1st slide

|  |  |
| --- | --- |
| |  | | --- | | **Part 3: Damages and Recovery in a Child Sex Abuse Case (BRAND NEW)** | |

|  |  |
| --- | --- |
| |  | | --- | |  | |

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| --- | --- |
| |  | | --- | | DEALING WITH THE FAMILY CASE/INDIVIDUAL  SLIDE 2﻿ | |

Plan:

1. STATUTE OF LIMITATIONS
2. INTAKE/INVESTIGATION
3. THE CLAIM LETTER
4. LITIGATION
5. TRIAL AND JUDGMENT

STATUTE OF LIMITATIONS SLIDE

CHILD USA MAP SLIDE

**State Statute of Limitations for Child Sexual Assault/Abuse**

|  |  |  |  |
| --- | --- | --- | --- |
| **State** | **SOL for Perpetrators** | **SOL for Entities/Other Defendants** | **Window + Starting Date** |
| Alabama | By age 25 |  | N/A |
| **Alaska** | **No SOL for felony sex abuse; By age 21 for misdemeanor sex abuse** |  | **N/A** |
| Arizona | By age 30 |  | 19-Month Window, May 2019 |
| Arkansas | By age 21 |  | N/A |
| California | By age 30 |  | 3-year Window, January 2020 |
| **Colorado** | **By age 24** | **By age 20** | **N/A** |
| Connecticut | No SOL if criminally first-degree sex assault; otherwise by age 51 |  | N/A |
| Delaware | No SOL |  | 2 2-Year Windows, 2007 & 2010 |
| Florida | No SOL for sexual battery victims under 16; Otherwise by age 25 |  | N/A |
| Georgia | By age 23 |  | 2-Year Window, 2015; limited |
| **Hawaii** | **By age 26** | **By age 20** | **3 2-Year Windows, 2012, ’14, ’18** |
| Idaho | By age 23 |  | N/A |
| Illinois | No SOL |  | N/A |
| Indiana | By age 20 or within 7 years - whichever is later |  | 1-Year Window, May 2019 |
| Iowa | By age 19 |  | N/A |
| Kansas | By age 21 |  | N/A |
| **State** | **SOL for Perpetrators** | **SOL for Entities/Other Defendants** | **Window + Starting Date** |
| **Kentucky** | **By age 28** | **By age 19** | **N/A** |
| Louisiana | By age 28 |  | N/A |
| Maine | No SOL |  | N/A |
| Maryland | By age 38 |  | N/A |
| Massachusetts | By age 53 |  | N/A |
| **Michigan** | **By age 28** |  | **90-Day Window, 2018 – re Nassar** |
| Minnesota | No SOL |  | 3-Year Window, 2013 |
| Mississippi | By age 24 |  | N/A |
| **Missouri** | **By age 31** | **By age 26** | **N/A** |
| Montana | By age 27 |  | 1-Year Window, May 2019 |
| **Nebraska** | **No SOL** | **By age 33** | **N/A** |
| Nevada | By age 38 but no SOL if clear and convincing evidence of abuse |  | N/A |
| New Hampshire | By age 30 |  | N/A |
| New Jersey | By age 55 |  | 2-Year Window, December 2019 |
| New Mexico | By age 24 |  | N/A |
| New York | By age 55 |  | 1-Year Window, August 14, 2019;  Extended to January 14, 2021 |
| North Carolina | By age 28 |  | 2-Year Window, January 2020 |
| North Dakota | By age 20 |  | N/A |
|  |  |  |  |
| Ohio | By age 30 |  | N/A |
| Oklahoma | By age 45 | By age 20 | N/A |
| Oregon | By age 40 |  | N/A |
| Pennsylvania | By age 55 |  | N/A |
| Rhode Island | By age 53 |  | N/A |
| South Carolina | By age 27 |  | N/A |
| South Dakota | By age 21 | Statute of Repose of 40 for all but perp. | N/A |
| Tennessee | By age 33 |  | N/A |
| Texas | By age 48 |  | N/A |
| **Utah** | **No SOL** | **By age 22** | **3-Year Window, 2016; limited** |
| Vermont | No SOL |  | N/A |
| **Virginia** | **By age 38** | **By age 20** | **N/A** |
| Washington | By age 21 |  | N/A |
| Washington D.C. | By age 40 |  | 2-Year Window, May 2019 |
| West Virginia | By age 36 |  | N/A |
| **Wisconsin** | **By age 35** | **By age 20** | **N/A** |
| Wyoming | By age 26 |  | N/A |

**Investigation** What can you do SLIDE

1. Tips
   1. Google/Internet searches RIGHT/WRONG/IT DEPENDS SLIDE
      1. Useful websites/databases include:
         1. Bishop-Accountability.org; and,
         2. ChildSexAbuse.org

How Sarah found pacheco's abuser? how Jesse found the 1970s letter for notice in pacheco and rivera? Sarah's work to get corroboration on the schnapp case. etc.

* + 1. Google’s “news” tab
       1. Enter perp/parish’s name
       2. Sort by date published
       3. Go through a history of articles
          1. Usually if the perp has been accused/had their conduct at the center of litigation before, dating as far back as the late 1990s/early 2000s, there will be an article from a local paper, etc. detailing such information

Article may include information for the lawyers who have previously litigated cases involving claims against the perpetrator

May be worth contacting to see what non-privileged information they may have dug up as it would have been closer to the time of the abuse

* 1. NYSCEF (and other local courts e-filing databases) and PACER searches are also very useful
     1. While NSYCEF is limited in terms of the timeframe and the perp may not be a named defendant, it is worth searching by entity and reading through complaints filed to see what other sorts of allegations have potentially been brought against the perp and/or his parish/diocese
        1. Then you can again contact these attorneys and see what sort of information they may have/are willing to provide
  2. Grand jury reports
  3. FOAIs/FOILs to local agencies (i.e. criminal and/or ACS, etc.)
     1. May turn up information about proceeds brought against/involving perp/entity
  4. Create a working timeline of the perp’s assignments
     1. If he was moved around a lot, that is usually a good sign that the diocese knew what he was up to and moved him to avoid further problems 🡪 great material for a potential deposition

1. Disciplinary Rule 7-104 of the Code of Professional Responsibility
   1. Communicating With One of Adverse Interest
      1. (A) During the course of his representation of a client a lawyer shall not:
         1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other partyor is authorized by law to do so
         2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client
   2. *Neisig v. Team I*, 76 N.Y.2d 363, 374 (COA 1990) SLIDE
      1. Procedural Posture
         1. Plaintiff employee, who worked for third-party defendant construction company, brought suit against defendants, contractor and owner, after being injured at a construction site
         2. He challenged the decision of the Appellate Division of the Supreme Court in the Second Judicial Department (New York) that he could not conduct ex parte interviews of current construction company employees under N.Y. Jud. App., Code Prof. Resp. DR 7-104(A)(1)
      2. Overview
         1. Stating that a disciplinary rule did not have the force of law, the court wrote that in interpreting it, it was entitled to make its own decision in the interests of justice
         2. Writing that the issue was which corporate employees should be deemed to be parties under the rule, which prohibited communications with represented parties, the court stated that the blanket rule against any contact with corporate employees adopted by the lower court was too broad, while the "control group" test, defining "party" to include only the most senior management exercising substantial control over the corporation, was too narrow
         3. It concluded that the test that best balanced the competing interests was one that defined "party" to include corporate employees whose acts or omissions in the matter under inquiry were binding on the corporation or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel
         4. Such a test, it stated, was consistent with the purpose of the rule, was rooted in developed concepts of the law of evidence and the law of agency, and was similar to that adopted by courts and bar associations throughout the country
      3. Outcome
         1. The court reversed the lower court's order denying the employee's motion to permit ex parte interviews of current construction company employees
      4. Headnotes
         1. N.Y. Jud. App., Code Prof. Resp. DR 7-104(A)(1) states that during the course of the representation of a client a lawyer shall not communicate or cause another to communicate with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so
         2. N.Y. Jud. App., Code Prof. Resp. DR 7-104(A)(1) applies only to current employees, not to former employees
         3. In determining whether corporate employees are "parties" under N.Y. Jud. App., Code Prof. Resp. DR 7-104(A)(1), the test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel -- all other employees may be interviewed informally
   3. *Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 836 N.Y.S.2d 527 (COA 2007). SLIDE
      1. Procedural Posture
         1. Appellant brokerage firm sued defendant, a manufacturer of financial software, alleging breach of contract and breach of fiduciary duty in failing to promote the firm's business interests
         2. On the firm's motion, the trial court disqualified the manufacturer's attorneys from the case
         3. The New York Supreme Court, Appellate Division, reversed
         4. The firm sought further review pursuant to [CPLR 5713](https://plus.lexis.com/document/?pdmfid=1530671&crid=d7ea5e72-7a7d-435c-876f-931801f7eec4&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4NNY-6DV0-TXFV-S2TB-00000-00&pdcontentcomponentid=9096&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=pt4k&earg=sr0&prid=d976ab32-229a-40bd-908f-1a5cba09561e)
      2. Overview
         1. The firm entered into an agreement with the manufacturer to jointly create and operate an internet brokerage service
         2. After the instant suit was filed, the manufacturer's attorneys interviewed an employee of the firm, who had been terminated, about the underlying facts of the case, but advised him whom they represented and warned him not to provide any privileged information or any details about the firm's litigation strategy
         3. The trial court held that disqualification of the manufacturer's attorneys was warranted, regardless of whether they actually received privileged information, because there was an "appearance of impropriety”
         4. The intermediate appellate court disagreed, holding that disqualification was not justified because the attorneys had advised the employee not to disclose privileged information and no such information had been disclosed
         5. The high court agreed; ex parte interviews of an adversary's former employee were neither unethical nor prohibited by N.Y. Code Prof. Resp. DR 7-104(a)(1)
      3. Outcome
         1. The order of the intermediate appellate court was affirmed
      4. Headnotes
         1. N.Y. Code Prof. Resp. DR 7-104(a)(1) applies only to certain current employees of a party
            1. Ex parte communications with nonmanagerial employees are permitted, but adversary counsel is prohibited from directly communicating with employees who have the power to bind the corporation in litigation, are charged with carrying out the advice of the corporation's attorney, or are considered organizational members possessing a stake in the representation
         2. Disqualification of a party's attorneys is not warranted merely because a former employee of the party's opponent, whom they interviewed, was at one time privy to his employer's privileged and confidential information
            1. That does not mean, however, that the right to conduct ex parte interviews is a license for adversary counsel to elicit privileged or confidential information from an opponent's former employee -- counsel must still conform to all applicable ethical standards when conducting such interviews
      5. Opinion
         1. The Appellate Division reversed, holding that disqualification was not justified because Intuit's attorneys had advised employee not to disclose privileged information and, based on the record, no such information had been disclosed
            1. In so holding, the Appellate Division noted that this Court's opinion in *Niesig v Team I* "makes it clear that ex parte interviews of an adversary's former employee are neither unethical nor legally prohibited"

Pursuant to CPLR 5713, the Appellate Division granted Siebert's application for leave to appeal to this Court and certified the following question: "Was the order of this Court, which reversed the order of Supreme Court, properly made?"

We now affirm and answer the certified question in the affirmative

* + - 1. In *Niesig*, we held that DR 7-104 (a) (1) applies only to certain current employees of a party
         1. We made clear that ex parte communications with nonmanagerial employees are permitted, but adversary counsel are prohibited from directly communicating with employees who have the power to bind the corporation in litigation, are charged with carrying out the advice of the corporation's attorney, or are considered organizational members possessing a stake in the representation

By so holding, we struck a balance between protecting represented parties from making imprudent disclosures, and allowing opposing counsel the opportunity to unearth relevant facts through informal discovery devices, like ex parte interviews, that have the potential to streamline discovery and foster the prompt resolution of claims

1. Non-contact rule as applied in other States
   1. California (Cal. R. Prof. Conduct 2-100)
      1. *Snider v. Superior Court*, 113 Cal. App. 4th 1187 (Court of Appeal of California, Fourth Appellate District, Division One – 2003) SLIDE
         1. Procedural Posture
            1. Petitioner former employee sought a writ of mandate to vacate an order from respondent Superior Court of San Diego County (California), which, in a trade secrets and unfair competition case, disqualified an attorney from representing the former employee because of the attorney's contacts with two employees of respondent employer
         2. Overview
            1. The employer alleged that the former employee misappropriated confidential and secret business information from the employer and used that information to compete with the employer
            2. The former employee's attorney identified as percipient witnesses and subsequently interviewed a sales manager and a production department supervisor who worked for the employer
            3. The employer filed a motion to disqualify counsel
            4. The trial court granted the motion, finding that attorney-client privilege had been compromised and that Cal. R. Prof. Conduct 2-100 had been violated
            5. The court held to the contrary, determining that Rule 2-100(B)(1) did not prohibit contacts with employees other than officers, directors, and managing agents
            6. Rule 2-100(B)(2) applied to management-level employees who had actual authority to speak on behalf of the organization or who could bind it, within the meaning of Cal. Evid. Code § 1222, with regard to the subject matter of the litigation
            7. The two interviewed employees were not managing agents because they did not exercise substantial discretionary authority over organizational policymaking and could not make admissions binding on the organization
         3. Outcome
            1. The court issued a writ of mandate directing the trial court to vacate its order disqualifying the former employee's attorney
         4. Headnotes
            1. Cal. R. Prof. Conduct 2-100 permits opposing counsel to initiate ex parte contacts with present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability
            2. Cal. R. Prof. Conduct 2-100(B)(1) states the control group test: officers, directors and managing agents of the organization may not be contacted for any purpose

However, Rule 2-100(B)(2) focuses on the subject matter of the communication and arguably applies to employees outside of an organization's control group if the subject matter of the conversation is the employee's act or failure to act in connection with the matter at issue, and that act or failure to act could bind the organization, be imputed to it, or if the employee's statement could constitute an admission against the organization

* + - * 1. While the language of Cal. R. Prof. Conduct 2-100(B)(2) may be broader than the control group test, Rule 2-100(B)(1) adopts that test, given the terms employed

A managing agent that exercises substantial discretionary authority over organizational policy making is consistent with the definition of control group members, those officers and agents responsible for directing the company's actions in response to legal advice

* + - * 1. The second category in Cal. R. Prof. Conduct 2-100(B)(2), those employees whose statements may constitute an admission on the part of the organization, only applies to high-ranking executives and spokespersons with the authority to speak on behalf of the organization
        2. Cal. R. Prof. Conduct 2-100(B)(2) may apply to persons outside the control group if in fact such a management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation

This portion of the rule appears to follow the managing-speaking agent test: those employees having managing authority sufficient to give them the right to speak for, and bind, the corporation

* 1. New Jersey (N.J. Ct. R., R. Prof. Conduct 4.2)
     1. *In re Op. 668 of the Advisory Comm. on Prof'l Ethics*, 633 A.2d 959 (N.J. Sup. Ct. 1993)
        + 1. The court reviewed an opinion of the Advisory Committee on Professional Ethics regarding the ethical restraints on ex parte interviews of current and former employees of a corporate litigant
        1. Overview
           1. The court approved of the conclusion by the Advisory Committee on Professional Ethics that there were ethical restraints on ex parte interviews of current employees of a corporate litigant that also applied to the ex parte interviews of former employees
           2. The court found that under N.J. Ct. R., R. Prof. Conduct 4.2, a lawyer, in representing a client, could not communicate about the subject of the representation with a party the lawyer knew to be represented by another attorney in the matter without consent of the other lawyer
           3. The court determined that since a corporation could not speak except through natural persons, [rule 4.2](https://plus.lexis.com/document/midlinetitle/?pdmfid=1530671&crid=f3f86427-e51b-4d4f-8e17-a00f754c0147&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S3J-VJ20-003C-P015-00000-00&pdcomponentid=9073&ecomp=gp_k&earg=sr22&prid=50b2f3dd-cde8-4bb8-846d-93db3c96b825) was to have a limited application to the control group; those employees entrusted with the management of the case or matter in question, and the employee or employees whose conduct established the organization's liability
        2. Outcome
           1. The court approved the Advisory Committee on Professional Ethics conclusion that the ethical restraints regarding ex parte interviews applied to both current and former employees of a corporate litigant
        3. Headnotes
           1. In the case of an organization, N.J. Ct. R., R. Prof. Conduct 4.2 prohibits communications by a lawyer for one party concerning the matter in representation with (a) persons having a managerial responsibility on behalf of the organization, and with (b) any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or (c) whose statement may constitute an admission on the part of the organization
           2. Courts and commentators elsewhere have adopted or recommended a variety of approaches for determining which persons may be considered "parties" for purposes of N.J. Ct. R., R. Prof. Conduct 4.2

Some of the more familiar are the "control group test," the "managing speaking agent test," or the "alter ego test."

* + - * 1. The control group is defined as those top management persons who have the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision
  1. Pennsylvania (Pa. R. Prof. Conduct 4.2)
     1. *McCarthy v. Se. Pa. Trans. Auth.*, 772 A.2d 987 (Sup. Ct. 2001)
        1. Procedural Posture
           1. Appellant, employee, sought review of an order from the Court of Common Pleas, Philadelphia County, Civil Division (Philadelphia), disqualifying her chosen attorney and denying her motion for post-trial relief in an action against appellee, employer
        2. Overview
           1. Employee sued employer for injuries sustained in a workplace accident. Employee's attorney obtained statements from other employees outside the presence of employer's counsel
           2. The trial court ruled that the statements could not be used at trial, but did not directly prohibit attorney from having future communication with employer's past or present employees
           3. Attorney subsequently contacted other employees and was disqualified for violating Pa. R. Prof. Conduct 4.2
           4. An associate attorney tried the case and the employer was found not to be negligent
           5. Employee was denied post-trial motions and filed an appeal
           6. The appellate court found that the trial court's assertion that attorney was on notice that he should have no future contact with employer's past or present employees was unsupported by the record
           7. The trial court made no finding of fact that the witnesses' statements constituted admissions for the purposes of Pa. R. Prof. Conduct 4.2
           8. The trial court's finding regarding those employees was based on Pa. R. Evid. 803(25)
           9. Therefore, the appellate court held the trial court erred in removing attorney based on his purported violation of Pa. R. Prof. Conduct 4.2
        3. Outcome-The order of the trial court was reversed, and the case was remanded for a new trial

**\*The Claim Letter and Ethical Considerations\*** SLIDE

What is a claim letter?

Making sure it gets to right place

Try and find smoking gun

What is going to happen w response-ignore, t/c please make demand or need time

SLIDE - CLAIM LETTER OR LITIGATION?, (find image someone thinking)

Advantages of claim letter - quick, no digging into personal life, avoid a lawsuit

Advantages of litigation-full discovery, full recovery, bankruptcy, judgment proof

Case may be worth more to some before filing a lawsuit, most conducive in fam

What is the process? SLIDE

Send letter

Give deadline to respond

Initial call

f/u calls

mediation

What goes into a claim letter?

**NY MODEL RULES OF PROFESSIONAL CONDUCT IMPLICATED:**

**3.1 Non-meritorious claims and contentions**

**3.4 Fairness to Opposing Party and Counsel**

**3.6 Trial Publicity**

**4.4 Respect for Rights of Third Persons**

**8.4 Misconduct**

**CASE LAW:** SLIDE - ANY IMAGES FROM THIS CASE?

* United States v. Jackson, 180 F.3d 55, 59 (2d Cir.), on reh'g, 196 F.3d 383 (2d Cir. 1999)

Jackson (Cosby’s daughter out of wedlock) threatened to publicize her claim to be his daughter and harm his reputation and that she was prepared to go to a tabloid on his voicemail and repeated conversations with his personnel and attorneys.

Cosby alerted FBI and at the direction of FBI Cosby’s lawyers set up a meeting with Jackson where she signed an NDA in exchange for 24 million. She was then arrested.

The indictment of Jackson in 1998 alleged violation of 18 U.S.C. § 875(d), 18 U.S.C. § 1952 (a)(3), 18 U.S.C. 371. After a jury trial she was convicted on all 3 counts.

On appeal to the 2nd circuit the issues were that the district court gave an erroneous jury charge on the elements of extortion because it omitted in any instruction that in order to convict, the jury must find that the threat to injure Cosby’s reputation was “wrongful”. However, the 2nd Circuit actually did not take issue with that but instead found error in the Court’s definition of the word “extort”. They also found an error in the conspiracy charge.

The 2nd circuit remanded for a new trial based on technical errors (jury instructions above).

* Flatley v. Mauro, 39 Cal. 4th 299, 139 P.3d 2 (Cal. 2006)

Michael Flatley (entertainer) sued Mauro an attorney who was representing a woman named Tyna Roberts who claimed Flatley raped her.

Details of the letter: The first paragraph of the third page of Mauro's letter refers Flatley to a “settlement of $100,000,000.00” awarded as punitive damages in an unidentified case. The second full paragraph then states that an investigation into Flatley's assets for purposes of determining an appropriate award of punitive damages, will require “an in-depth investigation” and that any information would then “**BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT**

Phone calls thereafter stated that if he did not pay an acceptable amount he would go public.

The 2nd Circuit upheld that the pre-suit settlement demand letter and subsequent telephone calls constituted criminal extortion as a matter of law, and extortionate speech is not protected, and the anti SLAPP statute did not apply.

**FACTS:**  SLIDE OF AVENATTI COMPLAINT

Michael Avenatti used threats of economic and reputational harm to extort Nike. Avenatti threatened to hold a press conference on the eve of Nike’s quarterly earnings call and announce allegations of misconduct of employees of Nike.

Avenatti said he would refrain from holding the press conference and harming Nike only if Nike made payment. He demanded as much as $25 million.

**STATUTES IMPLICATED BY AVENATTI’S CONDUCT:**

18 USC §1951(a) (Hobbs Act extortion)- Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years or both.

18 USC § 875 (d)(Interstate threats/extortion)-Whoever, with intent to extort from any person, firm, association, or corporation any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

NY Penal Law § 155.05 (Larceny by Extortion): A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(vii) Testify or provide information or withhold testimony or information with respect to another’s legal claim or defense; or

(ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

NY Penal Law §155.05 (Larceny by Extortion Defenses)

1. In any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith.
2. In any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

**PRESS COVERAGE/ GOOD QUOTES:**

NY TIMES 3/25/19- Geoffrey S. Berman, the United States attorney for the Southern District of New York, based in Manhattan, said at a news conference that Mr. Avenatti’s conduct amounted to a “shakedown.”

“Avenatti used illegal and extortionate threats for the purpose of obtaining millions of dollars in payments from a public company,” he said. “Calling this anticipated payout a retainer or a settlement doesn’t change what it was — a shakedown. When lawyers use their law licenses as weapons, as a guise to extort payments for themselves, they are no longer acting as attorneys.”

**You could have another slide that says GUILTY ON ALL COUNTS**

NBC NY 2/14/20-Jury convicted Avenatti on all counts. He faces a potential 42 years in prison for the extortion convictions.

Law.com 7/22/20- Avenatti, who was convicted on extortion and fraud charges stemming from an attempted shakedown of the athletic apparel giant in 2019, was released from Manhattan’s Metropolitan Correctional Center in April because of the coronavirus. His sentencing has been moved to October of 2020.

LITIGATION

COMPLAINT - THEORIES OF LIABILITY- no neg, neg hiring etc, assault, battery, IIED

NEED CASE LAW FROM WATERBURY

SERVICE

ANSWER -

USUALLY NO MTD

DISCOVERY - STRAIGHTFWD - NOT A LOT OF DOCS

CMO1/2 nyc cva - shorter deadlines

NO MSJ

TRIAL

4. Filing a lawsuit, theories of liability and litigation. Matt, please gather some sample complaints that can be compared to cases against institutions and explain the differences in the causes of action. What information we need in discovery - Sarah can help with that based on Robb, mosley- unavailability of sj.

**CHILD USA – CLE -- #5: TRIALS & COLLECTIONS - SLIDE**

**BLUE = Gloria G.**

**RED = Epstein**

TRIALS ARE STRAIGHTFORWARD - ISSUES OF FACT FOR JURY

MORE LIKE CRIMINAL CASES - DID SEX ABUSE HAPPEN

TRIAL VERDICTS VS COMPANIES- GREATER BURDEN OF PROOF

ABUSE HAPPENED AND SOMEONE ELSE RESPONSIBLE

**Trial and Collection**

1. Having expert witnesses testify by video – important given COVID
   1. The Court of Appeals has held that "trial court[s] ha[ve] the discretion to utilize live video testimony pursuant to [their] inherent power to employ innovative procedures where necessary to carry into effect the powers and jurisdiction [they] posess[]. *See* *Matter of State of New York v. Robert F.*, 25 N.Y.3d 448 (2015) (citing to *Matter of State of New York v. Robert F.*, 113 A.D.3d 691 (2nd Dept. 2014))
      1. Furthermore, in Robert F., the Court of Appeals found that the trial court's granting of Petitioner's use of video testimony "was not an improvident exercise of discretion [and] did not violate any [of respondent's] constitutional right[s], particularly since the hearing ‘was civil in nature.’” *See* *Matter of State of New York v. Robert F*., 25 N.Y.3d at 453 (citing to *Matter of State of New York v. Robert F.*, 113 A.D.3d at 692-693)
         1. Similarly, in *People v. Wrotten*, the Court of Appeals held that "'the court's inherent powers and Judiciary Law § 2-b vest it with the authority to fashion a procedure whereby witnesses are permitted to testify via live, two-way television at trial.’” *See* *Matter of State of New York v. Robert F*. at 453 (citing to *People v. Wrotten*, 14 N.Y.3d 33 (2009))
            1. Indeed, in *Robert F.*, even though the State "merely indicated that Dr. Peterson could not appear in court on short notice and was somehow limited by her remaining employment with the Office of Mental Hygiene facility", the Court of Appeals still upheld that permitting the witness in that case to deliver her testimony via video conference over Respondent's objection without requiring a proper showing of exceptional circumstances was a harmless error. *See* *Matter of State of New York v. Robert F.* at 454
2. Default Judgments (CPLR 3215(a))
   1. Procedural History and Defendant’s Failure to Timely Answer
      1. Date S/C was filed
      2. Dated and method S/C was served (make sure to e-file AOS and proof that it was the proper dwelling/residence) (CPLR 308(1))
      3. Timing of Defendant’s appearance/answer (CPLR 320(a))
      4. CPLR 3215(a) - "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial..., the Plaintiff may seek a default judgment against him."
3. Inquests/Damages (22 NYCRR 202.46)
   1. Plaintiff Should be Awarded for Her Injuries or an Inquest Should be Set to Determine Plaintiff's Damages
      1. Since liability is granted in Plaintiff's favor by default and/or summary judgement, Plaintiff’s damages must be assessed
         1. Make sure complaint makes clear that plaintiff suffered serious and severe injuries, pain and suffering, emotional distress, mental anguish, embarrassment and humiliation as a result of defendant’s conduct
   2. Case law
      1. GLORIA G and EPSTEIN (RACHEL)
      2. Other
         1. *John Doe, an Infant by His Mother and Natural Guardian, Jane Doe, Individually v. The Jewish Child Care Association of New York, Inc*, 2016 Jury Verdicts LEXIS 11855 (Sup. Ct. N.Y. Cty. 2016) ($10,650,000 [$5,450,000 for future medical costs; $5,000,000 for past pain and suffering; and $200,000 for future pain and suffering] for minor Plaintiff who was sexually assaulted at a foster-care facility who was negligent in failing to ensure the safety of the minor.)
         2. *Gloria Grant v. Mount Vernon*, Westchester Index No. 70026/2012 ($28 million for fourteen-year-old girl sexually assaulted)
         3. *Cheetham v. Cheetham*, Saratoga Index No. 94- 1437 (1996) ($93.5 million for sexual abuse by a father for eight years)
4. Anonymity and sealing/redacting the record/docket
   1. While New York law broadly entitles the public access to judicial proceedings and court records, this public right is not absolute. See Mosallem v. Berenson, 76 A.D.3d 345 (1st Dept. 2010). The public’s interest in open judicial proceedings is limited by numerous statutes as well as the court’s discretion to seal and/or redact court records by a finding of “good cause”. See Gryphon Dom. VI, LLC, 28 A.D.3d 322 (1st Dept. 2006).
   2. The power to seal and/or redact court records exists independently within the court and is inherent in its very constitution. See Dorothy D. v. New York City Probation Dept., 424 N.Y.S.2d 890 (NY. App. Div. 1980) (citing to Vanderbilt v. Schreyer, 81 N.Y. 646 (1880)). As cases and circumstances greatly vary, “the exercise of that power necessarily must be consigned to the sound discretion of the court of first instance, reviewable only where there is an abuse of that discretion as a matter of law." See id.
   3. The burden is on the moving party to prove there is “good cause” that justifies restricting public access. See O'Reilly v. Klar, 167 A.D.3d 919 (2nd Dept. 2018). While the term “good cause” is not defined by the courts, a finding of “good cause” presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant.” See Mosallem, 76 A.D.3d at 345 (citing to Mancheski v. Gabelli Group Capital Partners, 39 A.D.3d 499 (2nd Dept. 2007))
   4. Indeed, courts “must weigh the competing interests of the public and the parties” to determine if there is sufficient “good cause” to require the records in question be sealed. O'Reilly, 167 A.D.3d at 919.
   5. Here, Plaintiff has a compelling interest to redact any and all identifying information in the matter at hand, as she is the victim of a brutal sexual assault, which is of a highly sensitive and personal nature. Plaintiff, as a victim of a sexual crime, faces a serious risk of retaliatory harm and social stigmatization if her identity were to be made public knowledge.
   6. New York courts recognize the compelling interest of sexual assault victims to protect their identity and privacy. Civil Rights Law § 50-b recognizes a limited right of privacy which permits plaintiffs’ anonymity “where a substantial privacy interest is involved.” See NY CLS Civ R § 50-b; See also Doe v. New York Univ., 6 Misc. 3d 866 (N.Y. Cty. 2014).
   7. Tomkins County Supreme Court recognized this substantial privacy interest in granting Plaintiff’s Order to Show Cause and allowing Plaintiff to proceed under a pseudonym in this case. See Exhibit 5.
   8. However, Plaintiff may still be identified to the public by reference to her personal information within the Tompkins County and Otsego County court records. Mentions to her date of birth and other identifying information, would enable identification of the Plaintiff, and should be redacted.
   9. In this case, because the Defendant’s relationship to the Plaintiff would also enable public identification of the Plaintiff, to protect Plaintiff’s compelling interest in this matter and ensure protection of her identity, the name of the Defendant should also be redacted to in all court records in connection with this matter.
   10. In accordance with the relief sought in this motion, Plaintiff has redacted all of this matter’s court records containing any of the identifying information at issue. They have been annexed hereto and are as follows:
5. Collection
   1. Get money judgment 🡪 subject copy of judgment signed by judge to the county clerk for them to produce a transcript of judgment 🡪 send transcript of judgment to county clerk in county where defendant has assets (docketing of judgment) 🡪 this places a lien on all real property in the county
   2. Seizing bank accounts
      1. Hire search firm (i.e. SearchNet) to locate accounts
         1. Serve the debtor (via certified mail) with (1) an information subpoena with restraining notice; (2) questions and answers in connection with the information subpoena; (3) a debtor questionnaire; and, (4) a self-addressed stamped envelope
         2. Serve the bank (via process server) with (1) a subpoena duces tecum with restraining order; (2) an exemption notice; (3) an exemption claim form; (4) a check for $15; and, (5) a self-addressed stamped envelope
            1. NOTE: I have these forms so you can offer attendees to contact us for templates
   3. Seizing real property
      1. Homes
         1. Ask county clerk to run a title search to get the abstract and deed to all real property – some county clerks do not do this, and you will need to hire a title search firm
         2. Keep the homestead exemption in mind (CPLR 5206)
            1. Get appraisal of the property sought to be seized

(a) Property of one of the following types, not exceeding **$150,000 (Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; $100,000 (Dutchess, Albany, Columbia, Orange, Saratoga and Ulster;  and, $75,000 (rest of state)** in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

a lot of land with a dwelling thereon,

shares of stock in a cooperative apartment corporation,

units of a condominium apartment, or

a mobile home

(d) A lien attaches to the surplus of the property in excess of amounts listed in (a)

(e) A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding values listed in (a)

The court may direct that the notice of petition be served upon any other person.

The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold

DAMAGES

**Rape/bullying:** Doe v. Crime Prevention Agency, Inc., No. 2014CV01498D (Ga. St. Ct. Clayton Cty. May 22, 2018) ($1 billion in compensatory damages for a fourteen-year-old rape victim) SLIDE ON HEADLINE

Baca v. Island Girl, Ltd., Case No. 16-003324 (Broward Cty. 2018) (jury awarded an eighteen-year old rape victim $66 million dollars in pain and suffering [$70 million total] that was not reduced on post-trial motion)

Gloria G v. Mount Vernon, Index No. 70026/2012 ($28 million verdict for 14YO) SLIDE ON HEADLINE- SHAMELESS PROMO

Does v. Youth Minister, (a man and a woman were awarded $11.45 million in Nassau County for being sodomized, raped and digitally and it was not appealed)

Bernstein v. 655 Realty Co., Goodman Mgmt. Co., 1985 WL 351193 (N.Y. Sup.) ($4 million ($9.3 million in today's dollars) award in 1985 for one-time rape of a woman by an intruder inside of her apartment)

McCormack v. Cambria Home Remodeling Corporation, 1985 WL 352653 (N.Y. Sup.) ($4 million ($9.3 million in today's dollars) award for a 30-year-old female who endured emotional distress after she was raped by an intruder in her home)

Doe et al. v. Bd. of Ed. Of the City of New York et al., 2008 WL 4981245 ($9 million settlement in 2008 for sexual abuse of two infant plaintiffs by their schoolteacher)

Thompson v. Steuben Realty Corp., 820 N.Y.S.2d 285 (2nd Dept. 2006) ($4.5 million ($5.7 million in today's dollars) for an adult tenant against property owner resulting from a single sexual assault)

LOOK AT VERDICTS IN FAMILY CASES - ALMOST ALL ARE HIGH

ANY MAKE ANY HEADLINES FOR SLIDES

Doe v. Pampa, No. CV-18899352 (Ohio Ct. Com. Pl. Cuyahoga Cty., Nov. 20, 2019) ($134 verdict for woman who was repeatedly abused by her friend’s father)

**Sexual Assault:** Cheetham v. Cheetham, Index No. 94-1437, 1996 WL 642231 (N.Y. Sup. Saratoga Cty. 1996) ($93.5 million for sexually abuse by a father for eight years) May 1, 1996) ($77.5 million in compensatory damages for a victim who was sexually abused by her father)

**Rape/bullying:** Gray v. Honenshell, in which the Iowa Court of Appeals affirmed a jury award of $50 million to a thirteen-year-old rape victim (only a year younger than C.M. was when she was raped). See 927 N.W.2d 680, 2019 WL 325015, at \*10 (Iowa Ct. App. 2019).

- The analysis in that case is instructive. Like the District here, the defendant in that case argued that there was a “lack of evidence, concerning medical records or medical bills and objective psychological, psychiatric or neurological analysis,” that the child “no longer needs therapy,” and that the total damages award of $127 million “raises a presumption that it is the product of passion or prejudice.” Id. at \*3. The court rejected all of those arguments and instead deferred to the jury:

o The jury was in the best position to judge the credibility of the witnesses and to make the judgment call about what the noneconomic elements of damages were worth. That is exactly what juries are for. We should not set aside a verdict simply because we might have reached a different conclusion. Were we to do so, we would be relegating juries to “unimportant window dressing.” Id. at \*9 (citation and alterations omitted)

LESSONS FROM PERESS AND ZYNSHTEYN

Seizure of assets

Knowledge of transfer of assets

Fraudulent conveyance

Seized home

Seized business property

Seized bank accounts