MondayMonday

Sanctioned By His Own Hand

February 20, 2017

New York City school's Chancellor, Carmen Fariña, has reinserted cursive writing back into the public school curriculum, at least as an option. The study resurrecting what used to be called "penmanship," notes that researchers confirm a connection between cursive writing and accurate spelling, concluding that "[m]otor memory is a component of word knowledge." In a more pragmatic sense, cursive writing was simply faster and, afer all, writing faster is an academic advantage. So, should schools teach printing ("manuscript") writing or cursive? The study says: Both.

For people that work with words, however, there's a stronger argument for cursive writing. A number of years ago, with computer dictation developing superior programs, we decided to give a very popular dictation application a try. Indeed, it accurately tracked every word we said, which it was all we asked it to do. We came to find out, however, that's not all we do when we handwrite words.

In our neck of the legal woods, we read scores and scores of trial transcript and records on appeal. So, we thought that the dictation program would save us from the task of making handwritten notes of everything we read. We would just dictate our thoughts into the program and "voila!", typewritten notes.

The notes were typewritten, produced immediately and far more legible than our scrawl. The problem was, they were useless. We

came to realize that we had unknowingly developed some sort of secret code in taking these notes; a code comprised of where we placed the letters on the line, how bold we made our pen stroke and how we spaced the words on the foolscap. In computer dictation, while the words were correct, the words didn't comprise all the work we had done in writing them. Only our handwriting did. It was how we made the words themselves that told a story only we could comprehend.

The Lubavitcher Rebbe said that there are no "things", only "words". As usual, he was right. Especially for those who write for a living, in making the words ourselves, we make the things which help others, harm others, elevate others and even, if we do it well, enrapture others. If the words are the notes, then cursive writing is the melody. The music, as always, is up to us.

Is there a double-standard on discovery defalcations? Many of us have long-believed that plaintiffs are dealt with far more severely, *i.e.*, having their cases dismissed, after being caught with their discovery pants down. Whether that's true or not and, if so, whether that varies based upon which department is doing the spanking, we offer last week's *Lucas v. Stam,* 2017 NY Slip Op 01190 (2d Dep't 2/15/17).

This medical malpractice action against NY Presbyterian and others ran into discovery problems when plaintiff sought information relating to a "surgical booker" working at the hospital. The booker gave her a medical clearance form to be filled out by her internist. On the form, the booker stated that the opthalmic surgery was to be conducted under local anesthesia. The internist returned the form noting that plaintiff, a moderate surgical risk, was approved for "local/standby anesthesia." However, the surgery, taking 7 hours, was actually performed on both eyes using general anesthesia, resulting in a major stroke and other injuries.

It took a compliance order to the hospital to extract the name of its surgical bookers, which its defense counsel assured, were only two in number and no longer employed. When plaintiff's counsel found out that wasn't so, defendant's counsel said "Oops!", an innocent mistake. A subpoena, however, then discovered the name of yet a *third* booker. At a sanctions hearing, the hospital's lawyer tried "Oops!" once again. Problem was that counsel had actually interviewed this booker previously, where he identified his handwriting on the medical clearance form. When the court directed defendant to produce an affidavit as to the form, it never received it, so the court struck the hospital's answer. However, the court gave the hospital another chance when the hospital offered a counter-order limiting the time span of the affidavit. Eventually, the court only sanctioned defendant's counsel $10,000.

No, says AD2, that was an abuse of discretion. The failure was "willful and contumacious" with affirmative misrepresentatiions. The AD has its