Practice Tips
For
Social Security Disability Practitioners

A Podcast Series Presented by:

The Social Security Bench-Bar Committee

United States District Court for the Western District of Washington

Podcast 1: Practice Tips for Effective and Ethical Legal Writing

In this podcast, Magistrate Judge Theresa Fricke will discuss ethics in Social Security disability appeals practice specific to writing. This is a panel presentation with Chris Dellert, plaintiffs' attorney, and Joe Langkamer, a Government attorney. The discussion will involve Washington's Rules of Professional Conduct (RPC) with respect to briefing practices in federal court.

Summary of Materials

1. Outline of Podcast 1

2. Biographies of Speakers

3. Resources
    a. Washington Rules of Professional Conduct
        i. Preamble
        ii. Rule 1.1 – Competence
        iii. Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer
        iv. Rule 1.4 – Communication
        v. Rule 3.2 – Expediting Litigation
        vi. Rule 3.3 – Candor toward the Tribunal
        vii. Rule 4.3 – Dealing with a Person Not Represented by a Lawyer

    b. Case Authority
        i. *Reid v. U.S. I.N.S.*, 949 F.2d 287 (9th Cir. 1991)
        ii. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)
        iii. *Garrison v. Colvin*, 759 F.3d 995 (9th Cir. 2014)
        iv. *Trevizo v. Berryhill*, 871 F.3d 664 (9th Cir. 2017)
        v. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090 (9th Cir. 2014)
        vi. *Leon v. Berryhill*, 880 F.3d 1041 (9th Cir. 2017)

    c. Secondary Sources
        i. Wyatt G. Sassman, How Circuits Can Fix Their Splits, 103 Marq. L. Rev. 1401 (2020)
        ii. Luci D. Davis, "Heads We Win; Tails, Let's Play Again": The Split over the Credit-As-True Rule in the Ninth Circuit, 50 Ariz. St. L.J. 365, 366 (2018)
        iii. Sarah E. Ricks & Jane L. Istvan, Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs, 38 U. Tol. L. Rev. 1113 (2007)

Introduction to the Podcast: Judge Fricke

Introduction to the Social Security Committee and CLE Series by Remote Means: Judge Fricke

- This will be the first installment of our series of podcasts—all relating to ethics in the practice of law for Social Security disability litigation

A. Ethical Rules

1. Wash. R. Prof. Conduct 1.1, Competence
2. Wash. R. Prof. Conduct 3.2, Expediting Litigation
3. Wash. R. Prof. Conduct 3.3, Candor Toward the Tribunal

B. Questions and Examples – Chris Dellert, Joe Langkamer

C. Wrap-up by Judge Fricke; preview of the next CLE podcast

United States Magistrate Judge Theresa L. Fricke

Judge Fricke was appointed to the federal bench on May 1, 2017. She is a graduate of the Seattle University School of Law, and the University of Washington Foster School of Business. Before becoming a United States Magistrate Judge, she served as an Assistant Attorney General representing the Washington State Department of Transportation (WSDOT) in construction litigation and advising on construction contracts. While an Assistant Attorney General, Judge Fricke was co-chair of the statewide committee on electronic discovery for the Washington State Attorney General's Office. She also represented the Department of Social and Health Services in complex litigation.

Judge Fricke is President-Elect of The Honorable Robert J. Bryan American Inn of Court in Tacoma. As a member of the Inn of Court, she works with a team of judges and attorneys to produce a civics program for undergraduate students at the University of Washington Tacoma campus, in collaboration with the University of Washington Legal Pathways program. Judge Fricke is a member of: The Federal Bar Association for the Western District of Washington; Diversity Committee of the Federal Magistrate Judges Association; Magistrate Judge Education Committee of the Ninth Circuit; and a Judicial Advisor concerning the Civil Jury Project, New York University School of Law.

Early in her career, Judge Fricke served as a staff attorney with the Washington Pattern Jury Instruction Committee (2009-12). She worked in private practice in Pierce County (1998-2009); and was a Senior Deputy Prosecuting Attorney with the King County Prosecutor's Office in Seattle (1990-98), where Judge Fricke led the Criminal Division Appellate Unit. She specialized in appellate practice, presented many cases as lead counsel in the Washington Supreme Court, and handled jury trials as second chair, including an Aggravated First-Degree Murder case.

When she is not working, Judge Fricke enjoys trail running, cross-country skiing, horseback riding, and traveling with family and friends.

CHRISTOPHER DELLERT

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EXPERIENCE

OCTOBER 2010 – PRESENT

MANAGING PARTNER, DELLERT BAIRD LAW OFFICES, PLLC

- Drafting legal memoranda (motions, briefs, replies) in appeals to the United States District Courts and the Ninth Circuit Court of Appeals.
- Researching Statutes, Regulations, Caselaw, and other authorities.
- Maintaining schedule for all deadlines related to our cases.
- Reviewing potential cases for appeal.
- Proofreading and editing briefs and motions prepared by associates.
- Drafting correspondence to clients and government agencies.

DECEMBER 2002 – SEPTEMBER 2010

PARALEGAL, SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE GENERAL COUNSEL

- Maintain database of cases and deadlines for workload of 800+ cases a year.
- Edit and format legal memoranda prepared by attorneys to appropriate Court standards.
- Draft motions and answers.
- Contact opposing counsel, U.S. Attorney's Offices, and other SSA components to resolve issues.
- File briefs, motions, answers, and other documents for attorneys through the electronic case filing system.

EDUCATION

12/2009 - JURIS DOCTOR, SEATTLE UNIVERSITY

5/1999 – MASTER OF ARTS DEGREE IN LITERATURE – IOWA STATE UNIVERSITY

5/1995 – BACHELOR OF SCIENCE, WRITING; MINOR, LITERATURE – SLIPPERY ROCK UNIVERSITY

Joseph Langkamer

Joe Langkamer is an Assistant Regional Counsel for the Office of the General Counsel for the Social Security Administration. Before joining the Office of the General Counsel in 2014, Joe worked for a law firm in Philadelphia for several years and, prior to that, clerked for a U.S. Court of Appeals Judge for the Third Circuit. He graduated from Temple University School of Law.

Resources

1. Washington Rules of Professional Conduct – Available via Washington Courts
    a. Preamble
    b. Rule 1.1 –Competence
    c. Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer
    d. Rule 1.4 – Communication
    e. Rule 3.2 – Expediting Litigation
    f. Rule 3.3 – Candor toward the Tribunal
    g. Rule 4.3 – Dealing with a Person Not Represented by a Lawyer

2. Relevant Case Law
    a. *Reid v. U.S. I.N.S.*, 949 F.2d 287 (9th Cir. 1991)
    b. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)
    c. *Garrison v. Colvin*, 759 F.3d 995 (9th Cir. 2014)
    d. *Trevizo v. Berryhill*, 871 F.3d 664 (9th Cir. 2017)
    e. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090 (9th Cir. 2014)
    f. *Leon v. Berryhill*, 880 F.3d 1041 (9th Cir. 2017)

3. Secondary Sources – Available via Westlaw
    a. Wyatt G. Sassman, How Circuits Can Fix Their Splits, 103 Marq. L. Rev. 1401 (2020)
    b. Luci D. Davis, "Heads We Win; Tails, Let's Play Again": The Split over the Credit-As-True Rule in the Ninth Circuit, 50 Ariz. St. L.J. 365, 366 (2018)
    c. Sarah E. Ricks & Jane L. Istvan, Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs, 38 U. Tol. L. Rev. 1113 (2007)

Podcast 2a & 2b: Ethical Considerations Regarding the Respective Roles of the Claimant and the Attorneys for Both Sides

In these podcasts, Magistrate Judge J. Richard Creatura will have a panel discussion about ethical considerations regarding the respective roles of the claimant, the Administration, and attorneys for both sides.
In podcast 2a, we will hear the perspective of Victoria Chhagan and Amy Gilbrough, attorneys who represent claimants. In podcast 2b, we will hear the perspective of Stephen Dmetruk, an Administration attorney.

Summary of Materials

1. Outline of Podcasts 2a and 2b
2. Biographies of Speakers
3. Resources

Podcast Outline

Ethical Considerations Regarding the Respective Roles of the Claimant and the Attorneys for Both Sides

A. Set the stage

Introduction to the Podcast: Judge Creatura

B. Ethical Rules

1. Preamble and Scope to Wash R. Prof. Conduct
2. Wash R. Prof. Conduct 3.3, Candor Toward the Tribunal
3. Wash R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor
4. Wash R. Prof. Conduct 4.3, Dealing with a Person Not Represented by a Lawyer

C. Ethical Issues for Plaintiffs' Attorneys - Victoria Chhagan and Amy Gilbrough

D. Ethical Issues for SSA Attorneys Interacting with Pro Se Plaintiffs – Stephen Dmetruk

J. Richard Creatura
United States Magistrate Judge for the Western District of Washington

Judge Creatura is a Magistrate Judge for the Western District of Washington in Tacoma. He has served since March 2009.

Before going on the bench, Judge Creatura had been a trial attorney with the law firm of Gordon Thomas Honeywell Malanca Peterson & Daheim LLP, in Tacoma, Washington. He had served on the firm's Board of Directors and as Board Chair.

He is an Emeritus Member of the Robert J. Bryan Chapter of the American Inns of Court and former member of the American Board of Trial Advocates. He served on the Washington State Board of Bar Examiners for over twenty years and was a former Chair of the Commercial Litigation Section of the Washington State Trial Lawyers Association. He is a former Trustee of the Federal Bar Association and served on a number of committees with the Ninth Circuit, including the Ninth Circuit Advisory Board.

He received his undergraduate degree at Tufts University in 1974 and law degree from University of the Pacific, McGeorge School of Law in 1978. Before graduation, Judge Creatura served as a law clerk to the Honorable Anthony M. Kennedy at the Ninth Circuit Court of Appeals.

Amy Gilbrough, Attorney

Amy Gilbrough is a partner at Douglas Drachler McKee & Gilbrough, a Seattle law firm practicing Social Security and Labor law. She has been practicing Social Security law since 1997, first at the Social Security Administration's Office of Disability Adjudication and Review as a decision writer, then at the Office of General Counsel. She moved to private practice in 2003, dividing her time between administrative and federal court cases in the Western District of Washington and the Ninth Circuit Court of Appeals. She has given presentations on Social Security law and practice for the King County Bar Association, the American Bar Association, the National Business Institute, and the Ninth Circuit Conference.

Victoria Chhagan, Attorney

Victoria Chhagan is a partner at Douglas Drachler McKee & Gilbrough, a Seattle law firm practicing Social Security and Labor law. She has been practicing Social Security law since 1997, first at the Social Security Administration's Office of the General Counsel, and then as an appellate attorney handling Social Security appeals in the Eastern and Western Districts of Washington and the Ninth Circuit Court of Appeals. She now splits her time between her administrative and appellate practice.

Stephen Dmetruk

Stephen Dmetruk is an Assistant Regional Counsel for the Office of the General Counsel for the Social Security Administration. Before joining the Social Security Administration in 2010, Stephen worked for a law firm in Georgia and, prior to that, clerked for a U.S. Court of Appeals Judge for the Eleventh Circuit. He graduated from the University of Georgia School of Law.

Rules Of Professional Conduct, Scope

SCOPE

Currentness

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] **[Washington revision]** For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client-lawyer relationship is formed. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18 and Washington Comment [11] thereto. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and is a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Additional Washington Comments (22-25)

[22] Nothing in these Rules is intended to change existing Washington law on the use of the Rules of Professional Conduct in a civil action. See *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

[23] The structure of these Rules generally parallels the structure of the American Bar Association's Model Rules of Professional Conduct. The exceptions to this approach are Rule 1.15A, which varies substantially from Model Rule 1.15, and Rules 1.15B, 5.8, 5.9, and 5.10, none of which is found in the Model Rules. In other cases, when a provision has been wholly deleted from the counterpart Model Rule, the deletion is signaled by the phrase “Reserved.” When a provision has been added, it is generally appended at the end of the Rule or the paragraph in which the variation appears. Whenever the text of a Comment varies materially from the text of its counterpart Comment in the Model Rules, the alteration is signaled by the phrase “Washington revision.” Comments that have no counterpart in the Model Rules are compiled at the end of each Comment section under the heading “Additional Washington Comment(s)” and are consecutively numbered. As used herein, the term “former Washington RPC” refers to Washington's Rules of Professional Conduct (adopted effective September 1, 1985, with amendments through September 1, 2003). The term “Model Rule(s)” refers to the American Bar Association's Model Rules of Professional Conduct.

[24] In addition to providing standards governing lawyer conduct in the lawyer's own practice of law, these Rules encompass a lawyer's duties related to individuals who provide legal services under a limited license. A lawyer should remember that these providers also engage in the limited practice of law and are part of the legal profession, albeit with strict limitations on the nature and scope of the legal services they provide. See APR 28; LLLT RPC 1.2.

[25] Rule 5.9 refers specifically to a lawyer's duties relating to business structures permitted between lawyers and LLLTs. Rule 5.10 refers to a lawyer's responsibilities when working with other legal practitioners operating under a limited license. Other rules have been amended to address a lawyer's relationship with and duties regarding LLLTs. In general, a lawyer should understand the authorized scope of the services provided by LLLTs, including the requirement that an LLLT must refer a client to a lawyer when that client requires services outside of that scope. See LLLT RPC 1.2; APR 28(F). Lawyers should participate in the development of a robust system of cross-referral between lawyers and LLLTs to promote access to justice and the smooth

and efficient provision of a complete range of legal services. In addition, a robust system of cross-referral will benefit the profession by supporting LLLTs in operating ethically within their limited licensure. See Preamble Comment [6].

Credits

[Amended effective September 1, 2006; April 14, 2015.]

Scope, WA R Scope

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/20.

End of Document

West's Revised Code of Washington Annotated
Part I. Rules of General Application
Rules of Professional Conduct (Rpc) (Refs & Annos)
Title 3. Advocate

Rules Of Professional Conduct, RPC 3.3

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party;

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Credits
[Amended effective September 1, 2006; April 14, 2015.]

Editors' Notes

COMMENT

[1] **[Washington revision]** This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0A(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] **[Washington revision]** An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [4] to Rule 8.4.

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] **[Reserved.]**

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] **[Washington revision]** The duties stated in paragraphs (a) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions other than Washington, however, courts have required counsel to present the

accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See State v. Berrysmith, 87 Wn. App. 268, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008, 954 P.2d 277 (1998). For an explanation of the term "counsel" in the criminal context, see Washington Comment [10] to Rule 3.8.

[8] **[Washington revision]** The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0A(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] **[Reserved.]**

Remedial Measures

[10] **[Reserved.]**

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] **[Washington revision]** Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented

party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] **[Washington revision]** Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation as permitted by Rule 1.6.

[Comment adopted effective September 1, 2006; amended effective April 14, 2015.]

Notes of Decisions (43)

RPC 3.3, WA R RPC 3.3
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/20.

End of Document

West's Revised Code of Washington Annotated
Part I. Rules of General Application
Rules of Professional Conduct (Rpc) (Refs & Annos)
Title 3. Advocate

Rules Of Professional Conduct, RPC 3.8

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Currentness

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) when, a prosecutor knows of new, credible and material evidence creating a reasonable likelihood, that a convicted defendant is innocent of the offense of which, the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction, was obtained in the prosecutor's jurisdiction,

(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

(h) [Reserved.]

(i) A prosecutor's independent judgment, made in good faith, that the evidence is not of such nature as to trigger the obligations of paragraph (g) of this Rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Credits
[Amended effective September 1, 2006; December 13, 2011.]

Editors' Notes

COMMENT

[1] [Washington revision.] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. The extent of mandated remedial, action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Additional Washington Comments (7-10)

[7] [Washington revision.] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction, was convicted of a crime that the person is innocent of committing, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to make reasonable efforts to inquire into the matter to determine whether the defendant is in fact innocent, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

[8] [Reserved.]

[9] [Reserved. Comment [9] to Model Rule 3.8 is codified, with minor revisions, as paragraph (i).]

[10] In many of the Lawyer RPC, the term “counsel” has been changed to “lawyer” to avoid ambiguity between a lawyer and an LLLT. The term “counsel” has been retained in this Rule, however, because this term in a criminal matter may implicate statutory and constitutional responsibilities that are not intended to be modified. The term “counsel” in this Rule nevertheless denotes a lawyer.

[Comment adopted effective September 1, 2006; amended effective December 13, 2011; April 14, 2015.]

Notes of Decisions (1)

RPC 3.8, WA R RPC 3.8
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/20.

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West's Revised Code of Washington Annotated
Part I. Rules of General Application
Rules of Professional Conduct (Rpc) (Refs & Annos)
Title 4. Transactions with Persons Other than Clients

Rules Of Professional Conduct, RPC 4.3

RULE 4.3. DEALING WITH PERSON NOT REPRESENTED BY A LAWYER

Currentness

In dealing on behalf of a client with a person who is not represented by a lawyer, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure the services of another legal practitioner, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Credits

[Amended effective October 29, 2002; September 1, 2006; April 14, 2015.]

Editors' Notes

COMMENT

[1] **[Washington revision]** An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f). For the definition of "unrepresented person" under this Rule, see Washington Comment [5].

[2] **[Washington revision]** The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain the services of another legal practitioner. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations. For special considerations that may arise when a lawyer deals with a person who is assisted by an LLLT, see RPC 4.4 Comment [5].

Additional Washington Comments (3-6)

[3] An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation. (The provisions of this Comment were taken from former Washington RPC 4.3(b)).

[4] Government lawyers are frequently called upon by unrepresented persons, and in some instances by the courts, to provide general information on laws and procedures relating to claims against the government. The provision of such general information by government lawyers is not a violation of this Rule.

[5] For purposes of this Rule, a person who is assisted by an LLLT is not represented by a lawyer and is an unrepresented person. See APR 28.

[6] When a lawyer communicates with an LLLT who represents an opposing party about the subject of the representation, the lawyer should be guided by an understanding of the limitations imposed on the LLLT by APR 28, related regulations and the LLLT RPC. The lawyer should further take care not to overreach or intrude into privileged information. APR 28(K)(3) ("The Washington law of attorney-client privilege and law of a lawyer's fiduciary responsibility to the client shall apply to the Limited License Legal Technician-client relationship to the same extent as it would apply to an attorney-client relationship.")

[Comment adopted effective September 1, 2006; amended effective April 14, 2015; June 4, 2019.]

Notes of Decisions (1)

RPC 4.3, WA R RPC 4.3
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/20.

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141 Wash.2d 29
Supreme Court of Washington,
En Banc.

Kay LYBBERT and Norma Lybbert, husband and wife, and the marital community composed thereof, Respondents,
v.
GRANT COUNTY, STATE OF WASHINGTON, Petitioner.

No. 67805–7.
|
Decided June 8, 2000.

Synopsis

Motorist and passenger who were injured in automobile accident allegedly caused by hole in county road sued county. The Superior Court, Adams County, Richard W. Miller, J., granted summary judgment to county based on insufficient service of process. Plaintiffs appealed, and the Court of Appeals, 93 Wash.App. 627, 969 P.2d 1112, reversed. Granting county's petition for review, the Supreme Court, Alexander, J., held that: (1) county was not equitably estopped from asserting insufficient service of process as affirmative defense; (2) affirmative defense of insufficient service of process may be waived; and (3) county waived defense by failing to raise it in answer or responsive pleading, by engaging in discovery over course of several months, and by asserting defense after statute of limitations had apparently extinguished plaintiffs' claim.

Judgment of Court of Appeals affirmed.

Madsen, J., filed a dissenting opinion in which Guy, C.J., and Talmadge, J., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****1125** ***31** Leavy, Schultz & Fearing, George Fearing, John Schultz, Kennewick, John Knodell, Grant County Prosecutor, Stephen Hallstrom, Deputy, Ephrata, for Petitioner.

George Ahrend, Spokane, for Respondents.

Russell Hauge, Kitsap County Prosecutor, Shelley E. Kneip, Cassandra Noble, Deputy's, Port Orchard, for Amicus Curiae on Behalf of Washington Association of Prosecuting Attorneys.

Graham Black, Michael R. Kenyon, Issaquah, for Amicus Curiae on Behalf of Washington State Association of Municipal Attorneys.

****1126** Michael King, Jodi A. McDougall, Seattle, for Amicus Curiae on Behalf of Washington Defense Trial Lawyers.

Christine O. Gregoire, Attorney General, Narda D. Pierce, Solicitor General, Maureen A. Hart, Asst., Olympia, for Amicus Curiae on Behalf of Attorney General's Office.

Bryan P. Harnetiaux, Debra Leigh Stephens, Spokane, for Amicus Curiae on Behalf of Washington State Trial Lawyers Association.

Opinion

ALEXANDER, J.

Kay and Norma Lybbert brought suit against Grant County (hereinafter County) for personal injuries they allegedly sustained in an automobile accident on a Grant County road. The County thereafter moved for a summary judgment dismissing the Lybberts' suit, contending that service of process by the plaintiffs was defective. The trial court agreed with the County and dismissed the suit, concluding that the plaintiffs failed to properly serve their summons and complaint on the County within the ***32** applicable statute of limitations. The Court of Appeals reversed the trial court, holding that the County was not entitled to rely on the affirmative defense of insufficient service of process because (1) it had waived the defense and/or (2) was equitably estopped from asserting it. We granted the County's petition for review and now affirm the Court of Appeals on the basis that the County waived the defense of insufficient service of process.

The Lybberts claim that they were both injured in early 1993 when their automobile struck a hole in a Grant County road. On August 30, 1995, the Lybberts filed a summons and complaint in the Adams County Superior Court in which they sought damages from the County for the injuries they contend they sustained as a consequence of the County's alleged failure to maintain its roadway in a safe condition. [1] Pursuant

to RCW 4.28.080(1), the Lybberts were required to serve their summons and complaint on the County auditor.[2] They mistakenly served process on the administrative assistant to the County commissioners. Nonetheless, a few days after the "service," counsel for the County filed a notice of appearance in which it was indicated that the County was not "waiving objections to improper service or jurisdiction." Clerk's Papers (CP) at 13.

For the next nine months the County acted as if it were preparing to litigate the merits of the case that the Lybberts were attempting to mount against it. For example, shortly after filing its notice of appearance the County served the Lybberts with interrogatories, requests for production, and a request for a statement setting forth general and special damages. In this discovery effort, the County made no inquiry regarding the sufficiency of the service of process. ***33** The County also associated counsel from an outside law firm and duly filed a "notice of association of counsel." CP at 15. Thereafter, one of the attorneys for the County had conversations over the telephone with the Lybberts' attorney about insurance coverage and potential mediation. During these contacts, the attorney for the County did not make any mention of an issue surrounding sufficiency of the service of process. The Lybberts' attorney claims that one of the attorneys for the County told him that the County was working on its answer to the complaint and that it would be provided "as soon as possible." CP at 30.

On February 29, 1996, the Lybberts' attorney served one of the attorneys for the County with interrogatories and a request for production of documents. One interrogatory ****1127** asked the County whether it would be relying on the affirmative defense of insufficient service of process.[3] In April of 1996, a County sheriff's detective, ostensibly acting on behalf of the County, contacted the Lybberts' attorney in order to ascertain what type of information the Lybberts were requesting in their interrogatories. According to an affidavit from the Lybberts' attorney, the detective said that the County would fully cooperate in providing all of the requested discovery information.

On May 6, 1996, the Lybberts responded to the County's interrogatories, as well as to its requests for production and statement of damages. On June 21, 1996, the County filed its answer to the Lybberts' complaint and asserted, for the first time, the affirmative defense of insufficient service of process. The County then filed a motion for summary judgment, based on the alleged insufficient service of process, and requested that the case against it be dismissed on the ground that the applicable statute of limitations had ***34** run on the Lybberts' claim.[4] The trial court granted the County's motion and dismissed the Lybberts' complaint with prejudice. The Lybberts appealed to Division Three of the Court of Appeals. The Court of Appeals reversed the trial court, holding that the County waived the defense of insufficient service of process and was equitably estopped from asserting it. We granted the County's petition for review.

DISCUSSION

I. Scope of Review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7–11 Hoagy's Corner,* 133 Wash.2d 192, 197–98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

The County argues that the Court of Appeals' decision, with respect to waiver and equitable estoppel, conflicts with precedent from this court as well as case law from Divisions One and Two of the Court of Appeals. The Lybberts counter that if this court concludes that the County waived the defense of insufficient service of process or is equitably ***35** estopped from asserting it, such a conclusion would be consonant with the cases from this court as well as cases from Divisions One and Two of the Court of Appeals. We discuss both equitable estoppel and waiver in turn.

II. Equitable Estoppel

The Lybberts argue here, as they did at the Court of Appeals, that the County is equitably estopped from asserting the defense of insufficient service of process. Equitable estoppel is based on the notion that "a party should be

held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarevcky v. Department of Soc. & Health Servs.,* 122 Wash.2d 738, 743, 863 P.2d 535 (1993) (quoting **1128 *Wilson v. Westinghouse Elec. Corp.,* 85 Wash.2d 78, 81, 530 P.2d 298 (1975)). The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Board of Regents v. City of Seattle,* 108 Wash.2d 545, 551, 741 P.2d 11 (1987). Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. *Chemical Bank v. Washington Pub. Power Supply Sys.,* 102 Wash.2d 874, 905, 691 P.2d 524 (1984). Equitable estoppel must be shown "by clear, cogent, and convincing evidence." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,* 124 Wash.2d 816, 831, 881 P.2d 986 (1994).

We are satisfied that the Lybberts have established two of the elements of equitable estoppel. In that regard, it is readily apparent that the County acted in a way that was inconsistent with its eventual assertion of the defense of insufficient service of process. For nine months following its attorneys' appearance in response to the Lybberts' duly *36 filed summons and complaint, the County gave multiple indications that it was preparing to litigate this case. Only after the statute of limitations appeared to have run on the Lybberts' claim did it raise the affirmative defense of insufficient service of process. Furthermore, allowing the County to assert the defense of insufficient service of process after the statute of limitations has run would be injurious to the Lybberts because they would be without a forum in which to pursue their claim against the County.

We are satisfied, though, that the Lybberts have not established that they justifiably relied on the actions of the County's counsel. Wereach that conclusion because the statute governing service of process on counties is explicit in specifying that the county auditor is the person who is to be served with process. RCW 4.28.080(1). Given the clear statutory mandate to serve the county auditor, it was not at all reasonable, much less justifiable, for the Lybberts to rely on the County's failure to expressly claim, prior to the expiration of the statute of limitations, that the service upon it was ineffective. *See Overhulse Neighborhood Ass'n v. Thurston County,* 94 Wash.App. 593, 972 P.2d 470 (1999) (holding unambiguous mandate of statutory service provisions made reliance unreasonable); *Davidheiser v. Pierce County,* 92 Wash.App. 146, 154, 960 P.2d 998 (1998) (rejecting equitable estoppel claim because clarity of statutory provision precluded any reasonable reliance), *review denied,* 137 Wash.2d 1016, 978 P.2d 1097 (1999); *Landreville v. Shoreline Community College Dist. No. 7,* 53 Wash.App. 330, 332, 766 P.2d 1107 (1988).

The *Landreville* case, with which we are in agreement, is particularly illustrative of the point that the Lybberts' reliance was not justifiable. There a process server left a copy of the summons and complaint with an administrative assistant to the attorney general despite the fact that the statute pertinent to that case required that service be made upon the attorney general. The plaintiff argued there that the defendant should be estopped from asserting the defense of insufficient service of process because the attorney *37 general's administrative assistant represented that she had authority to accept service of process. The *Landreville* court disagreed with that argument, holding that because of the clear language of the service statute it was unreasonable for the plaintiff to rely on the actions of the attorney general's assistant. The Lybberts argue that *Landreville* is distinguishable because there the plaintiffs were relying on the actions of an administrative assistant rather than the actions of the defendant's counsel, as was the case here. This appears to us to be a distinction without a difference. The fact remains that in the instant case, as in *Landreville,* a statute explicitly indicates who is to be served with process. In light of the clarity of the statute, any reliance on action or inaction on the part of either or both of the County's counsel is not justifiable.

Before leaving this issue, we note that in resolving the equitable estoppel issue in favor of the Lybberts, the Court of Appeals **1129 placed emphasis on what it described as a duty on the part of the government to conduct litigation "in a manner above reproach" and to be "scrupulously just in dealing with its citizens." *Lybbert v. Grant County,* 93 Wash.App. 627, 634, 969 P.2d 1112, *review granted,* 138 Wash.2d 1002, 984 P.2d 1034 (1999). In light of that duty, the court opined, counsel for the County "should have raised the issue of insufficient service prior to the expiration of the statute of limitations." *Lybbert,* 93 Wash.App. at 634, 969 P.2d 1112. While we agree with the basic proposition

that the government should be just when dealing with its citizens,[5] we do not believe that an attorney representing the government has a duty to maintain a standard of conduct that is higher than that expected of an attorney for a private party. If we were ***38** to impose such a heightened duty on attorneys for the government we would be creating a two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties. We are loath to do so, particularly in light of the generally recognized view, embodied in the Preliminary Statement to the Rules of Professional Conduct, to the effect that "the rules should be uniformly applied to all lawyers, *regardless of the nature of their professional activities*." (Emphasis added.)

In sum, even after viewing the evidence in the light most favorable to the Lybberts, we are satisfied that they have not established the element of justifiable reliance by clear, cogent, and convincing evidence. Therefore, the County is not equitably estopped from asserting the defense of insufficient service of process. This does not mean, however, that the defense is available to the County if it was waived. That is the issue to which we now turn.

III. Waiver

The Lybberts, citing the common law doctrine of waiver, claim that the County is precluded from asserting the defense of insufficient service of process because it acted in an inconsistent and dilatory manner. This court has discussed the doctrine of waiver in this context on only one occasion. *See* *French v. Gabriel,* 116 Wash.2d 584, 806 P.2d 1234 (1991). In that case we recognized the viability of the doctrine, but concluded that under the facts of that case the defendant had not waived the defense. Significantly, all three divisions of the Court of Appeals of this state have also recognized the common law doctrine of waiver. *See* *Clark v. Falling,* 92 Wash.App. 805, 813, 965 P.2d 644 (1998) (Division One); *Davidheiser v. Pierce County,* 92 Wash.App. 146, 155, 960 P.2d 998 (1998), *review denied,* 137 Wash.2d 1016, 978 P.2d 1097 (1999) (Division Two); *Romjue v. Fairchild,* 60 Wash.App. 278, 281, 803 P.2d 57, *review denied,* 116 Wash.2d 1026, 812 P.2d 102 (1991) (Division Three). Under the doctrine, affirmative defenses such as insufficient ***39** service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *Romjue,* 60 Wash.App. at 281, 803 P.2d 57. It can also occur if the defendant's counsel has been dilatory in asserting the defense. *Raymond v. Fleming,* 24 Wash.App. 112, 115, 600 P.2d 614 (1979) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1344, at 526 (1969)), *review denied,* 93 Wash.2d 1004 (1980).

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind ****1130** the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it. *See, e.g.,* *Trustees of Cent. Laborers' Welfare Fund v. Lowery,* 924 F.2d 731, 732 (7th Cir.1991) (observing that "[a] party may waive a defense of insufficiency of process by failing to assert it seasonably"); *Santos v. State Farm Fire & Cas. Co.,* 902 F.2d 1092, 1096 (2d Cir.1990); *Marcial Ucin, S.A. v. S.S. Galicia,* 723 F.2d 994, 997 (1st Cir.1983); *Kearns v. Ferrari,* 752 F.Supp. 749, 752 (E.D.Mich.1990); *Burton v. Northern Dutchess Hosp.,* 106 F.R.D. 477, 481 (S.D.N.Y.1985); *Tuckman v. Aerosonic Corp.,* 394 A.2d 226, 233 (Del.Ch.1978); *Joyner v. Schiess,* 236 Ga.App. 316, 512 S.E.2d 62 (1999).

Despite embracing this doctrine of waiver, we quickly add that the doctrine does not alter the traditional duties litigators owe to their adversaries. Those duties, which are memorialized in the Rules of Professional Conduct (RPC) and refined by case law from this court, remain the same. *See* RPC 3.4; *Sherman v. State,* 128 Wash.2d 164, 184–85, 905 P.2d 355 (1995); *see also* *Washington State Physicians Ins. Exch.* ***40** *& Ass'n v. Fisons Corp.,* 122 Wash.2d 299, 858 P.2d 1054 (1993). Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.

We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and

believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that

> [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.

Santos, 902 F.2d at 1096.

In applying the doctrine, we first observe that there are no material facts in dispute.[6] It is, therefore, appropriate for this court to apply the doctrine of waiver to the undisputed material facts to determine if the County is precluded from asserting the defense of insufficient service of process in this case. In this process, the well-reasoned decision of the Court of Appeals in *Romjue v. Fairchild,* 60 Wash.App. 278, 803 P.2d 57, is instructive. There, a process server did not make proper service on the defendants. Nevertheless, the defendants' attorney filed a notice of appearance and subsequently served plaintiff's attorney with interrogatories and a request for production of documents. The attorney for the plaintiff responded to the discovery requests and then ***41** served the defendants with his own interrogatories and requests for production of documents. Plaintiff's attorney also sent a letter to the defendants' attorney stating, "it is my understanding that the defendants have been served in the above matter [Romjue v. Fairchild]." (alteration in original) (emphasis omitted). *Romjue,* 60 Wash.App. at 281, 803 P.2d 57. The attorney for the defendants did not respond to this letter, but instead waited for the statute of limitations to run and then asserted the defense of insufficient service of process. The issue there, as here, was whether the defendants waived the defense by participating in discovery and failing to assert the defense prior to the expiration of the statute of limitations.

The *Romjue* court quite properly noted that the mere act of engaging in discovery "is not always tantamount to conduct inconsistent with a later assertion of the ****1131** defense of insufficient service." *Romjue,* 60 Wash.App. at 281, 803 P.2d 57. This is so because in some circumstances it may be entirely appropriate for a party to engage in discovery to determine if the facts exist to support a defense of insufficient service. *Romjue,* 60 Wash.App. at 281, 803 P.2d 57; *see also* *Matthies v. Knodel,* 19 Wash.App. 1, 5–6, 573 P.2d 1332 (1977) (observing that deposition was taken to find out if defense existed for the defendant). The Romjue court went on to conclude, however, that the defendants' discovery efforts were inconsistent with the later asserted defense because it was not geared toward elucidating facts relating to a defense of insufficient service of process. The court took particular note of the letter the plaintiff's attorney sent to the defendants' attorney, prior to the expiration of the statute of limitations, expressing the plaintiff's understanding that service of process had been effected on the defendants. The court concluded that by engaging in discovery and ignoring the letter, the defendants waived the defense of insufficient service of process that was asserted only after the time clock had run out.

The County's conduct was similar to that of the defendants in *Romjue*. In particular, we note that the County's ***42** discovery efforts were not aimed at determining whether there were facts that supported the defense of insufficient service of process. Indeed, because the process server's affidavit was filed by the plaintiffs, the County knew or should have known that the defense of insufficient service of process was available to it.[7] Moreover, the County did more than just undertake discovery. As noted above, its detective contacted Lybberts' counsel in order to make certain that the County correctly understood the nature and extent of the Lybberts' interrogatories. Furthermore, there were telephone calls between counsel for the respective parties at which there was a discussion about potential mediation.[8] Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense.

The County asserts that because the Lybberts were several months tardy in providing answers to the County's discovery requests, the Lybberts cannot fault it for its delay in answering discovery and asserting the defense. We disagree. The record reveals that the Lybberts' delay in answering was justified because they "were still actively treating and that complete answers to interrogatories, which were served in October 1995, would be delayed so ***43** that a complete history of the injuries and damages could be submitted." CP at 36. This reason stands in stark contrast to that provided by the County, which was that the County "routinely avoid[s] answering a complaint, until a motion for default is brought." CP at 164.

It is also of no significance to our waiver analysis that the notice of appearance, filed by one of the attorneys for the County, included a statement that counsel was appearing "without waiving objections to improper service or jurisdiction." CP at 13. That is so because we have said that the mere appearance by a defendant does not preclude the defendant from challenging the sufficiency of service of process. ****1132** *Adkinson v. Digby, Inc.,* 99 Wash.2d 206, 209, 660 P.2d 756 (1983); *see also* *Matthies,* 19 Wash.App. at 4, 573 P.2d 1332. Thus, even if the caveat had not been included, the County could have challenged the sufficiency of the service of process. In other words, it was not necessary for the County to indicate that it was appearing "without waiving objections to improper service" in order to subsequently challenge the service of process. Since the filing of a notice of appearance without including the caveat cannot constitute a waiver of the defense, we see no reason why filing the notice of appearance with the caveat should serve as a vehicle to preserve it.

According to the dissent, the County did not waive the defense because it "filed a notice of appearance expressly reserving the right to assert the defense of insufficient service of process." Dissenting op. at 1135. To the degree the dissent suggests that a notice of appearance is the functional equivalent of an answer or other responsive pleading, we disagree. The Superior Court Civil Rules (CR) require that the defense of insufficient service of process be brought forth in a pleading. *See* CR 12(b) ("Every defense ... shall be asserted in the responsive pleading...."). The rules are quite clear as to what constitutes a pleading. *See* CR 7(a) (A pleading is one of the following: a complaint, *an answer,* a reply to a counterclaim, an answer to a cross claim, a third party complaint, and a third party answer.). Absent from this list is a notice of appearance.

***44** Finally, the County argues that if we were to affirm the Court of Appeals on the waiver issue, such a decision would conflict with this court's decision in *French v. Gabriel,* 116 Wash.2d 584, 806 P.2d 1234. We disagree, being satisfied that our decision today is in complete harmony with *French*. In *French,* the plaintiff argued that the defendant waived the defense of insufficient service of process by filing an untimely answer, objecting to a trial date, taking a deposition, and consenting to amendment of the complaint. The plaintiff also argued that the defendant waived the defense because he delayed in filing his answer to the complaint. We held there was no waiver because the defendant preserved the defense by pleading it *prior* to objecting to the trial date, taking a deposition, and consenting to amendment of the complaint. *French,* 116 Wash.2d at 594, 806 P.2d 1234; *see also* *Voicelink Data Servs., Inc. v. Datapulse, Inc.,* 86 Wash.App. 613, 625, 937 P.2d 1158 (1997) (participating in substantive discovery did not waive defense since it was pleaded prior to engaging in discovery); *Crouch v. Friedman,* 51 Wash.App. 731, 735, 754 P.2d 1299 (1988) (raising defense in answer prior to engaging in discovery is sufficient to preserve the defense). Moreover, the answer, although late, was filed more than a year before the statute of limitations extinguished the plaintiff's claim. Although we expressed displeasure at the defendant's failure to file a timely answer, we noted that " 'mere delay in filing an answer does not constitute a waiver of an insufficient service defense.' " *French,* 116 Wash.2d at 593–94, 806 P.2d 1234 (quoting *French v. Gabriel,* 57 Wash.App. 217, 222, 788 P.2d 569, *review granted,* 114 Wash.2d 1026, 793 P.2d 976 (1990)).

By contrast, here, the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. *French* does not remotely stand for the proposition that it is ***45** acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action. [9]

****1133** CONCLUSION

For the reasons stated above, we conclude that the County is not equitably estopped from asserting the defense of insufficient service of process. It did, however, by the actions of its representatives waive the defense. We, therefore, affirm the result reached by the Court of Appeals.

SMITH, JOHNSON, SANDERS, IRELAND, JJ., and SHIELDS, J.P.T., concur.

MADSEN, J. (dissenting).

The majority purports to apply the common law doctrine of waiver, but instead creates a rule where waiver of the defense of insufficient service of process will be found in virtually every case. The majority states that the defense of insufficient service of process is waived in situations where a process server's affidavit is filed (imputing knowledge to the defendant of the effectiveness of service), and phone calls and interrogatories have been exchanged before the defense is raised. This is *not* the standard applied by the cases the majority relies on and, if applied to future cases, will be the harshest standard of common law waiver in the country.

Under the doctrine as it is generally defined, a defense of insufficient service of process may be waived by dilatory conduct or conduct inconsistent with assertions of the ***46** defense. *Raymond v. Fleming,* 24 Wash.App. 112, 114–15, 600 P.2d 614 (1979). However, in examining both Washington cases and cases from other jurisdictions, it becomes apparent that purposeful or misleading conduct is required before courts will find a waiver. Indeed, the case law strongly supports the conclusion that not only must the defendant's conduct be dilatory or inconsistent with assertions of the defense, the circumstances also must establish that the defendant actually knew of the defense and remained silent or engaged in conduct which misled the plaintiff.

In Washington, for example, in the case upon which the majority chiefly relies, the party claiming the defense had *actual knowledge* that plaintiff was relying on proper service and intentionally misled the opposing party as to the effectiveness of the service. *Romjue v. Fairchild,* 60 Wash.App. 278, 282, 803 P.2d 57 (1991). Additionally, cases from other jurisdictions in which the common law doctrine has been applied involve conduct which ranges from intentionally misleading conduct spanning several years prior to the defendant's answer to postanswer conduct clearly illustrating an "intentional relinquishment or abandonment of a known right or privilege" because of actual knowledge of improper service. *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 229 (Del.Ch.1978) (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938)); *see also* *Marcial Ucin, S.A. v. S.S. Galicia,* 723 F.2d 994 (1st Cir.1983); *Joyner v. Schiess,* 236 Ga.App. 316, 512 S.E.2d 62 (1999) (postanswer conduct of engaging in discovery and continuances not enough to illustrate intentional relinquishment of defense). None of the cases relied on by the majority impute actual knowledge of ineffective service to the defendants based on the process server's affidavit.

The majority's guidelines leave the doctrine of common law waiver of the affirmative defense with no meaning at all since the majority fails to distinguish between circumstances which exist in nearly every case—the process server's affidavit, phone conversations, and exchanged interrogatories --and conduct exhibiting actual knowledge of deficient service or conduct intended to mislead. The majority's analysis also improperly and unfairly shifts the burden of proper service to the defendant where, as here, the defendant made attempts to reserve the defense, and the facts do not show either actual knowledge of improper service or effort on the defendant's part to mislead the plaintiff. Therefore, I respectfully dissent.

In *French v. Gabriel,* 116 Wash.2d 584, 806 P.2d 1234 (1991), this court addressed the ****1134** viability of the common law doctrine of waiver of the defense of insufficient service of process and distinguished between conduct that did not waive the defense and conduct that did. To illustrate the type of conduct required to find waiver, the *French* court pointed to the conduct in *Raymond,* 24 Wash.App. at 115, 600 P.2d 614. *French,* 116 Wash.2d at 592–93, 806 P.2d 1234. In *Raymond,* the plaintiff improperly served the defendant. *Raymond,* 24 Wash.App. at 114, 600 P.2d 614. After filing a notice of appearance, the defendant repeatedly asked for more time in response to plaintiff's repeated requests for an answer to the complaint. *Id.* at 114, 600 P.2d 614. Almost eight months after defendant's first notice of appearance, the plaintiff in *Raymond* moved for an order of default or, in the alternative, an order compelling answers to interrogatories. *Id.* Thereafter, the defendant obtained two continuances past the expiration date for proper service of process. *Id.* This dilatory and clearly inconsistent conduct,

coupled with plaintiff's attempts to compel action, constituted sufficient grounds to conclude that the defendant there had waived his affirmative defense of insufficient service of process. *Id.* at 115, 600 P.2d 614.

After comparing the conduct in *Raymond* with the conduct of the defendant before it, the *French* court declined to find a waiver. Although the plaintiff made repeated requests, the defendant did not ask for more time for an answer or more time to obtain court continuances. *French,* 116 Wash.2d at 593, 806 P.2d 1234. This court agreed with the Court of Appeals that "'while not to be condoned, a mere delay in filing an answer does not constitute a waiver of an insufficient service defense.'" *Id.* at 593–94, 806 P.2d 1234 (citing *French v. Gabriel,* 57 Wash.App. 217, 222, 788 P.2d 569 (1990)).

The majority relies on *Romjue,* 60 Wash.App. 278, 803 P.2d 57, to support its application of the waiver doctrine. In *Romjue,* the plaintiff improperly served the defendant's mother. *Romjue,* 60 Wash.App. at 280, 803 P.2d 57. Approximately one month after the defendant's attorney filed a notice of appearance, and after the defendant's attorney had received the process server's affidavit, the plaintiff's attorney sent a letter which stated in part, "it is my understanding that the defendants have been served in the above matter [Romjue v. Fairchild]." 60 Wn. App. at 281 (emphasis omitted). The defendant's attorney did not respond to the letter and later asserted the defense of insufficient service of process after the statute of limitations had expired. *Id.* at 282, 803 P.2d 57. Based on the receipt of the letter, the court concluded that the defendant had actual knowledge that the plaintiff believed service was proper and that the defendant "relied upon the defective service, yet he chose to say nothing until after the statute of limitation had expired." *Id.*

Although the court in *Romjue* noted that the parties had exchanged interrogatories and defense counsel had the process server's affidavit, the deciding factor for the court was the plaintiff's letter to the defendants, sent before the statute of limitations had run, stating that the plaintiff believed service was proper. Based on the defendant's receipt of this letter, the court concluded that the defendant had actual knowledge of the improper service and his failure to respond to the letter misled the plaintiff. *Id.* at 281–82, 803 P.2d 57. Thus, as in *Raymond,* the *Romjue* court did not rely upon the existence of a process server's affidavit or the fact that the parties had conversed but instead relied on other conduct clearly indicating defendant's knowledge or intention to mislead.

In the present case, we have neither the facts of *Raymond* nor the facts of *Romjue*. Unlike *Romjue,* nothing here indicates the defendant in this case actually knew service was improper and relied upon defective service, misleading ***49** the plaintiffs by choosing to say nothing until the statute of limitations expired and, unlike *Raymond,* there is no purposefully misleading conduct in the form of court continuances. The only conduct here, filing of a process server's affidavit, phone conversations, and exchanges of interrogatories, does not indicate knowledge nor is the plaintiff's conduct inconsistent with assertion of the defense. Consistent with *Romjue,* this court should not find that the mere exchange of interrogatories, communications between the parties, and the process ****1135** server's affidavit are sufficient for waiver. Rather, as in *Romjue,* this court should require a showing that the defendant actually knew that plaintiffs were relying on effective service. *Romjue,* 60 Wash.App. at 282, 803 P.2d 57.

Unfortunately, the majority here places undue emphasis on the process server's affidavit, reasoning that the defendant either knew or should have known that the plaintiffs were relying on valid service because of the process server's affidavit. However, the plaintiffs in every case anticipate that service is effective. By holding that the process server's affidavit is enough to impute to a defendant actual knowledge of improper service so that the defendant must assist the plaintiff to remedy the mistake, the court has effectively alleviated the plaintiff's duty to make effective service in the first place. Under this rule, the common law doctrine of waiver has no meaning because waiver will be found in every case where an affidavit exists and the defendant does not inform the plaintiff that service was defective.

Moreover, Grant County filed a notice of appearance expressly reserving the right to assert the defense of insufficient service of process. The majority cites *Adkinson v. Digby, Inc.,* 99 Wash.2d 206, 660 P.2d 756 (1983), and dismisses this fact by asserting that since mere appearance by a defendant does not preclude the defense of insufficient service, then a notice of appearance reserving the defense should not serve as a vehicle to preserve the defense. *Adkinson* involved a defendant, who upon learning that the plaintiff intended to effect service, filed a notice of

appearance ***50** prior to service specifically stating that the defendant appeared "without waiving objections to proper service. . . ." *Adkinson,* 99 Wash.2d at 207–08, 660 P.2d 756. Actual service on the defendant was not made until after the statute of limitations had passed and the defendant then asserted the defense of insufficient service of process. *Id.* This court held that the defendant could argue insufficient service because CR 4(d)(5) provided that "[a] voluntary appearance of a defendant does not preclude his right to challenge ... insufficiency of process...." *Id.* at 209. *Adkinson* merely clarified CR 4(d)(5) and did not suggest that appearance by the defendant cannot serve to reserve the defense of insufficient service of process. Here, the notice of appearance, along with the nonexistence of misleading conduct, illustrates the County's clear intention to assert the defense, not a clear intention to waive it. Moreover, the Lybberts' attorney was on notice that the defendants would assert the defense.

The majority contends, though, that the actions of the Lybberts are not at issue in determining whether Grant County waived the defense of insufficient service. The decision in *French* is to the contrary. There, this court found it significant in *French* that the plaintiff never complained about the lateness of the defendant's answer. In fact, this court stated, "once [the defendant] was late in filing his answer, French could have moved for a default judgment pursuant to CR 55(a). He chose not to." *French,* 116 Wash.2d at 593, 806 P.2d 1234. Thus, the actions of the nonwaiving party have been significant in the only previous case in which this court addressed the issue of waiver of the defense of insufficient service.

The Lybberts could have moved for a default judgment. They chose not to. The Lybberts' attorney also chose not to bring a motion to compel discovery under CR 37(a) nor a request for admission of proper service under CR 36, and did not confirm in writing or phone conversations with the County that effective service had been accomplished. Instead, two months after sending their interrogatories, the ***51** Lybberts' attorneys merely requested in writing that Clark County send responses to interrogatories "at your earliest convenience." Clerk's Papers (CP) at 57 and 63. [10] Effecting proper service and determining ****1136** whether service is proper is the duty of the attorney filing the claim, not the attorney defending the claim.

Because the facts do not indicate that Grant County intended to mislead the Lybberts regarding the sufficiency of process, it is of little import that Grant County contacted the Lybberts' attorney to discuss other unrelated matters. The majority states that the relevant facts are not in dispute, but both parties contest the number and content of the communications between them. It is clear, however, that Grant County received the Lybberts' interrogatories six months after the complaint was filed and a detective working for Grant County called the Lybberts' attorney to clarify the content of the questions. An attorney for Grant County may have also briefly mentioned state-sponsored mediation during one phone conversation. However, these facts do not show that the plaintiffs at any time informed the defendant that they were relying on proper service. None of the facts supports a conclusion that the attorneys for Grant County intended to mislead the Lybberts and wait for the statute of limitations to expire. An affidavit, phone conversations, and exchanged interrogatories are simply not enough to show common law waiver of the defense of insufficient service of process.

2 The majority correctly asserts that the doctrine of common law waiver of the affirmative defense of insufficient service of process is well established in courts throughout our country. While that is true, after examining the cases the majority offers to support this contention, I find that the doctrine of waiver is not applied with such severity as the majority applies it here.

Some jurisdictions have applied the common law doctrine of waiver in situations where the defendants' misleading conduct spans several years. For example, defense counsel in *Marcial Ucin,* 723 F.2d 994, filed a notice of appearance, engaged in 13 depositions over a period of four years, and only then moved for an entry of default against the plaintiff for failure to properly serve the defendant. *Id.* at 997. The court held that the defendants waived the defense because their prejudgment conduct was clearly inconsistent with the later assertion of the defense. *Id.* Similarly, while the court in *Kearns* stated that Fed.R.Civ.P. 12(h) "[did] not preclude waiver by implication[,]" the *Kearns* court held that the defendants had waived the defense because they had repeatedly stipulated to extensions of time to answer the complaint over a period of four years and filed these stipulations with the court, but at no time actually reserved the right to contest the sufficiency of process. *Kearns v. Ferrari,* 752 F.Supp. 749, 751 (E.D.Mich.1990) (citing *Marquest Med. Prods., Inc. v. EMDE Corp.,* 496 F.Supp. 1242, 1245 n. 1 (D.Colo.1980)).

Other jurisdictions have applied the waiver doctrine only where the defense failed to raise the defense prior to judgment. In *Trustees of Cent. Laborers' Welfare Fund v. Lowery,* 924 F.2d 731 (7th Cir.1991), the court held that the defendants waived the defense of insufficient service of process after failing to assert it either prior to default judgment or after postjudgment proceedings spanning nearly six years. *Id.* The *Trustees* court stated that the six years of postjudgment conduct "led both the court and the plaintiffs to believe that a valid judgment had been obtained against them." *Id.* at 733.

***53** The facts of the lower appellate decisions of *Burton v. Northern Dutchess Hosp.,* 106 F.R.D. 477 (S.D.N.Y.1985), and *Tuckman v. Aerosonic Corp.,* 394 A.2d 226 (Del.Ch.1978), are also dissimilar to the facts of this case. In *Burton,* the defendants seasonably preserved the defense of insufficient service, but then waived the defense by failing to make a motion to dismiss the complaint during the succeeding three and one-half years of extensive discovery, requests for continuances, and ****1137** transfer of the case from Connecticut to New York. *Burton,* 106 F.R.D. at 481. In *Tuckman,* a year after filing a notice of appearance, the defendant learned that a recent United States Supreme Court decision had held that parts of the Delaware service statute were unconstitutional. *Tuckman,* 394 A.2d at 227 (citing *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)). The court emphasized that waiver of a known right in a civil case must involve a "knowing and voluntary waiver." *Tuckman,* 394 A.2d at 229 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938)). The defendant subsequently waived the defense by continuing to engage in discovery and failing to assert the defense, or show reason for delay, after the defendant had actual knowledge of the implications of the *Shaffer* decision. *Tuckman,* 394 A.2d at 232–33.

In *Joyner,* 236 Ga.App. 316, 512 S.E.2d 62, the defendant had asserted the defense of insufficient service in both his answer and responses to interrogatories seven months after the complaint. *Id.* at 317, 512 S.E.2d 62. The court stated that "after a party has properly raised such a defense, it will only be found waived if the party later engages in conduct so manifestly indicative of an intention to relinquish a known right or benefit that no other reasonable explanation of its conduct is possible." Id. (quoting Heis v. Young, 226 Ga. App. 739, 740, 487 S.E.2d 403 (1997)). The Joyner court held that the defendant's conduct in engaging in discovery after asserting the defense did not manifest a clear intent to relinquish the defense. *Id.* at 318, 512 S.E.2d 62 (distinguishing *Tate v. Leres,* 59 Ga.App. 6, 200 S.E. 325 1938) ***54** (defendant waived the defense by failing to assert the defense and allowing the case to proceed to trial)). Significantly, while Georgia requires a manifest intent to relinquish the defense so that no other reasonable explanation is possible, the *Joyner* court also dismissed as hearsay evidence plaintiff counsel's affidavit that asserted defense counsel expressly stated they did not intend to pursue the insufficiency of service defense. *Id.* at 319, 512 S.E.2d 62.

None of the cases cited by the majority has applied common law doctrine of waiver to the limited conduct at issue here —prejudgment conduct involving a notice of appearance, limited communications between the parties, and an assertion of the defense in the first court pleading 10 months after the complaint was filed. To the contrary, waiver has been applied in other jurisdictions only to purposeful and misleading conduct or postanswer actual knowledge of improper service. As these cases illustrate, the doctrine of common law waiver in other jurisdictions is not as harsh or broad as the rule the majority proposes today.

Finally, the majority states that its decision is consistent with the traditional duties litigators owe their adversaries and is consistent with the duties expressed in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993). The *Fisons* decision was limited to persistent, misleading, and egregious action which prevented the plaintiffs from obtaining information solely in the hands of the defendants. That is not this case. Moreover, unlike the plaintiffs in *Fisons* who had no control over the defendants violation of the discovery rules, the plaintiffs in this case could have easily discovered their own service of process mistake by looking to the applicable service of process statute, RCW 4.28.080(1), and existing case law. *See* *Nitardy v. Snohomish County,* 105 Wash.2d 133, 712 P.2d 296 (1986) (holding that substantial compliance with the provisions of RCW 4.28.080(1) is no defense to improper service of process, the service must exactly comply with the statute's ***55** provisions). In fact, CR 4(d) outlines the proper process for service and specifically refers to RCW 4.28.080. [11]

In sum, unlike *Raymond,* Grant County did not ask for additional time to answer the complaint or interrogatories, and unlike *Romjue,* did not receive a letter fromthe Lybberts which directly expressed their reliance on proper service. The County expressly reserved the right in its notice of appearance to argue the claim. At no point during limited communications between the parties did Grant County ever express an intent to waive the defense of insufficient service or attempt to mislead the Lybberts. Grant County's actions simply do not constitute inconsistent conduct illustrating relinquishment of the right to assert the defense of insufficient process. Therefore, I dissent.

GUY, C.J., concurs.

TALMADGE, J., concurs in result only.

All Citations

141 Wash.2d 29, 1 P.3d 1124

Footnotes

1 A plaintiff has the option to sue in the superior court of the county where the injury occurred, "*or in the superior court of either of the two nearest counties*." RCW 36.01.050 (emphasis added).

2 RCW 4.28.080 states in pertinent part: "Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

> "(1) If the action be against any county in this state, to the county auditor."

3 Interrogatory No. 65 states, in pertinent part: "If your answer to Plaintiffs' Complaint sets forth any of the following as an affirmative defense or if you plan on alleging any such defenses when you do answer the Complaint, state with particularity all facts upon which each affirmative defense is based: ...
"....
"(c) Insufficiency of service or process." CP at 54–55.

4 The alleged injury occurred on March 8, 1993. Thus, the statute of limitations would not extinguish the Lybberts' claim until May 7, 1996. *See* RCW 4.96.020(4) ("No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.")

5 It is true, as the Court of Appeals noted, that this court has previously indicated that the government should be "scrupulously just" when dealing with its citizens. *See State ex rel. Shannon v. Sponburgh,* 66 Wash.2d 135, 143, 401 P.2d 635 (1965). We held there that the government needed to act "scrupulously just" when it is acting in a regulatory capacity. Our rationale for requiring the government to act in such a manner was consistent with our notion of due process, which precludes the government from acting in an arbitrary and capricious manner. Here, the County was not acting as a regulatory body and, thus, the "scrupulously just" language of *Sponburgh* is not applicable in the present context.

6 The only factual dispute is whether one of the County's attorneys, George Fearing, had a telephone conversation with the Lybberts' attorney, prior to June of 1996. We find this dispute immaterial. Whether or not Mr. Fearing conversed with the Lybberts' attorney is of no significance because it is undisputed that the other attorney for the County, Stephen Hallstrom, indicated that he had telephone conversations with the Lybberts' attorney on more than one occasion prior to June of 1996.

7 The dissent asserts that "the *Romjue* court did not rely upon the existence of a process server's affidavit" in finding waiver. Dissenting op. at 1134. We disagree with the dissent's reading of *Romjue*. That court explicitly noted that "the record indicates Mr. Fairchild's counsel should have known of this defense when

he received the copy of the process server's affidavit from Mr. Romjue's counsel, some 3 weeks before he initiated discovery." *Romjue,* 60 Wash.App. at 281, 803 P.2d 57. It is apparent to us the existence of the process server's affidavit figured prominently in the court's waiver calculus.

8 One of the attorneys for the County conceded that he told the Lybberts' attorney that "the County had historically participated in mediation when requested and that he did not see why the County would not in this instance." CP at 129–30.

9 The County also argues that if we affirm the Court of Appeals on the issue of waiver it would conflict with this court's decision in *Nitardy v. Snohomish County,* 105 Wash.2d 133, 712 P.2d 296 (1986). Once again, we disagree. *Nitardy* is not applicable to this case. In that case, a disgruntled employee of Snohomish County sued the County but served the wrong government agent. Snohomish County engaged in discovery, and then after the statute of limitations had expired on the employee's claim it moved to have the lawsuit dismissed. The trial court granted the motion and this court accepted review. Nitardy argued before this court that service was effective because she "substantially complied" with the dictates of RCW 4.28.080, an argument we rejected. Nitardy did not argue that the County waived its defense by failing to preserve it and then engaging in discovery. *Nitardy,* in sum, provides no guidance on the issue of waiver.

10 Although CR 33 requires answers to interrogatories within 30 days, the rules also provide that this period can be extended or modified by written stipulation of the parties. It seems reasonable that where the defendants allowed the plaintiffs more time to fully answer interrogatories and understood from the plaintiffs' written communication that they also had additional time to answer interrogatories, such failure to answer should not reflect negatively upon the defendants. In fact, after the Lybberts requested answers to the interrogatories "as soon as possible" (June 10, 1996), Grant County sent the answers. Clerk's Papers at 60, 63. *See, e.g.,* CR 33(a) – "The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories...." A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to CR 29. Unless the court orders otherwise, the parties may by written stipulation, "modify the procedures provided by these rules for other methods of discovery." CR 29(2).

11 CR 4(d) service – "(1) *Of Summons and Complaint*. The summons and complaint shall be served together.

> "(2) *Personal in State*. Personal service of summons and other process shall be as provided in RCW 4.28.080–.090 ... and other statutes which provide for personal service."

296 F.Supp.3d 569
United States District Court, E.D. New York.

Maxie DACOSTA, Plaintiff,
v.
The CITY OF NEW YORK, Detective David Shapiro, Shield #6054, and Police Officers John and Jane Doe #1 through 20, individually and in their official capacities, Defendants.

15–CV–5174
|
Signed November 8, 2017

Synopsis

Background: After his robbery charges were dismissed, arrestee brought § 1983 action against city and city police officer, asserting claims for malicious abuse of process, malicious prosecution, municipal liability, and intentional infliction of emotional distress. After engaging in discovery, arrestee moved to amend his complaint to add police officer, who was lead detective in robbery prosecution, as defendant. The District Court, Mann, United States Magistrate Judge, issued report recommending that arrestee's motion be denied.

Holdings: The District Court, Jack B. Weinstein, Senior District Judge, held that:

city's defense attorney, who failed to correct misconception by arrestee's counsel as to the proper defendant, did not comply with his or her ethical and discovery obligations, and thus, attorney could not assert the statute of limitations as defense in arrestee's § 1983 action;

arrestee demonstrated good cause in failing to add city police officer, who was lead detective in arrestee's robbery prosecution, as defendant prior to scheduling order's deadline for amending pleadings, and thus, arrestee would be allowed to amend his complaint to add defendant;

under New York law, as predicted by the district court, arrestee's amended complaint related back to arrestee's original complaint, and thus, arrestee's § 1983 claim against police officer was timely; and

under the federal relation-back doctrine, arrestee's amended complaint related back to arrestee's original complaint, and thus, arrestee's § 1983 claim against police officer was timely.

Report reversed.

Procedural Posture(s): Motion to Amend the Complaint.

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MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT

Jack B. Weinstein, Senior United States District Judge:

Table of Contents

I. Introduction

Two legal issues are central to this civil rights opinion: first, is it ethical for a government defense attorney to fail to correct plaintiff's counsel's misconception about the proper defendant; and second, should the relation back of an amendment adding a new defendant be allowed *nunc pro tunc* to avoid a statute of limitations defense pursuant to the standards of the Supreme Court and the New York Court of Appeals rather than the more rigid standards sometimes applied in cases decided in the Second Circuit. The answer to the first question is "no," such a practice of holding back the identity of the proper defendant is neither ethical nor allowed in the Eastern District of New York under local and national rules. And to the second, "yes," the more flexible standards of the two highest courts allow a *nunc pro tunc* amendment avoiding the statute of limitations.

Plaintiff has alleged serious civil rights violations by a New York City police officer. He filed suit the day before the expiration of the statute of limitations naming the wrong police officer in his complaint about his prosecution for robbery. The City's attorney representing the named officer possessed, or should have possessed, knowledge about which police officer was involved in the investigation leading to Plaintiff's prosecution for robbery. When Plaintiff finally learned the name of the officer who was responsible for the alleged harm, the attorney for the City claimed it was too late to amend the complaint to name the proper party.

Plaintiff's amended complaint naming the proper police officer is allowed, with a relation back to the time the original complaint was filed. Defendants' motion for summary judgement on the grounds of a statute of limitations defense is denied.

II. Facts

Plaintiff was accused of three crimes in 2007: homicide, escape, and robbery. He was acquitted of the homicide and escape by a jury, and the robbery charge was shortly after dismissed. This suit is based primarily on a theory that the police lacked probable cause to bring charges and prosecute Plaintiff for the robbery.

The homicide and escape charges are unrelated to the robbery. Oct. 23, 2017 Hr'g Tr. 12:12–20. Plaintiff was accused of committing a murder on July 28, 2007, *id.* 16:12–20, and it was alleged that while in custody for the homicide charge, Plaintiff, while under the supervision of Detective David Shapiro, escaped from the police precinct, *id.* 9:25–10:6. Eventually, Plaintiff was sent to jail on the homicide and escape charges. *Id.* 16:12–17:8; Am. Compl. ¶ 12.

The robbery charge that forms the basis of the present civil suit is based on a different set of facts. On the evening of July 28, 2007, an armed man entered a retail sports store, threatened and assaulted employees, and forcibly removed $4,600 from the cash register. Plaintiff's Response to Defendants' Statement Pursuant to Local Rule 56.1 ("56.1 Stmt.") at ¶ 1, ECF No. 65.

About a month later, on August 29, 2007, one of the robbery victims, Mohammad Sarwar, was watching the news on television and saw a picture of Plaintiff on a ***577** wanted poster related to the homicide and escape accusations. *Id.* at ¶¶ 2, 3. Mr. Sarwar believed that Plaintiff was the person who robbed the store the previous month; he contacted the 106th Precinct Detective Squad. *Id.*

A day later, he met with Detective Fortunato Tranchina, the lead detective responsible for investigating the robbery. *Id.* at ¶¶ 4–5. Mr. Sarwar was shown a photo array at the precinct and again identified Plaintiff. *Id.* at ¶ 7. The photo array contained a photograph from the wanted poster that Mr. Sarwar had seen the day earlier—the same photograph

that prompted him to come forward to the police. *Id.* Two other eyewitness-victims of the robbery were also there, Anita Saunders and James Cadawan. *Id.* They had seen the same wanted poster that Mr. Sarwar saw the prior day, but they expressed some uncertainty about whether Plaintiff was the perpetrator of the robbery. *Id.*

On March 11, 2008, Mr. Sarwar, Ms. Saunders, and Mr. Cadawan returned to the precinct to view a lineup. *Id.* at ¶ 8. Mr. Sarwar identified Plaintiff as the guilty person. *Id.* Ms. Saunders and Mr. Cadawan viewed the lineup, but did not identify Plaintiff. *Id.* Ms. Saunders identified a different person with 80% confidence and Mr. Cadawan told the police that he did not recognize any of the people in the lineup. *Id.*

On April 24, 2008, Detective Tranchina arrested Plaintiff, who was already in jail on the other charges—homicide and escape—and signed a criminal court complaint charging him with two counts of Robbery in the First Degree. *Id.* at ¶¶ 9, 11. Plaintiff was, on May 15, 2008, indicted by a Grand Jury for one count of Robbery in the First Degree, one count of Robbery in the Second Degree, two counts of Assault in the Second Degree and one count of Criminal Possession of a Weapon (in the robbery) in the Fourth Degree. *Id.* at ¶ 13. On September 3, 2008, a criminal court judge determined that the indictment was not defective. *Id.* at ¶¶ 14–15.

After spending several years in jail on the robbery, homicide, and escape charges, Plaintiff was tried and acquitted of the homicide and escape. Am. Compl. ¶ 22. That same day he was released from jail on his own recognizance. *Id.* at ¶ 23. A month later, on September 6, 2012, the robbery charges were dismissed. *Id.* at ¶ 13.

Detective Tranchina was the lead detective on the robbery case, which forms the basis of this lawsuit. Plaintiff and his counsel were under the mistaken notion that Detective Shapiro, the officer who was involved in the murder investigation, and from whose custody Plaintiff allegedly escaped, was in charge of the robbery investigation. *See* Compl. Plaintiff filed suit on this assumption, and named as defendants Detective Shapiro along with twenty John and Jane Doe officers. *Id.*

Plaintiff believed that Shapiro had orchestrated his arrest for the robbery as payback for his alleged escape. Oct. 23, 2017 Hr'g. Tr. 9:16–10:13. In discovery, Plaintiff found no evidence that this theory was true, but learned of the extensive involvement of Detective Tranchina in the robbery prosecution. *Id.*

III. Procedural History

Plaintiff filed suit on September 5, 2015. *See* Compl. As amended, the complaint asserts claims under 42 U.S.C. § 1983 for deprivation of federal civil rights, malicious abuse of process, malicious prosecution, municipal liability, and a claim for intentional infliction of emotional distress under New York state law. *See* Am. Compl. at 5–10. The original complaint named The City of New York, David Shapiro, a detective, ***578** and twenty John and Jane Doe defendants. *See* Compl. at 1.

On February 26, 2016, Defendants filed a motion to dismiss the action for failure to state a claim. Plaintiff then amended his complaint on March 18, 2016, mooting the motion to dismiss. *See* April 19, 2016 Order, ECF No. 21. On June 3, 2016, Defendants answered Plaintiff's First Amended Complaint. *See* Answer, ECF. No. 25.

After engaging in discovery, on January 9, 2017, Plaintiff filed a motion to amend his complaint for a second time to add a new defendant, Detective Tranchina, determined in discovery to have been the lead detective in the robbery prosecution at the heart of the instant case. *See* Pl.'s Mot. Am., EFC No. 46. Defendants opposed the motion on the ground that the statute of limitations had run and that the amended pleading did not relate back to the filing of the original complaint. *See* Defs.' Opp'n Am., ECF No. 47.

Magistrate judge Mann agreed with Defendants. She issued a Report and Recommendation on February 10, 2017 recommending that Plaintiff's motion to amend his pleadings and add Detective Tranchina be denied. *See* R. & R., ECF. No. 59.

For the reasons indicated below, the statute of limitations does not bar the suit. Relation back is permitted. The report of the magistrate judge recommending denial of permission to amend is reversed.

IV. Law

A. Standard of Review from Objections to Magistrate Judge's Report and Recommendations

The magistrate judge issued a Report and Recommendation on the issue of whether Plaintiff should be granted leave to amend his complaint and whether that amendment relates back to the original pleading. Although this is a Report and Recommendation on a motion to amend a pleading, the magistrate judge recognized that it was effectively a dispositive motion because denial would "foreclose plaintiff's potential claims against Tranchina." R. & R. at 2 n.2, ECF. No. 59.

Since this report is dispositive of Plaintiff's claims, the court reviews it *de novo*. *See* Fed. R. Civ. P. 72(b); *Covington v. Kid*, No. 94 CIV. 4234 (WHP), 1999 WL 9835, at *2 (S.D.N.Y. Jan. 7, 1999) ("A dispositive matter is one that disposes of, or terminates, a claim or defense. Because Magistrate Judge Peck's order denying Plaintiff leave to amend the complaint foreclosed the potential claims against P.O. Lorenzo and Lt. Ahearn, it was dispositive.").

A party has fourteen days to object to a Report and Recommendation. Fed. R. Civ. P. 72. Plaintiff did not file an objection. *But see Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989) ("[T]he district court is not bound by the recommendation of the magistrate."). The court has discretion to conduct *de novo* review even without receiving objections within the allotted fourteen-day window. *See United States v. Male Juvenile (95–CR–1074)*, 121 F.3d 34, 39 (2d Cir. 1997) ("Although defendant did not object to the magistrate judge's recommendation ... [t]he record indicates that the district court made a *de novo* determination of the Report and Recommendation .... The court's review was well within its discretion.").

While a failure to timely object may at times lead to a waiver of a right to review, the court here reviews *de novo* because of the serious ethical and other considerations that were revealed by Defendants' summary judgment motion. The parties have long been on notice that the court was considering this issue. On March 7, 2017 the court informed the parties that it would hear argument on Plaintiff's motion ***579** seeking to amend his complaint along with Defendants' motion for summary judgement. *See* Mar. 7, 2017 Order, EFC No. 62. In a later scheduling order the court informed Defendants that "[c]ounsel for the defendants, the defendants, and prospective defendants may be questioned about their litigation conduct in failing to bring plaintiff's counsel's error to the timely attention of plaintiff's counsel, if that was a failure." May 17, 2017 Order, ECF No. 71.

B. Statute of Limitations

As in the case of many federal substantive statutes, Congress did not establish a statute of limitations for civil rights actions brought pursuant to 42 U.S.C. § 1983. *Bd. of Regents v. Tomanio,* 446 U.S. 478, 483, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Consequently, federal courts are sometimes driven to "borrow" state statutes of limitations. *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (citing cases). Section 1988 instructs district courts to follow

> the laws of the United States, so far as such laws are suitable to carry [the provisions of Section 1983] into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern the said courts in the trial and disposition of the cause ...

42 U.S.C. § 1988 (emphasis added).

The state statute to be borrowed should not be selected arbitrarily; the limitations period for "the prosecution of a closely analogous claim" must be chosen because "a federal court is relying on the State's wisdom in setting a limit" for when the action may be brought, which "inevitably reflect a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson*, 421 U.S. at 463–64, 95 S.Ct. 1716.

The statutes should be adopted with at least some state interpretative nuances. To properly apply a statute of

limitation, it is necessary to understand the purposes underlying it. The purposes underlying statutes of limitation of the state of New York is as follows:

> Statutes of limitation are essentially creatures of the legislative rather than of the judicial process. Although isolated instances of time limitations upon the institution of suits existed prior to the seventeenth century, the genesis of modern comprehensive prescription of time limitations is generally ascribed to the English Limitation Act of 1623.
>
> Statutes of limitation are among the more anomalous creatures of the law. They often operate arbitrarily upon passage of the specified period of time to bar justified as well as unjustified claims, and typically apply whether the delay in bringing suit was justifiable or, indeed, could have been avoided at all. They represent a legislative judgment that such occasional hardship is outweighed by the advantages of barring stale claims.
>
> A number of interrelated policy considerations are advanced as the "advantages" that outweigh these occasional hardships.
>
> Perhaps most fundamental, certainly most deeply rooted in the "instinct of men," are the considerations that underlie ***580** the common appellation of limitation statutes as "statutes of repose."
>
> It seems harsh that misdeeds and obligations perhaps long forgotten should remain a source of uncertainty and concern, if those harmed do not seek vindication within a reasonable time. Expectation are developed., with the passage of time, that the slate has been wiped clean of ancient obligations, or even that they have been forgiven, and it is not unreasonable to seek security to mold one's affairs in the light of these expectations. So long as the injured person is given a reasonable time and opportunity to seek any desired redress for personal grievance, and is aware of the bar by the passage of time, concern for that person need not conflict with this policy of repose.
>
> The policy consideration most frequently articulated by courts, however, and the one that has had the greatest effect in shaping the law of limitations, concerns the effect of the passage of time upon the availability and reliability of evidence, and the consequent prejudice to fair and accurate determination of factual disputes. Fairness to the defendant is primarily stressed, but concern for the effectiveness of judicial machinery is also apparent.
>
> Less often articulated, but certainly a related element of justification for time limitations, is the experiential knowledge that meritorious claims will usually be pressed within a reasonable period of time, which leads to a presumption of sorts that the probability of merit is less in a stale than a fresh claim. An English judge may have had the probability, as well as the policy of repose in mind, in stating that "Long dormant claims have often more of cruelty than of justice in them."
>
> In addition to these general policy considerations, statutes of limitation are often used to implement a legislative attitude toward particular types of actions or particular classes of litigants. The short slander period reflects disfavor of this type of action; the two-year and six months medical malpractice period evidences special favorable treatment of a particular class of defendants.

1 J. Weinstein, H. Korn, & A. Miller., N.Y. Civ. Prac. ¶ 201.01, at 2–7 to 2–9 (1995).

State legislatures often provide for different statutes of limitations to be used depending on the claims and the parties at issue. *See, e.g.*, *Pauk v. Bd. of Trs.' of City Univ. of N.Y.*, 654 F.2d 856, 861 (2d Cir. 1981) (reviewing different New York statutes of limitations that could apply to plaintiff's Section 1983 claim). Trying to divine which limitations period to apply to a Section 1983 action was a difficult task because there are no causes of action analogous to a federal suit stating claims under Section 1983. That section is "a uniquely federal remedy" that has "no precise counterpart in state law. Therefore, it is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson v. Garcia*, 471 U.S. 261, 271–72, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (internal quotation marks and citations omitted).

Another problem with the borrowing rule is the variety of conduct that can constitute the basis of a valid Section 1983 claim. *See* *id.* at 274, 105 S.Ct. 1938 (cataloguing some of the "numerous and diverse topics and subtopics" that have been alleged as constitutional claims under § 1983). In endeavoring to apply "analogous" state statutes of limitations, courts could apply different limitation periods to different legal claims falling under the umbrella ***581** of a

Section 1983 claim, which might even happen within the same lawsuit. *Id.*

In the face of these issues, the Supreme Court has explicitly shifted away from the *Johnson* rationale for using state statutes of limitations—that borrowing limitations statutes is a way to borrow the "wisdom" of state legislatures who balanced the interests of repose and substantive justice when considering "closely analogous claims"—and instead has held that "practical considerations ... explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose." *Id.* at 272, 105 S.Ct. 1938.

The primary practical consideration relied upon by the Court is that a uniform statute of limitations within each state helped further "the [federal] legislative purpose to create an effective remedy for the enforcement of federal civil rights," and the effectiveness of that remedy "is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Id.* at 275, 105 S.Ct. 1938. Eventually, the Supreme Court decided that the three-year statute of limitations of New York CPLR 214(5), which governs general personal injury actions, should be applicable to any and all Section 1983 actions filed in New York. *Owens v. Okure*, 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).

Supreme Court jurisprudence in this area has led to the peculiar result that the time within which a plaintiff must bring a claim under Section 1983 varies widely from state-to-state. *See* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 379, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004) ("[L]imitations borrowing resulted in uncertainty for both plaintiffs and defendants, as a plaintiff alleging a federal claim in State A would find herself barred by the local statute of limitations while a plaintiff raising precisely the same claim in State B would be permitted to proceed."); Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 Neb. L. Rev. 454, 483 (1993) ("A person in North Dakota or Maine who has been denied his or her First Amendment rights has six years in which to assert a claim, but a person in Kentucky or Louisiana loses the same First Amendment claim after only one year."); David D. Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 99 (1983) ("[I]t must strike any observer as incongruous that something as fundamentally 'federal' as a federal civil rights claim should be subject to varying periods from state to state."). Though Congress subsequently passed a law establishing a catch-all federal statute of limitations of four years (*see* 28 U.S.C. § 1658), the law is not retroactive and "applies only to claims arising under statutes enacted after December 1, 1990." *Jones*, 541 U.S. at 380, 124 S.Ct. 1836. For Section 1983 claims, courts are still required to apply the directives of Section 1988 of Title 42 as interpreted by the Supreme Court.

The application of state statutes of limitations to Section 1983 claims comes with a caveat; Section 1988 allows for the application of state law only " 'so far as the same is not inconsistent with' federal law." *Wilson*, 471 U.S. at 269, 105 S.Ct. 1938 (quoting 42 U.S.C. § 1988). "In order to gauge consistency ..., the state and federal policies which the respective legislatures sought to foster must be identified and compared." *Tomanio*, 446 U.S. at 487, 100 S.Ct. 1790. While "in general, state policies of repose cannot be said to be disfavored in federal law ... it is appropriate to determine whether" application of a state statute of limitations is appropriate given ***582** the federal policies embodied in the creation of a cause of action under Section 1983. *Id.* at 488–89, 100 S.Ct. 1790.

The instruction to consider the state's policy in setting the relevant statute of limitations is strange given the Court's acknowledgement that "practical considerations" drove its directive that a single limitations period be used for all Section 1983 claims in any state, and its recognition that "when the federal claim different from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Wilson*, 471 U.S. at 271–72, 105 S.Ct. 1938 (internal quotation marks omitted).

The importance of federal policy in enacting Section 1983 can hardly be overstated. Congress passed Section 1983 as part of the Civil Rights Act of 1871 in response to the terrorist campaigns of the Ku Klux Klan that sought to deny

"decent citizens their civil and political rights." *Id.* at 276, 105 S.Ct. 1938. "By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the [Southern] region through the subtle power of civil enforcement." *Id.* Section 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). "The high purposes of this unique remedy make it appropriate to accord the statute a sweep as broad as its language." *Wilson*, 471 U.S. at 272, 105 S.Ct. 1938 (internal quotation marks omitted). More specifically, "[t]he policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590–91, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

Congressional policy encourages attorneys to file lawsuits asserting valid Section 1983 claims. Congress passed the Civil Rights Attorney's Fees Act of 1976 (42 U.S.C. § 1988(b))—which allows the court to award a "prevailing party" in "any action or proceeding to enforce a provision of" Section 1983 to recover "a reasonable attorney's fee"—to encourage civil rights lawsuits and deter civil rights violations. *See* David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 Duke L.J. 706, 708–712 (1992) (reviewing the legislative history of the Civil Rights Attorney's Fees Act of 1976).

Despite the importance of the policies that undergird Section 1983, "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson,* 436 U.S. at 593, 98 S.Ct. 1991. In *Robertson*, the Supreme Court found that Louisiana's survivorship statute, which did not allow for the executor of the plaintiff's estate to recover pursuant to a decedent-plaintiff's § 1983 action, was not "inconsistent" with federal law so that it was appropriate to create a federal common law rule that would allow the survival of the action. *Id.* In allowing the action to abate, the Court noted that

> given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality, at least in situations in which there is no claim that the illegality caused the plaintiff's death. A state official contemplating illegal activity ***583** must always be prepared to face the prospect of a § 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of Louisiana survivorship law would hardly be influenced in his behavior by its provisions.

Id. at 592, 98 S.Ct. 1991.

> In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit (for reasons entirely unconnected with the official illegality) and who would not be survived by any close relatives.

Id. at 592 n.10, 98 S.Ct. 1991. The Court classified its holding as a "narrow one" in which application of the state law "has no independent adverse effect on the policies underlying § 1983." *Id.* at 594, 98 S.Ct. 1991.

In situations where application of a state law could undermine Section 1983's twin goals of compensation and deterrence, courts will not apply that law. *See, e.g.*, *Chaudhry v.*

City of Los Angeles, 751 F.3d 1096, 1105 (9th Cir. 2014) ("California's prohibition against pre-death pain and suffering damages limits recovery too severely to be consistent with § 1983's deterrence policy. [The California law] therefore does not apply to § 1983 claims where the decedent's death was caused by the violation of federal law."); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) ("To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deference to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death. State law that would preclude a claim for punitive damages in a case like the present one is manifestly 'inconsistent' with federal law within the meaning of section 1988.").

C. Motion for Leave to Amend a Pleading

Prior to trial, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). If a scheduling order has been entered setting a deadline for amendments, the schedule "may be modified" to allow the amendment "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). While the "primary consideration" for determining whether a party has good cause is if "the moving party can demonstrate diligence," the district court may also consider "other relevant factors including, in particular, whether allowing the amendment of the pleading at this state of the litigation will prejudice defendants." *Kassner v. 2nd Avenue Delicatessen, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007).

It must be kept in mind that all federal civil procedure rules should "be construed, administered, and employed by the court and the parties to secure the *just*, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (emphasis added). It is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of [ ] mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (citing Fed. R. Civ. P. 1 and 15 in holding that amendment of a complaint should be freely given so a plaintiff is "afforded an opportunity to test his claim on the merits.").

*584 D. Relation Back

In some instances, "an amended pleading relates back to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable limitations period." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 541, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010). Two forms of "relation back" are relevant. First, an amended pleading relates back when "the law that provides the applicable statute of limitations allows relation back." Fed. R. Civ. P. 15(c)(1)(A). Second, an amended pleading that adds a new party relates back pursuant to Rule 15(c)(1)(C) if the following conditions are met:

> (1) the claim must have arisen out of conduct set out in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party should have known that, but for a mistake of identity, the original action would have been brought against it; and ... [4] the second and third criteria are fulfilled within 120 days of the filing of the original complaint, and ... the original complaint [was] filed within the limitations period.

Hogan v. Fischer, 738 F.3d 509, 517 (2d Cir. 2013) (alterations in original) (citing *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 468–69 (2d Cir. 1995)).

1) Federal Rule 15(c)(1)(A)

For a claim brought pursuant to 42 U.S.C. § 1983, "the law that provides the applicable statute of limitations" is the law of the state in the jurisdiction in which the federal district court sits because there is no federal statute of

limitations. *See* *Wilson*, 471 U.S. at 275, 105 S.Ct. 1938; *Hogan*, 738 F.3d at 518. Courts must "look to the entire *body* of limitations law that provides the applicable statute of limitations." *Hogan*, 738 F.3d at 518 (emphasis in original). If the claim would be saved under an applicable state law, that law must be applied. *Id.*

a) New York CPLR 1024

New York has a rule that specifically pertains to claims against John Doe defendants. CPLR 1024 reads:

> A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

New York courts have read two additional requirements into the application of CPLR 1024: (1) there must not be prejudice to the newly-substituted defendant, and (2) the plaintiff must have been reasonably diligent in attempting to ascertain the identity of the unknown defendant prior to the expiration of the statute of limitations. *Hogan*, 738 F.3d at 518–19.

There is also a third requirement, which arises from the interaction of CPLR 1024 and CPLR 306–b—the newly-named defendant must be served within 120 days of the filing of the complaint. *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 31–32, 883 N.Y.S.2d 99 (N.Y. App. Div. 2009). This 120–day service requirement may be extended "upon good cause shown or in the interest of justice." *Id.* at 31, 883 N.Y.S.2d 99 (quoting CPLR § 306–b). "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service." *Id.* Whether an extension is in "the interests of justice" is a broader inquiry that takes into consideration the merits of the underlying action, ***585** diligence, and prejudice to the defendant, among other factors. *Id.* at 32, 883 N.Y.S.2d 99.

b) New York CPLR 203

Within the body of New York limitations law is also a more general relation-back statute, CPLR 203. A plaintiff's claims against one defendant may relate back to claims asserted against another if:

> (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for a[ ] ... mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

Buran v. Coupal, 87 N.Y.2d 173, 638 N.Y.S.2d 405, 661 N.E.2d 978, 981 (1995). "[T]he doctrine enables a plaintiff to correct a pleading error ... after the statutory limitations period has expired [and] ... thus gives courts the sound judicial discretion to identify cases that justify relaxation of limitations strictures to facilitate decisions on the merits if the correction will not cause undue prejudice to the plaintiff's adversary." *Id.* (internal citations, quotation marks, and alteration omitted).

Buran is a leading policy determining case for New York decided by its highest court. It greatly expanded opportunities to relate back for amendments based on new defendants. Prior to the decision of the New York Court of Appeals in *Buran*, many lower courts only allowed relation back if the mistake by the plaintiff as to identity of the proper parties was "excusable." In *Buran*, the Court of Appeals held that

the mistake need not be "excusable," and that requiring courts to evaluate the excusability of the mistake "unwisely focuses attention away from ... the primary consideration in such cases —whether the *defendant* could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter had been laid to rest as far as he is concerned." *Id.*, 638 N.Y.S.2d 405, 661 N.E.2d at 983 (emphasis in original) (internal quotation marks omitted).

Notice to the defendant, rather than the diligence of the plaintiff, is the " 'linchpin' of the relation back doctrine." *Id.* (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)). The "practical effect" of requiring excusability "ha[d] been to render the relation back doctrine meaningless in all but rare circumstances.... Surely, such a result is not in keeping with modern theories of notice pleading and the admonition that the Civil Practice Law and Rules 'be liberally construe to secure the just, speedy and inexpensive determination of every civil judicial proceeding.' " *Id.* (quoting CPLR 104).

The New York Court of Appeals clarified that tactical jockeying is not encouraged.

> This is not to say, however, that removing the excusability requirement from the third prong would prevent a court from refusing to apply the doctrine in cases where the plaintiff omitted a defendant in order to obtain a tactical advantage in the litigation. When a plaintiff intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired.

***586** *Id.* Courts may also be "justified in denying a plaintiff the benefit of the doctrine in order to prevent delay or disruption in the normal course of the lawsuit. Application of the doctrine in such circumstances would likely result in prejudice to the adversary and, as noted above, bar application of the doctrine under the second prong." *Id.*

The first prong of the *Buran* test—same occurrence—is easily applied and rarely litigated. The second prong, whether the new defendant is "united in interest" with the timely named defendant so that the new defendant can be charged with notice and will not be prejudiced, requires further exploration. "[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff." *Amaya v. Garden City Irrigation, Inc.*, 645 F.Supp.2d 116, 122 (E.D.N.Y. 2009) (citing *Connell v. Hayden*, 83 A.D.2d 30, 42–43, 443 N.Y.S.2d 383 (N.Y. App. Div. 1981)). A "jural relationship" is simply a "legal relationship giving rise to potential liability." *Id.*

"The most frequently cited relationship creating a unity of interest is vicarious liability, such as between an employer and employee or a corporation and its agents." *Id.* This relationship it has been held does not lead to a unity of interest in the context of a Section 1983 lawsuit because "a municipality cannot be held liable *solely* because it employs a tortfeasor, or, in other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory." *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (italics in original); *Higgins v. City of New York*, 144 A.D.3d 511, 513–16, 43 N.Y.S.3d 1 (N.Y. App. Div. 2016) (holding that there is no unity of interest between a city and its police officers because the city can only be held liable under *Monell* and is not vicariously liable for the actions of its officers); *cf. Llerando–Phipps v. City of New York*, 390 F.Supp.2d 372, 385 (S.D.N.Y. 2005) (allowing claims substituting individual officer names to relate back under CPLR 203 "because the individual officers are 'united parties in interest' with their employer, Defendant City of New York.").

The reality as observed in practice, however, is that the City and police officers have a practical unity of interest. The practice is for the City to pay any officers damages in almost all Section 1983 cases. New York City has a statutory obligation to indemnify individual policer officers for their tortious conduct so long as the tortious conduct

"occurred while the employee was acting within the scope of his employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." N.Y. Gen. Mun. Law § 50–k(2) (McKinney 2017). "New York courts have ... found that the duty to indemnify creates a unity of interest between parties." *Strada v. City of New York*, No. 11-CV-5735, 2014 WL 3490306, at *7 (E.D.N.Y. July 11, 2014) (citing New York cases). In circumstances where the City is bound by this duty, or uniform practice, the indemnification obligation is sufficient to constitute a "unity of interest" that passes the muster of the second prong of CPLR 203. *See* *Strada*, 2014 WL 3490306 at *8 n.6 ("[H]ere, the City—the originally named party—has the duty to represent and indemnify the untimely-added officers.... [T]he statutory duty of the City to indemnify its officers, even absent vicarious liability, is sufficient to create a unity of interest between the parties.").

***587** The third prong of the relation back test asks whether the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well. Whether this prong is met often turns on interpretation of the word "mistake." Most federal district courts have held that the term "mistake" in CPLR 203 should be given the same meaning as the term is given in Rule 15(c)(1)(C) of the Federal Rules of Civil Procedure. *See, e.g.*, *Briggs v. County of Monroe*, 09–CV–6147W, 2016 WL 1296060, at *10 (W.D.N.Y. Mar. 29, 2016) (citing cases). Nevertheless, as narrowly interpreted by the Court of Appeals for the Second Circuit, there is no "mistake in identity" that allows for relation back under Rule 15(c)(1)(C) if the "added defendants were not named originally because the plaintiff did not know their identities.... [T]he failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake." *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 469–70 (2d Cir. 1995); *see* *Hogan*, 738 F.3d at 517–18 (same); *see also infra* Part IV(D)(2).

Other federal district courts have inquired whether the plaintiff intentionally did not initially name the newly added defendants. *Amaya*, 645 F.Supp.2d at 124; *Ingenito v. Riri USA, Inc.*, 89 F.Supp.3d 462, 483 (E.D.N.Y. 2015). Under this inquiry, relation back is available if a plaintiff lacked knowledge of the true identity of the defendant, but the plaintiff evinces a lack of mistake if he fails to amend his complaint in a timely manner upon learning the defendant's proper identity. *See, e.g.*, *Amaya*, 645 F.Supp.2d at 124 ("Plaintiffs were aware of Tedesco's role at least as of May 12, 2005, when he was added as a third-party defendant, yet they did not seek to add him as a direct defendant for almost three years."); *Strada*, 2014 WL 3490306, at *9 ("Plaintiff offers no explanation for his failure to timely amend the Complaint to add the proposed defendants despite having knowledge of the individual defendants' potential liability by, at least, October 3, 2012 ... Here, by Plaintiff's own representation, he knew of all of the proposed defendants over a month before the statute of limitations expired on November 7, 2012.").

The role of the federal district court judge, when confronted with an issue of state law, is not to graft on to state law the precedent of a similar federal law, but to "ascertain from all the available data what the state law is and apply it [as a state court would] rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 (1940). "A federal court faced with a question of unsettled state law must do its best to guess how the state court of last resort would decide the issue. Where the high court has not spoken, the best indicators of how it would decide are often the decisions of lower state courts." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 850 (2d Cir. 1992) (internal citations omitted).

Not every New York state court interprets the term "mistake" in the state relation-back test in the same way the New York federal courts do when applying the federal relation-back test. The different appellate departments evaluate the third prong in different ways.

The Fourth Department is the most permissive in allowing relation back. In that Department, filing a complaint against a "John Doe" defendant because of ignorance ***588** of the proper party's identity *is* a "mistake in identity" that allows for claims against newly-named parties to relate back to the original filing against "John Doe." In *Kirk v. University OB-GYN Assoc., Inc.*, plaintiffs sued a hospital, individual doctors, and "John Doe, M.D." and "Jane Roe, M.D." for medical malpractice related to injuries sustained by an infant during the infant's delivery. 104 A.D.3d 1192, 1193–94, 960 N.Y.S.2d 793 (N.Y. App. Div. 2013). One year after the statute of limitations became a bar, the plaintiffs moved for leave to amend their complaint by substituting the name

of the physician who performed the delivery in place of "John Doe, M.D." The lower court granted the plaintiffs leave to amend their complaint. On appeal, the newly named physician argued that "there was no mistake and only neglect on the part of plaintiffs[;] [the appellate division agreed] with plaintiffs, however, [noting] that even if they were negligent, there was still a mistake by plaintiffs in failing to identify [the newly named physician] as a defendant." *Id.* at 1194, 960 N.Y.S.2d 793.

Following *Kirk*, the Fourth Department affirmed this interpretation of mistake in *Johanson v. County of Erie*. It held that "the third prong [of the relation back test] [was] satisfied" where a plaintiff moved to add a sheriff to a wrongful death complaint after the statute of limitations expired. *Johanson v. County of Erie,* 134 A.D.3d 1530, 1531, 22 N.Y.S.3d 763 (N.Y. App Div. 2015) (citing *Kirk* and *Buran*). In *Nasca v. DelMonte* it held "that plaintiffs also satisfied the third prong of [the relation back] test inasmuch as they established that their failure to include DelMonte P.C. as a defendant in the original or first amended complaint was a mistake and not the result of a strategy to obtain a tactical advantage." 111 A.D.3d 1427, 1429, 975 N.Y.S.2d 317 (N.Y. App. Div. 2013) (citing *Kirk* and *Buran*) (internal quotation marks and alteration omitted).

The Third and First Departments hew closer to the narrower federal *Barrow* rule (*see infra* Part IV(D)(2), discussing the Barrow under Rule 15(c)(1)(A)) that "plaintiffs' failure to identify [a newly-named defendant] prior to commencing this action was not the result of any mistake but, rather, was the product of their failure to make a timely and genuine attempt to ascertain [the defendant's] identity. [And] therefore reject plaintiffs' assertion that they should be permitted ... to utilize th[e] [relation back] doctrine." *Hall v. Rao*, 26 A.D.3d 694, 696, 809 N.Y.S.2d 661 (N.Y. App. Div. 2006); *see also Tucker v. Lorieo*, 291 A.D.2d 261, 262, 738 N.Y.S.2d 33 (N.Y. App. Div. 2002) ("In this case, however, the failure to identify Lorieo in the original summons and complaint and make timely service on him was not due to a mistake on the part of plaintiff in identifying the proper parties. Rather, it was due to plaintiff's failure to timely request the hospital record and ascertain Lorieo's identity.").

The Second Department also requires that plaintiffs demonstrate "that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations," but this is an "added burden" to fulfilling the other three prongs of Section 203 and not an outgrowth of the third prong. *Bumpus v. N.Y.C. Tr. Auth.*, 66 A.D.3d 26, 35, 883 N.Y.S.2d 99 (N.Y. App. Div. 2009).

Though the *Hall*, *Tucker*, and *Bumpus* decisions fault plaintiffs for their ignorance of the proper party's identity, other decisions from the same courts have ruled that ignorance of the proper party's identity is a prerequisite to invoking the relation-back doctrine. In *Somer & Wand, P.C. v. Rotondi*, the Appellate Division Second Department did not allow an amended ***589** complaint adding the individual shareholders of a professional corporation to relate back to the original filing because the counterclaimants "concede that they were aware of the identities of the individual shareholders ... when they commenced the action ... [and] contend that they intentionally did not name and serve the individual shareholders because they believed that the shareholders would be personally liable under Business Corporation Law § 1505(a)." 251 A.D.2d 567, 568–69, 674 N.Y.S.2d 770 (N.Y. App. Div. 1998). The court held that "[t]he mistake here was not a mistake as to the identity of the shareholders, but a mistake of law, which is not the type of mistake contemplated by the relation-back doctrine." *Id.* at 569, 674 N.Y.S.2d 770. The Third Department came to the same conclusion that a "mistake resulting from a misapprehension" about the law is "not a mistake as to ... identity." *State v. Gruzen Partnership*, 239 A.D.2d 735, 736, 657 N.Y.S.2d 830 (N.Y. App. Div. 1997).

These decisions produce a patchwork of conflicting rules about when relation back should be permitted, complicating the task of federal districts courts in discerning how the New York Court of Appeals or the Court of Appeals for the Second Circuit would rule on this issue. The Fourth Department allows relation back when there has been a John Doe pleading without regard to a plaintiff's diligence in identifying the unknown defendant. *See, e.g.*, *Kirk v. University OB-GYN Assoc., Inc.*, 104 A.D.3d 1192, 1193–94, 960 N.Y.S.2d 793 (N.Y. App. Div. 2013). The First and Third Departments classify naming John Doe as a defendant as a failure to ascertain a defendant's identity, rather than a "mistake" in identity. *See, e.g.*, *Hall v. Rao*, 26 A.D.3d 694, 696, 809 N.Y.S.2d 661 (N.Y. App. Div. 2006); *Tucker v. Lorieo*, 291 A.D.2d 261, 262, 738 N.Y.S.2d 33 (N.Y. App. Div. 2002). The Second Department recognizes that suing John Doe could

be a mistake, but plaintiffs may only avail themselves of the relation back doctrine if they attempted to avoid this mistake by making a sufficient effort to identify the defendant prior to filing suit. *See, e.g.*, *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 35, 883 N.Y.S.2d 99 (N.Y. App. Div. 2009).

The *Buran* decision by the New York Court of Appeals is the best guidance on which of these approaches the New York Court of Appeals would likely adopt as the New York rule. Based on *Buran*, it appears that the permissive approach of the Fourth Department is most aligned with New York Court of Appeals precedent. In *Buran*, the Court explicitly eschewed a prior iteration of the doctrine that required a plaintiff's mistake to be "excusable." *Buran*, 638 N.Y.S.2d 405, 661 N.E.2d at 981–83. Focusing on the diligence of the plaintiff, as the First, Second, and Third Appellate Division Departments do, is a reintroduction of the excusability gloss that the Court of Appeals abandoned. While noting, with disdain, that "the practical effect [of the excusability requirement] for New York litigants has been to render the relation back doctrine meaningless in all but rare circumstances," the New York Court of Appeals cited the Second Department's decision in *Sandor v. Somerstown Plaza Assocs.* as emblematic of this trend. *Id.*, 638 N.Y.S.2d 405, 661 N.E.2d at 983. In *Sandor*, the appellate court did not allow relation back because the "plaintiff did not diligently attempt to ascertain the true identity of the defendant before the running of the statute of limitations," meaning the plaintiff's failure to timely identify the proper defendant "was not attributable to any reasonable mistake, but to her own inexcusable neglect." 210 A.D.2d 212, 213–14, 619 N.Y.S.2d 737 (N.Y. App. Div. 1994) (internal quotation marks ***590** omitted). The *Buran* Court held that the result in *Sandor* was "not in keeping with modern theories of notice pleading and the admonition that the Civil Practice Law and Rule be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." *Buran*, 638 N.Y.S.2d 405, 661 N.E.2d at 983 (internal quotation marks omitted).

The *Buran* decision traced the "excusable mistake" requirement back to "a judicial gloss imposed on rule 15(c) [of the Federal Rules of Civil Procedure]" by courts which denied plaintiffs the benefit of relation back

> on grounds that they deliberately failed to identify the proper party who was known to them at the time ... or where the proposed new defendant had no notice of the pendency of the action such that the defendant could not reasonably have expected to have been sued.... Despite the existence of this judicially created exception to the doctrine for reasons of lack of notice or bad faith, it is apparent that apart from excusability of the mistake, the *Brock* [83 A.D.2d 61, 443 N.Y.S.2d 407 (1981)] test already provides an independent ground for denying application of the doctrine in these cases—absence of mistake under the first prong or operative prejudice to the defendant under the second. Adding the word 'excusable' to the third prong effectively converts what are already valid considerations under the first and second prongs into an independent factor under the third.

Id., 638 N.Y.S.2d 405, 661 N.E.2d at 982–83 (internal citation omitted). If a plaintiff is not diligent in ascertaining the defendant's identity and amending his claim, a court has the discretion to deny "a plaintiff the benefit of the doctrine in order to prevent delay or disruption in the normal course of the lawsuit." *Id.*, 638 N.Y.S.2d 405, 661 N.E.2d at 983. Denial under these circumstances, though, would be under the "second prong" since plaintiff's nondiligence "would likely result in prejudice to the adversary." *Id.*

In the present case, this court concludes that the New York Court of Appeals, if deciding this issue, would hold that the diligence of the plaintiff is not an aspect of the "mistake" prong, and suing "John Doe" when a defendant's identity is unknown is a mistake for purposes of the relation-back doctrine of CPLR 203.

To the extent that the state law on relation back is relevant and ambiguous, the Court of Appeals for the Second Circuit

may certify the question to the New York Court of Appeals. *See* Second Circuit Local Rule 27.2; N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) (2017). A federal district court does not have this procedure available to it and must decide considering the state and federal relations at play. Under the circumstances of the present case relation back should be permitted. *See supra* Parts V(C)-(D).

2) Federal Rule 15(c)(1)(C)

"Rule 15(c)(1)(C) provides the federal standard for relation back." *Hogan,* 738 F.3d at 517. "For an amended complaint adding a new party to relate back under Rule 15(c)(1)(C), the following conditions must be met:

> (1) the claim must have arisen out of conduct set out in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party should have known that, but for a mistake of identity, the original action would have been brought against it; and ... [4] the second and third criteria are fulfilled within 120 days of the filing of the original complaint, and ***591** ... the original complaint [was] filed within the limitations period."

Id. (citing *Barrow*, 66 F.3d at 468–69). Substitution of a real name for a "John Doe" defendant "adds a new party" to a complaint so that claims against that new party only relate back if the strictures of Rule 15 are met. *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir. 1993).

The leading federal case on relation-back in the context of a John Doe pleading is *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466 (2d Cir. 1995). In *Barrow*, a plaintiff brought suit against a police department under Section 1983. The complaint originally only named the police department as a defendant. The complaint was later amended to include John Does, and then to include the names of six police officers. The only pleading that was filed within the statute of limitations was the original complaint naming only the police department. The six officers moved to dismiss the complaint under Rule 12(b)(1) on the theory that the claims were barred by the statute of limitations. The district court granted the motion, finding that the "defendants' attorneys were not served with a complaint until ... considerably after the limitations period had expired," and the plaintiff made no showing "that the six individual defendants had even constructive knowledge of the claims against them within 120 days of the court's receipt of the initial complaint." *Id.* at 467.

The Court of Appeals for the Second Circuit framed the issue before it in *Barrow* as "whether defendants who are not named originally because the plaintiff lacks knowledge of their identity are, within the meaning of [Rule 15(c)(1)(C)], not named because of a 'mistake' concerning their identity." *Id.* at 469. The court held restrictively that

> the rule is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as a misnomer or misidentification ... [w]e are compelled to agree with our sister circuits that Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities. Rule 15(c) explicitly allows the relation back of an amendment due to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake .... His amended complaint identifying six police officers by name—filed, by any calculation, after the statute of limitations had run—did not correct a mistake in the original complaint, but instead supplied information Barrow lacked at the outset. Since the new names were added not to correct a mistake but to correct a lack of knowledge, the requirements of Rule 15(c) for relation back are not met."

Id. at 469–70.

Relying on *Barrow*, most federal district courts within the Second Circuit have not allowed the amendment of a complaint to add an individual officer's name after the statute of limitations has run to relate back to the filing of the original complaint naming "John Doe" as a defendant; instead they rule that Section 1983 claims are time-barred against the newly named defendants. *See, e.g.*, *Feliciano v. County of Suffolk*, No. CV 04-5321, 2013 WL 1310399 (E.D.N.Y. Mar. 28, 2013); *Felmine v. City of New York*, No. 09-CV-3768, 2012 WL 1999863 (E.D.N.Y. June 4, 2012); *Sherrard v. City of New York*, No. 15-CV-7318, 2016 WL 1574129 (S.D.N.Y. Apr. 15, 2016) (dismissing as time-barred claims brought against defendants originally ***592** named as John Does when complaint was filed one day before statute of limitations).

Barrow is readily distinguished from the instant case. In *Barrow* no police officer was named, unlike here where the wrong police officer was named and the City should have known this and promptly informed Plaintiff's counsel of the correct defendant. *See infra* Part V.

In 2010, in *Krupski v. Costa Crociere S.p.A.*, the Supreme Court of the United States, like the New York Court of Appeals in *Buran*, took a liberal position. 560 U.S. 538, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010). It held that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." *Id.* at 541, 130 S.Ct. 2485. In *Krupski*, a woman who was injured on a cruise sued "Costa Cruise Lines," the sales and marketing agent of "Costa Crociere S. p. A.," the operator of the cruise. The plaintiff, after the statute of limitations expired, amended the complaint to sue the proper party (the operator), but the district and circuit court held that the claim was time-barred since the amendment did not relate back. They held that the amendment did not relate back because Krupski knew or should have known about Costa Crociere's identity as a potential party, and Krupski therefore chose to sue the sales agent and did not make a "mistake" as to the identity of the party.

The Supreme Court, unanimously, disagreed with this restrictive position on relating back.

> The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original complaint.

Id. at 548, 130 S.Ct. 2485 (italicized sentences in original) (underlined sentences for emphasis added).

> We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff

> might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, *and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied*.

Id. at 549, 130 S.Ct. 2485 (emphasis added).

Despite *Krupski* 's admonition that courts focus on the knowledge of the defendant, ***593** rather than that of the plaintiff, the Court of Appeals for the Second Circuit has not yet abandoned the *Barrow* rule. In *Hogan v. Fischer*, 738 F.3d 509 (2d Cir. 2013), citing *Barrow*, it noted that "[t]his Circuit has interpreted the rule to preclude relation back for amended complaints that add new defendants, where the newly added defendants were not named originally because the plaintiff did not know their identities ... [T]he failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake." *Id.* at 517–18. Ruling that the plaintiff was "time-barred from amending his complaint," the court held that "[t]his Court's interpretation of Rule 15(c)(1)(C) makes clear that the lack of knowledge of a John Doe defendant's name does not constitute a 'mistake of identity.' " *Id.* at 518.

A year later the Court of Appeals for the Second Circuit again relied upon *Barrow*, distinguishing the Supreme Court's *Krupski* on the grounds that a plaintiff's substitution of an officer's name for John Doe is not "correct[ing] a mistake of fact," but rather "seek[ing] to add information—the names of the officers involved—that he lacked when he filed the complaint." *Scott v. Vill. of Spring Valley*, 577 Fed.Appx. 81, 83 (2d Cir. 2014). Following these decisions, district courts have almost uniformly held that *Barrow* is still good law despite *Krupski*. *See, e.g.*, *Morales v. County of Suffolk*, 952 F.Supp.2d 433, 437–38 (E.D.N.Y. 2013) (citing cases).

The guidance of the Second Circuit Court of Appeals after *Krupski*—and the district courts following that court's reasoning—seems too narrow in view of the importance of Section 1983 actions. It can be revisited by the Court of Appeals for the Second Circuit. *Cf.* *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 201 n.4 (3d Cir. 2001) ("[S]ome Courts of Appeals have held that proposed amended complaints that seek to replace a 'John Doe' or other placeholder name in an original complaint with a defendant's real name do not meet Rule 15(c)(3)(B)'s 'but for a mistake' requirement. We find this conclusion to be highly problematic. It is certainly not uncommon for victims of civil rights violations ... to be unaware of the identity of the person or persons who violated those rights. *This information is in the possession of the defendants*, and many plaintiffs cannot obtain this information until they have had a chance to undergo extensive discovery following institution of a civil action.") (emphasis added).

Despite the rule of the Court of Appeals for the Second Circuit, some district courts have sought to follow the spirit of *Krupski* and have carved out an exception to *Barrow* "*in situations where the defendants withheld identifying information or unreasonably delayed in producing such information*." *Feliciano v. Cty. of Suffolk*, No. CV 04-5321, 2013 WL 1310399, at *9 (E.D.N.Y. Mar. 28, 2013) (emphasis added). These cases have held that relation back may be allowed when the "plaintiff attempted to discover the identity of an unknown defendant but was prevented from doing so by defense counsel's conduct." *Wallace v. Warden of M.D.C.*, 14 Civ. 6522, 2016 WL 6901315, at *8 (S.D.N.Y. Nov. 23, 2016) (citing *Byrd v. Abate*, 964 F.Supp. 140, 147 (S.D.N.Y. 1997), *Archibald v. City of Hartford*, 274 F.R.D. 371, 378–79 (D. Conn. 2011), and *Morales v. County of Suffolk*, 952 F.Supp.2d 433, 438 (E.D.N.Y. 2013)).

In *Byrd*, the plaintiff attempted to learn the name of the John Doe defendant by serving discovery requests before the statute of limitations expired, but was stymied by the Corporation Counsel of the City. On ***594** that basis, the district court distinguished the case from *Barrow*, holding that

> it was the defense, rather than the plaintiff, who failed to identify the individual defendant despite Byrd's requests for that information. The identity of Hults [the John Doe defendant] was information uniquely within the knowledge of Corporation Counsel .... Byrd's counsel could obtain Hults' identity only from Corporation Counsel. Byrd's counsel requested that information prior to the end of the limitations period, but Corporation Counsel did not comply until after the limitations period had run. To hold that Rule 15(c) does not permit relation back in such circumstances would permit defense counsel to eliminate claims against any John Doe defendant merely by resisting discovery requests until the statute of limitations has ended.

Byrd, 964 F.Supp. at 146.

Hults received sufficient notice of the complaint within 120 days of its filing because he was being represented by the same attorney that was representing the other defendants in the case, and "[n]otice of a lawsuit can be imputed to a new defendant state official through his attorney, when the attorney also represents the officials originally sued." *Id.* Imputation of notice to the defendant through his attorney was proper because "the attorney knew or should have known that the additional defendant would be added to the existing suit" because of the specificity of the original complaint in describing John Doe as the officer on duty during the incident that caused the plaintiff's injury. *Id.*

In *Archibald*, the court followed *Byrd*. It looked specifically at four criteria while holding that relation back was permitted. First, it permitted relation back because the defendants substituted for John Doe had sufficient notice of the suit due to the specificity of the original complaint and their representation by the same attorneys representing the defendants identified in the original complaint. *Archibald*, 274 F.R.D. at 379–81. The defendants seeking to use the statute of limitations defense did not argue that they "lacked constructive notice of the action or that they would be prejudiced in defending the case on the merits." *Id.* at 381. Second, it noted that the Supreme Court held that the Rule 15 analysis focuses on what the "*defendant* knew or should have known ... not what the *plaintiff* knew or should have known at the time of filing" of the original complaint. *Id.* (quoting *Krupski*, 560 U.S. at 548, 130 S.Ct. 2485 (emphasis in *Krupski*)). The rule

> essentially requires that a newly added defendant must not have had reason to believe that the failure to add his name during the limitations period resulted from an intentional decision not to sue him. In this case, Officers Labbe and Spearman knew or should have known through their counsel that they would have been named as Defendants before the limitations period ended, but for Mr. Archibald's inability to obtain that information from defense counsel itself.

Id. Third, the plaintiff tried to timely identify the officers through discovery "[w]ell before the end of the three-year limitations period," and followed up on his demands when the responses were "unsatisfactory," but his efforts to identify the officers were "either completely rebuffed or substantially delayed by defense counsel." *Id.* Finally, the court relied on the obligation of defense counsel to correct a misapprehension of plaintiff's counsel. It stated that it seems

> indisputable that when a plaintiff asks repeatedly during discovery for the names of the officers who engaged him, *the City's police department has an obligation* ***595** *to conduct research and to disclose the identities of those officers*. As Rule 26(g)(1) of the Federal Rules of Civil Procedure states: Counsel's signature on a discovery request discloses that the information is "complete and correct as of the time it is made," "consistent with the rules," and "not interposed for any improper purpose, such as ... caus[ing] unnecessary delay." Fed. R. Civ. Proc. 26(g)(1). "Discovery is not supposed to be a shell game,

where the hidden ball is moved round and round and only revealed after so many false guesses are made and so much money is squandered." *Lee v. Max International, LLC*, 638 F.3d 1318 (10th Cir.2011). Defense counsel is not entitled to transform discovery of the names of police officers who engaged the Plaintiff into a game of hide-and-seek. Regrettably, that is what it became in this case —and needlessly so .... [T]he Court believes that *it would be inequitable and inconsistent with the purposes of Rule 15 and Rule 26 to punish Mr. Archibald for the Defendants' obstruction of his counsel's diligent efforts to determine the identities of the "Doe" officers ....*

Id. at 382 (emphasis added).

How much weight should be given to the diligence of plaintiff's counsel is not clear. It does not appear sound policy in 1983 civil rights cases for the allegedly abused client to be punished for the failure of his attorney to move past "enough" on the "diligence scale"

E. Disclosure Obligations

Rule 26 of the Federal Rules of Civil Procedure requires a party—without court order—to disclose

> the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Fed. R. Civ. P. 26(a)(1)(A)(i).

> A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Fed. R. Civ. P. 26(a)(1)(E). These initial disclosures must occur "within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order" (Fed. R. Civ. P. 26(a)(1)(C)), and the 26(f) conference must take place "as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." Fed. R. Civ. P. 26(f)(1).

The 16(b) scheduling order must be issued "as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." Fed. R. Civ. P. 16(b)(2). In sum, parties generally must make their initial disclosures —at the latest—either 83 days after any defendant has been served with the complaint or 53 days after any defendant has appeared.

Beyond the initial disclosures, parties have an obligation to promptly and efficaciously respond to discovery requests. *See Rodriguez v. Pie of Port Jefferson Corp.*, No. CV 14-0519, 2015 WL 1513979, at *2 (E.D.N.Y. Mar. 13, 2015) (noting that in discovery counsel must still adhere to the goals of Federal Rule of Civil Procedure 1 to work towards a "just, ***596** speedy and inexpensive determination" of every matter). The purpose of discovery is to allow the parties to litigate based on complete information—"[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In order to facilitate this sharing of information, "[c]ounsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures." S.D.N.Y. & E.D.N.Y Local R. Civ. P. 26.4(a) (formerly S.D.N.Y. & E.D.N.Y Local R. Civ. P. 26.5). "Discovery requests shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client." S.D.N.Y. & E.D.N.Y Local R. Civ. P. 26.4(b) (formerly S.D.N.Y. & E.D.N.Y Local R. Civ. P. 26.7). This local rule requires cooperation from the opposing counsel in

discovering critical facts, not an avoidance by the monkey's: don't see, don't hear, don't say.

F. Particular Need for Discovery in Police Civil Rights Cases

Decisions of the Court of Appeals for the Second Circuit reflect the broad principle that courts should not be quick to dismiss plaintiffs for lack of information that is in the possession of the defendants. Elimination of the information asymmetry that exists at the outset of every case is a bedrock principle of our legal system; after all, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The Court of Appeals for the Second Circuit has consistently emphasized that courts should be more lenient with civil rights pleadings and permit discovery when plaintiffs would otherwise not be able to state a claim for relief due to a lack of information about defendants and their practices. Though the court has been particularly solicitous of allowing discovery under these circumstances when the plaintiff appears *pro se*, the rationale of these decisions is not so limited.

For example, in *Davis v. Kelly*, a prisoner brought a *pro se* action under Section 1983 alleging he was transferred in retaliation for his bringing a lawsuit. 160 F.3d 917 (2d Cir. 1998). The only defendant was Warden Kelly, the warden of the transferor prison. *Id.* at 919. During discovery, plaintiff asked for numerous documents, but never sought to learn which prison officials were personally involved in his transfer. After the warden denied any personal knowledge of the transfer, his motion for summary judgment was granted on the grounds that the plaintiff failed to state a claim of retaliation, that the warden was not personally involved in the transfer, and that the warden was entitled to qualified immunity. *Id.* at 920. Davis appealed, and the Court of Appeals appointed counsel for the appeal.

On appeal, the Court of Appeals for the Second Circuit held that the "problem with the resolution of Kelly's involvement is that it has been made prematurely" because the affidavits relied upon by the defendants denied personal knowledge about who transferred Davis and why. *Id.* at 920–21. While the court acknowledged that the defendant was not

> obligated at that point to provide the names of the officials who had carried out the transfer, since Davis had not asked for such names ... Davis could not reasonably have been expected to understand prison transfer procedures ***597** or to be able to identify the officials involved. Moreover, without the assistance of an attorney, his failure to make the necessary inquiries is understandable.

Id. at 921.

Reversing the district court's grant of summary judgment, the court noted that "[i]n similar circumstances, courts have pointed out the appropriateness of maintaining supervisory personnel as defendants in lawsuits stating a colorable claim until the plaintiff has been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability." *Id.* (citing cases). The Court of Appeals for the Second Circuit went on to state that dismissal is "premature where the opportunity to identify those involved has not yet been accorded," and though Davis had the opportunity in this case, his failure was "understandable under the circumstances." *Id.* at 922. The court held that

> when a pro se plaintiff brings a colorable claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery.

Id.

Before deciding *Davis*, the Court of Appeals for the Second Circuit gave similar advice not to be quick to dismiss complaints of improper identification of a defendant in another civil rights case where a plaintiff, represented by counsel, sued Suffolk County and the police commissioner for allegedly having a "municipal policy whose implementation infringed plaintiff's constitutional rights." *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986). Recognizing that "[t]hese types of claims against government entities and supervisors are frequently asserted in police misconduct cases," and that the claims appeared to be mere "boiler-plate," that

> [i]n view of the *strong policies favoring suits protecting the constitutional rights of citizens*, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers. A plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed.

Id. (emphasis added). Though "neither the plaintiff nor his attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved," and therefore would be hard-pressed to plead such claim with a solid factual foundation, those claims should still be allowed to proceed to discovery because "it is extremely unlikely that before formal discovery any citizen would or could be in possession of such information." *Id.*

Particularly pertinent to the present case is *Valentin v. Dinkins*, where the Court of Appeals for the Second Circuit "relaxed" the "general principle of tort law that a tort victim who cannot identify the tortfeasor cannot bring suit." 121 F.3d 72, 75 (2d Cir. 1997) (internal citation omitted). Valentin, who alleged he was accosted by police officers in violation of his civil rights, was incarcerated five months after the harassing incident for unrelated reasons, and remained incarcerated when he filed suit *pro se*. On the day the statute of limitations expired, he filed a complaint ***598** against, *inter alia*, "Donavan, N.Y.C. Police Dept.", describing in general terms when and by whom he was harassed. At a pre-trial conference, the Assistant Corporation Counsel said that the information in the complaint was too vague to identify the defendant police officer, and that she "would not be able to do so without his shield number." *Id.* at 74. After the judge directed Valentin to provide a more detailed description of the police officer, he named the drug task force on which Donavan served, and stated that Donavan could be identified by "police incident reports associated with Criminal Docket Number 91–NO–95751 ... in Criminal Court Part F." *Id.* He also appended interrogatories which stated the cross streets and time at which the incident took place, and asked "defendants to state '[w]hat officers/and or agents were in the area', as well as their rank, function, and identifying badge numbers.' " *Id.* The City did not answer these interrogatories, and the district court dismissed the complaint against Donavan because Valentin had "failed to provide defendant's attorney with a more detailed description." *Id.*

On appeal, Valentin's newly appointed *pro bono* counsel argued that the district court abused its discretion by not meeting its obligations assisting the plaintiff in discovery. *Id.* The Court of Appeals for the Second Circuit agreed with plaintiff's counsel.

> Valentin's case provides a paradigmatic example of why discovery may be necessary before a defendant may be fully identified. Valentin alleges that a police officer assaulted him, the file of the case was thereafter sealed, and he went to prison, apparently on unrelated charges, some five months later. From his place of incarceration, it is hard to see what investigative tools would

> be at his disposal to obtain further information on Donavan's identity.

Id. at 75. The information that the plaintiff did provide to the City was detailed enough that "at least some inquiry should have been made as to whether such an officer exists and could readily be located." *Id.* In agreeing with plaintiff's counsel, the court rejected the argument by the City that "plaintiff could have carried out the necessary research in the period prior to the sealing of the case and his incarceration." *Id.*

The rationale for the opinion of the Court of Appeals for the Second Circuit in *Valentin*, on its face, is not limited to cases where a plaintiff is proceeding *pro se*:

> The problem with the City's argument is that the statute of limitations in this action under 42 U.S.C. § 1983 is three years, not fifty-three days (the time between the incident and the sealing of the file) or five months (the time between the incident and Valentin's incarceration). The City offers no reason why Valentin was required to telescope his pre-complaint investigation into a shorter time frame than the statute permits.

Id. at 75–76.

Despite *Valentin* 's rational applying to represented defendants, district courts have largely limited the case to the *pro se* context. *See, e.g.*, *Murray v. Pataki*, 378 Fed.Appx. 50, 52 (2d Cir. 2010) (citing *Valentin* while holding that "[d]istrict courts have a responsibility to assists *pro se* plaintiffs in their efforts to serve process on defendants."); *Gill v. City of New York*, 15–CV–5513, 2017 WL 1097080, at *7 (E.D.N.Y. Mar. 23, 2017) (noting that in *Valentin*, "the Second Circuit made clear that a *pro se* litigant is entitled to assistance form the district court in identifying a defendant."). So-called "*Valentin* Orders"—where a district court orders an agency defendant to identify John Doe defendants based on information provided by ***599** the plaintiff—have also been largely confined to cases where the plaintiff is representing herself. *See, e.g.*, *Bishop v. City of New York*, 13–CV–9203, 2016 WL 4484245, at *1 (S.D.N.Y. Aug. 18, 2016) (describing the order issued by the court "instructing the City of New York to assist Bishop"—who was appearing *pro se*—"in identifying the John and Jane Doe officers."); *Dolce v. Suffolk County*, No. 12-CV-0108, 2014 WL 655371, at *1–2 (E.D.N.Y. Feb. 20, 2014) (discussing the issuance of a "*Valentin* order" in a Section 1983 action brought by a *pro se* plaintiff and the court's efforts to ensure compliance with the order).

Confining *Valentin* to cases where civil rights plaintiffs proceed *pro se* ignores the harsh realities faced by plaintiffs. *Valentin* focused on the difficultly for a *pro se* plaintiff in performing a pre-complaint investigation and the obstacles one would face without the assistance of counsel. The fact that a plaintiff is represented by counsel in a specific lawsuit does not mean that she was represented the entire time between the events giving rise to the lawsuit and the expiration of the statute of limitations, nor that the representation was adequate. That concern applies with equal force to a civil rights plaintiff who retains counsel shortly prior to filing a complaint.

Limiting *Valentin* 's scope to *pro se* litigants would also impermissibly afford *pro se* litigants greater rights than plaintiffs who retained counsel. The theory behind affording *pro se* litigants "special solicitude" is to "protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training"; it is often applied to shield unrepresented parties from a "harsh application of technical rules." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983). The thrust of *Valentin* is the informational asymmetry between a civil rights plaintiff and the government. This is not a technical rule; this is a function of the structural difference between an individual with limited tools at her disposal to investigate her government, and a municipal lawyer, who has at her disposal a much greater wealth of knowledge and sources of information about City agencies. Representation by counsel does not in itself eliminate this disparity nor does it necessarily give rise to

the inference that a plaintiff's interests are being adequately protected. *See Wechsler v. R D Mgmt. Corp.*, 861 F.Supp. 1153, 1157 (E.D.N.Y. 1994) ("It is hardly an unwarranted leap in logic to extend the command of solicitude to a party represented by a less than adequate lawyer who has failed to plead an absolute defense or an incontrovertible cause of action.").

Valentin 's logic conflicts with the diligence gloss some courts have added to the relation-back of pleadings rules. *See supra* Part IV(D). A diligence requirement prior to running of statute of limitations in effect creates a pseudo-statute of limitations that can vary widely, chancellor's foot-like in its discretion, and does not comport with the certainty and uniformity necessary to ensure Section 1983's twin goals of deterrence and compensation. In a similar context the Court of Appeals for the Second Circuit has realized that "where the facts are peculiarly within the possession and control of the defendant" the plaintiff may plead the facts "upon information and belief" and then utilize discovery procedures to support her allegations. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010). *Valentin* is an extension of this principle where the name of a proper defendant is unknown to the plaintiff but can easily be obtained by the government.

G. Ethical Obligations of Government Counsel

A lawyer working for a municipality has many clients. She directly represents the municipality, its agencies, and its employees ***600** whose actions might be imputed to their governmental employer. Often overlooked, but no less important, is the lawyer's representation of the resident of the municipality, whose votes and taxes guide and fund the government's activities. That representatives of the government are necessarily representatives of all the people is a hallmark of democratic governance. *See, e.g.*, Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (urging that the American government remain a "government of the people, by the people, for the people"); The Federalist No. 22 (Alexander Hamilton) (Dec. 14, 1787) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.").

It is uncontroversial that a lawyer representing the government in the criminal context has a heightened ethical obligation that extends beyond just representing the narrow interests of her most direct client; she also must endeavor to "do justice." *See, e.g.*, Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (Am. Bar Ass'n 2017) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). This "obligation" requires the prosecutor to take actions, such as disclosing exculpatory evidence, or to refrain from taking actions, such as prosecuting a charge that is not supported by probable cause. *See* Model Rules of Prof'l Conduct R. 3.8(a); 3.8(d) (Am. Bar Ass'n 2017). Some of these specific obligations are rooted in the constitutional rights of the defendants who are her nominal adversaries, though the demands of the Constitution are not an outer limit on the ethical obligations that may be imposed on the prosecutor. *See* *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in [*United States v.*] *Bagley* [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)] (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.").

The origin of the prosecutor's general obligation to do justice is that she "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). "He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." *Id.*

The rationale underlying the prosecutor's obligation to do justice—her representation "not of an ordinary party ... but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all"—applies equally to attorneys who represent the government in civil disputes. *See* *Freeport–McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (holding that the principle in the Supreme Court's *Berger* decision that "government lawyers have obligations beyond those of private lawyers ... appl[ies] with equal force to the

government's civil lawyers."); *Judicial Notice and the Duty to Disclose Adverse Information*, 51 Iowa L. Rev. 807, 810 (1966) (a government attorney is in a "special position" because his "obligation to his specific client is tempered by the fact that ***601** he has a deeper obligation to the public, which his client represents, and to the enforcement of justice generally."); *see generally Zimmerman v. Schweiker*, 575 F.Supp. 1436, 1440 (E.D.N.Y. 1983) ("The ponderous machinery of the federal bureaucracy and United States Attorney's Office should not be turned implacably against them unless the government has first stopped to ask itself, 'Is opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and fact?' "); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. Rev. 1, 18 (1985) (Federal Rules of Civil Procedure 11 and 37 "embody the special duty the public's lawyers, as litigators, owe to the judicial system not to burden the courts with unnecessary litigation. To comply with this obligation, they are expected to stipulate whenever possible, to avoid offering clearly unacceptable or inadmissible evidence, and to cooperate in supplying documents and in preparing impartial experts under Rule 706 [of the Federal Rules of Evidence]."); *id.* at 28 ("[W]hile compliance with executive policy should be the norm, a compelling need exists in this society—as in others that have come before it—to mitigate the harshness of the law through the individualization of justice. Responding with courage, compassion, and good sense in the individual case places the government attorney squarely within our highest ethical and philosophical traditions."); Judge Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 Fed. B.J. 331, 335 (1974) ("Where the client is the Government itself he who represents this vague entity often becomes its conscience, bearing a heavier responsibility than usually encountered by the lawyer."); Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 Brandeis L.J. 13, 31 (2003) ("[C]ourts will hold government attorneys to a higher standard that attorneys for private parties in refusing to countenance certain hardball litigation tactics, in light of government attorneys' broader duties to serve the public interest.") (internal punctuation omitted).

Unlike a private attorney, who can "attempt to get the best possible result [ ] from his single client's point of view," the "public attorney ... is torn in a number of ways." Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Me. L. Rev. 166, 169 (1966). Should a public attorney seek to pay the lowest sum possible in a condemnation proceeding? Should she use procedure to delay a meritorious case in an attempt to extract a favorable settlement? In tort cases, should the lawyers "t[ake] pride in getting the lowest possible settlements and in securing defendants' verdicts in close cases"? *Id.* at 169–70.

The public's attorney both represents "the many departments" of the municipality and "the people as well as government." *Id.* at 169. In the mid–1960s, an empirical study of the condemnation practices of Nassau County revealed that less than 16% of condemned properties received compensation commensurate with the lesser of two appraisals conducted by the county. Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 Colum. L. Rev. 430, 442 (1967). County residents were accepting such low sums in part because of ignorance about the value of the property. *Id.* at 445–46. Rather than accept this state of affairs—which was nominally beneficial for the county as an entity unto itself—the Nassau County Attorney reformed the government's condemnation practices to ensure ***602** landowners were compensated fairly. *See id.* at 458 n.59 (describing reforms). These reforms were justified by the County Attorney's overarching representation of the people, which followed naturally from his representation of the government (which is, at its core, a representative of the people).

New York City's Corporation Counsel has recognized the dual obligation of the municipal attorney to both the institutional interests of the City and the City's residents. Corporation Counsel, Zachary Carter, on the Department's website states:

> The New York City Law Department is truly a great organization. It defends the institutional interests of the City and its constituent agencies, providing wise counsel on a wide array of legal issues. This Office prosecutes and defends lawsuits in the name of the City of New York, its agencies and citizens. Our work often involves being an adversary in litigation against an individual citizen or organization of the City. This presents a special obligation. *Not only must we vigorously advocate the legal*

> *position of the City, but we should never be indifferent to the fairness of the outcome and its impact*. That obligation should not be viewed as a burden. On the contrary, it is what makes the jobs of the individuals working in this office worth having.

Corporation Counsel's Message, http://www.nyc.gov/html/law/html/about/counsel-message.shtml (last visited Nov. 6, 2017) (emphasis added).

This dual obligation towards adversaries in litigation as well as to their client, the City, provides the government attorney with greater autonomy than her counterpart in private practice. The preamble to the Model Rules of Professional Conduct states that "[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships." Model Rules of Prof'l Conduct, Preamble & Scope ¶ 18 ((Am. Bar Ass'n 2017). An example from the preamble is: "a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment." *Id.* That this power resides with the lawyer and not the putative client is a product of the government lawyer not having an absolute obligation to the municipality's institutional interests in the way a private attorney does to her client.

Some courts and commentators have expounded less expansive views of the government lawyer's responsibilities. For example, in *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 1 P.3d 1124, 1129 (2000) (en banc), the court

> agree[d] with the basic proposition that the government should be just when dealing with its citizens, [but it did] not believe that an attorney representing the government has a duty to maintain a standards of conduct that is higher than that expected of an attorney for a private party.

The court held that the government lawyer did not have a higher ethical responsibility out of fear of a "two-tiered system of advocacy" and based on a principle formerly in the Preliminary Statement to the Rules of Professional Conduct that ethical rules "should be uniformly applied to all lawyers, *regardless of the nature of their professional activities*." *Id.* (emphasis in original). The Washington Supreme Court reversed the intermediate appellate court's conclusion that a government lawyer had the obligation to raise a service of process issue prior to the expiration of the statute of limitations. *Id.*

***603** The *Lybbert* court's view does not accurately state the current understanding of the role of the government lawyer. A multi-tiered system of advocacy is deeply entrenched in the American legal system. It is beyond dispute that the prosecutor has a host of obligations above and beyond the private attorney. The preamble to the Model rules, as explained above, now also expressly recognizes that government lawyers have obligations and autonomy larger than the private attorney.

A former New York City Corporation Counsel, Michael Cardozo, has supported the position that government attorneys owe an obligation to only government institutional interests. *See* Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer,* 22 J. Prof. Law. 4 (2014). Michael Cardozo recognizes that some "feel deeply uneasy whenever the government takes on a sympathetic citizen in court," but he believes that this is an "inevitable byproduct of the adversarial system through which the victim of an alleged wrong must seek compensation from the government." *Id.* at 8.

There is nothing inherent in an adversarial system that prevents the government from dealing justly with its citizens who have legitimate claims to compensation. A prosecutor too deals within an adversarial system but must put the interests of the citizenry and justice ahead of winning at all costs.

Supportive of Michael Cardozo's position, and relevant to this case, is the history of New York General City Law § 20(5), which provides that a city "shall have no power to waive the defense of the statute of limitations." The seeming harshness

of this rule has been ameliorated by the New York Court of Appels. The Court has limited this rule by noting that

> [a]n agreement to extend the Statute of limitations is not truly a waiver unless it is made after the statutory period has run. Thus, as a general rule a party who has not raised the Statute of Limitations as a defense in the answer or by a motion to dismiss is held to have waived it. A city, as noted, lacks the power to waive the Statute of Limitations but is not otherwise precluded from granting an extension.

John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99, 103–04 (1979) (internal citations omitted).

The New York State Legislature's general view of the ethical obligations of a municipal lawyer supports flexibility. Directly before the clause about the statute of limitations, the General City Law expressly empowers a city "to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it." N.Y. Gen. City Law § 20(5) (McKinney 2011). The rule as it pertains to waiver of the statute of limitations does not encourage or permit a municipal attorney to stand as a barrier to a plaintiff filing a legitimate claim against a city.

V. Application of Law to Facts

The parties' dispute concerning the statute of limitations primarily focuses on whether Plaintiff's Proposed Second Amended Complaint, which he sought leave to file on January 9, 2017 and which adds a new defendant, Detective Tranchina, relates back to the filing of the Plaintiff's original complaint on September 5, 2015. Defendants' do not contend that at the time of the filing of the original complaint, Plaintiff's malicious prosecution or municipal liability claims were untimely. *See* Defs.' Opp'n Am. at 3, ECF No. 47.

***604 A. Ethical Obligations of Counsel**

The City of New York was alerted to Plaintiff's claim long before the filing of the original complaint. Plaintiff filed a required Notice of Claim with the City. A hearing pursuant to General Municipal Law Section 50–h was held on that claim on May 17, 2013. From the 50–h Hearing it is clear that Plaintiff raised the same claims now brought in this lawsuit and did not know the identity of the officer who investigated the robbery for which he was arrested or the precinct in which the officer worked. It is also clear that it was the robbery claim (of which Detective Tranchina was in charge) and not the homicide or escape charge (of which Detective Shapiro was in charge) that was in issue.

> [*By Counsel for Plaintiff*] These cases result from an absence of probable cause *for the prosecution for robbery*, and absence of due process rights, and other constitutional violations in terms of how he was dealt with in relation to all of the charges ....
>
> [*Counsel for the City*]: When were you *arrested for the robbery*?
>
> [Plaintiff]: April 2008.
>
> *[Counsel for the City]: Who was the arresting officer for the April 2008 robbery charge?*
>
> *[Plaintiff]: I don't know*.
>
> [Counsel for the City]: Were you sent to a precinct at that time?
>
> [Plaintiff]: Yes.
>
> [Counsel for the City]: What precinct was that out of?
>
> [Plaintiff]: I believe, the 104th precinct.

May 17, 2013 R. 50–h Hr'g Tr. 12:25–13:22, ECF No. 79, Ex. B (emphasis added).

While recognizing that the Corporation Counsel retained outside counsel to lead Plaintiff's 50–h hearing, the facts elicited in the hearing are attributable to the City's law department. Based on this knowledge, it was the Corporation Counsel's duty to bring to the attention of Plaintiff's counsel before the filing of the civil 1983 complaint in a clear way all of the documents and information that showed that Detective Tranchina should have been named as a defendant. *See The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 Brandeis L.J. 13, 19 (2003) (reviewing

cases and arguing that government attorneys have a quasi-Brady obligation in civil cases); *see also supra* Part IV(G). Although Plaintiff's original complaint was filed shortly before the expiration of the statute of limitations, the claim was not new to New York City. Plaintiff was not afforded the opportunity to file his initial complaint against the correct officer because the Corporation Counsel did not supply him with the necessary information to do so.

Instead of providing the necessary information to Plaintiff about the extent and nature of Detective Tranchina's involvement in the case Plaintiff was suing on, Defendants delayed the proceedings. Plaintiff originally filed this suit against Detective Shapiro and twenty "John and Jane Doe" police officers. *See* Compl. at 1. The Corporation Counsel's office, representing the City of New York, did not immediately answer or seek to dismiss the Complaint. *See* Defs.' Mot. Extension of Time to Answer, ECF No. 12. Instead the Corporation Counsel sought a sixty-day extension of time in order to "acquire as much information as possible concerning this matter in order to properly assess the case and respond to the Complaint." *Id.* at 1. On December 4, 2015, the Corporation Counsel sought another extension of time to respond to the complaint and represented that the "application d[id] not affect any other deadline in this case." Defs.' Second ***605** Mot. Extension of Time to Answer at 1, ECF No. 14. Plaintiff consented to this extension and it was granted. *Id.*; Dec. 7, 2015 Order. The Corporation Counsel sought a third extension of time to answer the Complaint on February 3, 2016, and again, received the consent of Plaintiff and represented that no deadlines in the case were affected by the application. *See* Defs.' Third Mot. Extension of Time to Answer, ECF No. 16. This request, too, was granted on consent. *See* Feb. 3, 2016 Order.

It was not until February 16, 2016, when Defendants filed a motion to dismiss the complaint, that they responded to the original complaint. *See* Defs.' Mot. Dismiss, ECF No. 17. Defendants' Answer was not filed until June 3, 2016. Answer, ECF No. 25. It took the Corporation Counsel nearly nine months to answer the complaint.

Throughout the time between the filing of the original Complaint and the Defendants' Answer, Detective Shapiro and twenty John and Jane Doe Officers were the only named individual defendants in the case. The Corporation Counsel's office was conducting an investigation of the allegations, with the consent of Plaintiff and the court, but Plaintiff was not made aware that Detective Tranchina was the officer involved in the robbery case. Armed with the knowledge that Plaintiff sued the wrong individual, Defendants sought to dismiss the complaint. *See* Defs.' Mot. Dismiss, ECF No. 17, 18.

Plaintiff sought to depose Detective Tranchina after learning of his involvement in the case. While maintaining that Detective Tranchina should have been named as a defendant in the case, the Corporation Counsel sought to quash Plaintiff's subpoena to depose him. *See* Defs.' Mot. Quash, ECF No. 38; Pl.'s Resp. Mot. Quash, ECF No. 39. Finally, on December 23, 2016 Plaintiff deposed Detective Tranchina, and, after completing the deposition, he sought leave to amend his complaint to add Detective Tranchina on January 9, 2017. Pl.'s Mot. Am., ECF No. 46.

The Corporation Counsel's obligation to promptly provide Plaintiff with the identity of the correct officer does not stem solely from its ethical obligations, it is also derived from the discovery obligations explained by the Court of Appeals for the Second Circuit in *Valentin v. Dinkins* 121 F.3d 72, 75 (2d Cir. 1997), which applies in the present case. *See supra* Part IV(F). In *Valentin*, the plaintiff filed his complaint the day before the statute of limitations expired. While the Second Circuit Court of Appeals did not reach the question of whether an amended pleading would relate back under the Rule 15(c), it took a strong position that the district court and municipal attorney had an obligation to assist the plaintiff in identifying the officer involved in the case. *Id.* at 74–76.

For months the City sat in silence while a resident it serves had a readily curable defect in his complaint that the Corporation Counsel now claims deprives him of his right to have his claim adjudicated on the merits.

The Corporations Counsel did not adhere to its ethical and discovery obligations in this case. The Corporation Counsel has shown indifference to fairness of outcome and process. Because the Corporation Counsel has not complied with these obligations, it cannot assert the statute of limitations as a defense. Its conduct substantially contributed to plaintiff's failure to name the proper defendant prior to the expiration of the statute of limitations.

B. Leave to Amend Under Federal Rules 15 and 16

The court holds that Plaintiff demonstrated good cause in failing to add Detective Tranchina prior to the July 28, ***606**

2016 deadline for amending pleadings because of the dilatory tactics by Corporation Counsel. That Plaintiff waited until after deposing Detective Tranchina to amend his complaint should not be held against him. It was reasonable for Plaintiff to use the discovery devices available to ensure that he was naming the correct defendant, after mistakenly identifying the officer controlling the investigation. The burden on Defendants is minimal given that they delayed this case several times and were a cause of Plaintiff's failure to amend promptly. No prejudice is shown to the Corporation Counsel, the City, or Detective Tranchina, since the evidence in the case remains the same and all were aware of it from the beginning. Plaintiff may amend under Federal Rules of Civil Procedure 15 and 16.

C. Relation Back Under Federal Rule 15(c)(1)(A)

The court holds that the amendment relates back to the original complaint under Federal Rule of Civil Procedure Rule 15(c)(1)(A) and this court's reading of the New York relation back statutes as interpreted by the New York Court of Appeals in *Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405, 661 N.E.2d 978, 981 (1995). *See supra* Part IV(D)(1).

Plaintiff meets the three requirements articulated in *Buran*: (1) the claim arises out of the same conduct as articulated in the original complaint because the plaintiff's suit is still premised on the malicious prosecution of the same robbery; (2) the two parties share a "unity of interest" because the City must, and will voluntarily, indemnify Detective Tranchina; and (3) Detective Tranchina, and the City, by virtue of him being the lead detective on the robbery case giving rise to this lawsuit, should have known that but for a mistaken identity the action would have been brought against him. Detective Tranchina has claimed that he did not learn of this lawsuit until November 2016, *see* Oct. 23, 2017 Hr'g Tr. 29:13–17, but given that the City was notified of the claim in May 2013, he should have been informed by the Corporation Counsel about the lawsuit at its inception. The court declines to apply the diligence gloss articulated by several federal and state courts, under the circumstances of the present case, for the reasons stated *supra* Part IV(D)(1).

Under New York State law, filing a complaint against a "John Doe" defendant because of ignorance of the proper party's identity is a "mistake in identity." *See Kirk v. University OB-GYN Assoc.,* 104 A.D.3d 1192, 960 N.Y.S.2d 793 (N.Y. App. Div. 2013); *see also supra* Part IV(D)(1)(b). The caption on Plaintiff's proposed Second Amended Complaint does not remove Detective Shapiro, but the facts and circumstances indicate that Detective Tranchina should be substituted for him since Detective Tranchina conducted the investigation related to Plaintiff's alleged unlawful robbery prosecution. Even if this was a "John and Jane Doe" case, it would still relate back under New York law. *Id.*

Because there has been no showing that Detective Shapiro had any involvement with the robbery investigation that forms the basis of this lawsuit, Plaintiff may amend his complaint to substitute Detective Tranchina for Detective Shapiro. This was a straightforward mistake in the identity of the proper officer.

D. Relation Back Under Federal Rule 15(c)(1)(C)

Plaintiff's amended complaint also relates back under the federal standard. Under Rule 15(c)(1)(C) an amendment relates back when

> the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is ***607** satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C).

As interpreted by the Supreme Court in *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 541, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010), the focus of this inquiry is on a defendant's constructive or actual knowledge and the prejudice to the new defendant. *See supra* Part IV(D)(2). Here, as explained above, Detective Tranchina was the investigator of the robbery and shares the same attorney with the original Defendants in the lawsuit. Notice of the lawsuit is imputed to him on this basis. *See Berry v. Vill. of Millbrook*, No. 09-CV-4234 KMK, 2010 WL 3932289, at *5 n.6 (S.D.N.Y. Sept. 29, 2010) (holding that a newly added defendant was "not prejudiced because his attorney was or should have been aware, within the

Rule 4(m) limitations period, that he would be named as a Defendant"); *Almeda v. City of New York*, No. 00-CV-1407 (FB), 2001 WL 868286, at *3 (E.D.N.Y. July 26, 2001) (holding that knowledge of a lawsuit could be imputed to a defendant where "Corporation Counsel should have known that [the new defendant] would be added to th[e] action when it received the original complaint").

The only issue left is whether Detective Tranchina "knew or should have known that the action would have been brought against [him], but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). In *Krupski* the Supreme Court defined mistake as "[a]n error, misconception, or misunderstanding; an erroneous belief." 560 U.S. at 548, 130 S.Ct. 2485. In the instant case, Plaintiff believed that Detective Shapiro led the investigation of the robbery charges against him, when in fact it was Detective Tranchina. This was clearly an erroneous belief, known to be erroneous by defense counsel. It is immaterial why he believed this. Detective Tranchina was never misled; the Corporation Counsel should have informed him of his jeopardy as soon as the Section 50–h hearing was held. *See supra* Parts V(A), (C).

The proper focus of the inquiry is on whether Detective Tranchina should have known that had there not been a mistake he would have been named in the complaint. The Corporation Counsel should have informed Detective Tranchina at the inception—or before—the lawsuit about these claims against him. The facts and circumstances of the case should have indicated to his potential attorney, the Corporation Counsel, that Detective Tranchina was the proper defendant, not Detective Shapiro.

VI. Conclusion

Plaintiff may amend his complaint to substitute Detective Tranchina for Detective Shapiro. Plaintiff's claim against Detective Tranchina is timely under the governing statute of limitations. The Corporation Counsel may not assert the statute of limitations as a defense; it did not adequately discharge its ethical and procedural duties to Plaintiff to disabuse him of his mistake.

The claim against Detective Tranchina relates back to the filing of the original complaint. Dismissing this claim on the basis of the statute of limitations would be inconsistent with ***608** *Valentin v. Dinkins*, 121 F.3d 72, 75 (2d Cir. 1997), *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 541, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010), and *Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405, 661 N.E.2d 978, 981 (1995).

The court reserves judgement on Defendants' motion for Summary Judgement on other grounds.

SO ORDERED.

All Citations

296 F.Supp.3d 569, 99 Fed.R.Serv.3d 91

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949 F.2d 287
United States Court of Appeals,
Ninth Circuit.

Julian Carlton REID, Petitioner,
v.
U.S. IMMIGRATION AND
NATURALIZATION SERVICE, Respondent.

No. 90–70334.
|
Argued and Submitted Sept. 12, 1991.
|
Decided Nov. 13, 1991.

Synopsis

Alien appealed from Board of Immigration Appeals' order of deportation. The Court of Appeals, Noonan, Circuit Judge, held that: (1) Board's reconsideration of deportation case was a nullity, and (2) alien would not be required to make another motion to Board to consider evidence in support of his application for asylum after he had twice been wrongfully prevented from presenting that evidence.

Reversed and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***287** Perry S. Goldman, Morrison & Foerster, San Francisco, Cal., for petitioner.

William J. Howard, Office of Immigration Litigation, U.S. Dept. of Justice, Washington, D.C., for respondent.

Petition to Review a Decision of the Immigration and Naturalization Service.

Before GOODWIN, SCHROEDER and NOONAN, Circuit Judges.

Opinion

NOONAN, Circuit Judge:

Julian Carlton Reid, a.k.a. John Kenneth Opoku, appeals from a decision of the Board of Immigration Appeals (the Board). We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND AND PROCEEDINGS

Reid was born August 6, 1960 in Kumasi, Ghana. He alleges that he participated in a coup against the Rawlings government of Ghana; that the coup failed; and that some of his friends were captured and executed. Reid fled to Britain and then entered the United States. He was apprehended by the ***288** Immigration Service and on November 10, 1988 was given a deportation hearing.

Represented by counsel, Reid applied for asylum and withholding of deportation. But, as the hearing went on, the immigration judge raised the question whether Reid really wanted these remedies and asked Reid's counsel, "Is he or is he not going to claim asylum and withholding of deportation as to Ghana?" Counsel replied, "It's not clear to me at this time." The judge said, "Then Mr. Opoku, I put it to you. Do you or do you not wish to seek asylum and withholding of deportation as to Ghana?" Reid replied, "Actually I do all right. But ... well, the money. I'm being, you know, the bond I'm being asked to pay? I don't got much money to pay for it." The judge said, "Free legal services may be available to you. I assume you are aware of that? Notwithstanding, you are being represented by [counsel]." Reid answered affirmatively and then declared he wished to seek asylum and withholding of deportation.

After further proceedings, the hearing was adjourned without explanation. When it resumed, counsel told the court, "Upon further discussion with my client, notwithstanding at the very minimum a subjective fear of returning to Ghana, he at this time wishes to withdraw any application for relief and will accept the deportation order." Reid himself made the same declaration. The judge advised him that he would be deportable to Ghana. Reid did not object. His counsel said Reid waived appeal.

Seven days later on November 17, 1988 Reid acting pro se filed a notice of appeal. This notice was noted by an officer of the Immigration Service, but due to some mischance never reached the Board. Accordingly, the Board on August 9, 1989 dismissed Reid's appeal as untimely. Thereafter Reid petitioned this court for review.

Reid then acquired new counsel. On August 8, 1989 she wrote the Board stating that Reid "appears to have valid claims of political asylum, and may have suffered ineffective assistance from his previous counsel with regard to the withdrawal of his

application before the immigration judge." After she departed on maternity leave, present counsel, Morrison & Foerster, was substituted for her on November 16, 1989.

On February 1, 1990 the Service notified the Board that in fact Reid had appealed to the Board at a timely date. It stated, "For this reason, the Service moves that the Board reopen this case and consider the appeal." No copy of this motion was provided to Reid or Morrison & Foerster.

On February 12, 1990 the Service moved the Ninth Circuit for an order "holding [the] review proceedings in abeyance" because of its motion to reopen the case. The Service noted, "Petitioner's counsel has authorized the undersigned to represent that he agrees that this proceeding should be held in abeyance." A copy of this motion before the Ninth Circuit was provided to Morrison & Foerster, who did not object to the Service's statement of the case and counsel's agreement. The Board itself entered no written order granting the motion to reopen.

On March 14, 1990, the Board reconsidered Reid's case and ruled that his appeal was timely. Morrison & Foerster filed nothing with the Board. The Board did take notice of a statement from Reid's second counsel, made in a letter of September 9, 1989, that Reid withdrew his asylum request because of his belief that his first counsel would seek asylum for him through Canada. The Board held that it would "not consider counsel's averment in this regard as evidence of record." Accordingly, it dismissed Reid's appeal and ordered deportation.

Reid appeals to this court.

ANALYSIS

The Service was forthright in its confession of error as to the timeliness of Reid's appeal. In this respect, counsel for the Service has behaved as the counsel for the government should. Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.

On appeal, Reid argues that "neither he nor his counsel received notice of the BIA's decision to reopen the case or ***289** reconsider the appeal." By February 12, 1990 counsel for Reid was informed that the Service had moved to reopen the appeal. But at no time did the Board enter a written order granting the motion. The Board's own regulations state: "Rulings upon motions to reopen or motions to reconsider shall be by written order." 8 C.F.R. § 3.8(d). The Board did not comply with this regulation.

The Service argues that Reid's objection is based on a technicality. As counsel had no notice that the Board had granted the motion of the Service, on a matter of life and death significance to Reid he had no representation. As the Board did not comply with its own regulation, its reconsideration of the case was a nullity.

The Service has acknowledged that the petitioner has evidence, proffered to this court, going to the merits of his asylum claim that was not available at the time of the original hearing. The Service has also acknowledged that it twice prevented the petitioner from presenting this evidence, first by treating his appeal as untimely and then by failing to give him any notice of reopening. At this late date, the Service asks that we hold the petition in abeyance and require the petitioner to make still another motion to the Board to consider the evidence. Based upon the record in this case, it would be an abuse of the Board's discretion to refuse such a motion and deny petitioner's request for remand to the immigration judge for a rehearing on his asylum claim. Accordingly, we reverse the Board and remand the case to the Board with instructions to remand to the immigration court for consideration of the asylum application on the ground that Reid has a substantial likelihood of being killed if he is deported to Ghana.

If proceedings do continue and there is a decision by the Board, we reserve to this panel of this court any further appeal.

REVERSED and REMANDED for proceedings in accordance with this opinion.

All Citations

949 F.2d 287

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Podcast 3: Ethical Considerations in Case Management

In this podcast, Magistrate Judge David Christel will have a panel discussion with Erin Highland and Leanne Martinez about Washington Rules of Professional Conduct 1.3 and 3.2. The panelists will share their experiences, challenges, and best practices of case management.

Podcast Outline

A. Introduction to the Podcast: Judge Christel
B. Washington Rules of Professional Conduct (RPC)
    1. RPC 1.3, Diligence: “A lawyer shall act with reasonable diligence and promptness in representing a client.”
    2. RPC 3.2, Expediting Litigation: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
C. Managing caseloads from plaintiffs’ side: Leanne Martinez
D. Managing caseloads from the government’s side: Erin Highland
    1. Challenges with case management
    2. Tips for balancing heavy workload
E. Caseload perspectives from the bench
    1. Local Civil Rule 7(j)
    2. Perspectives on how the Court manages its caseload
F. Wrap-up by Judge Christel

Speaker Bios

The Honorable David W. Christel

Judge Christel has been a U.S. Magistrate Judge for the Western District of Washington since 2007 and has been full-time presiding in Tacoma since 2015. After his undergraduate degrees at Washington State University, he graduated from the University of Washington School of Law in 1985. He started in commercial litigation in Seattle and then moved to Vancouver, Washington where he was in private practice until 2015.

Leanne Martinez

Leanne Martinez is a partner at the law firm of Douglas Drachler McKee & Gilbrough, a firm that has been representing disabled individuals for over 30 years. She represents clients throughout all levels of the Social Security disability process, including administrative hearings and through federal court appeals. She began advocating for disabled individuals prior to law school and has focused her practice solely on this area of the law since graduating from Seattle University School of Law in 2012.

Erin Highland

Erin Highland is an Assistant Regional Counsel for the Social Security's Office of the General Counsel at the regional office in Seattle. She is responsible for district court and circuit court cases involving Social Security disability litigation. Before joining SSA in 2009, Erin was in private practice at a civil litigation law firm in Atlanta, Georgia. Erin graduated with honors from Emory University School of Law and received her undergraduate degrees from the University of Washington.

Resources

A. Washington Rules of Professional Conduct
    1. Rule 1.3 – Diligence
    2. Rule 3.2 – Expediting Litigation

B. Western District of Washington Local Civil Rule 7(j) – Motions for relief from a deadline

C. 28 U.S. Code § 476. Enhancement of judicial information dissemination

RULE 1.3
DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

[Adopted effective September 1, 1985.]

Comment

[1] **[Washington revision]** A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that

the client will not mistakenly suppose the lawyer, is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] **[Reserved.]**
[Comments adopted effective September 1, 2006.]

RPC 3.2
EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not legitimate interest of the client.

[Comment adopted effective September 1, 2006.]

28 U.S. Code § 476. Enhancement of judicial information dissemination

(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—

(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

(3) the number and names of cases that have not been terminated within three years after filing.

(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

(Added Pub. L. 101–650, title I, § 103(a), Dec. 1, 1990, 104 Stat. 5093.)

WDWA Local Civil Rule 7(j) – Motions for Relief from a Deadline

A motion for relief from a deadline should, whenever possible, be filed sufficiently in advance of the deadline to allow the court to rule on the motion prior to the deadline. Parties should not assume that the motion will be granted and must comply with the existing deadline unless the court orders otherwise.

If a true, unforeseen emergency exists that prevents a party from meeting a deadline, and the emergency arose too late to file a motion for relief from the deadline, the party should contact the adverse party, meet and confer regarding an extension, and file a stipulation and proposed order with the court. Alternatively, the parties may use the procedure for telephonic motions in LCR 7(i). It is expected that if a true emergency exists, the parties will stipulate to an extension.