



# MondayMonday

## The Lesser Of Two Evils

July 20, 2015

While words of love, soft and tender, may not win a girl's heart anymore, those of us who use words as tools would believe otherwise. A Chasidic sage reminds us that the world only came into being when God spoke; that for that reason, the world itself was created by words. Not understanding words scatters their meaning. They then become only things, which are nothing more than words in exile.

We love words and always have. A new word is like a raw diamond. It only shines when cut properly.

What about the word "ethics?" Is it something we "do" or something we "are?" Discussing Harper Lee's "To Kill A Mockingbird", the late Monroe Freedman, suggested the latter. Atticus Finch, the professor suggested, did only what he had to do when the court appointed him to represent a black defendant, doing so in a courthouse where he knew black citizens couldn't even use the bathroom. This was scarcely "ethical." Now with publication of



"Go Set A Watchman," a prequel or sequel purportedly penned by Lee, we discover that Atticus Finch is a bigot and not the person we thought he was. How were we so wrong, or is it that we looked at things, instead of words?

The words are all that's real. Ethics is not pragmatics. Ethics is not what we do, but who we are, and that goes for Atticus Finch as well.

Justice is all about playing fair. Judges are in charge of seeing to it that the rules are obeyed. These principles, drilled into our national psyche on the baseball fields of America, are rather intuitive. That's what makes the problem of spoliation so distasteful. Spoliation is based on the deceit that if one can't win with the evidence at hand, one has to destroy it. Judges are supposed to punish that sort of cheating very severely.

In *Morales v. City of New York*, 2015 NY Slip Op 06121 (2d Dep't 7/15/15), plaintiff, a detective in the

Emergency Services Unit of the NYPD, was injured while changing the CO<sup>2</sup> cylinder on a tranquilizer gun. The end cap of the gun was the key to liability. Not only was the end cap "lost", but so was the gun once repaired with a new end cap. This occurred 30 days or so before the service of plaintiff's notice of claim.

While the trial court struck the City's answer for its conduct, AD2 only grants plaintiff a negative inference at trial, because striking the answer is too "drastic" a remedy. After all, the "loss" of the end cap and gun were never proven to be *intentional* and the effect of their loss affected both plaintiff and the City *equally*. While the City may have "lost" the evidence, the prejudice was *mutual*. Plaintiff could still prove his case without that evidence. Really?

The message is clear and defendants are taking note, both in state and federal practice. No document or other piece of evidence is immune from "loss." A mere negative inference, sympathetically explained to a jury ("Hey, things happen") is better than damaging evidence that can never be explained away.

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