovereign is essential to its very survival, and it instinctively does whatever is required to reassure the Bankers. This was the reason for including the Contract Clause in the Constitution, and the same instincts for self-preservation underlie all of the sophistry employed to prop up the shield of "immunity" in contract cases. The Bankers have the leverage anyway, and as for those who do not qualify as Bankers, they must be taught a proper respect for the orb and scepter.

To return to the beginning, I represented the plaintiff in the *P.T. & L. Construction Co., Inc.*[11] trilogy in which we assaulted the citadel by suing the State of New Jersey for the balance on a construction contract, much to the amazement of the State. Expecting to be drop-kicked out of court at the trial level on the ground of sovereign immunity, I was not disappointed. The appeal went to the New Jersey Supreme Court and, in 1970, the court held that the State could be sued in a contract case, expressly overruling all prior New Jersey decisions to the contrary, but leaving open the question of what would happen if the legislative and executive branches refused to honor a money judgment against the State entered by the judicial branch. Meanwhile, I had proceeded with the assertion of the same claim to a legislative committee. Three times in three successive years the Legislature passed a bill providing for the payment of the claim. Three times the Governor vetoed the appropriation.[12]

The vetoes by the Chief Executive were, in each case, bottomed

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9 47 U.S. (6 How.) 507 (1848).

10 *See* Griggs v. Allegheny County, 369 U.S. 84 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897).

11 55 N.J. 341, 262 A.2d 195 (1970), *modified*, 57 N.J. 439, 273 A.2d 353 (1971), *modified*, 60 N.J. 308, 288 A.2d 574 (1972).

12 Ironically, on two of those occasions, the Governor was a man who later became my partner in the practice of law.

upon the sound conviction that such claims ought to be tried in the courts, rather than presented to legislative bodies which are afflicted by whim and caprice, and occasionally by less innocent vectors.

Nothing is better calculated to arouse a legislative body from its customary lethargy than the suggestion by the Judicial Branch that it might act in an area which the politicians have come to regard as a special preserve. Accordingly, the New Jersey Legislature promptly enacted a statute purporting to bar the maintenance of any such suit filed prior to July 1971. Quite flattering, since my case was the only one of its kind then in captivity. Since this case was back in the trial court, the Attorney General once again moved for judgment based upon this statute and we were summarily booted out on the street. I picked myself up and climbed yet again to the Supreme Court which, in February of 1971, found it unnecessary to decide whether the statute was constitutional, relying upon the advice of the Attorney General to the effect that it was merely a temporary moratorium and was not intended as a permanent bar. This judicial deference was rewarded by the immediate enactment of a statute extending the moratorium until April 1, 1972. Once again, like Sisyphus, I began the task of rolling the stone back up the hill to the Supreme Court which, in March of 1972, finally held that it was the duty of the Judicial Branch to provide a forum for the disposition of this suit in contract against the State notwithstanding the statute.

By way of epilogue, within 48 hours of the decision's announcement, the Attorney General announced that the Executive Branch, after long study, had prepared a proposed statute that would confirm and vindicate the right of all persons to sue the State of New Jersey upon an express contract. This was promptly enacted into law,[13] and does not require description or comment beyond this: it is four pages long. It had to be lengthy to severely curtail the rights which it professes to confirm.

CONCLUSION

I think of myself primarily as a litigator and, like all such specialists, I have a tendency to become infatuated with my own utterances. Still, I remain something of a sophomore in my deeply felt reverence for the institution of the law. Our perception of social evolution throughout the world is kaleidoscopic. This will always be so, and the role of a lawyer is to monitor and evaluate

[13] *See* N.J. STAT. ANN. § 59:13-1 to -10 (West 1992).

the ever-changing social weather to the end that his or her clients may anticipate and adapt to changes as they occur.

We all have the same tools: a decent education, access to a law library, Lexis and Westlaw, etc. Given this sound foundation and assuming continuing diligence and hard work, your level of achievement depends almost entirely upon your imagination. Think the problem through, be inventive, challenge the status quo and keep on trucking. Above all, read outside the law. Despite the need for specialization, the law is not a vertical discipline such as metallurgy or accounting, it is horizontal, cutting laterally across the cultural grain. It is the web which holds everything else together; all other endeavors are warp — the law is woof.

I have said enough, though I am by no means finished. If I have entertained the reader to some extent without unduly taxing his patience, my purpose will have been served. I will therefore close with a quotation:

> I hasten to emphasize the fact that I am far from esteeming myself capable of reporting all that took place at the trial in full detail, or even in the actual order of events. I imagine that to mention everything with full explanation would fill a volume, even a very large one. And so I trust I may not be reproached, for confining myself to what struck me. I may have selected as of most interest what was of secondary importance, and may have omitted the most prominent and essential details. But I see I shall do better not to apologize. I will do my best and the reader will see for himself that I have done all I can.[14]

EPILOGUE

The risk of boring the reader is overcome by ego; therefore, I have taken the liberty of citing some of the other reported cases that I had the privilege of arguing between 1958 and 1988, with sometimes irreverent syllabi by the author.

1958

Coughlin v. U.S. Tool Co., 52 N.J. Super. 341, 145 A.2d 482 (App. Div. 1958), *certif. denied*, 28 N.J. 527, 147 A.2d 305 (1959) (If kids climb on your roof and fall off, you might not be liable.).

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[14] FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV 799 (Constance Garrett trans., Random House 1950).

1960

Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (Can a child maintain a suit alleging that it sustained prenatal injuries negligently caused by the defendant?);

Mueller v. NJHA, 59 N.J. Super. 583, 158 A.2d 343 (App. Div. 1960) (There may be a taking of private property for public use requiring the payment of compensation, even where there is no physical invasion of the real estate.).

1961

Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc., 68 N.J. Super. 305, 172 A.2d. 237 (Ch. Div. 1961) (Sulphur is a nuisance — how to make sulfuric acid, according to the New Jersey Supreme Court);

Miller v. Muscarelle, 67 N.J. Super. 305, 170 A.2d 437 (App. Div. 1961) (When can evidence of a prior similar accident be introduced upon the issue of notice?);

Dowd v. Boro Drugs, Inc., 70 N.J. Super. 488, 176 A.2d 13 (App. Div. 1961) (Advertising in magazines circulated in a state is not sufficient "contact" with the state to subject the advertiser to jurisdiction of state courts.).

1962

Marion v. Public Service Electric & Gas Co., 72 N.J. Super. 146, 178 A.2d 57 (App. Div. 1962) (What duties are "non-delegable?" The right to control does not automatically give rise to a duty to control.);

Walter Reade, Inc. v. Township of Dennis, 36 N.J. 435, 177 A.2d 752 (1962) (Does a municipality have the right to tax a restaurant located upon a State toll road passing through the town?);

DeVito v. Mullen's Roofing Co., 72 N.J. Super. 233, 178 A.2d 226 (App. Div. 1962) (When I ask for your opinion, I'll tell you what to say.).

1963

Makar v. St. Nicholas Ruthenian (Ukrainian) Greek Catholic Church, 78 N.J. Super. 1, 187 A.2d 353 (App. Div. 1963) (A churchgoer may constitutionally be barred from suing the church by a "charitable immunity" statute, even though the man who reads the gas meter could bring such an action if not a communicant.).

Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc., 82 N.J. Super. 281, 197 A.2d 569 (App. Div. 1963) (If you can conjure up a claim for equitable relief at the outset, you can effectively prevent the defendant from getting a jury trial upon any issue. Also, how to prove damages through a witness who has no first hand knowledge of the facts.);

1964

Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc., 83 N.J. Super. 263, 199 A.2d 394 (Ch. Div. 1964) (Some observations on the method of calculating interest due plaintiff after an appellate court modifies the original judgment.);

New Jersey Turnpike Authority v. American Federation of State, County, and Municipal Employees, 83 N.J. Super. 389, 200 A.2d 134 (Ch. Div. 1964) (Public employees have no right to strike.).

1965

Ekalo v. Constructive Service Corp. of Amer., 46 N.J. 82, 215 A.2d 1 (1965) (A wife may sue for loss of "consortium" where her husband was negligently injured by the defendant. "Fear of expansion of litigation should not deter courts from granting relief in meritorious cases." (citing *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960))).

1966

Board of Education v. Palmer, 46 N.J. 522, 218 A.2d 153 (1966) (Absent a physical invasion of real estate, under what circumstances may construction of a highway constitute a "taking of private property for public use requiring the payment of 'just compensation?' " The Supreme Court ducks the issue.).

1967

New Jersey Chapter, American Institute of Planners v. New Jersey State Board of Professional Planners, 48 N.J. 581, 227 A.2d 313 (1967) (The Supreme Court does not sit as a super-legislature, or so it says.);

Commercial Union Insurance Co. v. Burt Thomas-Aiken Construction Co., 49 N.J. 389, 230 A.2d 498 (1967), *rev'g* 91 N.J. Super. 13, 218 A.2d 892 (App. Div. 1966), *rev'g* 87 N.J. Super. 287, 209 A.2d 155 (Law Div. 1965) (Don't rely upon notaries public — you do so at your peril.).

1968

United New York Sandy Hook Pilots Ass'n v. Rodermond Industries, Inc., 394 F.2d 65 (3d Cir. 1968) (What is the relationship between maritime law and the law of a State? Admiralty law of indemnity analyzed.);

Board of Education v. NJEA, 96 N.J. Super. 371, 233 A.2d 84 (Ch. Div. 1967), *aff'd* 53 N.J. 29, 247 A.2d 867 (1968) (Teachers, like others in public employment, may not take concerted action which obstructs or disables government.).

1969

Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104, 251 A.2d 295 (App. Div. 1969), *aff'd per curiam*, 54 N.J. 11, 252 A.2d 403 (1969) (When you seek the aid of the courts in challenging regulatory action by administrative agencies, you are swimming upstream. The beginnings of the energy cost explosion.).

Garden State Parkway Employees Union v. NJHA, 105 N.J. Super. 168, 251 A.2d 463 (App. Div. 1969) (When is a State agency not a State agency?);

Jacobs v. NJSHA, 54 N.J. 393, 255 A.2d 266 (1969) (Mandatory retirement at a certain age may not be enforced where integrity of a pension fund may be jeopardized.).

1970

Lullo v. International Association of Fire Fighters, 55 N.J. 409, 262 A.2d 681 (1970) (comparing the rights of persons in public employment to organize and negotiate collectively with the rights of persons in private employment to bargain collectively);

NJHA v. Sills, 109 N.J. Super. 424, 263 A.2d 498, *modified*, 111 N.J. Super. 313, 268 A.2d 308 (Ch. Div. 1970) (The legislature may not constitutionally impair contract rights.);

Biger v. Erwin, 57 N.J. 95, 270 A.2d 12 (1970) (A jockey is the employee of the owner of the horse, not an employee of the trainer.).

1971

State v. Birch, 115 N.J. Super. 457, 280 A.2d 210 (App. Div. 1971) (problems incident to the dedication of public streets — when does a street become a street?).

1972

P.T. & L. Construction Co. v. Commissioner, 55 N.J. 341, 262 A.2d 195 (1970), *modified*, 57 N.J. 439, 273 A.2d 353 (1971), *modified*, 60 N.J. 308, 288 A.2d 574 (1972) (The King can do wrong! The State is subject to suit for breach of contract.);

Campbell Foundry Co. v. Sullivan, 119 N.J. Super. 51, 289 A.2d 801 (App. Div. 1972) (Before the Sierra Club, a court expresses a primitive view on pollution control — the cost to cure ought not to be unreasonable in the balance between the utility of the enterprise and the effect upon the environment.);

Concerned Citizens of Marlboro v. Volpe, 459 F.2d 332 (3d Cir. 1972) (The good old days, when a highway could be built without years of hearings and litigation on a variety of environmental considerations.).

Trap Rock Industries, Inc. v. Kohl, 115 N.J. Super. 278, 279 A.2d 138 (App. Div. 1971), *rev'd*, 59 N.J. 471, 284 A.2d 161, *certif. denied*, 405 U.S. 1065 (1972) (An indictment of a majority stockholder alone is sufficient evidence of a lack of moral integrity to justify suspending a corporation from supplying material for use in public work.);

1973

Rite Aid of New Jersey, Inc. v. Board of Pharmacy, 124 N.J. Super. 62, 304 A.2d 754 (App. Div. 1973) (Classic example of the abuse of licensing to maintain a narrow market, all at the cost of the consumer. Administrative regulations, properly gussied up, will not be set aside by the courts. The packaging is the critical thing.);

Cervase v. Kawaida Towers, Inc., 124 N.J. Super. 547, 308 A.2d 47 (Law & Ch. Divs. 1973) (Leroi Jones, a.k.a. Imamu Baraka, establishes a black, African-oriented housing project in the heart of North Newark, a predominantly white neighborhood under the suzerainty of Tony Imperiale.).

1974

Foont-Freedenfeld Corp. v. Electro-Protective Corp., 126 N.J. Super. 254, 314 A.2d 69 (App. Div. 1973) *aff'd*, 64 N.J. 197, 314 A.2d 68 (1974) (An unsuccessful effort to do an end run around a limitation of liability provision in a contract; equitable fraud, a classic oxymoron, defined.);

Singleton v. Consolidated Freightways Corp., 64 N.J. 357, 316

A.2d 436 (1974) ("Liberal construction" does not authorize ignoring the plain language of a statute.);

Allstate Insurance Co. v. Howard Savings Institution, 127 N.J. Super. 479, 317 A.2d 770 (Ch. Div. 1974) (Laches, waiver, estoppel: excuses for refusal to pay debts. The conjunction "and" is interchangeable with "or.");

Hudik-Ross, Inc. v. 1530 Palisade Avenue Corp., 131 N.J. Super. 159, 329 A.2d 70 (App. Div. 1974) (The courts will enforce agreements to arbitrate disputes whenever possible.).

P.T. & L Construction Co. v. Teamsters Local Union No. 469, 131 N.J. Super. 104, 328 A.2d 642 (Law Div. 1973), *aff'd*, 66 N.J. 97, 328 A.2d 603 (1974) (suit against labor union for damages as the result of a work stoppage held subject to arbitration rather than civil litigation);

Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974) (Can a child maintain a suit for damages against Dad where it is alleged that Dad murdered Mom?);

1975

Howard M. Schoor Associates, Inc. v. Holmdel Heights Construction Co., 68 N.J. 95, 343 A.2d 401 (1975) (The statute of frauds is not available as a defense where some benefit flows to the person who orally guarantees the debt of another.);

Taylor v. Shepard, 136 N.J. Super. 85, 344 A.2d 344 (App. Div. 1975) (What is the standard of care by which lawyers' malpractice is to be measured?).

1976

R.J. Longo Construction Co. v. Township of Hamilton, certif. granted, 68 N.J. 492, 348 A.2d 533 (1975), *aff'd per curiam* (Jan. 13, 1976) (The mystery case. The state supreme court affirmed the appellate division by virtue of an equally divided vote (3-3). Neither the appellate division nor the supreme court affirmance is reported. I'll never tell!);

State v. Winters, 140 N.J. Super. 110, 355 A.2d 221 (Law Div. 1976) (What is perjury?);

State v. Laqanella, 144 N.J. Super. 268, 365 A.2d 224 (App. Div. 1976) (In a criminal case, the prosecution failed to turn over the tape of an interview with a principal state witness. The trial judge dismissed the indictment but the appellate court reversed and held that a new trial would not constitute double jeopardy.

Was I guilty of "gamesmanship" as the appellate court suggested?).

1977

KSB Technical Sales Corp. v. North Jersey District Water Supply Commission, 150 N.J. Super. 533, 376 A.2d 203 (Ch. Div. 1977) (A state "buy American" statute may be invalid where it conflicts with United States trade agreements with foreign countries.);

Ukrainian National Urban Renewal Corp. v. Muscarelle, 151 N.J. Super. 386, 376 A.2d 1299 (App. Div. 1977) (What is the essence of arbitration?).

1978

George Harms Construction Co. v. Borough of Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960 (Law Div. 1978) (The word "shall" in a statute is presumed to be used in its imperative (as distinguished from directory) sense.);

George Harms Construction Co. v. Ocean County Sewerage Authority, 163 N.J. Super. 107, 394 A.2d 360 (App. Div. 1978) (the case of the bogus bond);

Gilborges v. Wallace, 78 N.J. 342, 396 A.2d 338 (1978) (When an appeal as of right lies because of a dissent in the Appellate Division, only the issues comprehended by the dissent may be argued.).

1979

Brick Township Municipal Utilities Authority v. Diversified R.B. & T. Construction Co., 171 N.J. Super. 397, 409 A.2d 806 (App. Div. 1979) (Either sue or demand arbitration first — talk later, lest you be barred by acting more reasonably.).

1980

Sasso v. State, 173 N.J. Super. 486, 414 A.2d 603 (App. Div. 1980) (If you rely upon what the government tells you, don't cry later.);

Conforti v. Eisele, Inc. v. J.C. Morris, 175 N.J. Super. 341, 418 A.2d 1290 (Law Div. 1980) (If the plans are defective, you can sue the design professional who prepared them even though you had no contract with him.).

1981

Saturn Construction Co. v. Middlesex County Freeholders, 181 N.J. Super. 403, 437 A.2d 914 (App. Div. 1981) (An unsuccessful bidder on a public contract does not have standing to challenge the terms of the specifications after the opening of bids.).

1983

Nappe v. Anschelewitz, Barr, Ansell & Bonello, 189 N.J. Super. 347, 460 A.2d 161 (App. Div. 1983) (Punitive damages are allowable even where the plaintiff cannot prove any compensatory damages.);

Schiavone v. Time, 569 F.Supp. 614 (D.N.J. 1983) (The Fourth Estate is well protected if it "reports" calumny gleaned from an "official" document. Per Stern, J.).

1984

Nappe v. Anschelewitz, 97 N.J. 37, 477 A.2d 1224 (1984) (Punitive damages may be recovered even where the plaintiff suffered no injury or loss, if the defendant's conduct was "egregious.");

Schiavone v. Mario Montuoro, 587 F.Supp. 66 (S.D.N.Y. 1984) (Public prosecutors may defame you with impunity.);

Schiavone v. N.Y.C. Transit Authority, 593 F. Supp. 1257 (S.D. N.Y. 1984) (Federal courts are reluctant to interfere with state court criminal proceedings.);

Schiavone v. Fortune, 750 F.2d 15 (3d Cir. 1984) (There is no such thing as *Fortune* magazine.);

Schiavone v. Time, 735 F.2d 94 (3d Cir. 1984) (*See* 1986) (Judge Stern was wrong.).

1985

Conforti & Eisele v. John C. Morris Assoc., 199 N.J. Super. 498, 498 A.2d 1233 (App. Div. 1985) (Anybody can sue anybody for anything and may win.);

Schiavone v. Hackensack Meadowlands Dev. Comm., 98 N.J. 258, 486 A.2d 330 (1985) (You can fight City Hall.);

Schiavone v. Const. Co., v. Time, Inc., 619 F.Supp. 684 (D.N.J. 1985) (It looks like I was right, per Sarokin, J.).

1986

Petition for Review of Opinion No. 552 of the Advisory Committee on

Professional Ethics, 102 N.J. 194, 507 A.2d 233 (1986) (Representing the government and its officials charged with wrongdoing is not *per se* prohibited as "conflict of interest.").

Schiavone v. Fortune, 477 U.S. 21 (1986) (If a company does business under several different names, make sure you guess the right one.);

Schiavone v. Merola, 638 F.Supp. 206 (S.D.N.Y. 1986) (*See* 1988 — prosecutors can say whatever they like about you, in or out of court.);

Schiavone v. Const. Co. v. Time, Inc., 646 F.Supp. 1511 (D.N.J. 1986) (It looks like I was wrong, per Sarokin, J.).

Petition for Review of Opinion No. 583 of the Advisory Committee on Professional Ethics, 104 N.J. 447, 517 A.2d 435 (1986) (In administrative hearings, the government attorney ought not to communicate ex parte with the hearing officer.).

1988

Schiavone Constr. Co. v. Merola, 848 F.2d 43 (2d Cir.), *cert. denied*, 488 U.S. 855 (1988) (Prosecutors enjoy even more immunity than media.);

Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988) (It looks like I was right.).