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Trial Practice Update

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Judge's Disparagement of Attorney Warrants Reversal: The New York Court of Appeals granted a new trial in the appeal by a defendant convicted of attempted car-jacking. The basis for the conviction's reversal was the repeated comments made by the trial judge about defense counsel in front of the jury. At various times, including while cutting off defense counsel's cross-examination of a prosecution witness, the judge referred to the lawyer's conduct as "clown"-like and "silly." The Court of Appeals found that these comments tainted the jury's verdict and violated the defendant's due process right to a fair trial. Of greater general applicability, the Court of Appeals took the opportunity to set forth the desired manner by which a trial court should reprimand counsel for perceived misconduct. It advised that the matter should be addressed directly with counsel outside the presence of the jury. Moreover, should the judge recognize that any comments made in front of the jury might be inappropriate, the court should give the jury a curative instruction. See *People v. Leggett*, 76 A.D. 3d 860, 908 N.Y. S. 2d 172 (Sept. 14, 2010)

Court Provides Guidance on Spoliation: The Chief United States Magistrate for the District of Maryland recently published an opinion that surveys the state of the law in various jurisdictions regarding when a party or counsel can be sanctioned for spoliation of evidence. *Victor Stanley, Inc. v. Creative Pipe, Inc.* 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010). In surveying the widely disparate treatment among different federal courts on spoliation issues, the court took it upon itself to discuss the differences and offer its opinion as guidance to lawyers on the state of the law and document preservation obligations. According to the court, the touchstone for any sort of unifying theory of spoliation analysis is "reasonableness and proportionality." Thus, a threshold question in determining sanctions for the destruction of evidence is assessing culpability and differentiating among negligent destruction, grossly negligent destruction, and intentional destruction. Only when the spoliation resulted from gross negligence or intentional spoliation should the relevance of the missing data be presumed. If relevance—and therefore prejudice to the opposing party—exists, either by proof or by presumption, the sanctions still must be proportional to the conduct. When warranted, the sanctions should both punish the perpetrator (through fines or even referral for criminal prosecution) and seek to place the litigants in a fair position for the case to be adjudicated, through evidentiary or other sanction.