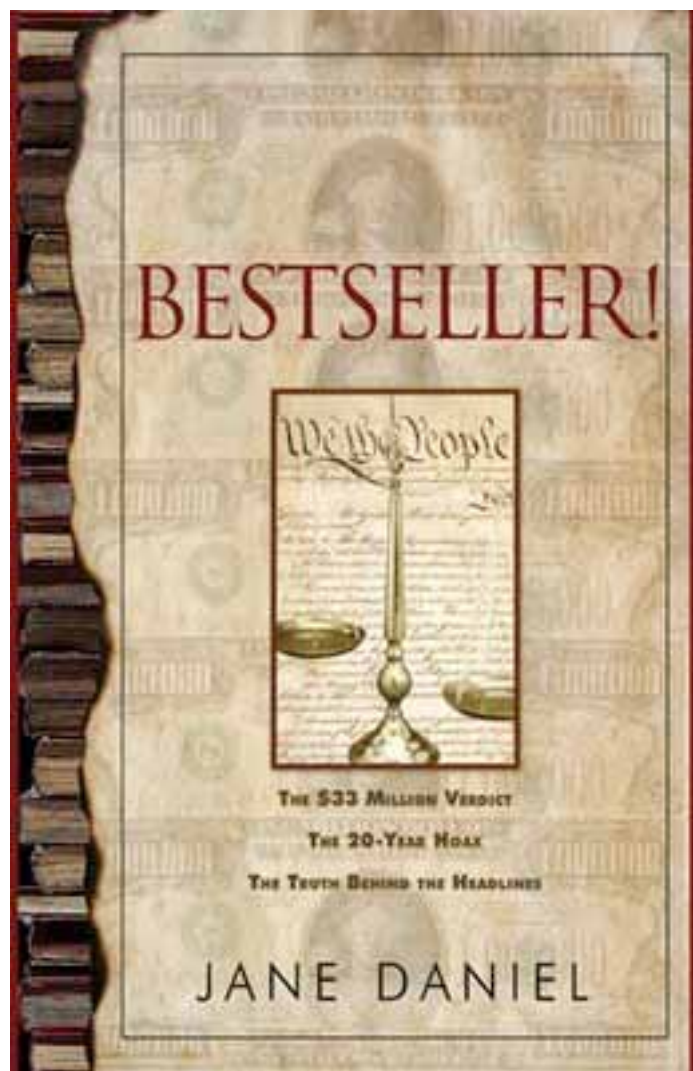


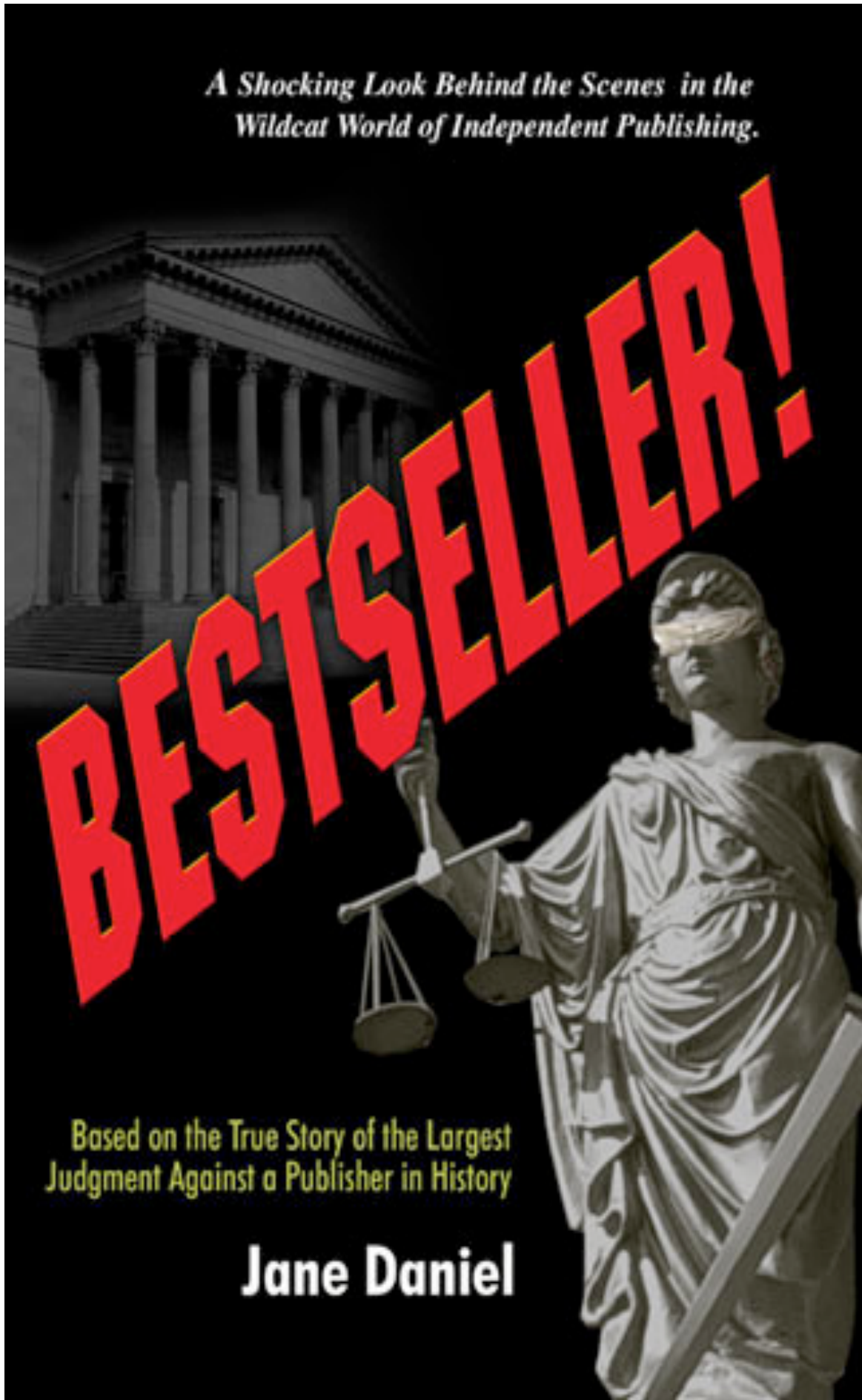
L'INCROYABLE ESCROQUERIE DE MICHKA, "LA FILLE AUX LOUPS," QUI SE RETOURNE CONTRE SON ÉDITRICE AMÉRICAINE POUR LUI EXTORQUER DES MILLIONS DE DOLLARS.

Nous reproduisons un état du manuscrit avant corrections et publication. Ce n'est donc pas exactement le livre publié. Mais le contenu et le sens sont à peu de chose près les mêmes.

Voici la couverture du livre publié, et ensuite la couverture du livre tel qu'il avait été projeté:







Jane DANIEL : Bestseller

Le livre, intitulé *Misha* a été publié  
début avril 1997.

# BESTSELLER!

Jane Daniel



BASED ON THE TRUE STORY OF THE LARGEST  
JUDGEMENT AGAINST A PUBLISHER IN HISTORY ---  
A SHOCKING LOOK INSIDE THE WILDCAT WORLD  
OF INDEPENDENT PUBLISHING

Internet  
2007

Reprint in <pdf>:  
Internet  
AAARGH  
2009

19.2.08

### Does Anyone Recognize These Pictures?

In August 2007 when this blog was begun it was with the hope that more information about the woman who calls herself Misha Defonseca would be made available. Below are documents that have been supplied to the author of this blog which present information previously unknown.

Research in Belgium has been guided by information found in U.S. records, as well as information and photos included in the original 1997 U.S. Mt Ivy Press edition of the book entitled *MISHA A Memoire of the Holocaust Years*. In later European editions, after Misha gained control of the copyright through a lawsuit against her original publisher, Mt Ivy Press, the photos were removed and the *DeWael* name was changed to *Valle*.

The first French edition, *Survivre avec les loups*, over which Misha had exclusive control from the beginning through an agreement with Mt Ivy Press, was released just months after the American edition. All French editions appeared with a changed name and without the photos that were in the original American edition. I believe that it was these changes that allowed the perpetuation of one of the longest running and most lucrative hoaxes in literary history. Though the truth has begun to emerge, there are still missing pieces. Here are some of the pieces that have emerged.

The time line for young Monique De Wael and her family includes the following items.

*Click on the images below to see an enlarged version. Higher resolution images are available upon request.*

#### **1937 St Gertrude's Parish, Etterbeek, Belgium *Baptismal* Register Extract:**

Monique Ernestine Josephine De Wael; parents Robert Henri Ernest De Wael and Josephine Germaine Barbe Donvil residing at rue Floris 58, Schaerbeek, but originally from Anderlecht; godfather Ernest De Wael (paternal grandfather); godmother Josephine Dillemans (maternal grandmother).

[Google maps link to rue Floris 58](#)

1941 "polyphoto" pictures of Monique De Wael

#### **1943 Primary School No 2 Register, rue Gallait 18:**

Six years later, in the same neighborhood where her parents lived when she was born, Monique De Wael, daughter of Robert De Wael, employee of the Schaerbeek town administration and Marguerite Levy begins school. Marguerite is the younger sister of Monique's first husband Morris Levy, who's father was also named Morris Levy, occupation film distributor, wife's name Germaine Reps.

[Google maps link to rue Gallait 18](#)

Above and below: 1940's photos of Monique and her paternal grandparents Ernest De Wael and Marthe Coulon.

This is a letter I sent to Misha for which I never received a reply.

*Misha Defonseca  
70 Mason Road  
Dudley, MA 01571  
September 26, 2007*

*Dear Mrs. Defonseca,*

*We have not spoken for more than a decade but I'm sure you remember me. I am currently writing a book about the litigation associated with the book, Misha A Memoire of the Holocaust Years. I have come into possession of an official document bearing your signature that raises numerous questions. I wanted to be fair to you and give you a chance to explain certain discrepancies.*

*On this document, signed by you in 1991, you state that your mother's maiden name was Donville, and that you were born in Etterbeek, Belgium on May 12, 1937. This indicates that you were, indeed, four years old at the time you say you began your 3,000 mile journey, not seven as you have repeatedly claimed.*

*This information raises a number of other questions regarding statements you make in the English edition, **Surviving with Wolves**.*

*1. You say that your parents were Reuven and Gerusha, but you never knew their surname. Your father, you say, was German and your mother a Russian Jew with an accent so thick she hid in the house to avoid being found out by the Nazis. Why would a woman with a French maiden name speak with a thick Russian accent?*

*2. You apparently were born in Etterbeek, not Brussels, yet you say that Grandpere found you after the War from "fake" birth records for Monique Valle in Brussels. How can this be?*

*3. The surname given you by the people who took you in after you lost your parents was DeWael in the American edition, Valle in the French and U.K. editions. Why the discrepancy?*

*4. In the Epilog, you say that you went to "the Town Hall" to "correct my identity." In what town? You have referred to yourself using all of the following names, at one time or another:*

*Mischke  
Misha  
Misha Defonseca  
Misha E. Defonseca  
Monique Ernestine Defonseca  
Monique Valle  
Monique De Wael  
Misha Levy Defonseca*

*You seem to have begun using Levy as a middle name at the time you signed the publishing agreement. That is your son's surname and your first husband's surname. Why would you begin using your first husband's name again, many years after that marriage ended and you remarried?*

*As you are aware there have been numerous Holocaust experts who have questioned whether your story is a hoax. I have never seen any attempt on your part to put their skepticism to rest, although there are documents that could substantiate your story, if true. For instance, when you emigrated to the U.S. you would have been required to file an Application for Immigrant Visa and Alien Registration. The information on that form (#OF-230-1) includes:*

*Family name, first name, middle name  
Other names used or by which known  
Date of birth, place of birth  
Name of spouse  
Name, date and place of birth of all children*



*Name of father, date and place of birth and address  
Name of mother, date and place of birth and address  
All the places you have lived for six months or longer over the age of sixteen*

*If you did not have all the information required on this form there would have been an indication of that in processing your application. Every immigrant at that time was required to provide this information to the U.S. Consulate in the country of origin and to the INS (Immigration and Naturalization Service, now Homeland Security) here. The information was used to perform a security check and became part of your Immigrant Visa. You were also required to supply a long form birth certificate and a valid passport and a marriage certificate and divorce or death certificate for any previous marriage. There is no shortage of official records that you could use to refute allegations of fakery.*

*It appears that your husband, Maurice, filed Chapter 13 Bankruptcy on 2/15/2001, this despite the Trial Court's finding that "the Defonsecas'*

*three bank accounts reveal deposits between December 1996 and February 2000 of over \$243,700. The evidence never made clear how, notwithstanding that amount of deposits, the Defonsecas were claiming financial hardship, such that their home was foreclosed upon in 2001." This figure, you will recall, was based on evidence we provided of wire transfers into your accounts from foreign banks, and did not included deposits you made in the U.S. A March, 1999 Boston Globe article by Steve Bailey, stated "Defonseca says she and her husband, Maurice, are in danger of losing their home and have been reduced to taking food from Jewish charities." You are quoted as saying that you were reduced to eating dog food. How do you explain this in light of your income during that period?*

*Before I go forward in raising these questions in my book, I would like to give you an opportunity to address them and provide any documentation that ou feel supports your story. I look forward to hearing from you.*

*Yours truly,*

*Jane Daniel*

POSTED BY JANE DANIEL AT 6:40 AM 0 COMMENTS

20.8.07

[About This Blog](#)

*If you can shape it in your mind, you will find it in your life.  
- Chinese fortune cookie*

This blog is more than a blog, it's a real book being written in real time. It's a book I've been writing in my head for years as I lived it. I am setting down the story now as I continue to live it. I've written and published several paper-and-ink books, but I've never done one like this before. I'm making up the rules and learning as I go along.

I hope this will be an Interactive Book. Perhaps, as you read this, you will want to share with me your thoughts and insights. Since the events described here are relatively recent and they and the characters are based in reality, I especially hope to hear from those of you who may have been there at the time, or who knew the people I am writing about.

*The New York Times Book Review* often publishes little tombstones called Author's Queries, that go something like this:

*Author seeking information, documents or photos relating to the life of What's-his-name during his childhood years, for biography. Please contact so-and-so.*

So I am posting a sort of Author's Query here because there are still a lot of missing pieces to this story. The chapters I've written so far are not carved in stone; they may be revised as new material comes along.

I am going to shine a light into some dark and hidden places. I do so with the knowledge that I may disturb a nest of resting vipers. Justice Louis Brandeis said, "Sunlight is the best disinfectant." The Bible says, "The truth shall set you free." Mine is a tale that needs to be told. I do what I must do.

This story will have an end, as all things do, but I don't know what it will be as I write this now. I hope you will decide to join me on this real-life journey to that unknown end.

How to reach me:

blog response  
email [xana@hoveyhouse.com](mailto:xana@hoveyhouse.com)  
fax 978 281-7745  
phone 978 281-7732

19.8.07

Prolog

*"In Dante's Inferno the innermost Circle of Hell, the Ninth, where the punishments are most heinous, is reserved not for murderers and their ilk but for those who have betrayed a trust."*

**In the year 2000** [2001 in the paper book], in Suffolk Superior Court, Commonwealth of Massachusetts, a jury awarded to two elderly women damages in the amount of \$11 million, which was trebled by the court to \$33 million. To put this in perspective, just three years earlier, Superior Court in Santa Monica, California awarded the same sum to the victims' estates in the wrongful death lawsuit against OJ Simpson for the brutal killings of Ronald Goldman and Nichole Brown Simpson.

The Massachusetts case represents one of the largest awards in the state's history (bracketed by record awards of \$30 million in 1992 and \$40 million in 2005 for medical malpractice resulting in massive brain injuries to newborns.) Unlike the OJ case and the medical cases, however, the lawsuit of the elderly women involved no death or physical harm; it was a contract dispute between two unknown co-authors and their tiny publisher. This action, and the numerous others springing from it involving over a dozen more defendants, mired the Massachusetts courts for a decade.

This is the story of the legal system run amok. It's about conduct incompetent at best and unethical at worst. But most of all it is a tale of betrayals of basic sanity on many levels of the judicial system that is entrusted with meting out justice in legal disputes.

To slip too deeply into the machinations of civil litigation is to become a gnat ensnared in a web; once the process begins it may be impossible to escape. As the struggle runs its course, the pitfalls of human fallibility and institutional vagary are unforeseeable and uncontrollable. For that reason, no matter how just the merits or heroic the effort, the outcome will always be a crap-shoot.

Within this narrative lies a cautionary message for those who take lightly the phrase, "I'll see you in court."

*If ye find not justice in the courts of law,  
seek it in the court of public opinion.  
- Chinese proverb*



18.8.07  
Chapter One

*I am still determined to be cheerful and to be happy, in whatever situation I may be — for I have learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.* - Martha Washington

I arrived on time at my doctor's office and took a seat in a cream and gray upholstered chair. I was there for my final, follow-up appointment after a routine surgical breast procedure.

In the previous couple of months I had gotten to know the receptionist, Marian, who always greeted me with a radiant smile. The question, "How are you?" was not rhetorical for Marian; she actually listened to the answer. At one appointment, though, her usual ebullience seemed strained.

I asked her if she wasn't feeling well. "My daughter had a very bad weekend," she said.

"What happened?" I asked, afraid I was being too personal.

"She's been having seizures. They're getting worse. She was born deaf and blind."

Now it was my turn to listen. The child's father had left them and Marian was caring for the three-year-old by herself.

Marian spoke of the difficulties of simply taking the child out of the house for fresh air, or of going for rides in the car.

"She's terrified of strange places because she can't get her bearings by sight or sound. Sometimes she just screams."

"My God," I said. "I'd never have imagined you were struggling with so much. You've always been such a bright spot in my visits here. You always seem so happy."

Her next remark came without a moment's hesitation. "I have to be happy. If I'm not happy how will my little girl learn to be happy?"

Weeks passed and my incisions were looking less raw. I could wear a bra and fitted clothes.

Marian and I were chatting as I waited for the doctor. Her daughter was doing better, she said. I was so relieved to hear it. The doctor, manila file in hand, appeared at the door of the examining room and motioned me inside. "I'm feeling great," I said to her, smiling. She looked at me carefully and then asked me to have a seat on the paper-covered examining table. She drew a deep breath.

<sup>1</sup>  
"I have something to tell you."

I didn't see it coming. I'd gone through all kinds of checks before the surgery. I'd had no lumps, no symptoms, nothing suspicious in any of my pre-op visits. My mammograms were clean. "There's good news and bad news," she continued, laying her hand over mine. Then, reading the alarm that must have been rising in my eyes like mercury in a thermometer, she spoke quickly. "The tissue that was removed from your breasts, you know... Well, it's..." She struggled for words. "They do a routine biopsy on removed tissue. They always do that. They found cancer cells in one breast."

I stopped breathing.

"I've never had this happen before in my practice. After a cosmetic procedure, I mean," — as if that information might reassure me.

"But the good news is it wasn't a tumor. It was cells. Just cells. It was caught very early. It might

not have shown up as a lump for two years — or more.”

The light drained from the room.

“Lie back,” she said, taking hold of my shoulder. “You’re about to faint.”

I don’t remember how I got out of there. Did I drive myself home? Did I go directly to another doctor, perhaps a cancer doctor, in the same building? Did I say goodbye to Marian?

During the next few days, numb with terror I was dispatched to an oncologist, then to a second-opinion-oncologist, then to a cancer counselor, then to a surgeon who would perform a mastectomy, then to the plastic surgeon who’d put me back together, assuming there was enough skin left to cover the implant once the recently-stitched, not-fully-healed edges were cut away.

Since the cancerous tissue had not been marked as to location during the cosmetic procedure, it was the oncology team’s consensus that the best, the only, course of treatment was to remove all the remaining breast tissue. Plus some lymph nodes to be sure the malignancy hadn’t spread. I would lose some feeling in my arm, I learned, but if there were no “involvement” of the lymph nodes, there was more “good” news: No chemo, no radiation. And a new, albeit fake, breast.

How does one’s body decide to grow malignant cells? What signal, impulse, trigger, causes evil cells to spring up where before were only good cells? A few months after the mastectomy when I went for a follow-up appointment, I asked the doctor how long those cells had been there.

“When did they start to grow?” I wanted to know.

“About a year ago,” he replied.

About a year ago. I am not a journal keeper except in times of extreme duress. About a year ago I had written in my journal, “This is taking a terrible toll on my body.” The “this” I was referring to was the second lawsuit. That journal entry was dated several months into the second lawsuit.

Time has passed. I have put the cancer experience behind me. Years later, when an acquaintance who had just been diagnosed with breast cancer called me in a panic for advice, I had a ready answer.

“Don’t worry.” I said. “In the hierarchy of bad things that have happened to me in my life, breast cancer is at the bottom of the list.”

At the top of the list is the second lawsuit.

17.8.07

## Chapter Two

*According to a recent survey 81% of Americans feel they have a book in them and that they should write it.*

The New York Times, September 28,2002

For most of the twentieth century, if writing a book was your dream, you needed a publisher to reach the readers who would buy it. To find yourself a publisher you needed a literary agent, the gatekeeper, who would usher your manuscript through a publisher’s door. Of course, if you’d never been published before, you didn’t have an agent and you didn’t even know any agents.

So you went to the library and the reference librarian would direct you to Literary Marketplace (L.M., for short), a thick book suitable for use as a boat anchor, containing lists in blindingly fine print

of anybody related to publishing — including literary agents.

Because your research had enlightened you as to the hopelessness of approaching a publisher directly, you studied up on how to write a pitch letter, the purpose of which was to interest agents in your manuscript. You compiled your list of suitable agents based on types of literary material they represented (as described in L.M.), spent hours at Kinko's making copies of your cover letter and your manuscript (or a sampling of the best parts) bought padded mailing pouches and books of stamps, and optimistically deposited stacks of your creative expression at the post office.

Then you waited. And waited. When you decided enough time had passed that it wouldn't seem pushy, you sent a letter inquiring if the unresponsive party had, by any chance, not received the package and offering to send another. It's pretty much a sure bet you never heard from any of those agents, not even a "thanks, but no thanks."

In desperation, with an oh-what-the-hell-it-can't-hurt-and-may-help recklessness, you repeated the entire process, sending even more packages (to increase the odds in your favor) directly to the Acquisitions Departments of big and little book publishers.

And heard nothing.

Meanwhile there were the lucky ones who had, in some inexplicable way known only to God, made it through the no-man's-land of never-been-published and who actually had an agent, a publisher and a book out there.

From the depths of despair, you'd wish with all your heart to be a member of the exclusive club of Published Authors who had found literary fulfillment.

Not exactly.

Here's what you would be experiencing if you were one of them.

A literary agent, convinced of your manuscript's potential, (said agent having been acquired through a miracle of Catholic proportions) would have persuaded a publisher to offer you a contract and for so doing would have taken a percentage of your meager advance. (The full term is advance against royalties meaning that you pay the publisher back from the first sales of your book.)

An editor would have been assigned to whip your manuscript into marketable shape, a publication date would be set, a cover designed, the galleys (the bound page layouts of the book) would arrive for you to read and mark for last minute changes, and the publisher might have sent you a copy of the upcoming catalog containing a picture and description of your book (just one among scores, maybe many scores, of other books being released by your publisher that season.)

The much anticipated publication date would arrive. You'd begin haunting bookstores. Your book might appear on a shelf in a couple of your local outlets. You'd call the marketing department with helpful suggestions.

"What about the other Barnes & Noble?"

"You know that little bookstore just a mile from my house? I'd love to do a signing there."

In return for all your enthusiasm you'd get promises, and more promises.

Your regional newspapers would send a reporter and a photographer to cover the local author angle. You would be floating on hope, like a cherry atop an ice cream soda, raring for more. A couple of reviews would show up in unexpected places, which you'd take as a sign that word was getting around. You'd pass out the ten free copies from your publisher to your family and best friends who would congratulate you and tell you how much they loved the book.

And then you'd wait. And wait.

Presently you'd begin the next round of fruitless letters.

To your publisher's Publicity and Promotion Director:

"Hi, Sue, I'm planning to be in Denver this summer on business. Would it be possible to set up a signing at The Tattered Cover?"

To the Books Editor of the *Denver Post*:

"Enclosed please find a press kit and a review copy of my book, Such and Such, published this year by..."

After a few months, as doubt has begun to nudge aside hope, your publisher will have moved on to the next season's offerings. No one is returning your phone calls. How is your book doing in California? you wonder. New England? You wait for that first royalty statement. Please, please, you pray, let there be good sales figures.

There are three seasons in publishing: A book is designated a Fall, Winter or Spring title. A title is part of the front list for the period of its season. As soon as the next season arrives, the previous season's titles join the back list. Unless they are moving off the shelves at a decent clip, bookstores return back list books to the publisher for full credit or don't reorder them, thereby making room for the next season's offerings.

With such a tiny window of opportunity, it's only a few more months before you learn that your book has been remaindered, which means that unsold copies are being disposed of for pennies just to get rid of them. At this point your book is a flat turtle in the middle of the road.

This tale of woe happens to the vast majority of aspiring authors. (Those overnight bestsellers by first-timers are the rarest of rarities.) John Grisham (a top selling novelist for two decades) is reported to have hawked copies of his remaindered first book outside Walmart's out of the trunk of his car.

During the 1990s there were more than fifty thousand titles published annually, of which less than a third broke even. Publishers worked on the wet spaghetti principle: Throw a bunch at the wall and some will stick. The ones that stuck paid for the flops. Publishers never spent serious money promoting a book unless it already had demonstrated in the marketplace that it "had legs" or the author was already well known. Those half-page ads in *The New York Times Book Review* were for books that were already bestsellers.

Though every individual book by an untested author was a risk, in the aggregate publishers did well with this wasteful, survival of the fittest system. The grand old dinosaurs of the book world had big city offices and large staffs - editors, designers, marketers, sales reps, art directors, artists, and folks who handled printing, binding, shipping, warehousing, advertising, public relations, and on and on.

The process of creating a finished book was labor intensive, time consuming and complicated. For instance, the copy that appeared on a finished page took many months to prepare. It was produced by typesetting machines that set text in columns on paper sheets that were literally cut and pasted by hand into page layouts. The designers who did this work were highly skilled and incredibly meticulous.

Publishers were the exclusive masters of all the intricate facets of production and delivery. The industry's lifeblood, the inventory, was transported along their distribution networks from warehouses to retail outlets all over the country. Among themselves the major publishers had a virtual monopoly on access to the one place where all the rest of us went to buy books: the bookstores.

And that's how things stood on January 24, 1984 when a gray gizmo smaller than a breadbox and named for a fruit was introduced. The reasonably priced Apple Macintosh, or Mac, worked with easy-to-use software that alchemized the look of finished layouts and real typesetting from pages of ordinary word processing. Literary wannabes everywhere immediately embraced the unprepossessing chunky cube with its revolutionary technology and the entire world of publishing changed overnight.

As the end of the century approached, books were being written, designed and laid out on Macs in home offices, garages and basements all over the country. Page layouts were mailed to offset printers, mainly in the middle of the country, from whence books could ship most economically both east and west. By the turn of the Twenty-first Century the Internet would break the stranglehold on the market held by brick and mortar bookstores.

Distribution companies sprang up to pre-sell small press titles to the chains, like Barnes & Noble and Borders, and the independents. The distribution companies' warehouses received finished books from the printers and fulfilled orders from big wholesalers, like Ingram and Baker & Taylor, and the nation's bookstores.

Meanwhile the little publishers deposited fat checks in the bank and continued to come up with successful titles. That's about the time I wandered, pretty much by accident, into the wildcat world of independent publishing.

Today we are at the leading edge of another wave of change in publishing, this one being driven by the Internet. Everyone with a product to sell can make it available to be found by those interested in purchasing that product. On the Internet, everyone, even those without money to invest, can be a marketer supreme.

Among the entrepreneurial front runners in taking advantage of the new technology are the music makers, led by a bunch of kids who cut their teeth on a computer mouse. Like the publishing industry, the music business has always been controlled by the major labels and the radio stations. These were roughly analogous to big publishers and bookstores. To make a record you needed a contract with a recording company. The recording company would then do its best to secure airtime so potential buyers could hear your music. An artist on his own had a snowball's chance in hell of getting so much as a minute of airtime and thus a chance to sell records.

The Internet has changed all that. Unknown basement bands can make a CD for pennies, put up a web site with samples of their music and sell downloads on the spot. Music blogs, run by enthusiastic fans, expand the exposure exponentially by sampling bits of their idols' work (sometimes more than bits, which raises issues of copyright infringement) for other fans to download free, thereby spreading the word to tens of thousands more potential fans. Tiny music labels and unknown groups have risen to stardom and riches in a matter of days.

The star-maker machinery, in the words of Joni Mitchell, has been retooled to give the independent press (known as "indies") a big boost. Amazon, the company that revolutionized the way people purchase books (and grabbed itself a huge market share in the process) is now expanding the breadth of kinds of books people will be able to purchase. Advantage, a special Amazon program for the small press sector, offers all the advantages a big publisher's books enjoy. Amazon will list any title with its own web page and provide an account to process sales, collect and remit money and ship books. And Google, that Goliath of the Internet, has a "Partner Program" designed to "help users discover your books by matching content with user searches." The program offers to "preview samples, drive buyers to bookstores, online retailers and your own web site." Indie authors are also making one or two minute promotional videos and posting them on Google Video and YouTube.

*The New York Times Book Review* will consider reviewing titles that sell at a rate of as little as one hundred copies a week. Kirkus Reviews, an influential trade publication, will consider indie books that have sold as few as 500 copies, or review any book for the modest fee of \$350.

The independent book world is riding the lip of another towering tsunami. "Self publishing was once considered as bad as vanity press, but with so many self-published successes in the past few years it is now possible to self publish with respect," according to John Kremer, indie (independent) press marketing guru. "Publishers Weekly [the industry bible] will now look at self published books, something they would never have done five to ten years ago. And now with print on demand [POD: the ability to print, in a short period of time, small numbers of books as needed] it's possible to self publish at little cost. In fact, many larger book publishers now scour the shelves and Internet for self published and POD books that could fit their publishing program."

In his book "The World Is Flat", three-time Pulitzer Prize winner Thomas Friedman chronicles the enormous changes the Internet and World Wide Web have made in just the first few years of the

Twenty-first Century. Friedman sees the Internet as a great leveler that bestows on the meekest among us the same ability to participate in the great flows of information and commerce as that traditionally enjoyed exclusively by high and mighty individuals, institutions and corporations. "This newfound power of individuals and communities to send up, out, and around their own products and ideas, offer for free...is fundamentally reshaping the flow of creativity [and] innovation... More than ever, we can all be producers, not just consumers." He adds, "And you ain't seen nothin' yet."

Kremer's optimism is consistent with Friedman's. He tracks indie press success stories, maintaining a list of Top Indie Publishers who do \$50 million to \$200 million in annual sales, as well as a Self Publishers Hall of Fame and an extensive Indie Bestsellers Hall of Fame. His enthusiasm knows no bounds. The whole system, he believes, has become one big wide-open field of possibilities to sell books and make money.

16.8.07

### Chapter Three -

#### **How to build a bestseller: Make up the rules as you go along.**

In 1988 I had bought my first Mac, having learned its usefulness in a previous job running a marketing communications department and producing a newsletter for a national franchise.

I was separated from my husband at the time, the sole support of two teenagers and nervously self-employed. I designed brochures and other marketing materials for small companies and trawled for new clients by writing absurdly low-paying freelance articles for local newspapers.

One story concerned a Boston-based elder law attorney, Harley Gordon, who presented seminars on asset protection to seniors worried about going into a nursing home. After my article appeared, I got a call from Harley. He liked the piece and wanted to meet with me.

On a fateful Sunday afternoon in early spring, Harley came to my basement office to discuss his ideas for a book. He was short and compact, neatly dressed, in his forties. He sat down directly across from me and was immediately focused on convincing me to help him. The book would mirror his lectures on legal strategies for preserving life savings from the ravages of long-term care. It would be written in plain English, no legalese (my job), so that elderly people could understand.

Not a subject that lit up my Christmas tree, I told him.

Still he persisted. Health insurance doesn't cover the devastating cost of long-term care, he explained. Neither does Medicare. This is a subject of vital importance, not only to seniors but also to their offspring who would be witnessing the rapid depletion of their inheritance should a parent go into a nursing home. The Great Generation and the Boomers: That's a huge demographic. This book would sell like hot cakes, he assured me, in not too original language.

"A book is more of a commitment than I am willing to make," I told him. "I'm not the girl for the job."

At that point, Harley reached into his briefcase and pulled out a slip of paper that he slid facedown across the table between us. "I just want to be sure I have your attention," he said. I turned it over. It was a check for five thousand dollars. Two years from that day, when we received from our accountant a tax return for the first year's earnings of the book, we realized we had grossed over \$1.6 million.

We had also been sued. For me that suit, catastrophic as it turned out to be, was but a warm up for the main event.

That early period, however, before the legal troubles hit was thrilling. At some time in the past Harley had hosted a legal advice talk show on a Boston radio station. When we didn't hear back from any of the publishers we'd sent manuscripts to, Harley proposed printing the book ourselves and selling copies via talk radio. He would pay the printing costs, a few thousand dollars. We would publish under a name he had considered for his seminars, Financial Planning Institute.

We hired a Mac-savvy designer to do page layouts (that took a couple of months) with which we ordered six thousand copies from a local printer. We chose a long, descriptive title: *How to Protect Your Life Savings from Catastrophic Illness and Nursing Homes*. The first edition was a pretty amateurish looking affair, with a rather goofy cover designed, I'm sorry to say, by me. I began pitching



producers of local talk shows (there were many of them in Boston at the time) and booking interviews for Harley, who turned out to be a highly polished interviewee. Switchboards at radio stations lit up with calls from worried listeners. The shows' hosts were amazed at the enthusiastic response of their audiences to Harley's message.

We ran around delivering cases of books to some of the local bookstores, leaving them on consignment. In a matter of weeks, we had sold out our entire inventory and ordered ten thousand more copies, paid for out of the proceeds of the first sales. Around that time we learned that the trade show for the American Booksellers Association was being held at the Javitz Convention Center in Manhattan. Every publisher in the country would be there. We decided to attend and hand out our book, hoping for a publishing deal. This huge annual event was referred to in the trade by its sponsor's acronym, "ABA," as in, "Are you going to ABA this year?" It comprised booth after booth of all the collected knowledge and culture of the world, compressed into thousands of volumes — big, handsome coffee table books, little novelty books, books with beautiful glossy photos, books with pop-up images for children, more fascinating books, more beautiful books, more original books than I had ever imagined existed in the world. We also encountered our first distributor, an outfit from California whose convivial staff invited us to a party back at their hotel.

An early entrant into the independent distribution field, Publishers Group West, a.k.a. PGW, was founded in 1976 and didn't initially set the publishing world aglow. In 1989, however, tiny Earthworks Press produced *50 Simple Things You Can Do to Save the Earth* which sold over a million copies. With an expanding stable of small publishers cranking out solidly successful titles, PGW rapidly established itself as the leading small press distributor in the United States. At ABA we were bumpkins in the Big Apple, picking up too many handouts at too many booths and stuffing them into Baker & Taylor shopping bags decorated, for some reason unbeknownst to us, with the sweet faces of Scottish Fold cats. We walked, starry-eyed, up and down the isles of the convention center, handing out our frumpy book, chatting up publishers' reps, trying to figure out who might be an agent, who a publisher, and hoping to learn as much as possible about this unfamiliar world in the brief time we had. What we learned almost immediately astounded us: We were not entirely unfamiliar figures among that crowd. Huge and far-flung as the publishing industry was, news traveled fast. Word of the strong sales of our book had already arrived like reports of successful nectar-gathering telegraphed from one bee to rest of the hive. Within days of my return to Boston, four contracts arrived, overnighted by publishers wanting to sign our book. One was from Fred Hill, something of a legend in the industry for shepherding *The Road Less Traveled* to super bestsellerdom. We were now faced with an exhilarating dilemma. Which publisher should we sign with? — if any at all. We knew what we didn't know, which was just about everything about publishing. But we also knew we had sold a lot of books in a little bit of time and we, not a commercial publisher, got to keep most of the proceeds.

At that point someone suggested that we speak with John Taylor (Ike) Williams, with the firm of Palmer & Dodge, who was reputed to be the preeminent literary attorney in New England. We arrived at Palmer & Dodge's posh offices, much more impressive than Harley's, contracts in hand. Ike greeted us with a firm, dry handshake. He was a tall, lean patrician, a Yankee-style Master of the Universe right out of Central Casting, whose slightly clenched-jaw speech suggested fancy prep schools and Ivy League polish. He wore a blue Oxford cloth button-down shirt, no doubt Brooks Brothers, a tiny bit frayed at the collar (blue blood frugality), and a Harris tweed jacket with suede elbow patches. We explained our situation, chatted briefly and left copies of the contracts for Ike to review. We would talk again in a week or so about how best to proceed with the book. It didn't take that long; in fact, the decision was made by the time we got back to our own offices. We had found a distributor (PGW) who could get books into bookstores and we had devised a proven system to move them rapidly off the shelves. What did we need a publisher for? We printed more books. For the next year and a half we repeated the publicity formula all across the country. Working from fat green volumes of Bacon's Media Directory (containing contact information for every media outlet in the entire US) we booked scores of interviews on radio talk shows.

I set up an in-house advertising agency so that we could qualify for the fifteen percent agency discount. We purchased sixty-second spots on the interviewer's show that ran for days or weeks following Harley's appearance. I hired a small staff consisting of an office manager (my daughter, Liza), a secretary, and a media buyer who placed and tracked our advertising and kept us supplied with her special homemade pizza bread. We all worked out of a hastily improvised office in my basement. I brought in an outside publicist, Bob Newman, a brash young man with an instinctive nose for the business, who, week after week, booked some of Harley's best interviews. Newman Communications is today one of the top book promotion houses. What made this book unique was the element of desperation among prospective buyers. Families facing a catastrophic illness had almost nowhere to turn for help in making crucial decisions. Timing was an essential factor in protecting assets. If you waited too long before acting, you could be wiped out. Millions of hard working, tax paying elderly



people faced the possibility of living out their Golden Years below the poverty line. The ad copy I wrote stressed the urgency of acting quickly. I set up an 800 number going to an answering service that captured orders and flipped them to a fulfillment company that shipped books. I insisted that the radio spots be informal “live reads” by the host who had conducted the interview, not a pre-recorded pitch by a staff announcer, so the message came across to the audience as a personal endorsement. The host (who was invariably male in those days, probably still is) was willing to put a little moxie on the ball, like prefacing the written copy with: “Hey folks, remember that guy on the show last week talking about saving Mom and Dad’s house?” The pitch was enhanced by self-interest; a good response would keep the ad dollars flowing into the talk jock’s column.

We were able to track ad responses geographically by matching shipping addresses to the DMAs (designated market areas) of radio stations currently airing the ad. For instance, if WBLA’s DMAs included all New England, we knew that an order coming from, say, Boston had been generated by WBLA. When we began an ad run, the response was always immediate but then would begin to tail off. By studying the origination zones of our orders, we knew exactly when a particular radio station was no longer cost effective and could quickly move on to another. We spent hundreds of thousands of dollars on that ad campaign. Today it could be done, and probably done better, for mere pennies on the Internet.

We were doing well by doing good. The rich could afford good health care, the poor had Medicaid, but middle class families had no safety net and were at risk of losing everything in the event of a protracted health crisis. In letters and phone calls from all over the country grateful book buyers reported that *How to Protect Your Life Savings* had saved their families from financial ruin when a husband or parent was stricken with Alzheimer’s or Parkinson’s or a stroke. Day after day we continued to reach from coast to coast. Harley did phoners with California talk jocks in his pajamas in the wee hours. At that time, the king of late night talk radio was Larry King. King had the largest audience and widest geographical reach of any radio host in the country. I had been trying to book his show for months but got no response to the mailed press kit and couldn’t get to the show’s producer by phone to make my pitch. Someone told me Larry King was going to be at a Boston hotel for a signing to promote his latest book. The room was packed when I arrived. The guest of honor was standing behind linen covered banquet tables stacked with volumes ready to be autographed. I purchased a copy, got in line and waited with scores of excited fans.

When I reached the star I surprised him by handing him a copy of *How to Protect*. “This is a very important topic for your audience,” I blurted. “Harley Gordon has been on many talk shows and the phone lines burn up when he speaks. Who should I talk to about booking him on your show?” King looked down at the book I had given him, opened it and scanned it for a few moments. He turned to the frontispiece and scribbled something. “That’s my producer’s name and direct line. Send him this book,” he said handing back the book I’d given him. Then he took the copy of his own book from my hand, opened it, asked my name, wrote something and returned it to me. I thanked him. He gave me a big smile and I moved on. When I opened my copy of *How to Protect* I saw he had written a name and phone number and the words “Chris — Book this guy.” Inside his own book he had written: “Jane — I think I love you. Larry King” Larry King was reputed to have a fondness for the ladies. I had had a brief stint as a Bunny in the Boston Playboy Club right out of college. It apparently hadn’t hurt that I had piled on the glam for this encounter. Harley was on the show a few months later. Our answering service laid in extra overnight staff to handle the expected calls. The lines lit up within minutes of the start of the interview and continued past dawn and into the next day. Thousands of orders poured in. A staff member on King’s show later told me that the interview had generated the strongest response she’d ever seen. Bookstore shelves emptied literally overnight. *How to Protect* was one of PGW’s bestselling books that year. A big commercial publisher never would have done the job on our book that we had done ourselves.

15.8.07

#### Chapter Four

*They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters.*

- Sir Thomas Moore, 1478-1535

The Verified Complaint arrived out of nowhere. Harley and I each got a copy. Armand Budish, an elder law attorney like Harley, was suing us in Federal Court in Cleveland, Ohio for infringement of his book, *The Medicaid Trap*, published in 1989, the copyright for which, the complaint stated formally, had been registered with the Copyright Office. I was so naïve at the time. I remember thinking, Of course it was registered with the Copyright Office; it was a published book.

Without specificity, it was alleged that our book, published a year later, had been — what? slavishly copied, stolen — from his. We were stunned. How could this be? Certainly this was a mistake. Harley said we needed an attorney who understood intellectual property. The term was unfamiliar to me. I looked it up: Intellectual property is a product of the intellect that has commercial value, such as literary, artistic and musical works which are protected by copyright; inventions which are protected by patent; and commercial names and symbols, which are protected by trademark.

Palmer & Dodge handled intellectual property but Harley had almost fainted when he saw Ike's bill. Harley asked around among his lawyer friends and got the name of a small Boston firm, Bromberg and Sunstein, that was said to specialize in IP. Their offices were as humble as Palmer & Dodge's were impressive.

Lee Bromberg and Bruce Sunstein joined us in a narrow, municipal-green conference room with overhead lights casting dreary shadows beneath the worn furniture. Framed law degrees, U Cal (Sunstein), and Harvard (Bromberg) were the room's only ornament. Harvard, I thought. That's good.

We handed them two copies of our book and a copy of the Budish book purchased by Harley on the way over. They said they had read the complaint that Harley faxed over in advance of our visit.

The claims were broad and vague, they opined: essentially, our book infringed his book. The four of us spent some time comparing and contrasting the copies spread out on the table. Both books covered the same subject: legal strategies to protect assets for people facing long-term care. Both books offered boilerplate legal strategies involving transferring the infirm family member's assets out of his and his spouse's name and into the names of his offspring or into trusts.

The material in the two books, however, was organized completely differently. The Budish book was dense and technical, explaining in lawyerly detail the complicated state statutes and federal Medicaid regulations that governed this area of health care law.

In contrast, our book was written for someone with a tenth grade education. It focused on the individual family's financial situation and the specific assets they needed to protect, not the law itself, with examples and corresponding solutions. It was See-Spot-run simple, as Harley had intended. I knew that not a sentence in the text of our book replicated one in the Budish text.

*The Medicaid Trap* had been out for about a year when we began work on *How to Protect*. I had read it; in fact, Harley had given it to me with the admonition, "This is what we don't want."

"Did you look at this guy's book when you wrote yours?" the lawyers asked.

"Of course, and everything else on the subject that I could get my hands on. That's called research," I replied.

"Did you lift any language, take any words and phrases, from his book and use them in yours?"

"Of course not," we said in unison.

"There appears to be no substance here. The complaint doesn't specify what you are alleged to have stolen. I can't see where he's going with this," Bromberg said.

"Our book is selling like hot cakes," Harley commented, (he liked that expression)"his book isn't. Maybe that has something to do with it."

"Frivolous suit," Bromberg pronounced.

Frivolous or not, it wasn't going to just go away. "This is going to cost serious money," Harley had said when the complaint arrived. His early assessment was being confirmed as we sat around the worn conference table, squirming in uncomfortable chairs. We had to file an answer. The answer would be a denial on all counts. There would be depositions, interrogatories, the gathering of many cartons of

financial and sales records. At some point in the process, when it had become apparent that there was no basis in fact for this suit, we would file a motion to have it dismissed, the lawyers assured us. We might even get our legal fees back.

Harley asked for an estimate of what the case might cost. It seemed to be a straightforward matter, they said, probably thirty-five to fifty thousand. I groaned inwardly. Harley wrote a five thousand dollar check for a retainer and we left, understanding little more than when we arrived.

Lee Bromberg would handle the case with an associate, Kerry Timbers, fresh out of Harvard Law. Discovery, the process whereby each side gathers documents and testimony to support their version of the case, began almost immediately. Notices of our depositions arrived in June; mine was to be first. A deposition is where the opposing attorney can ask you anything he wants in order to get something from you to use against you, Harley said. "They can go through your underwear drawer with a flashlight, if they want," was the way he put it.

A week ahead of the date I went to Bromberg's office to be prepared. "This is civil, not criminal and you have no First Amendment protections like you see on TV," Bromberg explained. "You have no right to remain silent. In your deposition I may object to a question for the record but then I'll usually instruct you to answer. Wait for my objection before you do."

The rest of the advice was pretty simple:

Tell the truth.

If you don't know an answer, don't guess; say, I don't know.

If you don't remember, say, I don't remember.

Don't give more information than is required to answer the question.

Don't rush.

Don't ramble.

"What are they looking for?" I asked. Bromberg said his office had gone over the two books with a fine-tooth comb and found no duplication of any of Budish's work in our work. No surprise, but that was reassuring to hear. Soon enough we were to learn that the fine-tooth comb they'd used was missing a tooth.

Attorney Kenneth Adamo, [*Richard, says the printed book*] was tall and gaunt with thinning hair and an ashen complexion. He was already in his chair when I came into the room and he barely looked up. Adamo had flown into Boston from the Cleveland branch of a sprawling national firm. He sat at one end of the conference table, I sat at the other, Bromberg beside me on one side, the stenographer on the other. The stenographer asked the spelling of my name and administered the oath: "Do you swear to tell the truth, the whole truth..."

The lawyers discussed some technicalities that I didn't understand regarding the way the deposition was to be conducted. Then Adamo began the questioning. He asked me about my background: Marital status. Schooling. Work experience.

What did I know about Medicaid?

Nothing, before I met Harley.

And now?

I know that Medicaid is a Federal program that pays for nursing home care for people who have no assets.

How had I met Harley?

I wrote an article about him.

How did we write the book?

Harley dictated his lectures to me and I cleaned them up and gave them back as a manuscript.

Where did you do this?

My office.

When did you begin? What month? How long did it take?

Where is he going with this, I wondered? He had put no documents before me to identify, as Bromberg had told me he might do. There was no sign of either book in the stack of papers beside him.

Finally, after three hours of questions that seemed to be aimless, he raised the topic of his client's book, *The Medicaid Trap*.

Had I read it?

Yes.

Where did I get it? [*presumably "it". Same mistake in the printed book (p. 14)*]

From Harley.

Where did Harley get it, if you know?

At an elder law conference he had attended. From Armand Budish himself.

Did Harley read the book?

I believe he read enough to know he didn't like the way it was written.

What did you think of it?

It was very technical. I couldn't understand it.

What do you mean by technical?

All the legal language.

Adamo's eyes narrowed and he began speak in a slow and deliberate manner.

Do you know what the National Governors' Association is?

I'm familiar with it.

And what is it?

I know that the organization, the NGA, prepared charts showing state by state what assets were exempt from being taken by a nursing home.

Mr. Adamo retrieved from his briefcase a copy of *How to Protect* and handed it to the stenographer to be marked as an exhibit. She wrote a number on a little sticker and affixed it to the cover.

Adamo rose from his chair and leaned forward to hand me the marked book.

I ask you to direct your attention to the book before you. Is this the book you and Mr. Gordon wrote?

Yes.

He continued standing as he read the questions from a yellow legal pad he was holding in his hand.

Did you include certain charts or tables in preparing this book?

Yes.

I direct your attention to the page I have clipped open in what you have identified as the book you co-wrote with Harley Gordon. Are those the charts you are referring to?

Yes.

Did you get permission to use them?

They are public domain. Anyone can use them.

How do you know that?

I called the NGA and they told me I didn't need permission.

Where did you get the charts that appear in your book?

You mean, from where, physically?

Yes.

Harley got them at the same elder law conference, but he couldn't find them in his files.

Is it possible you took them from my client's book?

It's entirely possible. I didn't do the layouts myself so I don't know for sure. We hired a designer to do the layouts.

Did you have a copy of my client's book in the office at the time?

Yes.

At this point I noticed that the papers Adamo was holding had begun to flutter slightly as if in a breeze.

Did you get my client's permission to use those charts?

Why would I do that? I didn't need to.

Why is that?

Because the charts in your client's book were from the NGA. They had an attribution at the bottom — "Source: National Governors' Association Report."

Adamo's face tightened. He seemed angry.

But you eventually got the charts from the National Governors' Association, is that correct?

No, I said I'm not sure. I don't recall our having the NGA charts.

But your recollection is that the charts in your book, in fact, were taken from the NGA charts.

No, that's not what I said.

Adamo returned to this line of questioning and rephrased the question a dozen times pressing me to say that the charts in our book had been taken from the NGA charts and each time I repeated I had no recollection of that.

Do you know what a primary source is? He demanded.

Yes.

Did you ever go to the primary source for a copy of those charts?

I don't think so. No.

Suddenly it was over. "We're done here," Adamo snapped and abruptly turned his back.

"What's with those charts, Lee?" I asked after Adamo had gone. "Did you see his hands shaking when he asked me about them?"

"Did they?" said Bromberg. He didn't seem worried in the least.

But I was worried. When I got home I wanted to compare the charts in the Budish book with the NGA charts but I didn't have a copy of either. I called two local bookstores but neither had The Medicaid Trap in stock. The book had come together so quickly I couldn't recall how or when the charts went into the layouts.

Harley's deposition was scheduled for 9:00 the next morning. I called him at home that night. "There's something going on with those NGA charts," I told him. "I testified we may have copied the charts out of Budish's book. Maybe Budish made some little changes in those charts. Just be careful and be exact. We don't want to appear to be lying about anything."

I called Harley the next day after his deposition.

How'd it go?

Fine. Piece o' cake.

Did he ask you about the charts?

Yes.

What did you say?

I said, "Everything in my book is original except for what is attributed to a public source." I groaned inside. Lawyers! Why couldn't he just have said flat out, "We probably got the charts from the Budish book"?

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[Copyright is intended to promote creative expression by offering the creator the exclusive right to commercially exploit his work for a set period of time. A copyright is literally "the right to copy." A painter's painting and a poet's poem are protected by copyright. No one other than the painter or the poet has the right to make copies of, or otherwise financially benefit from, their work.

Originality is required for copyright protection purposes, but it may be minimal. Lists of selected things in alphabetical order, Best Restaurants in Boston, for example, are protectible by copyright.

The law recognizes that society has an interest in fostering, rather than completely stifling, creativity and so the protections of copyright have a limitation in the principle of "fair use." Fair use is when *The New York Times* quotes a couple of lines or a paragraph from a book in a book review. *The Times* has created something new that includes a little bit of another creator's copyright-protected material. The courts in intellectual property cases try to strike a balance between competing interests: protection for the creator, encouragement for a fertile field of related creators.] *Missing in the printed book*

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A day or two after Harley's deposition Bromberg called with the answer to the mystery of the charts. The charts in the Budish book were indeed from the NGA but Budish had made some minor changes.

It would have been nice if you had checked the charts and advised Harley of that before he went into his deposition and made that wishy-washy statement, I said.

Not to worry, Bromberg replied, the changes were tiny, insignificant. A couple of transposed columns, different headings, an item or two deleted, a word or footnote changed here and there, that kind of thing. It's insignificant, *de minimus*. The amount of original material is so little Budish himself didn't claim authorship. He gave full credit for the charts to the NGA. It's fair use. That's our defense.

We were running out of books again and getting ready to go back to press. "Shouldn't we just take the charts out completely?" Harley asked our lawyers. "The book would be fine without them. Or we could use the NGA charts unaltered."

Not necessary, we were told. Bromberg said just to be on the safe side, his firm would handle the charts, reworking them and stripping out anything that could potentially cause trouble. We printed

another fifty thousand books containing the new Bromberg and Sunstein charts. As late as a year after our depositions, a court document (Defendant's Responses to Plaintiff's Request for Admissions) prepared and signed by Bromberg asserted that the National Governors' Association Report had been the source for the charts in our book.

Days after the new books hit the streets Armand Budish filed a motion for a preliminary injunction to restrain us from selling any more books. There was to be a hearing on the motion in September in Federal Court in Cleveland, Ohio. The night before we flew to Cleveland my insides went into wild rebellion and I barely made it to the plane the next morning.

The good news was that *How to Protect* was selling briskly and inventory was dropping fast.

The hearing lasted two days. We returned from Cleveland feeling that the light at the end of the tunnel was in sight and went back to selling out fifty thousand new books while confidently awaiting the judge's ruling. Weeks passed. Harley continued to do radio and television interviews in major markets all across the country and on national outlets like CNBC and National Public Radio. Life returned almost to normal.

The restraining order hit us like a bomb. I got the call from Bromberg at 7:00 in the evening. We could not sell even one more book, Bromberg told me. We had to pull the plug on the whole operation at nine o'clock the next morning or face serious penalties for contempt of court. The timing couldn't have been worse. We had printed one hundred thousand more copies with the Bromberg and Sunstein charts, at a cost of \$120,000, and I had confirmed that morning that they had just arrived at the distributor's warehouse. Shortly after that shock we received another: a bill from Bromberg and Sunstein — for somewhere in the neighborhood of \$200,000.

The basic thrust of the judge's ruling went like this: Our new charts were derivative of the Budish charts. Though we had tried to conceal our true purpose by making minor changes, the Court held, the charts in our book intentionally infringed Mr. Budish's copyright. Our conduct in printing more books containing the infringing charts, having been put on notice of the plaintiff's registered copyright (that formal language in the complaint again), was an example of flagrant disregard for the law, made all the more egregious in that Harley Gordon was himself an officer of the court.

"Four weeks before the hearing," the Opinion stated, "Defendants again denied copying their tables from *The Medicaid Trap*." That denial was in the Response prepared and signed by Lee Bromberg a year after our depositions. We looked like brazen liars. "The Court makes all credibility determinations against Gordon," the judge wrote. And the revised charts authored by our lawyers had actually elicited from the Court an accusation of a new infringement: "...the derived work...is itself an independent violation of the copyright law."

Budish's winning argument had relied heavily on a case just handed down by the Supreme Court in 1991. "The Feist opinion began with the well-grounded proposition that although facts themselves are not copyrightable, compilations of facts are." The key to copyright protection is determining "whether the selection, coordination, and arrangement is sufficiently original to warrant protection." In other words it was the format that was protectable by copyright, not the facts. "The requisite level of creativity is extremely low; even a slight amount will suffice...no matter how crude, humble or obvious it may be."

Most astounding of all was the Court's finding that Budish's misleading attribution to a public source did not "demonstrate that Budish intended to disclaim any protectable interest in his tables." What!? How was someone supposed to know that they'd be accused of "literary larceny" if they copied those charts?

That judge must be nuts, I remember thinking. Our book was completely and totally dissimilar, yet she had focused on those goddam charts. My knees almost buckled as I hung up the phone.

The story made the national and local legal journals, the AP wire, *The New York Times*, *The Wall Street Journal* and, of course, all the Boston papers. Harley and I decided we had no choice but to settle the case and we called Lee to tell him. Lee protested.

"The judge is wrong," he insisted. "You need to stiffen your spines and file an appeal. This was



just a ruling on an injunction. You need to take this case to trial.”

“We lost on the injunction; we have no cash flow,” Harley reminded him. “We have to get the injunction lifted. We need you to call them and tell them we want to settle the case.”

Lee refused. He was unwilling to put in any more time, he said, without an immediate payment of \$60,000 and an additional \$60,000 per month. Shortly thereafter he ceased returning our phone calls.

We flew back to Cleveland for a settlement conference, represented by a Cleveland lawyer who knew nothing about the case. Both sides would be meeting in chambers with a new judge. On our side paranoia was rampant. When we arrived we heard a rumor that someone had gotten wind of a possible *ex parte* meeting (a meeting with one party —us— not present) between the Cleveland lawyers and the Cleveland judge. We felt like lambs being led to slaughter.

The judge reminded me of General Patton and acted like a top officer accustomed to being in full command. We were briskly motioned into a row of seats in front of his huge mahogany desk. He wanted a settlement — now. He immediately began turning up the heat: he threatened Harley with disbarment and both of us with charges of criminal contempt.

Budish was demanding \$900,000. How much had our book earned? That much? So \$900,000 was not unreasonable when the book had grossed a million six its first year. There was some discussion of how the press had gotten the story; apparently the source was a press release from the Budish camp.

We signed a confession of judgment. I balked at the word “confession.” It doesn’t mean you are confessing to doing something wrong, I was told, it means that you are agreeing to a judgment amount to settle the case. The price tag: we were to pay \$750,000 in damages, \$150,000 immediately and the balance over two years at four dollars per book, in order for the court to lift the injunction and allow us to sell books.

To protect the book’s commercial viability Budish agreed to refrain from issuing negative publicity. The settlement documents were sealed by the court to protect the reputation of the book. Sealed, but not expunged. A ticking time bomb.

But it was too late to revive *How to Protect*. It had been pulled off bookstore shelves all over the country and word of the injunction had seeped like a stain throughout the industry. Publicity had been completely derailed for weeks on end. Sales were down to a trickle. For all practical purposes *How to Protect* was dead.

In the weeks following the settlement Harley began to talk to his lawyer friends about a malpractice suit. One of them contacted Bromberg and Sunstein on our behalf and informed them that we were challenging the outstanding balance on the bill and considering a malpractice action. Bromberg’s response was to seek and obtain an *ex parte* attachment on the company’s bank account and on my personal bank account, totaling approximately \$13,000. In his affidavit, Bromberg stated that his clients were pleased with the quality of his firm’s work and were simply refusing to pay the bill.

Another of Harley’s lawyer friends took the case on contingency and we sued Bromberg and Sunstein for malpractice. While that action was going forward Budish engaged a Boston law firm to transfer the judgment from Ohio to Massachusetts and initiate a new suit to collect the money. For many months I faced the terrifying possibility of losing everything, not only my livelihood but also the home where my children and I had resided for two decades. I would wake up in the middle of the night and pace the floor for hours.

Eventually there was an offer of settlement from Bromberg and Sunstein’s malpractice carrier. After our lawyer took his one-third contingency fee, the balance went toward paying off the judgment. Harley and I didn’t receive a penny.

Many months later I was cleaning out my office. The staff was long gone. The extra phone lines



had been turned off. The press kits, stacked in orderly piles along the walls, were collecting dust. Surrounded by remnants of a once thriving business, I still could not grasp how things had gone so terribly awry.

I came across a folder marked "Unsolicited Testimonials" containing grateful letters from people who had bought the book. I picked out one letter: "My mother suffers from Alzheimer's..." And another: "Since his stroke my husband can't walk or speak...I didn't know where to turn..."

My eye lit on a box of books on copyright law sitting in the corner. I grabbed the top one and sat cross-legged on the floor, flipping pages. Alone after all those many months of bewilderment, I was still looking for answers.

Suddenly pieces of the mystery, like shards of broken china, fitted into place. Fair use, I read, does not cover situations where the use is for a commercial purpose, is in a competing work, or where the use may affect the market for the copyrighted work.

Oh, my God, I whispered to myself. Our book was published for a commercial purpose, did compete with his book and did blow his book out of the marketplace. What were our lawyers thinking in relying on a fair use defense?

I read on. "Copyright infringement may be innocent when the work taken does not bear a copyright notice or that notice is in some way defective." Innocent! That was exactly what we were. How could we have known? The notice was defective. The attribution to a public source indicated the charts were free for anyone to use.

I reached for another volume, *The Copyright Book* by William Strong, and flipped to a section marked "The Innocent Infringer." A person who uses someone else's work, I learned, even if unwittingly, is still an infringer. However, the penalties for innocent infringement are far milder than those for deliberately stealing someone's work. Until the innocent infringer was notified that the work he had taken was registered with the copyright office (the precise language of the complaint), he could continue to publish. He might or might not have to turn over some or all of his profits or pay the lawful copyright holder a royalty. BUT "under no circumstances would he be required to compensate the copyright owner for damages."

Damages! There is no limit on damages in a willful infringement suit. That, no doubt, is the reason why publishing is one of the most litigious areas of commerce. Most lawsuits settle out of court and the dollar amount is usually concealed by a confidentiality agreement. Alex Haley is said to have spent \$10 million to defend his book *Roots* from infringement claims. Who knows if he caved in for no other reason than that he was being buried alive in legal fees.

Suddenly I remembered Adamo's hands shaking when he was questioning me about the charts. I'd said it was entirely possible that our charts had been taken from the Budish book because I relied on the attribution. On hearing that, Adamo had seen his case go from deliberate infringement to innocent infringement and his expectation of huge damages and big bucks crumbled on the spot. No wonder his hands shook.

At some point after the depositions, we later learned, Budish's camp had contacted Bromberg and Sunstein and floated the possibility of a settlement. And then we handed the big bucks right back to him. We continued to publish after we had been put on notice by the filing of a lawsuit that Budish was claiming copyright infringement.

As the months passed I could not stop going over and over the case, like a pathologist dissecting a hit and run victim. Something was still missing. At first I thought the Cleveland court had leaned on the scales of justice. The federal court there was said to be very political. I began studying legal books, wading through dense, obstruent language charged with Latin, looking for — what? I didn't know.

Eventually I found what I was seeking. In law there is something called the doctrine of estoppel. Estoppel has three elements: representation, reliance, detriment. In plain English here's what that means:

You told me something. That's representation.

I believed you. That's reliance.

I acted on that belief and harm was done. That's detriment.

When those three conditions are met you are barred by the doctrine of estoppel from seeking damages from me for any injury arising out of that sequence of events.

So in this case I could say: You told me the charts were public property (representation.)

I believed you (reliance.)

I then used them and became an inadvertent infringer thereby, allegedly, damaging your market (detriment).

You are barred (estopped) from seeking damages from me because you set off the chain of events in the first place.

Stripped of the legalese, that concept struck me as simple common sense. Innocent infringement and estoppel, that should have been our defense, not fair use. But it wasn't, because of what happened after we were sued.

Legally, the lawsuit had put us on notice. We should have stopped selling books right there and then until we found out what part of Budish's book we were alleged to have infringed. The damages, if any, would have been limited to the number of books we had sold up to then, perhaps only a tiny fraction of our profits or none at all because the copyright notice was defective.

But we didn't do that. We printed more books, and then more books, containing the charts after that notice, making us intentional infringers.

The fact that our intellectual property attorneys did not immediately tell us to stop selling books until we knew for certain where the problem was, the fact that we had been advised repeatedly that it was okay to print more books containing the charts even after it was clear that the charts were a problem, the fact that our lawyers themselves created even more problematical charts knowing we would be printing 100,000 new books, did not change the result: we were liable under the law.

Budish had claimed originality in twenty-six changes he made to eight public domain charts. The charts made up a scant three pages of a book almost two hundred pages long. For that he was to receive seven hundred and fifty thousand dollars.

Was there some kind of justice in all this that I was missing? How was society served by this particular test of copyright law?

Lawyers will tell you that the system worked because we were able to file another lawsuit to hold our attorneys accountable. We achieved a settlement, yes, but I was not comforted. The malpractice suit did not give back what was lost. No, it wasn't a human life. But it was a piece of the American dream and, like a child victim of medical error, that amazingly successful first book died prematurely. And the price of the settlement was many more months of grief.

Like a cancer, a protracted lawsuit changes your life. It's with you every minute. You wake up every morning and go to bed every night with the knowledge that there are well staffed law firms out there, full of highly paid, fiercely motivated specialists, trained in arcane procedures that you don't understand, whose purpose it is to inflict maximum harm on you.

As with a devastating illness, I believe only those who have lived it can understand. If you're resourceful, you find ways to cope. Remembering Marian, I learned to make a conscious effort to treasure every bit of warmth and light I could find amid the ashes.

But I was only in training; the worst was yet to come.

14.8.07

## Chapter Five

### Landing on my feet: After the the first lawsuit

*How to Protect* and Financial Planning Institute were dead. I had started a new imprint, Mt Ivy Press, that had published a couple of cookbooks, a couple of other non-blockbusters and a prurient but not hard-core tome, *Gigolos — The Secret Lives of Men who Service Women*, containing interviews with the real deals plying their amorous trade in Boston, New York, Washington D.C. and Florida. The book was a glimpse into a hidden world that most people never even imagine. We got tremendous media coverage. The trash-talking daytime TV shows ate it up - we did seven or eight network shows, one after another. When my authors were unavailable to tape the show, I was interviewed, flanked by a couple of tanned California gigolos, by Leeza Gibbons. The shows' producers were invariably sweet young things right out of college with names like Mindy and Buffy, who hadn't the faintest idea how to locate gigolos to appear as guests. It became my job to unearth the elusive creatures and convince them to appear on network TV. There was no dearth of subjects who liked the idea of having fifteen minutes of fame, but all had reservations about the effect of such publicity on their high-paying patrons.

The compromise: to protect their anonymity and that of their customers, they would appear on air in shadow and/or disguise — appropriate enough for their chosen way of life.

We placed ads in the Triple-X-Rated Personals sections of alternative papers like *The Boston Phoenix* and *The Village Voice*: "Small publisher seeks male escorts to appear on TV to publicize book." We were surprised at the many responses the ads elicited. The press kits we mailed out always contained a copy of the book. More often than not, the producer at the other end would call immediately to make arrangements for a show and to ask for additional copies because the staff was fighting to read it. The term "gigolo" was coined by author Edna Ferber during the period when young men went off to fight in World War I and women went to the dance halls to find replacements.

I learned some unexpected things from this project. For instance, most gigolos got into the business after being propositioned by a woman, a nice, respectable woman at that. The men typically were very candid, obviously enjoying the rare opportunity to speak freely about their secret lives.

Unlike female prostitutes, the men consistently reported that they never felt exploited. They did not refer to their women as tricks or in any other demeaning language. On the contrary, they respected their clients, enjoyed their work, and were proud of themselves for doing their chosen activity well.

Surprisingly, they were not necessarily handsome; in fact, most were rather average. They were not necessarily hired for sex either; some were arm candy for women who needed escorts to important social events (particularly in Washington, DC, where insiders referred to them as "walkers.") Some offered a dry shoulder to cry on, or a complete escape from reality or the fun and companionship that was missing from a marriage of necessity. Whatever the woman needed, they supplied. The gigolos came in all ages, from college kids to a widowed grandfather we encountered with a penile implant. He was supplementing his Social Security in Florida to the tune of \$2,000 a week. Most of the men had at least a college education.

It was a fascinating project. After talking with scores of men I noticed many consistent similarities. Most surprising, all of them, with one or two exceptions, had been raised Catholic. Having myself been raised Catholic, I searched my memory for some clue as to why this was so. Out of my own experiences I was not able to come up with a theory. Some years later when the clergy sex scandals became headline news in Boston, I made the connection between prior abuse and what could be seen as deviant behavior. The gigolos who had women friends in the sex trade (I met a couple of them) reported that the women in that business also were overwhelmingly Catholic. Men I knew who heard about this project invariably asked, Where do I sign up? I always told them, You wouldn't qualify. The gigolos' chief virtue was that they understood that the sine qua non of the transaction was that the woman had complete control. Absolute and unequivocal power was the ingredient that woman would pay good money for, because it is rarer than diamonds.

How often does a woman experience voluntarily conferred, not-to-be-challenged power in an intimate relationship with a man? Sometimes the gigolo net would pull up an unexpected fish, like the time I got a call from a curious college professor who had seen the ad in *The Phoenix*. It was after-hours but I was working late in my home office when the phone rang. He was not a male escort, he said, he was a dominant for hire. Submissives, he explained were people who, for one reason or another — he didn't elaborate — needed a certain degree of pain to achieve sexual gratification. He helped them experience pleasure. Sensing my discomfort, he pronounced, somewhat donnishly, that S&M was just another form of sexual gratification, one that involved a very high degree of trust

between the submissive and the dominant, more than in what is known as a “normal” relationship. I listened spellbound, without judging, as I had been doing all along with the gigolos. This was another intimate transaction that was all about control, I realized. The professor seemed anxious to educate me in the ways of his chosen alternate lifestyle. Because there was pain involved, he explained, it was absolutely necessary that the submissive trust his/her dominant. In an encounter that involved the submissive being in bondage there was always a prearranged signal between the two participants that meant “stop.” It was never the word “stop,” he explained, because the submissive might cry out, “Oh, no, please stop,” as part of the enactment. It had to be an out-of-context word like “albatross” or “department” which, as soon as it was invoked, was an inviolable signal to the dominant to desist.

The longer we talked the more I was able to understand the ritual aspect of the behavior and the less horrified I was. I asked about prior abuse, shame and guilt as factors in this lifestyle, but my instructor seemed uncomfortable with this line of questioning and I did not persist. At the end of our long conversation he invited me to a nightclub that was a watering hole for the sado-masochistic set, in the basement of a gay bar downtown. I checked what he'd told me about where he worked; he was indeed a full professor at a local college. At the time, I was dating a man who was six-foot-three and over two hundred pounds, and he was willing to accompany me on this odd mission. My curiosity got the better of me. On the appointed evening we approached an unmarked door in a purple-painted building in the Fenway area of Boston and entered a vestibule hellishly aglow with red light bulbs. A line of gay men in tight pants and shirts open to the waist was waiting to be admitted to the bar overhead. Pounding dance music poured down the stairs. Another flight of stairs led down to our destination from which no sound arose. It was like lifting a rock and finding a space tunnel to another planet. I was Luke Skywalker entering the saloon full of Wookies and other peculiar space creatures in the movie Star Wars. The basement, low-ceilinged with a long wooden central bar surrounded by high stools, resembled any other dim, crowded night spot except that the mingling crowd was dressed from head to toe in black leather. The men wore heavy boots, the women spike-heeled platform pumps and fishnet stockings. Most sported dog collars and wristbands gleaming with mean-looking metal studs. Some wore heavy belts from which dangled various whips, handcuffs and chains.

Our host had been watching for our arrival and met us promptly at the door. He was a small, gray-bearded, professorial man attired (incongruously, it seemed to me, as I studied his benign face) like the others. A gracious host, he began escorting us around the room, introducing us to people he thought would interest us. We met his submissive, a plump, pleasant woman who said she was an executive secretary in a major corporation. She was one of the few there dressed in street clothes but she, like our host, was greeted by the others as a regular. If control was the currency, then black leather seemed to be the vocabulary of S&M, worn by both dominants and apparently also submissives. In one corner of the room, facing the wall, a young man with his black leather pants around his ankles was handcuffed to the metal pipes overhead. By agreement with law enforcement, our host explained, there was no frontal nudity here. This *pas de deux* was called a “scene.” The man was having his bare fanny lightly whipped by a dominatrix who wore geeky eyeglasses and, except for the leather and fishnets, looked like she might be a spinster librarian. They both seemed bored, as did the crowd milling around ignoring them. Other than the whips, I wasn't sure how the participants signaled their predilections to their opposites. We, of course, were not wearing black leather which, I guessed, indicated that we were probably outsiders. But when our host introduced me as the publisher of a book about male escorts, we were instantly accepted. The professor stayed nearby until it must have seemed that we were mingling more or less comfortably, then wandered off leaving us to carry on by ourselves.

I was surprised that I did not feel unsafe among this crowd of people who clearly had visited their dark side. If I closed my eyes to their manner of dress nothing seemed amiss. Men and women were circulating and chatting all around us. Overheard conversations concerned a recent Red Sox trade, the unpredictability of New England weather and other such routine social fodder. Just your usual Saturday night cocktail party, I thought. If liaisons were being established, it was all done discreetly, or at least while we were there. At one point, I struck up a conversation with a young woman, elaborately outfitted in leather and whips, with the pretty, intelligent face of an upwardly mobile yuppie. She was a graphic designer by profession. We had something in common — that was also my field, I told her. She had been a dominatrix for five years. How much did she charge for her services? Three hundred dollars an hour. Did she enjoy the work? Yes, she found it interesting. Where did she get her leather outfits? Mail order. Who were her clients? All kinds. Bus drivers. Cops. Clergy. Any one group most heavily represented? Lawyers - by far.

I had briefly considered publishing a book about the S&M lifestyle but quickly changed my mind, in large part because of the surprising sales figures for *Gigolos* - the surprisingly low sales figures. *Gigolos* was an easy book to publicize but a hard one to sell. The average woman wasn't

comfortable handing it openly to a clerk with her credit card in a bookstore. Bad timing. In a few years the anonymity of the Internet and its huge marketing potential would have allowed the book to reach its full, fabulous potential. While I was working on *Gigolos* I came across a criminal attorney who represented sex trade workers and also some of the more dangerous elements of society — murderers, rapists, and the like. He had been raised in an affluent family with all the advantages a child could have. He graduated from an Ivy League college and law school. My impression of him was that he was a very nice person. I was curious about how he had gotten into this particular area of the law and how he felt about his work. "It's a job that needs to be done," he told me, "and it pays well." "But what about your clients? What happens when you're representing someone you know is guilty? Like a murderer." "I do my best to get them acquitted." "Have you gotten any murderers off?" I asked, shocked. "Oh, sure, lots, many," he replied. "But how do you sleep at night?" "I sleep fine. I'm just doing the job the law requires of me." "So how do you get a murderer off?" I asked. He began to recount the story of a client of his who was accused of murdering someone in a parking garage when I interrupted him. "Did he do it?" I asked. "That's not a question for me to answer," he replied. "That's for the jury to decide." "But what was your personal belief about whether or not he did it?" "Oh, I'm quite certain he did it. But I don't have to worry about that. It's the state's job to make the case against him, beyond a reasonable doubt." "And with your help he went free?" I was shocked. "Listen," he said. "When the prosecution presented the evidence against him they had a witness who testified that he had seen a brawl between my client and the dead man on the sixth floor of the garage where the murder occurred. When the jury saw the crime scene photos taken by the police, plain as day behind the chalk outline of the body and the yellow crime scene tape you could see painted on a concrete column: FLOOR 8. The state didn't do its job. They should physically have taken the witness to the crime scene so he could confirm the location of what he had seen. My client walked." "But he may murder somebody else," I said, disturbed. "He may indeed," the lawyer replied.

"But you have to remember one thing. If someday someone falsely accuses you of being a pedophile, and your family disowns you for disgracing them and your neighbors turn away because they're afraid of you and your friends are revolted by you, where do you turn? These things happen all the time. The only person in the world who has to stand up and zealously defend you is your lawyer."

Some days later I joined him for lunch with a couple of his clients, a gigolo and a Forty-second Street peep show girl with a master's degree in finance. He ordered his first double Scotch at 11:30. By the time we left the restaurant at 1:00, he had had three more.

12.8.07  
Chapter Six

**[Publishing 101, in the printed book : four pgs to explain what is "copyright".]**

Chapter (now) 7

**Slouching toward Bethlehem**

While waiting for the next big book idea to come along I was doing pr for Jan Schlichtmann, the Boston lawyer. He was the subject of the bestseller, *A Civil Action*, which later became a movie starring John Travolta. The book documented his notorious ten-year legal battle on behalf of children who had sickened and died from toxins in the water in Woburn, Massachusetts.

When the decade-long lawsuit ended, Schlichtmann, bankrupt and dejected, had fled Boston. At the time, he was something of a laughing stock in the local legal community. Outgunned and out-financed by goliath corporations employing top Boston law firms, "Jan sacrificed himself on a mission from God," according to Harley. In hiring me Schlichtmann was looking to rehabilitate his image in anticipation of the release of the book.

He wanted publicity for a difficult lawsuit he was handling involving a gruesome snow blower injury. The case was about to break wide open at a 9:00 am discovery hearing in Suffolk Superior Court. I alerted every media outlet in the area and they arrived in droves. One of the network morning TV shows sent a crew from New York. When the judge entered the courtroom he was visibly startled by



the video cameras and rows of seats packed with reporters. "I had no idea this case had attracted so much interest," he said bending into his microphone as he took the bench. Schlichtmann stood at the attorneys' table, his elegantly tailored back to the waiting press. His client had lost an arm because of a defect in a piece of equipment, he began. This product had been on the market for twelve years. He had been stymied in his efforts to learn whether there were other injuries that the company had known about while it continued to sell the machinery. He introduced into evidence the numerous discovery requests he had made over many months and described how the company had effectively blocked his efforts to obtain information about the product's safety record. He set that pile of documents to one side of the table.

Turning to a large brown carton in front of him he began slowly and deliberately, hypnotically, lifting out thick files, one by one, and setting them in a second pile. Every eye followed as a mountain of manila folders grew on the plaintiff's table. A whistle-blower had contacted him, Schlichtmann told the spellbound courtroom, and opened a crack in the wall of silence. Placing his hand on the towering stack of files he had been building in front of him, Schlichtmann stepped back and paused for effect. "These," he said pointing to the huge pile, "are the injuries that the company swore under oath never happened. This one" — holding up a file — "a hand hacked off; this one" — another file — "a foot amputated; this one, an arm. All settled out of court, all with confidentiality agreements. And all while the company continued to sell this machine" — he held up a large photo of a piece of equipment painted blood red — "that it knew was causing these horrible, horrible injuries." The entire courtroom had stopped breathing. It was a brilliant piece of lawyering.

During an idle conversation one day Jan asked if I could help his brother get a little press coverage to promote his small business making commemorative videos from family photos. When you undertake a new pr project you look for the hook that will make some publication want to do a story on your client. In this case the quickest way to get at the hook was to ask a question.

"What's the most unusual video you ever made?" brought the answer, "A two-and-a-half hour memorial for this lady's dead dog."

Well, who knew? Perhaps dog lovers everywhere were clambering to make photo videos of their departed pets. Pet magazines might love the story.

I got the dog lady's name and made a phone call. I met **Misha Defonseca** with her husband, Maurice, in a restaurant in Sherbourne, a suburb west of Boston. Misha was a short, plump woman, somewhere in her sixties, with pixie-cut platinum blond hair and icy blue eyes that glittered with extraordinary intensity. She wore a dress patterned with leopard spots and heavy Native American silver jewelry. Her eyes were rimmed with startling yellow-green liner. Long glue-on nails, white, tipped her fingers like claws. She began speaking as soon as we were seated. Her English was heavily French-inflected but she talked rapidly and gave the impression of complete conviction. She made the video, she said, in memory of her dog, Jimmy, (pronounced *GEE-mee*) because of her love of animals (*an-NEE-mahls*) and to console herself. She loved Jimmy more than any human, she said, and she had nothing to live for when he died. I wondered how her husband felt hearing this.

She was a Holocaust survivor who had found kindness among animals, she continued. Man was capable of terrible cruelty but animals had been her truest friends. She made a habit of looking you right in the eye with a fierce concentration as she spoke. Her husband listened to all of this with keen interest. He seemed shy, rarely making eye contact. He was quiet except for times when his wife's English was insufficient to convey her thoughts. Then he would softly ask her to explain to him in French what she wanted to say and would translate. The story that followed was amazing.

At the age of seven she was living with her parents in Brussels. It was the time of the Holocaust. Her father was in the Resistance and her family was hiding out under a false name. She was never told her true name because it was Jewish, but being blond and blue-eyed she could "pass." She was picked up at school one afternoon by a stranger who told her that parents had been arrested by the Nazis. She was placed in a foster home but she escaped and set out to search for them. She walked for five years across the European theatre of war, often hiding in the forest. Most astonishing, she said she had been befriended by dogs, and sometimes by wolves, along her journey.

**What an incredible tale! That's a book! I thought.** I told her that I had a small publishing company. I asked if she'd ever considered writing about her wartime experiences. She said she had not spoken of her past until recently, that it was too painful, but she had started speaking to bear witness to the horrors committed by the Nazis. We left the subject of a book open for further discussion and said goodbye. With the media flurry over *Gigolos*, Mt Ivy had signed on with Palmer & Dodge for the representation of that one title and translation rights had been sold in Iceland, of all places. One of the inducements offered for us to sign was that P&D's agents were also lawyers, "two for the price of one," Ike boasted. (The chic literary boutique known as the Palmer & Dodge Agency was part of the Palmer & Dodge law firm and was headed by Ike Williams, whom you will recall I briefly introduced to you

earlier.)

After my meeting with Misha I called Elaine Rogers, an agent at Palmer & Dodge, and described what we had discussed. "Do you believe she really was befriended by wolves?" she asked, incredulously. "I have no idea, but anything's possible, I guess," I replied. Elaine was blondish, attractive and WASPy. She might have shopped at Talbots. She was married to a doctor and living in the posh horse country north of Boston. (There are actually polo grounds in her area.) She seemed always to be darting off to Los Angeles and Frankfurt on Palmer & Dodge business. **An animal lover, she was excited by the wolf aspect of the story.**

I continued to meet with Misha to discuss the possibility of a book. On several occasions she invited me for lunch at her home in Millis. Her house was like nothing I'd ever seen. She had depictions of animals in every form displayed on every surface in every room. Stuffed animal toys of every species sat on shelves and chairs and in corners and a stuffed real cobra, its head reared to strike, held a place of honor in the middle of the living room floor. There were paintings of animals, photos of animals, figurines of animals, throw pillows of fake animal fur. There were bears, lions, tigers, dogs, cats, birds, reptiles - if it was a species on this planet, it was probably there in some form. She also had a live dog and numerous cats that all were treated like spoiled children. Her fenced back yard was cluttered with animal statuary, bird baths and bird feeders, squirrel feeders with dried corn and hummingbird feeders with sugar water. She grew towering sunflowers for the birds and squirrels and put out purchased dried corn for the deer. A band of huge raccoons ate cat food and leftovers from her table from a bowl outside her kitchen window. She frequently contrasted the purity of animals with the wickedness of humans.

One of her favorite expressions was: "If I was in a sinking boat with a dog and a human I would save the dog and throw the human overboard." As we contemplated how the book would come together, I was concerned about Misha's English, although Maurice was always at hand to translate. At one point I asked if she would feel more comfortable with a French-speaking ghostwriter and she said she would. For a time I thought we had someone who would help her but problems over terms in a collaboration agreement proved insurmountable. I continued to report back to Palmer & Dodge on the progress of plans for a book. My best friend, **Vera Lee**, was also my next-door neighbor of twenty years. We saw each other or spoke on the phone almost every day. She had listened patiently for hours as I wailed and obsessed endlessly as my marriage collapsed. Her advice: never love anyone more than they love you. A retired French professor, Vera was eighteen years my senior. She was a bright and flirty conversationalist, a gracious hostess, intelligent, and fun. Friends of mine who met her always commented that she was "charming." I admired her tremendously. She was my "Auntie Mame." Whenever I wrote her a note I always signed it, *Love, Jane*. I think she considered me an asset, too. She liked to show me off to her friends. We were the glamorous young couple — handsome, rock musician husband, vivacious, bright wife — in the mansion next door. She lived by herself on the other side of a common driveway in a cozy brick cottage that had been the gatekeeper's quarters. At the time we bought the big house, we were impecunious hippies who had acquired a bit of extra capital through a fluke business opportunity.

When we moved in, all our worldly possessions fit in half the living room. Our friends thought we were crazy. In that era those looming, grand Victorians were called white elephants; nobody wanted them — too much upkeep. Within a few short years they would regain their original status as trophy houses. My life and Vera's were densely intertwined. I knew her whole family and circle of friends and she knew mine. She was a necessary fixture at my family's celebrations. She was always with us on Christmas Eve (**she, being Jewish, didn't celebrate with her family**) when we opened presents. She often made her entrance waving a flaming red feather boa and toting a bag of gifts for everyone, my kids included. I would never consider having a party without Vera. Her lively patter was the Vaseline (her word) that kept any affair running smoothly. To encourage the flow of conversation Vera enjoyed conducting parlor games. She would ask people to pick a single word to describe themselves. It could be one word only. She was surprised that I chose "sensible." Why didn't you pick something more flattering? she asked. I don't remember the word she chose for herself. Or she'd say: You can be rich or famous. One or the other, not both. Which do you choose? She chose famous. I chose rich. She was surprised. I don't care to impress strangers, I said, I have two kids to send to college.

Another favorite party question was, "If you could push a magic button and someone, somewhere, would die and a million dollars would materialize in your bank account, and nobody would know what you did — would you do it?" She often played this one with new acquaintances. She was smiling brightly as she asked this rather macabre question and listened intently to the answer. In retrospect I now see this game as an ominous augur. For all her social skills Vera would sometimes tell me she felt "invisible" to other people. Given her engaging personality I couldn't understand why. She



worried because she was not beautiful. She would say, "The only thing that matters is the face, the face, the face." I would not understand, she said, because I was born with a beautiful face. Another time she told me I was smarter than any student she'd had in her teaching career. I was flattered by such high praise from someone I so admired. Over a period of twenty years Vera and I developed the shared comforts that characterize a long friendship. We both enjoyed cooking. My recipe box was stuffed with her recipes and hers with mine. I always contributed the most dramatic hors d'oeuvres I could muster for her annual spring party. Many of my recipes are in the Boston College Cookbook she compiled while she was teaching there. I still have that slim yellow volume on my kitchen shelf.

After my marriage ended, if either of us was dateless on New Year's Eve we went out for Chinese together. We were frequent practitioners of shop therapy. On my birthday every year we went to Allen Haskell's nursery in New Bedford for me to pick out plants and then we'd have lunch at a favorite café and visit the factory outlets. Her birthday card to me always contained a clever poem. Her garden and mine were on either side of the common driveway. She had glorious roses that I tried, unsuccessfully, to emulate. We would laugh and chat as we worked in our flowerbeds. When the sun was "over the armpit," as she used to say, we went to my kitchen or hers for bourbon juleps made with fresh mint from her garden or mine. Whenever we needed advice we turned first to each other. When it seemed my life had fallen apart after the Budish suit, it was Vera who encouraged me to get up and try again, even helping me choose the name for the new publishing company, Mt Ivy Press. In a deposition taken shortly after she filed the lawsuit against me, Vera was asked, "Why did Jane choose you to write the book?" She answered, without a trace of irony, "Because she trusted me." I did ask her to help Misha write the book. She was reluctant. She recently had taken up ballroom dancing and didn't want to take time away from an activity that gave her so much pleasure. I arranged for Vera and Misha to meet at my house. They chatted away for a while in French. But after Misha left, Vera's reaction was disinterested. Misha had talked of virtually nothing else but animals and their superiority to humans.

Vera didn't care in the least for animals, had no pets of her own, and had to restrain herself from cringing in front of Misha when my dog greeted her. After the meeting, Misha asked Vera for a writing sample that described her reaction to their meeting. Vera was annoyed. She told me she didn't have time but she would scribble something and give it to me to clean up — which she did. Vera had penned something very typical of Vera. It was very flattering, but much different from what she had expressed to me. I passed it on to Misha. The flattery worked and Misha was impressed enough that she was willing to work with Vera. I sensed Vera was just going through the motions. I knew she was concerned about taking time away from the new passion that was consuming increasingly more of her energy and interest.

The book project just didn't appeal to her, she said. I assured her I just needed her to help Misha get the basics of the story down in English. I would take over from there and work the material into a book. I had a clear vision of the kind of book I wanted. The wolf angle was unique. I had done some research and learned that accounts of wolves adopting children were more than the stuff of legend; there were some relatively recent, though undocumented, accounts. It was fascinating material, whether true or not. Although the protagonist was a child I thought the story would appeal to adults. No doubt to humor me, Vera agreed to continue to meet with Misha, but she was making no commitments. That would soon change. Vera went out several nights a week to nightspots that catered to a middle-aged ballroom dancing crowd. The day after a dance evening, sitting at her kitchen counter sipping wine, I would hear all about it. She would describe how many dances she'd danced, how other women had been wallflowers while she danced all night, how much she loved the attention. She was invited to compete in a tango contest and would need a tight, spangled dress with a high slit up one leg. Would I go shopping with her to find one? Of course I would — and I did. She seemed positively high, as if on a self-induced narcotic, after her nights out. She said she'd finally found what she'd wanted all her life: popularity, and showed me an essay she'd written entitled "*Look, Ma, I'm Popular!*"

I met only a couple of people from this new circle of friends. Mostly she saw them in the places where they danced. I worried that my friend would be hurt competing for attention with much younger women. At the time she was seventy-three.

One afternoon I got a call from Elaine. She had been out in California for a meeting about a film project with the folks at Disney Studios. In passing she'd mentioned the Misha story and they had been very interested. She needed a ten-page treatment within a week. What's a treatment? I asked. It's a brief synopsis of the story, Elaine replied. Now Vera was interested. She quickly met with Misha to get the basics of the story and wrote the treatment within the tight deadline. Elaine sent it off to Hollywood. Meanwhile Vera was dating men she met through her dancing. One, in particular, was much younger than she. She referred to him as "the Kid." She confided that she felt she was in love, and that the feeling was reciprocated. Although she had had long-term relationships, I had never

heard Vera speak of loving any man. I just listened quietly, though I was concerned. One night she had stood in the middle of her bedroom floor, she told me, and let out a gut-wrenching cry of agony. She didn't know why. She seemed surprised at herself. Though I tried to keep an open mind, I was troubled. The Kid's lime green car was frequently parked outside her door at all hours of the day and night. "I care about you," I said at another time. "What you've been telling me lately makes me worry that you could be hurt." "A true friend offers support, not criticism," she huffed, offended. "A true friend tells the truth as she sees it," I answered. "We've always done that with each other. You deflated my illusions about reconciling with my husband and you were right." "You've been involved with younger men," she countered. "Not that much younger," I answered, "and it was a lark — for my ego. I never imagined it was love." This discussion was going nowhere. I didn't recognize my dear friend. I felt a tiny stab of fear.

10.8.07

### Chapter Seven

Date ?

A few days after the treatment went off to California, Elaine called again with good news: Disney wanted a one-year option before the first chapter was even written! The money wasn't great: \$5,000 for the option, \$7,500 to extend the option for an additional year, \$50,000 purchase price. But it wasn't the money that was important. It was the clout of the Disney brand associated with this product: Priceless! We were on our way with a great new book. Elaine sent me an expanded Palmer & Dodge agency agreement covering all of Mt Ivy's earlier titles and all future titles. I was thrilled.

That Christmas I was invited to the Palmer & Dodge Agency Christmas party at a private club that Ike belonged to that seemed left over from pre-Revolutionary days. The Dickensian structure was reached by traversing a gloomy, cobblestone paved alley. Within its heavy wooden door, were low ceilings, huge fireplaces and murky paneled walls decorated with gilt-framed, smoke-darkened oil paintings. Ike escorted me around the room, introducing me to Palmer & Dodge's stable of authors and other assorted, gray-suited, bow-tied Harvard alum types whose place in the crowd was undefined. I'm sure I stood out from the gloom. I wore a bright red pants suit, very high heels and lots of sparkly silver jewelry. "This is our client, Jane Daniel," Ike said as we made the rounds. "Her publishing company has a marvelous new book out this spring, a Holocaust memoir. Disney has the option. We have very high hopes for it." With Palmer & Dodge behind us, so did I.

Have you ever wondered how a book becomes a hit around the world? How does *Harry Potter and the Sorcerer's Stone* get to the little Thai boy reading by oil lamp in a bamboo hut on stilts in a rain forest? Here's how: Literary agents — like Palmer & Dodge.

There's a far-flung network of literary agents moving books around the world. The good agents all know their own territory well and mostly they know each other. When a literary agency "markets" a work, they reach out to all their sub-agents in countries around the globe. For instance, an American literary agency representing a publisher with a novel to sell (technically, "to license") might contact their Italian counterpart who represents Italian publishers seeking to acquire new, hot titles from the US. The two agents converse back and forth, strategizing about likely placements for the work. The American agent sends press clippings — generally author interviews and book reviews — to the sub-agent and reports on the book's favorable reception in other markets. The Italian agent passes along the information to Italian publishers, hoping to generate a buzz about the lucrative prospects for an Italian translation.

Unlike *How to Protect*, which was an exclusively American subject, Misha had the possibility of generating international interest. The story line spanned most of Europe. We needed to reach those foreign markets. Palmer & Dodge was the leading literary agency in New England with experience in the European marketplace. It seemed a perfect fit. I believed we were in very good hands.

Misha and Vera each signed publishing agreements with Mt. Ivy. As part of the body of rights that are included in a copyright (more on this later), Mt Ivy acquired, as is customary, translation rights for all foreign languages, which included the authority to license those rights to foreign

publishers.

The blanket coverage comprised every language — from Korean to Croatian, Swahili to Sanskrit, every language, that is, except one: French. The reason for the French language exception: Misha Defonseca's native tongue was French and she wanted to write her own book in French. Misha's lawyer, Howard Zaharoff, retyped the final agreement and this change was incorporated into the contract. Brett Kates, a lawyer I had come to know when I interviewed him in connection with another project, oversaw Mt Ivy's contracts which were based on the version recommended by The Authors' Guild, an advocacy association for professional writers. Brett and I never realized at the time that this one, seemingly innocent, departure from the standard would be the seed of a calamity. Misha and Vera also hastily signed a collaboration agreement that had been prepared by Misha's lawyer for an earlier co-author who didn't work out.

Vera began visiting Misha's home, tape recorder and notepad in hand, to collect the story that would become a book. Elaine's assistant, Sandy Missakian, handled the routine business of preparing contracts and interfacing with clients. She also was a liaison with foreign publishers and oversaw the mailing of manuscripts to any and all who might be interested in acquiring this title. Like Elaine, she was a lawyer. Sandy was in her mid-twenties, dark and exotic looking, of Armenian descent, with a puppy-friendly nature. She stayed late at her desk every night, promptly returned missed phone calls, and was always willing to go the extra mile. I enjoyed working with her. Sandy answered her own phone, as did I. Although separated physically, we toiled, it seemed, side by side. To provide Sandy with marketing materials I needed to generate some press clippings, so I called *The Boston Globe* and pitched the story to a feature writer. The resulting article was a long, flattering interview with Misha, complete with numerous photos, featuring Misha's account of her childhood experiences with wolves. I sent the piece, plus some short bios from small community newspapers that Misha had generated, to Sandy who tucked them into packages with the raw manuscript being sent all over the world. Day after day Sandy and I worked together, oiling and adjusting the catapult that we hoped would launch this book to bestseller status. Misha herself showed a flair for garnering publicity. She was quick to accept invitations to speak to groups who represented those she viewed as oppressed — animal rights or rescue organizations, Jewish groups, anything to do with Native Americans. Once she asked me to accompany her on a speaking engagement she had arranged at the women's prison in nearby Framingham. We arrived at the facility an hour before the scheduled talk. We had been told to leave all our jewelry at home and not to wear blue jeans. We were met by a staff member who checked our IDs, took our watches and purses, and asked us to roll up our sleeves.

I was surprised to see that Misha's arms were covered with small sores that, she explained to me later, she picked at repeatedly until they became raw. The official covered each wound carefully with a Band Aid. We were patted down and then directed through a metal detector before being escorted down a long cinderblock-lined passageway into a large room with a ring of folding chairs arranged in a semi-circle at a distance from two chairs placed side by side. We took our seats in the two chairs as a guard opened a door at the far side of the room and a line of women prisoners filed in. I watched as they quietly took seats around us. Except for their prison uniforms, almost every one of them looked like young mothers you might see at a PTA meeting. Misha spoke eloquently for about an hour about the horrors of the Holocaust and the book she was working on as the prisoners sat spellbound. During the question and answer period that followed I was struck by how thoughtful and intelligent their comments were. "What a sad place," I remarked to Misha as we pulled out of the parking lot. "There but for the grace of God..." The book was coming together, bit by bit. After each visit Vera would call me to discuss what she had learned. Misha's accounts of her encounters with wolves were incredible. Alone in the forest, hiding from the Nazis, a mother wolf had adopted her and cared for her as if she were a puppy. "Unbelievable!" "Incredible!" we all said. Yet we all believed. But sometimes Vera reported that she suspected that Misha was making up the whole story. Perhaps too conveniently, she thought, Misha reported that she never knew her real name because her parents were in hiding from the Nazis and didn't want her to know her given name. It was a Jewish name, Misha said, and her parents worried lest the child reveal her true identity. I worried about how we would go about fact checking the story. Without a name to go on, how could the story be authenticated? Fact or fiction? How should Mt Ivy position the book?

I had been reading all the Holocaust literature I could get my hands on. There had been hundreds, maybe thousands, of first-person accounts published in the half century since the end of The War, most relatively unknown tomes, all horrifying. The ones that stood out had a message of hope, such as *The Diary of Ann Frank*. Our book had a powerful message of hope. Maybe it could become a classic like that, I dreamed, and sell millions of copies over decades. One recent offering that seemed to be on the way to becoming a classic was *Fragments*, by Binjamin Wilkomirski, a fractured, blurred account of the nightmarish experiences of a child caught in the Holocaust. The book received excellent reviews in this country and won the National Jewish Book Award. It was translated into a

score of languages and received an enthusiastic reception abroad. I thought Misha's story compared favorably with **Fragments**. Childhood memories, such as those in **Fragments**, are always going to be less reliable, I thought. I made a decision. Fact checking, to whatever extent was possible, would come later. At worst, where the story couldn't be authenticated, the reader was free to decide what was true and what was not. But when I listened to Misha herself — so intense, so coherent, so convincing — skepticism fell away.

My mistake was that I really wanted her story to be true. It represented a primal struggle between innocence and evil, a child and the Nazis, and the child won. We all wanted it to be true, and that colored our judgment and allowed us too easily to suspend disbelief. Although I worked mostly with Sandy at Palmer & Dodge, it was always Elaine who called with good news. The whole staff at Disney was excited about the book, she reported. "They love the idea that it's a true story." She had more good news. Disney had already assigned a screenwriter to turn the book into a movie. It was going to be aired in the fall as the kick-off to a new series of made-for-TV Disney films. Sandy followed up with the details. "Disney needs the life story rights," she said. "Do you have them?" "What are life story rights? Isn't her life story already in the book?" I asked. "Film companies sometimes want to purchase additional rights beyond the copyright in the case of a living person," Sandy explained. The publishing agreement that Misha had signed with Mt Ivy had nothing in it covering life story rights. Sandy drafted an addendum to the Mt Ivy contract granting Misha's life story rights to Mt Ivy and Misha signed it. Mt Ivy included the life story rights in the film option it granted to Disney. Palmer & Dodge handled the legal paper work. Disney paid Misha \$10,000 as a consultant.

She was to meet with a screenwriter almost immediately to provide whatever assistance was needed. Now the heat was on full blast. After conducting a series of interviews Vera began drafting chapters and giving them to me to review. I was disappointed with the results. At first I made suggestions in the margins: "Add more detail" or "Show, don't tell," but the problems persisted. I began rewriting whole sections and giving them back to her saying, "This is what I'm looking for." At first Vera would rework the material to accommodate my requests, but it was not long before she began to balk. On pages that I had changed she would mark in the margin, "I like MY version better." I would write back, "I don't care whose version it is; I just want it to be good." Misha, too, was proving to be high-maintenance. She would call me at all hours to unload her **financial problems**. "**I gonna lose my house,**" she'd say. "**I borrow from my neighbor this month but what I gonna do next month?**" In every call I could hear her husband Maurice's breathing as he listened in on their other phone. Since there was no manuscript written at the time the publishing agreement was signed, there had been no advance. Though I was sympathetic, I felt helpless to do anything to alleviate her problems. "What am I supposed to do? I'm not a bank," I said to Sandy. "Would a big publisher be expected to be so involved in an author's personal problems?" I had to have a cover ready for our distributor right away so that we could list the book in the PGW Spring Catalog with a pub date in April, Holocaust remembrance month. With the movie projected to air just a few months after the release of the book we expected a big initial print run. Meanwhile, Elaine was headed to Frankfurt, Germany for the huge international book fair held there annually. Misha had taken to calling me almost every day to report on the progress of the book and to complain that Vera was more interested in dancing than in writing. She wanted more of Vera's time. She also was worried about her worsening financial situation. Her husband had been working for a company based in Europe. **They apparently owed him money that they hadn't paid and the Defonseccas were having trouble making their mortgage payments.**

Vera and Misha also were having a logistical disagreement. Misha's version of her journey on foot from Belgium to the Warsaw Ghetto in search of her parents began in 1941 when she was seven years old. Vera insisted that her departure had to have been earlier, in 1940, in order for her to reach the Warsaw Ghetto before it burned down in 1941. I spoke with Vera about Misha's concerns and she assured me that Misha was wrong about the starting date of her journey. She was annoyed at my questioning her judgment. When I repeated Misha's concerns about her not being available to meet with her, Vera complained that she would give the project no more time than she had agreed to put in, which was enough to get a manuscript ready by the deadline in the collaboration agreement. I spent hours going over drafts with her but no matter how tactful I tried to be, Vera resented my oversight. I could see there was no way that I would have layouts ready to go to the printer in time to have books printed and ready for PGW to ship to bookstores in March. I began reworking Vera's chapters myself to get them ready for publication. Out of loyalty to her I tried to salvage as much of her text as I could. I had learned it was fruitless to ask her to make changes. She either argued or simply refused. But somehow I hoped that Vera would become again the supportive, caring friend I had known and trusted for twenty years. I think that's called "magical thinking." Or just denial. Disney assigned a Hollywood screenwriter named Shirley Pierce to the project. She flew out and met with Misha to get a sense of the character she was going to be creating. But there was no finished manuscript for her to work from. As I rewrote Vera's chapters, one after another, I faxed them to Shirley who incorporated them into her



script. I was on the phone with her every day during this period. The Disney deal endowed the project with Man O' War legs. Again it was Elaine Rogers who called with the news: A big German publisher, Heyne Verlag, would pay \$160,000 to publish the book in German. And the manuscript wasn't even finished! This call was followed in short order by more calls with good news: the Japanese, Dutch and Italian translation rights were sold and there were more deals in the works.

It was early afternoon on a bright summer day. I was in my kitchen upstairs from my office when a call came in on the business line. I picked up the phone. It was Elaine. More good news, she said. We have a French publisher, Laffont, interested in the book. The head of the company was, like Misha, a Holocaust survivor. "Sounds great," I replied "but Mt Ivy doesn't have the French rights. Misha is planning to write a book in French." "They don't want a different book in French," Elaine explained. "They want a translation of this book." "Mt Ivy never acquired the French rights from Misha," I explained. "You need to go read the publishing agreement and then speak with Misha about the French offer." From this point on I was pretty much out of the loop; I got all my information about what was going on between Palmer & Dodge and my author second-hand. I learned from Sandy that Misha's reaction to the news about the French publisher had been mixed. Misha had spoken on the phone with the head of the French publishing company, Charles Ronsac and the two had hit it off. Misha called me after their conversation and reported that she had been impressed by M. Ronsac. She badly needed money so she was relieved that he had assured her of his interest in acquiring this book. But she was not pleased with the way the offer had come about. On the one hand she wanted the deal, but on the other she didn't want to pay a commission to Palmer & Dodge for bringing it to her. Palmer & Dodge was Mt Ivy's agent, not Misha's, and had inadvertently arranged a deal for a property that was owned not by their client, but by their client's author whom they did not represent. In fact, under the circumstances, Palmer & Dodge was not entitled to a commission, but on this point they would not budge.

Misha called me again and was furious that she was expected to pay a commission on a deal she had not authorized. I understood her position. It was as if someone sold your car without your permission and then asked you for a commission on the sale. But Mt Ivy did not own those rights and I felt I needed to remain neutral. I relied too heavily on Palmer & Dodge to get caught in the middle of this dispute. "I'm sorry," I told Misha. "I'm not part of the French deal. I have no say in this. You have to work it out between yourselves." Over the next couple of weeks things got ugly. Sandy told me that Palmer & Dodge wanted Misha to sign an agency agreement covering this one deal. Misha refused and apparently tried to go around them and make her own deal with the French publisher to avoid Palmer & Dodge's **fifteen percent commission**. Laffont, protecting their business relationships with their own French agent Michele Lapautre and with Palmer & Dodge, insisted that Misha pay a commission. Misha called me and reported that Laffont had set a deadline for her acceptance after which their offer would be withdrawn. "They know I need money to pay my house," she complained. "They think because I am desperate, they can push me around."

Again I told her I was out of the loop on this one. This dispute had become a tar baby that I didn't want to get caught in — a worthy goal, but one that was not to be. Shortly thereafter Sandy called me and told me that Palmer & Dodge had reduced their fee to ten percent and the deal was going through. Misha agreed to become a client of Palmer & Dodge in order to consummate the publishing deal with Laffont but she would never trust them again, or by extension, me. Vera, who had retained the French rights with Misha, went along with the arrangement and signed on as a client of Palmer & Dodge as well. No one ever asked me how I felt about the prospect that the law firm/literary agency that had been representing Mt Ivy for three years was now representing Mt Ivy's problematical authors. It never occurred to me that I had a say in the matter. Within a year the Laffont edition would make the bestseller list in France and Misha's bank account would be receiving wired French royalties in increments of ten to thirty thousand dollars.

But the troubles with the French book had only just begun. While the difficulties with my authors continued, the marketing of the book was going extraordinarily well. I had used a speakers' bureau to arrange engagements for Harley during the How to Protect era. It was a local company, American Program Bureau, that represented some pretty big celebrities. I called Harry Sandler who worked there as a booking agent and told him about Misha. He had been part of the music scene in Boston when I was married to a rock musician. He pitched the idea to his boss and in short order APB accepted Misha as a client. Misha was a complete unknown at the time; I took this as a vote of confidence in me based on my track record with How to Protect. Her starting fee would be \$3,000 to \$5,000 per engagement but they expected to increase the price over time. APB would **promote her heavily with the numerous Jewish organizations** to whom they regularly provided speakers, such as Henry Kissinger, for special events. Misha's photo appeared in their promotional brochure under the portrait of Ed Koch, former mayor of New York and across from Pulitzer Prize winner Doris Kearns Goodwin and Dave Barry, the popular syndicated humor columnist.

I was sitting with Harry one day in his office, discussing a booking he was working on for Misha in Fort Wayne, Indiana. "Did I tell you my wife's a publicist?" he asked suddenly. Shirley had worked for years in the music business, he said. The singer Al Green was among her former clients. "I'll drop you off a manuscript," I replied. "Take it home to her and if she likes it, tell her to call me." Shirley and I met in a Newton coffee shop a few days later. She loved the story, she said. It had touched her heart. She didn't play hard-to-get; she really wanted to work on this project. I recognized in Shirley just the qualities of enthusiasm and experience I was looking for. The book was in layouts at that point. The cover had been designed. PGW'S Spring Catalog was out and PGW reps were already selling to bookstores across the country. The final layouts would be going to the printer in a matter of days. We were looking at a publication date only a couple of months away. It was time to ramp up the publicity to give the book a **powerful launch**. Despite the squabbling behind the scenes, the book had already begun to earn money. The Disney money had come in and I hand-delivered Misha's share to her the very day we got the check (less their commission) from Palmer & Dodge, although the publishing agreement allowed us sixty days before payment was due. The German money was on the way and there was a brisk flow of advances in the pipeline from the additional pre-publication sales of foreign rights. But we still needed to spend carefully.

I had planned a big press party to launch the book. Shirley and I talked about who should be on the media list to receive invitations. The list we compiled was seven hundred names long and included every person we could think of within two hundred miles who could help the book: newspaper feature writers, book reviewers, magazine editors, TV news program directors, radio show hosts and their producers, **local Jewish leaders, the Jewish press, freelance writers, people from Holocaust museums and Holocaust education programs**, school curriculum developers, clergy — the list went on and on. Shirley already had begun cultivating the book editor of *The Providence Journal* and was working on his counterpart at *The Boston Globe*, David Mehegan. I called on a designer to create a unique invitation. "These people get invitations all the time. It has to look slick and expensive," I said to Shirley, "so they'll want to come." We printed up 800 two-color self-mailers with a picture of a wolf howling at the moon and a quote from the book on the inside. Finding a location took a bit of work; function rooms were expensive. We finally settled on an art gallery that featured works by ghetto artists.

The director liked the idea of getting exposure with the media through our efforts and gave us a good deal on the rental. Misha liked the "downtrodden" connection. I chose interesting quotes from the book and had them blown up and mounted as posters that would sit on easels around the gallery. I ordered fresh spring flowers — red tulips, yellow daffodils, pink and white hyacinths, green ferns — to fill tall, wrought iron planters I had found at a flea market. These would sit atop round tables covered with red checked cloths I had found at TJ Maxx. We planned to give every attendee a free book as part of their press kit. Cases of books arrived at my office from the printer the week before the big event and twenty cases were delivered to the gallery. More cases of red and white wine were stacked beside them. We recruited friends and relatives to tend bar. I had had a small catering business when my kids were small and I planned to cater the event myself. I would shop and cook for a week for an estimated two hundred and fifty guests. The one fly in the ointment was Vera. She had become increasingly and openly hostile. Misha reported to me that Vera had said to her that the direction I was taking the book was wrong. She now found the book to be "an embarrassment" to her. Misha, not being fluent in English, was unable to determine for herself whether Vera's assessment was accurate or not and had become anxious about my guidance. When I confronted Vera she denied the remark. I was afraid to invite her lest she do something to spoil the evening for Misha.

The event was a huge success. We estimated that we had drawn well over two hundred guests. The book reviewer from the Providence Journal was there and Shirley was able to buttonhole him for a long conversation. He told her he had read the book and found it fascinating. **He wondered whether the story were true.** Shirley introduced him to Misha during the course of the evening and they spoke for some time. Later he told her he was hesitant to question the authenticity of the story because, "I felt as if I were in the presence of Mother Theresa." Two weeks later a long feature article appeared under his byline that was picked up by the AP wire and republished all over the country. David Mehegan, the *Boston Globe's* book reviewer did not attend, in spite of many attempts by Shirley to contact him. Nearly three years later, after the end of the trial, I would learn that his absence was not an oversight on his part; he had his reasons. Within a few months of the release of Mt Ivy's book, the translated versions would be released abroad where it shot to the top of bestseller lists in France, Italy and Canada. In the US Shirley Sandler would score the ultimate coup a book could ever hope to achieve: Oprah Winfrey's producer taped half a show with Misha at Wolf Hollow, a wolf sanctuary in Ipswich, Massachusetts, and we were given two tentative taping dates in Chicago with Oprah herself. Somehow, I believed that the problems with my authors would be swept away on the wave of success that we had generated. That was not to be. In fact, that very success acted like blood in

the water to the sharks. A month after the book's publication, the nightmare began: On Frisoli and Frisoli letterhead, the letter stated: "Please be advised that this office represents Vera Lee... My client has been substantially damaged [and] estimates the fair market value of the damages so sustained to be the sum of \$350,000. Demand is made upon you for a reasonable offer of settlement within 30 days." This language is the opening salvo of a lawsuit.

8.8.07

## Chapter Eight

### Chapter Eight

#### The Second Lawsuit

*Fortune is not satisfied with inflicting one calamity.  
Publilius Syrus*

In 1999 I left Newton and my home of more than twenty years. After Vera filed her lawsuit against me it had become too painful living so close to her. I remarried, bought a historic house north of Boston and opened a bed and breakfast. I hoped to find a little peace in a small town by the sea. Fast forward to the present: I am about to tell you the end of the story of the second, the worst, lawsuit I alluded to before. I will give you the facts and events as I have experienced them and you may judge it all for yourself. This second lawsuit, the Misha case, was a replay of the first lawsuit in its general configuration in that it involved another bestseller that was slammed with another lawsuit that was followed by another malpractice suit against another law firm, this time Palmer & Dodge. It also resulted in the death of my next publishing company, the destruction of another promising book just as it was hitting its stride, my own financial devastation and the possibility of a modern day version of debtors' prison for me. Long story short, in 1997 when Vera Lee and, soon after, Misha Defonseca, filed breach of contract suits against each other and also against Mt Ivy Press and me, I had not the slightest doubt in my mind that we would win. As with *How to Protect*, my company and I had pulled out all the stops in developing and promoting a book that was only the merest wisp of an idea when the publishing agreement was signed. By the time we went to trial Misha Defonseca, a complete unknown who barely spoke English at the time I met her, had earned over \$200,000 in royalties from the French translation alone. Instead of a victory, however, three years after this spectacular debut Mt Ivy and I ended up with a judgment against us of \$33 million dollars. You could reasonably surmise that we must have done something terrible to suffer such consequences, and the Trial Court found just that. But if, having read about the *How to Protect* lawsuit, you have formed any opinions about the bizarre origins of legal mayhem, I humbly ask you to suspend judgment until the end of my tale. To continue...

I was aghast at the outcome of the trial. It was beyond my comprehension. I felt like the victim of a horrible automobile accident — dazed, frightened, in shock, in pain, injured in ways I didn't yet comprehend. Right after the trial all I could do was grope around for a plan for what to do next. It would cost seventy-five, maybe one hundred, thousand dollars to appeal. My company was devastated, my savings exhausted. By law, I had a month to file a notice of appeal. Concerned that I not miss the deadline, I filed it myself, with help from the Appeals Court clerk, and begged my father for help. My family was never rich by most people's standards. We considered ourselves upper middle class. My parents, like the rest of their generation, had worked hard, spent carefully, and saved religiously. My father's father had lived his life similarly and it was real estate that my grandfather had acquired during the Depression that gave my parents a cushion in their old age and a tidy legacy for their two children, my sister and me. My father was terribly distressed by my situation.

After a lifetime of scrimping, his plans for a comfortable future for me were going out the window. Reluctantly he agreed to cover the legal costs. I engaged the firm of Daly Cavanaugh to handle the appeal of the \$33 million judgment. We immediately ordered a copy of the transcript from the court stenographer who had transcribed the ten-day trial. It should have arrived in a matter of months but, in another bizarre twist, it would take almost two years to get the complete record. I'll explain later. Several weeks after the trial ended, the judge, the Hon. Elizabeth Fahey, issued twenty-five



pages of Findings of Fact and Rulings of Law, which, surprisingly, included damaging findings regarding Palmer & Dodge. Not having read the trial transcript, it was hard for me to understand what specifically had triggered such vituperative remarks. Palmer & Dodge had been named as a reach and apply defendant only; the firm had not been accused of any malfeasance. (A reach and apply defendant holds disputed funds in escrow on behalf of the litigants, pending the outcome of the trial. Palmer & Dodge had routinely been collecting book royalties from the foreign publishers. The escrowed funds would be released when the litigation was over.) No one, least of all Palmer & Dodge, expected the judge's roiling ire to be directed at them. The judge's assessment of Mt Ivy and me was beyond excoriating. I was astonished and perplexed. What had happened at the trial to so inflame the judge? The ten-day trial had sped by in a high-octane blur.

As in the How to Protect case, I had no idea how this disaster had come about. I searched my memory but couldn't reconstruct what had transpired that could have led to this completely unexpected, catastrophic outcome. In filing their lawsuits my inexperienced authors, I thought, had completely unrealistic expectations about what a publisher was required to do for them. I believed we had done an excellent job of demonstrating all the extraordinary diligence we had put into this project. We had created something important and valuable out of nothing. Most of all my tiny company had created **a buzz of excitement in the entertainment world**. What seasoned author wouldn't be ecstatic to have a Disney movie deal, foreign rights sales, a shot at Oprah, a thick scrapbook full of press clippings, all within months of publication? It wasn't until I read the trial transcript that I pieced together what had happened. As before in the How to Protect case, I was alone in the wreckage, studying documents and looking for answers when the shards of broken pottery once again fell into place.

It was all there. As is so often the case, (think of Presidents Nixon and Clinton) it was a cover-up, not a deed alone, that brought down the house Mt Ivy built. Thereby hangs the tale, as they say. Patience, dear reader, I will get to it in time. As the ultimate punishment available to her, the trial judge trebled the damages against Mt Ivy and me. The jury award of \$9,900,000 to Misha Defonseca and \$3,300,000 to Vera Lee, became \$22 million and \$11 million respectively, plus attorneys' fees — a total of \$33 million for "unfair and deceptive business practices" (MGL 93A). And though there were no financial sanctions available to her to impose on Palmer & Dodge, she extended the blame onto them for, among numerous other acts of gross misconduct, "unfair and deceptive behavior as literary agents for Mt Ivy..." Following the trial, lawsuits sprouted like toadstools after a storm. What comes next reads like the "begats" in the Bible — "This lawsuit begat those lawsuits, which begat another lawsuit..." As in the Budish matter, the victorious plaintiffs began the process of collecting the money. I remember feeling numb and dazed for weeks. I learned the full meaning of the cliché: It was like a nightmare that I couldn't wake up from. Armed with the Trial Court's ruinous findings, Misha Defonseca's attorney, Ramona Hamblin, promptly filed a malpractice action against Palmer & Dodge. She also filed brand new lawsuits against entities only remotely connected to Mt Ivy: my daughter, my 85 year old father, Shirley Sandler, who had spent over a year arranging Misha's planned appearance on Oprah, the speakers' bureau that had booked public appearances for Misha, Brett Kates, the lawyer who handled our contracts. She went after the trusts my father had set up for me and my sister and our kids.

There were about a dozen new defendants in all. **Defonseca's litigation frenzy went on for several years** and cost the defendants many, many thousands of dollars. The publicist, Shirley Sandler, spent \$30,000 in legal fees preparing for trial. One count of the claim against her was that she had conspired with Mt Ivy to undermine Defonseca's book. (The allegation defies common sense. Why would a publisher sabotage its bestselling book?) On the day of trial neither Hamblin nor Defonseca appeared in court. The case was dismissed without prejudice, meaning it could be brought again. Shirley never recouped her legal fees. My own family spent far more. My father was accused of improperly hiding money for me, a claim that was entirely fabricated but which provided a pretext to gain access to all my father's financial records. After months of discovery in which my family turned over reams of documents, there was not a scintilla of evidence to support the allegation. My mother died in the midst of all this; my father was nearing the end of his own life. Frail and failing and terrified at the prospect of a harrowing trial **he settled out of court for \$425,000, what was left of my inheritance**. After months of legal wrangling, Palmer & Dodge paid out one million fifty thousand dollars to settle Defonseca's malpractice claim against them. We learned of this quite by accident. Had the Settlement Agreement between Defonseca and Palmer & Dodge been sealed, as is customary, and not instead placed in the Clerk of Court's open file, it would not have been discovered by Brett Kates, one of the many being sued by Defonseca in the aftermath of the trial.

He had been in the Middlesex Clerk's office looking up something related to his own case and, having some time to kill, began leafing through the file of Defonseca's malpractice case against Palmer & Dodge. What he discovered shocked him. There on the top of the pile was the settlement agreement.

As he read it, his jaw dropped. In arriving at the terms of settlement, Palmer & Dodge did something highly irregular: it took over the judgment held by Defonseca against Mt Ivy Press. Palmer & Dodge now held a \$22 million judgment against its own former client. The agreement was accompanied by a cover letter to the presiding judge from Thomas Sartory, of Goulston & Storrs, counsel to Palmer & Dodge, saying something like: Pursuant to the Court's request at the hearing on such-and-such date, please find enclosed the settlement agreement in the matter of blah, blah. Sartory had neglected to request that the settlement agreement be impounded. Brett called after he had faxed me the document. That's a clear breach of fiduciary duty if ever I saw one," Brett said. "It's the basis for a malpractice suit." I was perplexed. "What do you mean?" I asked. "Malpractice is all about two words," Brett explained: "fiduciary duty. Under the law there is a special relationship between a lawyer and a client. The lawyer, the fiduciary, has an absolute duty to his client to adhere to the strictest standard of behavior. He must be extremely loyal and trustworthy and must never put his own interests ahead of his client's. He must not profit from his fiduciary position without permission. His duty continues, with respect to the work the lawyer was engaged to perform, even after the professional relationship is terminated."

"Why would Palmer & Dodge want to own the judgment against Mt Ivy," I asked Brett. "If you asked them they'd probably say, "Well, wouldn't you rather have the assignment in the hands of a friend like Palmer & Dodge, rather than an enemy like Defonseca? Of course the next question is, 'If you're such a friend, why have you kept it a secret? Why haven't you marked the judgment satisfied and let Mt Ivy off the hook?'" "Would they try to collect \$22 million from Mt Ivy?" I asked, stunned. "Well, reading the language in Clause 4, it certainly says that they could do just that. Ramona Hamblin is suing Mt Ivy right now on their behalf. Or they could use that \$22 million judgment they now hold to threaten you or bargain with you if you decide to sue them. Whatever their purpose, it's unethical. They owe a duty to Mt Ivy not to put their interests ahead of yours. It's outrageous." David Daly saw it that way, too. He was convinced that Palmer & Dodge's conduct in secretly taking over a judgment against its former client was a blatant breach of fiduciary duty.

I had been asking David for two years to represent me in a malpractice suit against Palmer & Dodge, based on the French rights fiasco and the malfeasance found by the Trial Court. The discovery of the secret assignment was the tipping point that finally convinced him to take the case. We sued the Palmer & Dodge law firm, and Ike and Elaine personally, but not Sandy Missakian, for reasons that I will explain later. Jeffrey Swope, of Palmer & Dodge, had been counsel for his firm in the Misha trial. I was in David's office the day he called Swope to confront him with our discovery of the agreement. When he hung up the phone, David reported that Swope's voice had begun to quaver when he heard the news. Swope was a defendant in Defonseca's malpractice case and a signatory to the subsequent settlement containing the secret assignment. I mentioned to David that I'd heard that Swope had been Palmer & Dodge's ethics expert. On hearing that, David let out a burst of sardonic laughter.

In April, '04 David fired off a letter to Thomas Sartory, the attorney who represented Palmer & Dodge in the Defonseca malpractice case, pointing out that Palmer & Dodge owed a fiduciary duty to its former client, Mt Ivy Press, and demanding that Palmer & Dodge mark the judgment against Mt Ivy satisfied. His client would be willing to do that, Sartory replied, in exchange for Jane agreeing not to sue them. (Well there it was. Brett was right.) That wasn't going to happen. **We sued for \$33 million.** Daly's firm would get a third of whatever I got, Vera Lee would get the rest, hopefully enough to satisfy the judgment. Daly Cavanaugh was now handling two related cases for me, the appeal and the malpractice claim. The basis for an appeal — any appeal — is very narrow: judicial error; in other words, the judge made a mistake. Our appeal involved some of the most complex and arcane points of copyright law that, we claimed, had been misunderstood and misapplied by the judge. Although the appeal failed, the Opinion issued by the Appeals Court again contained damaging findings, similar to those of the Trial Court, regarding Palmer & Dodge. The extraordinary secret assignment prompted an interesting dialog during oral arguments. I kept notes.

On the long awaited morning, the attorneys convened at the cavernous Court of Appeals and filed into the deserted courtroom. We all sat in rows, whispering among ourselves, tensely waiting for the proceedings to begin. Presently, the bailiff intoned, "Aaaaaaall rise," and three black-robed judges, two men and a woman, solemnly entered the courtroom and took their seats at the long, high bench. Under the rules, each side has fifteen minutes to make their arguments, minus whatever time is taken up by judges asking questions. We had been notified beforehand that the session would be extended a few extra minutes because there was a motion (ours) to be heard relative to the appeal. The lawyers spoke in turn, David Daly first on behalf of Mt Ivy and me, then Ramona Hamblin for Defonseca, then Frank Frisoli for Vera Lee, then Thomas Sartory, representing Palmer & Dodge. Sartory, a plump, balding, benign-looking man, was there to answer the motion we had filed to have Palmer & Dodge's name substituted for Defonseca's opposing Mt Ivy's appeal, an untenable position for them. Sartory was the lawyer whose fingerprints were on the secret assignment that was now the subject of this motion. In

arguing for the substitution, Daly was irate: That Palmer & Dodge would engage in behavior harmful to its former client, Mt Ivy Press, as the Trial Court had found, and then enter into a secret agreement to benefit from the harm they themselves had contributed to, was an egregious breach of fiduciary duty.

When her turn came, Hamblin, pinched and gaunt, rose and stood before the bench. Her shoulders were hiked up under her ears and she wore black from top to toe. She had brought her young son to court. I guessed he was about ten years old. He sat alone in one of the long rows during the brief time it took for her to speak. The Court heard Hamblin admit that although her client no longer held the judgment against Mt Ivy Press, she, Hamblin, was continuing to pursue the collection action against Mt Ivy with the approval of Palmer & Dodge, as had been agreed upon at the time the assignment was executed. Any funds collected from Mt Ivy through her efforts would be turned over to Palmer & Dodge, she assured the Court. You are continuing to pursue this collection action after its assignment to another party? the judge on the left asked, incredulously. Hamblin hastily began an evasive reply. "It's a yes or no question," Judge Kantrowitz snapped. Again Hamblin avoided a direct answer. It was at this point that the judge scowled and grumbled, "This doesn't pass the sniff test."

Despite this apparent signal of disapproval of the opposition's position, the Appeals Court ultimately denied our motion to substitute. (There was no dispute over the fact that Palmer & Dodge, not Misha Defonseca, now owned the Mt Ivy judgment. How could it not be entirely appropriate that the caption (the names of the parties) on the case reflect this uncontested truth?)

This was just one in a series of many such dismaying results. It took me a while to connect the dots and understand why we seemed to lose no matter how strong the merits of our arguments. During the ensuing months, our malpractice case against Palmer & Dodge came to a stalemate. About two years earlier during a mediation Palmer & Dodge floated a number, "around a million dollars", to settle the case, on the condition that I would agree to a "no defamation" (Palmer & Dodge's words) clause in the agreement. Vera Lee's lawyer Frank Frisoli had refused our invitation to attend the mediation session at no cost to his client and turned his back on any discussion of settlement in this amount. I had agreed all along to accept any offer on the condition that Frisoli take the proceeds in exchange for a full release for me. In June of '06 we received a ruling on Palmer & Dodge's motion for summary judgment in our \$33 million malpractice case against them. (A lawsuit usually contains several "counts" or individual claims of wrongdoing against the defendant. A motion for summary judgment presents the court with issues that can be decided before trial, thereby economizing on the amount of time required to try the case.) Many of our strongest claims were thrown out, not on the merits, but because of a technicality: we had missed the deadlines (the statute of limitations) for filing those claims.

Frisoli had seriously miscalculated in refusing to negotiate before the adverse ruling came down. Although he had lost his ill-conceived gamble, he now claimed that he would get his recovery from my father's trusts. That was impossible. Defonseca's judgment against me was put to rest in 2003 when my ailing father settled the cases against our family. That settlement money and the hundreds of thousands of dollars in legal fees, almost a million dollars in all, more than exhausted my inheritance. Frisoli knew, or had the ability to find out, that there were no funds available to him in the trusts my father set up before his death. Despite his blustering, he never bothered to depose my father's trustee in search of funds to apply toward the judgment. I suspected Frisoli had learned that pursuing my father's financial instruments would be a waste of time from Misha's lawyer, Ramona Hamblin. Hamblin had obtained all the trust documents when she sued my father. No doubt frustrated at the lack of movement toward settlement in the malpractice case, in the summer of 2005 Frisoli opened a collection action in Gloucester District Court. A constable came to my door to serve me with the papers, a nerve wracking experience though it took only moments. I showed up in court alone. The regular judge was not on the bench that day. I asked the deputy sheriff in the corner of the courtroom the name of the judge who would be sitting on my case. "Judge Swan," I was told, "he's usually sits in Salem." When my name was called I stood at the table before the high bench awaiting my turn to speak. Frisoli stated his reason for being there: His client held a judgment for \$3.3 million which was trebled to \$11 million and now stood at \$22 million with interest and he was here to collect. I watched the judge's face carefully as Frisoli spoke and thought I detected a look of bemusement at hearing these astronomical numbers. When it was my turn to speak, I acknowledged the judgment against me and my obligation to pay. "I run a bed and breakfast here in town," I explained. "I just barely make my expenses, let alone have money left over." "What do you want me to do here?" the judge asked Frisoli. "I'd like a payment order for \$500 a month, your honor," he replied. The judge looked skeptical. "And how many thousands of years do you think it will take to pay off the judgment?"

Judge Swan denied Frisoli's request for a \$500 payment order and instead ordered me to turn over my financial records to Frisoli. He set another court date for a payment conference.

My financial records supported what I had testified to in court. However, Frisoli was a master of

twisting facts to his own advantage. The next time I was in court the regular judge, Richard Mori, was back on the bench. Frisoli restated the arguments he had made to Judge Swan but this time he got the reception he was looking for. Judge Mori's eyes widened with recognition as Frisoli spoke. "I know that case," he said, with enthusiasm. "That's a very important case." Within a matter of minutes I was ordered to make payments of \$2,000 a month to Frisoli's client.

I didn't have an extra \$2,000 a month; I barely covered my mortgage and the expenses of the business. But with the huge and damning judgment hanging over me it was easy for Frisoli to convince the judge that I was not to be believed. I was lying about my finances and withholding money that was available to me from my father's trusts, he told the judge, an allegation he knew, or should have known, was completely false. Between October of '05 and July of '07 I was in Gloucester Court eight times. At first I was pro se, (I represented myself) because I couldn't afford a lawyer. At one session, Judge Mori looked at me sternly from the bench and said, "Miss Daniel, I strongly advise you to get yourself an attorney." With my son's help, I was able to pay Tony Porcello, a Gloucester lawyer, the next time I was hauled into court. On seeing Tony beside me, Frisoli complained to the judge that obviously I had money but instead of paying his client, I was paying an attorney. The judge nodded vigorously in agreement. "But, your honor," I protested, "you told me to get an attorney." "I did not," retorted the judge. Frisoli was barred by the rules of professional conduct from addressing me directly after I had engaged Tony to represent me, but before, during the period that I was pro se, there was no such prohibition.

On several occasions he took the opportunity to sidle up to me in a smarmy way and assure me that the injury du jour, whatever it was, that he was attempting to inflict on me was "nothing personal." He also began a campaign of threatening letters and faxes. I dreaded finding yet another cover sheet or envelope with his name and return address and a crude depiction of the scales of justice in heavy black on my fax machine or in my mail. The supplementary process sessions that handle debt collections are held on Thursday afternoons in Gloucester District Court. I became familiar with the regulars, like the friendly, nattily-dressed deputy sheriff who always asked me, "How's it goin'?" and the ruffled, elderly plaintiff's attorney who weekly took a seat at the lawyers' table in front of the bench and went through a dozen or more miscellaneous debt cases with practiced grace and efficiency. He seemed always to treat the defendants politely and with respect. The routines became familiar to me, but being in such a setting wears you thin and makes you feel like a low-life. On one occasion, Frisoli appeared in Gloucester Court in black leather from head to foot: full-length black leather trench coat, black leather cowboy hat, black leather cowboy boots. He stood out menacingly among the bedraggled welfare moms who couldn't pay their rent and the down-on-their-luck Gloucester fishermen in grubby jeans, some still smelling of fish. The bed and breakfast I run is small. My home is beautiful, it overlooks Gloucester Harbor and Ten Pound Island, but after paying the expenses of the business I net very little. Frisoli had all my financial records. He knew to the penny what I earned and what I spent. I'd observed that in hearings the rules of evidence are different than at a trial; they seemed not to exist at all. Frisoli was fond of telling the judge that I lived "like a queen in a mansion." The judge always nodded in agreement. Once Mori said, "I've driven by her house. That's a beautiful spot up there." For a while my son made the payments but I knew that couldn't last forever. It is unusual, but not prohibited, for one party in a case to contact the party on the other side; both sides have lawyers who customarily do all the talking on behalf of their clients. But I felt I knew the parties on the other side personally and I knew that their reputations were important to them.

My attorneys were uncomfortable with my breaking with custom but I was getting desperate. In January '07 I sent a letter to Ike Williams, Elaine Rogers, Jeffrey Swope, and the managing partners of their respective firms saying: "In discussions with my lawyer Paul Cavanaugh, Att. Sartory indicated that any settlement would require an agreement that I not 'attack' (his word) his clients, specifically in any book about the case I might write or collaborate on." I suggested that anything I might say was not nearly so damaging as the findings of both the Trial Court and the Appeals Court regarding Palmer & Dodge's misconduct. I noted that Sartory had told Tony Porcello that he might settle with Frisoli. Other than my house, which was jointly held with my husband and thus protected, I had no other assets. If Palmer & Dodge would support me by demanding a release for me in exchange for the settlement money that would go to Frisoli, I urged, Frisoli might agree let me go: It would be "one hundred percent of the proceeds of the malpractice case or zero percent of \$22 million." (By now Lee's original \$11 million, with twelve percent interest, had ballooned to \$22 million.) I concluded: "I hope you will suggest to Atty. Sartory that he join forces with Paul Cavanaugh and Tony Porcello to bring this protracted and problematical case to a win-win conclusion.

There is a clear roadmap that can work — if we all work together." I certainly didn't expect to hear from Ike Williams or Elaine Rogers. They were the parties, but they were also lawyers. It would have been improper for them to contact me directly. But I did hope that they would contact Sartory and encourage him to talk to Tony about putting the squeeze on Frisoli, instead of me. Weeks and



then months passed and there was no progress toward a settlement. Palmer & Dodge's offer had dropped to \$250,000. Frisoli spurned it. Both David Daly and Tony had asked Frisoli to make whatever he considered to be a reasonable demand that we could take to Palmer & Dodge. Frisoli refused to name a number. Instead, he continued a nerve-wracking barrage of threats and attacks. He had already gotten a court order from Judge Mori to enter my home and he and his associate, Wendy Stander, had come with a videographer and a purported "antiques expert" (who took special interest in a cheap lacquer chest from Pier 1) to record my possessions. He subpoenaed my bank records. He wrote intimidating letters and made verbal threats to my lawyers to be passed on to me. If I didn't cooperate he would chase me until his death, he said, and after his death his children would pursue me. He would hunt me down wherever I went. He would force a sheriff's sale of my house and sell off the contents, which, he reminded me, had been videotaped. He would sue my son. He wrote, "Whether or not I can get at the trust money, I can certainly leave Jane in a position where she will not live so well in the future." And, "Collection may involve considerable legal effort, but legal effort was never an issue with me." It seemed not a week passed without some menacing communication from him. I marveled at the investment of time and effort he was making. (And for so little reward, Tony pointed out. In ten years, he'd collected only a few thousand dollars.)

In describing the experience, I told my friends, "This must be what someone feels like who is targeted by a stalker." I wondered where Vera Lee was in all this. Did she know what Frisoli was doing? Did she want to know? I thought not. She was never in court unless she had to be there to testify, which was only a couple of times since the end of the trial a decade ago. I had written her several letters. Except for one, which elicited a brief thank you, they went unanswered. Vera, once my best friend, had distanced herself from the whole dirty business; she had disappeared, vanished. It was as if Frisoli had become plaintiff and attorney in one. When my son couldn't keep up the \$2,000 monthly payments, Frisoli filed a Complaint for Civil and Criminal Contempt. I had no lawyer at the time; I couldn't afford one. My family and I had been hemorrhaging money for my legal fees for years. I hated asking my son for help. I called a bankruptcy attorney and asked her what could come out of this latest action. "Can I be sent to jail?" I asked. "Do you have the money to pay?" she responded. "No, I've been getting help from my son, but it's his money, not mine." "It's your obligation to pay, not his," she said. "In my twenty years experience, I've never seen anyone sent to jail who didn't have the means to pay." We don't have debtors' prison in modern America but we do have something that serves a similar purpose: contempt of court. If a judge is convinced that you have money that you are able but unwilling to pay, he can find you in contempt and impose a penalty, including jail time in any amount he deems reasonable. I didn't appreciate the gravity of my situation in being before this particular judge. I was unaware that Judge Mori had been publicly reprimanded in 1997 by the Commission on Judicial Conduct after admitting to an offensive remark about seven Cambodian defendants in a case in Lowell, Massachusetts. According to *Mass Lawyers' Weekly*, "a prosecutor had made statements about the defendants that the defense characterized as racist. Mori replied, 'I don't think that's racist at all. We ought to send them right back to the Killing Fields.'"

7.8.07

## Chapter Nine

*The only justice in the halls of justice is in the halls.*

- Lenny Bruce

I didn't stand a chance. At the contempt trial Frisoli easily persuaded Judge Mori that I was willfully withholding trust funds. He offered no evidence, no documents, as proof that I had access to my father's trusts. Instead he engaged in the tactics of smear and insinuation that I had experienced many times before when I was dealing with him *pro se*. He cited the findings of the Trial Court: "fraud," "unfair and deceptive business practices" and suggested (without offering a shred of evidence) that I had closed bank accounts where money was hidden (never happened). The judge was only too happy to be convinced, and I — a writer, a small innkeeper, a gardener, an animal lover, a grandmother — was ordered to spend ten days in MCI Framingham, the state's maximum security prison for women.

A bailiff immediately stepped forward and took my elbow and led me to a glass booth at the side of the courtroom where prisoners were held. I saw Frisoli smile as he strolled out of the courtroom. The van would be picking up prisoners in half an hour to transport us to the prison facility an hour away. My friends Ginny and Barbara had been in court with me that day. Ginny approached the bailiff and offered to go immediately to get money to pay the \$6,000 in back payments. It was not his job to handle the money, the bailiff replied, she'd need to see the Clerk. "You'll need cash," he advised. It was almost five o'clock and the banks would be closed. I was ordered into the glass booth and told I was not allowed to speak with Ginny again.

"I need to tell her who to call," I said, "to get the money."

"What you need is to learn to follow orders," the bailiff growled as he slapped handcuffs on my wrists.

I was promptly led, with another prisoner, a young woman who had apparently been held in the jail below, to a van behind the courthouse with the insignia of the Essex County Sheriff's Office on the sides. She was young and scared stiff. What are you here for? I asked. Her boyfriend had committed a robbery to support his drug habit, she said. She had been driving the car, but, she assured me, she hadn't known what he was doing. Later I heard her speaking with other prisoners. She seemed to know a lot about drugs for an innocent bystander.

The ride took almost four hours. We stopped several times to pick up prisoners from other facilities and the vehicle was soon packed. Through my shock and disbelief, my survival instinct kicked in and I slipped out of the prisoner identity that had been forced upon me and wrapped myself in the habit of observation of a reporter.

The first thing I noticed was that the prisoners all seemed to know each other. As more prisoners came aboard, they were greeted cordially by the ones in the van. It seemed like a school field trip with everyone chattering and exchanging details of their present situations. Most were young, white and female. They looked middle class, educated, like anyone who might live next door.

It was quickly apparent what had brought them to this place: drugs. The conversation in the bus turned to nothing else — who was caught holding, who was caught dealing, who else had been busted, who had been released. At one point we stopped to pick up three black prisoners, a mother, her sister and her grown son, the only man. All three had been arrested in a drug raid. It was not their first time, I gathered. They seemed to know what to expect at the end of our ride. They spoke sometimes in a sort of prison dialect that I didn't understand, referring, I gathered, to the inner workings of the prison. "That bitch C.O., she still there? Man, I hope she gone. She got a thing with me."

Most of them looked so average, so normal, so undistinguished, their appearances made their conversations seem surreal. Some of the young women asked others about friends who were on the inside and how long those among the current passengers were going to be in for. "Oh, good, I'll see you in there," a blond cheerleader-type said to a college senior-type. A forty-something woman worried aloud about what would happen to her teenage son while she was behind bars. Another mother comforted her. "I know how you feel. I've been there. He'll be okay with your mom till you get out," she said.

The young black man was dropped off first at the Concord correctional facility for men. "Take care of yourself, baby. I love you," his mother said. "I love you, too, Mama. I'm gonna miss you," her son replied.

It was dark by the time we arrived at the prison. We filed into a large, brightly lit holding room and sat on bare benches along the walls. My wrists were swollen and throbbing. The bailiff, annoyed when I tried to speak with Ginny, had tightened the metal cuffs to the point of pain. At last, a corrections officer came around and removed them from each of us. One by one the women were called out of the room to be put through the admittance procedure. I was one of the last, along with a pretty blond prisoner who seemed to know everybody, guards and prisoners alike.

"This your first time?" she asked me.

"Yes," I said.



"I could tell," she replied. "You don't look like you belong here. Don't worry, it's not so bad. I'm a social worker, by the way. As these things go, this place is okay." She seemed almost cheerful.

"You've been here before?" I asked.

"Oh, yeah. Drugs, ya know," she said matter of factly.

The induction process lasted two hours. From that first room we were sent to another room, where we were given thin cotton robes and paper slippers and then sent into a smaller room to be strip-searched. It was just what you see in the movies, bare naked, front, back, bend over, spread your cheeks. I had already given my watch to Ginny before I was taken away, but the guard took my contact lenses. "What size are you?" she asked.

With a packet of toiletries — toothpaste, toothbrush, soap, shampoo — we were sent in small groups to the showers across the hall and told to be sure to wash our hair. It was chilly there and I didn't want to be walking around with wet hair. I dabbed water on the ends of my hair only. Damp and cold and clutching my prison-issue toiletries I was met by a guard when I emerged. "Did you wash your hair?" she asked. "Yes," I replied, touching the damp ends. She pointed across the hall to an open door. "Over there," she said.

Back in the holding room there were no seats left. A younger prisoner, no doubt seeing me totally forlorn, stood up and offered me her seat. "I don't need it," she said. "I'm going over there (pointing across the room) to talk to my friend." I was exhausted. "Thank you so much," I said. "You take care," she replied. Another guard entered bearing a stack of uniforms, forest green with DOC (Department of Corrections) in large white letters on the back, white cotton underpants and bra, white, laceless sneakers.

We were told to dress, then sent one by one for fingerprinting and mug shots. The photographer asked if I had any tattoos or scars. I said no. I didn't want a photo of my mastectomy scar. I tried to put on a brave face for my mug shots. I composed my features in what I thought looked confident and normal and the photographer snapped the picture.

The next stop was the intake nurse who asked about my medical history. Was I on any medication? "Yes, Atenolol, for blood pressure." She pulled out a blood pressure cuff and wrapped it around my arm. "I'm sending you to the infirmary tonight," she said. "It's way elevated." I breathed a sigh of relief.

A guard appeared and led me away from the other prisoners and down a long corridor. I recognized it as the same hallway I had passed through with Misha ten years before when she spoke to the prisoners about the book. Exhausted as I was, the irony wasn't lost on me.

The infirmary was about 35 feet long and half as wide. Tall windows along one wall were completely covered with heavy wire mesh. Overhead florescent lights cast a bleak glow. Eight beds were lined up in two rows against opposite walls. On one end was the nurses' station behind glass, with a desk and a couple of chairs. On the long wall opposite the wire mesh windows was a big sheet of plate glass looking out onto the hallway. From the hallway the entire infirmary was visible, even the unscreened toilet that occupied one corner of the room. Male state troopers and female guards (the official term seemed to be corrections officers) strolled back and forth engaged in idle chatter.

I chose an empty bed in front of the nurses' station and sat down. Someone brought in brown paper lunch bags containing plastic wrapped sandwiches — soft white bread, one slice of boloney, a small packet of bright yellow mustard — and a carton of cold milk. I drank the milk. The bed was hard as a floor, with stiff sheets and a wooden pillow encased in a dingy cover with short black hairs curled into the fibers. The coarse gray blanket felt like a rug. In the other beds were several women in various stages of detox. They lay in their beds unmoving, as if dead. I got under the covers and closed my eyes, but I couldn't relax. During the night the woman across from me got up repeatedly to throw up in the toilet in the corner. The lights were on all night. I didn't sleep a wink.

When the weak gray light of dawn began to seep through the wire mesh, I sat up and looked around. A couple of the women in the other beds were stirring. I could see a clock in the hall on the

other side of the glass: six forty-five. At seven someone arrived with breakfast on trays: spongy, tasteless pancakes, a small sealed container of watery, fake maple syrup, terrible coffee, a carton of cold orange juice. I drank the juice.

"How are you feeling," I asked the woman who had been throwing up all night.

"I'm okay. It'll be better today. The first day of detox is the worst."

"What are you addicted to?"

She smiled wanly. "Easier to ask me what I'm not addicted to," she replied.

I learned that she was in for a year. It was her third time. She had children. Her daughter was graduating from high school soon; she wanted to go to community college to be a dental hygienist. Her son was still in grade school.

"What will you do when you get out?" I asked.

"I'll have my boyfriend pick me up with enough stuff in the car to get me good and high," she answered.

I had been told during the induction the previous evening that I could make a phone call the next morning. I tapped on the glass, trying to get the attention of anyone at the guard station across the hall. No response. Finally someone came over and motioned me to the door where I could speak through the pass-through used for meal trays. "What's your name?" the guard asked scanning a sheet of paper on a clipboard. I told her. "What're you in for?" I groped for words to explain. Some notation on the sheet answered her question. "Oh, you're doing fine time," she said, satisfied. "I'll let you know when you can use the phone."

I asked the woman I'd been speaking with earlier what that meant. "That's when you didn't pay a fine," she answered. I watched the black hands on the hall clock creep slowly, tediously around its white face. After two hours I went to the window and tapped on the glass. A C.O. who was sitting at a computer in the guard station clearly within earshot, didn't look up. I went to the pass-through in the door, knelt down and called out loudly several times. "Please, please, I'd like to use the phone," I said. Eventually the guard came over and let me out into the corridor. "Didn't you see I was busy?" she asked crossly. "Next time you wait till I'm through. I know your mother didn't raise you to act like that." She handed me the phone and I dialed Ginny's number.

Friends and family scraped together from their personal funds the \$6,000 I owed in back payments and Ginny took the cash to the Clerk's office in Gloucester District Court that morning. At 2:00 pm, after spending one sleepless night of a ten-day sentence in a maximum security penitentiary I was taken back to the induction area I had passed through the night before. My official papers were waiting for me in the guards' office. I saw my mug shot on the clipboard. My face, that I had tried to make brave, looked stricken. My street clothes from the night before were returned to me in a brown paper bag. I turned over my prison clothing and walked out into the sunshine where Ginny was waiting for me. Behind me, the women I'd met the night before were still facing months and years of what I'd just experienced. There but for the grace of God....

In retrospect, I should have served the full sentence. In that payment order, Frisoli had a two thousand dollar hammer to beat me with again and again. When I again fell behind in the payments he took care to remind the judge that I had managed to come up with the money before, so I could undoubtedly do so again.

Frisoli now knew he had a sympathetic ear in Gloucester — and so did Palmer & Dodge. Although he had an iron-fisted grip on any and all proceeds from my malpractice claim, he now sought to own and control the case itself. Again unable to make the \$2,000 payments, in February '07 I was dragged back to court. For the first time in Gloucester District Court, Thomas Sartory was in attendance.

Judge Mori's attention to Tony's description of my limited financial resources was perfunctory. Frisoli had the ability to seize any proceeds from my malpractice suit but it was still my case to proceed with as I saw fit or to settle. Frisoli wanted that power. Tony continued his arguments, explaining that

Frisoli already was able to reach and apply any proceeds from a settlement, and therefore the assignment Frisoli was demanding was unnecessary. The judge was unimpressed; I was coerced under threat of incarceration into assigning my rights in my malpractice case to Frisoli's client, Vera Lee.

The judge suspended the monthly payment order but made it clear that he expected me to cooperate in a settlement. A payment conference was scheduled for July 19; I would be back before Judge Mori in six months. If no settlement were reached I would owe six months of back payments. I felt the gun to my head.

Afterwards, in the lobby outside the courtroom, Frisoli chatted cozily with Sartory. Sartory was smiling broadly. The sight of them like this made me feel sick; I turned my back. As we were about to leave the courthouse, Frisoli came up to Tony, who was right beside me and, standing too close, asked in an ostentatiously sociable way, "What do you recommend, Tony? Where's a good place for lunch? Some place that's close by." He and Sartory were dining together, he explained.

"Frisoli and Sartory doing lunch. They're sending me a message," I thought, as Frisoli swaggered away.

There was still an offer of \$250,000 sitting on the table. Vera Lee now owned my malpractice suit against Palmer & Dodge. At that point, Frisoli and Palmer & Dodge could have settled the case without me.

If they did that, I was finished. I would have no leverage to try to force Frisoli to give me a release in exchange for my agreeing to what Palmer & Dodge kept referring to as a "no defamation" clause. But, on the other hand, without my signature Palmer & Dodge would have no control over what I wrote about them; without my signing on to any settlement, Frisoli had no authority over what I did or didn't write.

More weeks and then months passed and nothing happened, except that Sartory began telling Tony that he was about to finalize a settlement with Frisoli. "If they want to do that," I said to Brett Kates, Mt Ivy's one-time legal consultant, "what are they waiting for? They've had plenty of time to do it." Brett lived in New Jersey and I had met him over the phone years ago, but we continued a phone friendship over the years of the ensuing legal marathon. He had been a loyal supporter through all my trials and tribulations. Now he and I speculated about what Palmer & Dodge might be planning to do.

I predicted Palmer & Dodge wouldn't settle without me because Ike and Elaine would want their reputations protected. For that they needed to get from me some kind of expanded confidentiality agreement. There was too much embarrassing stuff back there, I reminded Brett. Their conduct had been the basis of two malpractice suits, which, though public, were buried out of sight in the court system. They might be tickled that any book I wrote would be embarrassing to Misha, (after all, she had sued them), but they certainly wouldn't want me to dig up all the skeletons in their closet.

Playing devil's advocate, Brett said Sartory worked for the malpractice insurance carrier; he didn't care about confidentiality. He'd probably be fine with settling the case with Frisoli for the \$250,000 that was on the table and be done with it, leaving me hanging.

That doesn't make sense, I countered. A lawsuit that has no possibility of winning at trial is a dead lawsuit. How can Frisoli put on a trial? With me as the star witness? What would be my incentive to help him? So that he could take the money (if he even won, which was completely unlikely) and still not give me a release? No way. It didn't add up. Why would Palmer & Dodge pay out a quarter of a million dollars for a case that was so moribund Sartory himself had once bragged to Tony that he could finish it off with one more motion for summary judgment. The court, in the earlier motion for summary judgment, had thrown out so much of our case that there was virtually nothing left.

Meanwhile Tony made phone calls and wrote letters to Sartory and Frisoli trying to find some way to help me. But I knew he was convinced I was being hopelessly unrealistic in thinking Palmer & Dodge had any interest in doing anything that might benefit me. I was getting more and more nervous myself.

I felt in my gut that Brett was wrong. If Palmer & Dodge were going to settle without me, why hadn't they done it by now? I saw an even darker outcome: I worried that if Sartory prepared a restrictive settlement agreement for me and gave a copy to Frisoli, Frisoli would try to take it to

Gloucester District Court and get the judge to force me to sign it or go to prison.

And that is just what happened.

In March, a month after Frisoli obtained the assignment of my malpractice claim, Tony Porcello received a draft settlement agreement between Palmer & Dodge, John Taylor Williams and Elaine Rogers on the one hand and, on the other hand, — me! There was no mention in the agreement of Vera Lee, who now held the judgment and full authority to settle the case without me. The draft agreement came from Thomas Sartory (you will recall he is the lawyer who crafted the secret assignment of the judgment in the Misha settlement agreement.) The cover letter said: Frank, Here are the revised settlement documents... have Daniel execute them."

There was no mention of the sum to be paid out either, which, of course, would ultimately go to Frisoli and his client. But it did contain a highly restrictive confidentiality clause that would have the effect of totally silencing me on the subject of the whole grim story.

"They can go to hell," I said to Brett, I'm not signing it."

In June Tony received another in the long line of threatening letters from Frisoli, saying, "If payment is not made [of the monthly \$2,000], I will ask the court to take appropriate sanctions.... Jane has not cooperated with respect to settlement of the Palmer & Dodge litigation.... We gave Jane a get out of jail card in consideration for her future cooperation in settlement of the matter and we have not resolved the matter because she has been unwilling to sign the release demanded by Palmer & Dodge."

Attached to the letter was a new draft settlement agreement, similar to Sartory's, with Vera Lee's name and payment terms for Frisoli added. Unaltered, however, was the extraordinarily restrictive confidentiality clause of the earlier draft agreement from Sartory.

Tony spoke with Sartory about the possibility of Palmer & Dodge upping their offer in light of the unusual terms being demanded. He suggested that an additional amount might induce Frisoli to take the offer and release me. The response was tepid.

Tony then spoke with Frisoli. "Make a demand," he urged again. "How much do you want to release Jane? Give me a number that I can take to Sartory. I think he might come up with more money, maybe another fifty to a hundred thou." Frisoli did not respond.

In casual conversation with David Daly's office Sartory several times had said, Jane got a raw deal in the Misha case. He repeated this thought again in this discussion with Tony. Tears of sympathy, however, were all he was prepared to offer to sweeten the pot.

I studied the proposed agreement again trying to see some opening for a compromise. The troublesome language was contained in just one line that was tacked onto the standard confidentiality clause that usually covers just the terms of a settlement itself. It read, "The parties shall not disclose any information relating to or make any statements to anyone concerning the Lawsuit or any allegations in the Lawsuit." In addition, the new proposed settlement, as in the earlier draft from Sartory, stated that I "have executed this agreement as [my] free act and deed."

"Sign or go to jail," I said to Brett. "Is that what they call a free act?"

That little line in the confidentiality clause carried huge implications for me. It was tantamount to a gag order covering the most important and all-consuming battle of my life, the second lawsuit, and a period of ten years. I was cornered. Feeling like a worm in hot ashes, I agreed to sign away my ability to write any book at all relating to the case, again on the condition that Frisoli give me a full release. Tony called Sartory and relayed the message but Sartory reiterated that he was expecting to settle with Frisoli soon.

Years ago, when Vera Lee's lawsuit first hit, Ike Williams told me he had had prior dealings with Frank Frisoli and he regarded him with utter contempt. "He's not normal. He's crazy," he had said. While leafing through magazines in a doctor's office I came across Ike's distinguished countenance on the cover page of a Special Section in Boston magazine entitled "Boston's Best Lawyers." How ironic, I

thought, that Frisoli was now the standard bearer for Ike's cause.

I was due back in Gloucester District Court in a matter of days. The more I thought about what was going on, the more upset I became. For six months Palmer & Dodge had been dangling \$250,000 under Frisoli's nose as he tried to coerce me into agreeing to their gag order using the threat of incarceration for my failure to make the court-ordered payments. "They've never done a thing to support me in these negotiations," I said to Brett, "but they seem to get on very well with Frisoli. Isn't that collusion?"

"You can't call it collusion," he replied. "You don't know whether they actually planned out a strategy with Frisoli. They didn't need to collude. They just did what they did and he did the rest."

"But what they did had the effect of throwing me under the bus," I said. "What about their fiduciary duty?"

"Obviously, they don't see it that way."

If I was going down, I decided, then I was going to have an audience in the courtroom. "Maybe they think that Gloucester is such a Podunk, backwater little town nobody will notice," I said to Brett. "They're wrong. This is a big case; it will make news when it settles."

I dialed the Massachusetts Trial Court Law Libraries' public access number and spoke with a reference librarian. "Please email me the rules on civil and criminal contempt," I said; then I sat down and began writing.

Here is a portion of the letter I emailed to the listed parties and individuals.

*John Taylor Williams, Esq.  
Fish & Richardson, P.C.  
225 Franklin Street  
Boston, Ma 02110  
July 9, 2007*

*Re: Jane Daniel, Mt Ivy Press vs. Palmer and Dodge, et al*

*Dear Attorney Williams,*

*Frank Frisoli has said that on July 19 in Gloucester District Court he will attempt to have me incarcerated in order to force me to sign a settlement agreement in the matter of Civil Action No. 04-1116. The threat of criminal prosecution in order to advance [a cause] in a civil matter is unethical in Massachusetts. Will Mr. Frisoli be able to persuade the court to send me to jail? Who knows? Nothing in this epic has been predictable. I might share the fate of Martha Stewart and Paris Hilton — and that could make headlines.*

*Given that confidentiality is the stumbling block in the settlement discussions, I'm surprised that Palmer & Dodge would risk an airing in open court in the presence of the press of the fact that one term of the proposed settlement is an extraordinary gag order covering a period of ten years! An observer would be hard-pressed to avoid the conclusion that Palmer & Dodge has a lot to hide. It would not be difficult for the curious to pull the Verified Complaint to see what all the fuss is about.*

*Mr. Sartory said to Tony Porcello last week that he believed that I wouldn't write a book because Mr. Frisoli could go after the proceeds. I have been saying I would write a book about this case since before it even went to trial. As literary people you, of course, understand that there is a higher motivator than money for writers: the primal need to tell one's truth.*

*If we don't have a settlement before July 19, there will be no settlement. I alone have taken the personal financial hit in this case for ten years, adding up to hundreds of thousands of dollars and the loss of my business. Equally painful, I have had my reputation destroyed. I have every reason in the world to want to earn it back. Do not underestimate me. ·*

*Yours truly,*

*Jane Daniel*

*Cc: Terrence Finn, Esq., co-managing partner, Edwards, Angell, Palmer & Dodge ·  
Charles Dewitt, Esq., co-managing partner, Edwards, Angell, Palmer & Dodge ·  
Jeffrey Swope, Esq. ·  
Elaine Rogers, Esq.*

I should have said, "there will be no settlement that includes me." The reply was swift: a sharp stick in the eye, or the dropping of a hot potato, I'm not sure which. On July 17, two days before I was due back in court, Tony Porcello was out of his office all day. The next morning he phoned me. Frisoli had been trying to reach him by phone. Failing that he had sent a fax. It said, "The only issue before the court on July 19 is the payments due. Palmer & Dodge is not requiring her signature on any documents." It was the first time ever we had heard from Frisoli that my signature was not required on the settlement agreement.

Here is a portion of the email I sent to the parties and individuals listed in the above letter after I heard the news:

*"I understand that [Tony Porcello] was told this morning by Mr. Sartory that Palmer & Dodge has settled with Frank Frisoli without my signature. Mr. Frisoli received the assignment of the case around six months ago and a settlement was never executed." I went on to question the "timing of this sudden settlement, immediately after I confronted certain issues with the parties and just hours before the scheduled court hearing where the questions would be publicly aired.... Mr. Sartory cautioned that if I made 'allegations' he would take steps against me. Since I still have a huge judgment hanging over my head it's hard to imagine any further damage that could be inflicted on me."*

Neither Tony nor I received a response to either communication, not even a denial of any wrongdoing.

Here is the press release I hastily emailed to a handful of media outlets around noon of the day before the hearing in Gloucester District Court:

### **FOR IMMEDIATE RELEASE**

#### **Monster Legal War Nears Final Battle**

*On Thursday, July 19 at 1:00 pm in Gloucester District Court the public may get a rare glimpse behind the scenes of a titanic legal battle involving one of the largest damages awards in the state's history. This action, and numerous others springing from it including two against the prestigious law firm and literary agency Palmer & Dodge, now renamed Kneerin & Williams and relocated with the law firm Fish and Richardson, mired the Massachusetts courts for a decade.*

*In the year 2000, in Suffolk Superior Court, a jury awarded to two elderly women, Vera Lee and Misha Defonseca, damages in the amount of \$11 million which was trebled by the court to \$33 million... in a dispute between two unknown co-authors and their tiny publisher, Mt Ivy Press and Jane Daniel.*

*Named as a reach and apply defendant in the suit was the representative of all the parties, Palmer & Dodge, New England's premier literary agency, now renamed Neerin & Williams and merged into Edwards, Angell, Palmer & Dodge. Based upon the trial court's findings of malfeasance by Palmer & Dodge, Misha Defonseca filed a suit against the firm for breach of contract and malpractice that settled out of court for over a million dollars in 2003. ·*

*Daniel and Mt Ivy Press filed an appeal, which was not successful, but the appellate court in its opinion again found malfeasance on the part of Palmer & Dodge. Based in part on the two court's findings, Daniel and Mt Ivy Press filed a malpractice and breach of contract suit for \$33 million*



*against Palmer & Dodge and two of its principals, John Taylor (Ike) Williams and Elaine Rogers. · Daniel and Mt Ivy settled with Defonseca in 2005.*

*The Lee collection action has not settled. The hearing in Gloucester District Court is a status conference in that case. The attorney for Lee is seeking to have Daniel, a grandmother of five who now operates a B&B in Gloucester, incarcerated for failing to make court ordered payments to his client. · Daniel has said she will begin publishing a serialized account of the case in an ebook blog entitled BESTSELLER! in August.*

###

In response to my emailed press release I received messages on my answering machine from Massachusetts Lawyers Weekly, National Law Journal and The New Yorker. I returned the calls and said I'd get back to them when I had more to report.

On the morning of the nineteenth, I awoke in a fog of dread. I owed six months of back payments, \$12,000, and I didn't have the money. In fact, I had paid the mortgage late. I knew that I could very well be sent to jail; this judge had already shown his willingness to pack me off in handcuffs.

My daughter Liza was staying with me for a little vacation with her three boys. She went over the guest book with me — who was coming when, who had paid in advance, phone numbers to call if she needed to cancel bookings. I dug out my checkbook and wrote out slips for household expenses — phone, electric, gas, health insurance. I put my blood pressure medication in my purse because I knew it would take time to get a prescription in jail.

Liza would take care of Earthquake, my retired greyhound, and Kiki, my rescued cat. Oh, and the fish. Don't forget to feed the fish. Liza would go with me to the courthouse where we'd meet up with my friends Barbara and Ginny. "Don't bring your cell phone," I told them, "they don't allow them in the courtroom."

On the way to the courthouse, a car horn honked behind me and I nearly jumped out of my skin. Something like that had happened the day before when a B&B guest had come unexpectedly into my kitchen. This exaggerated startle response had been happening for some time now. I recognized it as one of the indicators of traumatic stress syndrome.

I had no idea what to expect, but whatever happened it would indeed be the final battle as I had written in my press release. On top of everything else, my divorce was to be finalized next week. With the divorce decree I would lose the tenancy by the entirety (a legal form of ownership on the deed) that protects the marital home from creditors in Massachusetts. That meant Frisoli could take my house.

I'd been hearing about the imminence of this settlement for months and it hadn't happened. If Palmer & Dodge had, indeed, settled with Frisoli without me, I now had no more leverage to force Frisoli to give me a release. I would lose everything — my home, my livelihood, my way of life, everything I'd worked and slaved to achieve, and still have him lurking and threatening me forever. A burden to my children or a bag lady on the street in my old age. Every woman's nightmare. When you ain't got nothin', you got nothin' to lose.

Lawsuits like mine live on in law books. They become case law and are cited and studied in connection with similar cases in perpetuity. In the Information Age every scandal has the half-life of atomic waste. Some day my great-great grandchild might read about me and think, "What a bad person she was."

I'd been living with the stigma of this judgment for years. Even if most people didn't know about it, I knew about it and it felt like a shroud around my heart. More than anything I had wanted the sense of disgrace to end. I had been willing to give up the right to tell my story in exchange for freedom from Frisoli. A desperate act. A pact with the devil.

The sight of Frank Frisoli in the courtroom made my skin crawl. He sat next to Tony in a row of seats in front of the gallery railing. Barbara, Liza and I sat at the rear of the courtroom. Ginny came late from a dentist appointment and took a seat by the big double doors. The back of Frisoli's bald head glowed a pinkish white, with sprouts of pale thin hair that did little to conceal the odd bumps under his scalp. His large ears folded down slightly at the tops. He made chitty-chat conversation with Tony in a

thick, coarse Boston accent at a volume for all to hear. A young associate from Goulston & Storrs, Gary Ronan, listened on from a seat just behind the railing with a worried look on his face. Tony was facing towards us. His blue, blue eyes looked deadly serious.

As we sat in the worn seats in the courtroom I noticed my daughter's foot jiggling furiously. I reached my arm around her shoulders and she quickly leaned her head against my neck, just as she'd done as a little girl. "Don't worry, Baby Bird," I said. "Your mother's a survivor. I've landed on my feet so many times. Whatever happens, it will be all right." I had no idea how I'd accomplish this. At that moment I was flying on wings of faith.

And within a month my old friend and ally, Brett Kates, would be dead.

6.8.07

## Chapter Ten

### Chapter Ten

On a bookshelf in my home office sits a thick red volume of *Who's Who in America, 1966-1967*. My father, "James Daniel, writer", is on page 493. He was one of the leading journalists in America at the time. My father painstakingly typed his stories on an old Remington. His last job before he retired was as a Roving Editor for *Readers' Digest*, which meant that he wrote pieces from home on assignment. I remember him once sitting till late at night at a card table in our family room, literally cutting and pasting together yellow newsprint pages of copy as he rushed to meet a deadline. An editor had sent his manuscript back for extensive rewriting and he was down to the wire, but he understood that this was part of his job. I don't think there was much in my father's distinguished career that didn't go through the hands of at least one editor. When I hear untrained or inexperienced writers proclaim that they don't want an editor messing around with their work, I have to laugh. My father always said only bad writers fall in love with their own words. Good writers always worry, Have I said it right? Could it be better? A writer friend of mine put it this way, "You can live without your parents but you can't live without your editor." I thought of my father often when I was having such a hard time with Vera. She would give me a chapter of the manuscript and I would mark it up for revisions and she would defend and laud her version until I grew weary of explaining myself.

I had told Vera from the beginning that I wanted this to be an adult book, not a children's book. That was a marketing decision, I explained. "Misha doesn't want a children's book, either," I reminded her. "Mt Ivy is not in the children's book business. That's an entirely different market with an entirely different set of rules." Though Vera didn't agree with me about much, there was one area in which we totally concurred. **"Misha wants me to include long passages of her 'philosophy'", Vera reported in a phone call, "and it's just awful.** She says Maurice has been reading the manuscript, too, and he thinks there should be more stuff like this throughout the book." "Stuff like what?" I asked. "I'll read you the one I just got from her. It's part of a similar series. I told her to discuss it with you, but I wanted you to have a current sample in English. Here's the latest:

### Misha dans le texte

"Mankind you will not like what I am going to say here because you think you're superior to everything but you're not. Birds have always enchanted me and still do with their singing, trees amaze me with their beauty, flowers and streams are a delight to my eyes, wolves were my family, my brothers, cats and dogs my children, but you, men, you think only of destroying everything, you can't do without slums or killing or noises that deafen us and you think you are made in the image of God. You are nothing but devils of destruction, nothing but envious people and cowards afraid of everything greater and more beautiful than you are, the wolf's cry is more pleasant to me than your smile, in nature I didn't learn to love you, I learned to flee you like the plague, image of God you think only of trees to destroy them, because of you nature, the sky, the ocean, with your pesticides, splendid animals die from your bullets, your avarice, doomed to extinction, beneath your wheels over the roads, you ruin everything that is beautiful and reminds us of God, I cannot live without nature, animals, rivers, the sea, the wind in the trees and the songs of birds but I can live without you."

"Yipes! Did you tell her that you didn't want to include this?" "I told her I just wanted to tell the story of her journey in search of her parents. But she keeps giving me pages and pages of what she calls her 'thoughts' and I don't know what to say to her." "Let me handle it," I told her. "It's better for your working relationship if I be the one to say, No. You can tell her the publisher makes the final decision. This book is about a little girl's journey to survival. That's a positive message and that needs to be the dominant theme. Not preach-y, angry sermons." I did speak with Misha, telling her firmly that Vera and I agreed that her "philosophy" might have a place in another book she might write later, but we felt it didn't belong in this one. Misha was not pleased with that answer and the subject of her "philosophy" didn't end with that conversation.

**Vera communicated the message to Misha that the publisher had the final say about what went into the book**, but she seemed not to accept the idea as it applied to her own writing. She continued to disagree with me at every turn. At one point she put together a package with two versions of the manuscript: hers, "Version X", and mine, "Version Y", that I had, in desperation, rewritten to make less childish. Vera gave the two manuscripts to her daughter, her son-in-law, her sister-in-law, and three friends. They all reported back, and — what a surprise! — they all liked hers better.

On July 15, two weeks before the deadline for her final manuscript, she gave me three pages of their comments (which became trial Exhibit 19), flattering to her, critical of me: "So much is lost in Version Y [mine]. Version X [hers] was so much easier and smoother to read. Didn't have to work so hard to go through it. Young kids would be tuned in, and the book could hit them if the writing style were kept simple. 9 or 10 year olds could see themselves in a book like that." I reminded Vera for the umpteenth time that the publishing contract stated that the manuscript was to be "in form and content acceptable to the publisher" (a phrase that is part of every book publishing contract) and that the publisher had the right to edit the manuscript (another phrase that is included in every publishing agreement.) "Please, Vera, this is not about what your friends and relatives think," I pleaded. "Whether you agree with me or not, I am in charge because I'm the publisher. The publisher shells out the money. The publisher takes all the risk. The publisher positions the product in the marketplace in the optimal way to insure its success. That's why the publisher always has the final say. And I say I need an adult book." Vera was not persuaded. I began to worry that she wasn't simply refusing to cooperate with me, but rather that she wasn't able, didn't have the writing skills, to deliver what I was requesting from her. It was almost the end of July and I was out of time; I had to get the manuscript finished. To make matters worse, I had been trying to ease Vera away from contact with Misha because whenever they talked Misha always seemed especially anxious over the direction in which I was guiding the manuscript. Since I had taken the blame for shutting the gate on her "philosophy," Misha seemed to think that she might have more luck getting this material into the book if Vera were still involved.

I did keep Vera involved, but from a distance, sending her draft after draft as they were reworked. She never liked anything I sent her. "I like mine better," she repeated. Meanwhile, Misha kept suggesting that we three have meetings and work together. I knew that would be an exercise in futility and would put Misha in the middle of the disagreement between her publisher and her ghostwriter. Vera and Misha were having their own disagreement. Misha insisted that she had set out of her journey in search of her parents in the fall 1941 and reached the Warsaw Ghetto in the summer of 1942. Vera insisted she had to have left the previous year in order to have arrived before the Ghetto was burned to the ground in May of 1943. When I asked Vera about this she insisted that Misha was mistaken about her starting date. Vera was a scholar; she had been Chairman of the Romance Language Department at Boston College, and Director of the French Library in Boston. Trusting in Vera's scholarship over Misha's childhood recollections, I supported Vera, to Misha's great annoyance. All the while, as I tried to keep the peace and juggle two sensitive egos, I had make-or break-deadlines looming on the horizon that neither Vera nor Misha seemed to regard as important, though they both had agreed to them — in two different contracts, no less.

First, when Vera finally decided to work with Misha, Misha asked her to sign a collaboration agreement that had been prepared by her lawyer, Harold Zaharoff, a prominent intellectual property specialist in Boston. In the contract, Misha was identified as "the Author," Vera as "the Writer." I had no hand in drafting the agreement, and in fact, did not even review it before it was signed. This was a contract between just the two of them. At Misha's invitation, Vera and I went to Misha's home in Millis in mid-August, 1995 and sat at her kitchen table to decide on dates for the benchmarks for developing a finished manuscript. As usual when there was anything going on regarding the book Misha's husband, Maurice, hovered nearby. The two of them agreed that it would take about a year to complete the manuscript. There were three deadlines in the Collaboration Agreement, indicating the stages of producing the manuscript for the book. The deadline for completing the first stage of the process, "Interviews, fact collecting, preliminary writing", was to be no earlier than November 30, 1995 at Vera's request. She was working on another project and wanted time to finish it up. Misha was

disappointed with the delay but she accepted it.

The second phase, "Writing first draft" was to be completed by May 30, 1996, six months later, and the last deadline for "Final editing, revisions" was July 31, 1996. Misha entered all three dates on the blank lines provided in the contract. Both women placed their initials beside the paragraph with the deadlines and next to a similar iteration on the following page: "The Writer [Vera Lee] shall complete a final manuscript not later than May 30, 96. The parties estimate that the manuscript will contain approximately 225-250 pages." Misha and Vera then each signed two copies of the agreement at the bottom (trial exhibit 10.) Misha promised to give me a photocopy of the contract when she had a chance to get to a copy machine. The second contract containing the delivery deadline, July 31, 1996 was the Publishing Agreement that both Vera and Misha signed with Mt Ivy Press. In the publishing world, once the date for a finished manuscript is entered into the publishing agreement, it is carved in stone. "The delivery date is the very first of a series of benchmark dates that appear in a book contract," writes Jonathan Kirsch, author of Kirsch's Handbook of Publishing Law. "The failure to perform an obligation by a specified date is a breach of contract, and both author and publisher need to be mindful of the important dates." This date, July 31, 1996, which now appeared in three places in the two contracts, would become a central issue in the trial. With the contracts out of the way, we were off and running. My next step was to choose a publication date. When a publisher chooses the date a new book will be made available to the public, it's a marketing decision based on the opportunities available in that time frame to generate the critical publicity that is essential for book sales.

I chose April 2, 1997 because **April is National Holocaust Remembrance Month**. It was a natural choice and I figured that we could link up for joint publicity with Holocaust groups around the country who would be planning important commemorations. Every other deadline that a publisher has to meet in preparing a new book for market goes backward from that critical publication date. As soon Misha and Vera committed to their manuscript deadlines, I filled out the form for listing the book in Publishers Group West's Fall Catalog, which would be distributed during late summer to bookstores and wholesalers around the country. The catalog listing set the wheels in motion and from that point on there was no turning back. Retailers and wholesalers would place orders for books listed in the catalog months ahead of the pub dates for the next season's crop of new titles. I also had my eye on the Disney film, the script for which was in final edits, knowing that we had to have books in bookstores well in advance of the TV premier sometime in the fall. Bearing in mind the tremendous publicity that would be generated by a major TV movie, I estimated that our first print run would be 50,000 books. We had more than enough money coming in from the German publisher alone to cover the cost. In order to have books in stores by our pub date we had to have layouts off to the printer no later than the end of November, allowing a month to print, a month to ship to the PGW warehouse, another month to get books into the pipeline to retail outlets.

Still working backward, in order to have layouts ready to send to the printer we had to have a finished manuscript in the hands of the graphic designer who would, over the summer, develop the overall look of the book and set the text and photos into final form on a computer. But before the designer got the manuscript it had to go through the painstaking process of the publisher's final editing and fact checking. Each of these critical steps could take weeks or months. I had been working with deadlines for many years, both as a publisher and earlier as a marketing communications director for a national franchise. I knew that deadlines were inviolate and that a lack of respect for deadlines was the mark of an amateur. After she sent me the July fifteenth package of friends and family criticisms, Vera told me flat out she would not agree to the changes I was requesting. **We were at a crisis point**. I knew the project was in trouble.

The July 31 deadline for a final manuscript from Vera and Misha was blown, and I was now playing catch-up. I notified PGW that we needed to move the book up from the Fall 1996 catalog to the Winter catalog. This was the latest we could go and still have books in the stores **in time for the TV premier of the Disney film**. If we fell behind any more it could botch the entire national marketing effort, an irretrievable loss. The endless wrangling with Vera was jeopardizing everything — the book, the movie, everything. I realized with a heavy heart that I had to cut her loose. In a six-page letter (trial Exhibit 36) that I wrote her as we were getting ready to go to press, I tried to explain what was going on in my head at that time "to end the confusion and clear the air":

Dear Vera, 11/8/96

On June 1, the day of your family party, Misha brought me your first draft of the book along with pages and pages of revisions she wanted. I then reread the manuscript and also asked for more revisions. The book was far from ready and I began to worry as the July 31 deadline approached. When I began to press you to give the project more of your time, you told me you had other commitments — dance weekends away, dance lessons, etc. — that you were unwilling to give up. In the meantime,

based on the Disney deal, we had received a huge offer for the German rights and now the German publisher was anxious to see a finished book. In a panic that we'd lose these deals, I sat down and worked on the book myself, seven days a week, often all day until midnight. (I continued this way for most of the summer.) I gave you my revisions, which you read and essentially said you hated. Your assessment: no suspense, no drama, too much description, too sophisticated for a child, bad writing, etc. I gave you the disk with my copy so that you could change whatever you didn't like and begged you to work with me, and you replied that my approach was so wrong you couldn't deal with my manuscript at all, but only with your original manuscript. Several days later I again asked you to make whatever changes you wanted in my copy and you replied that my version was an "embarrassment" and you couldn't do it. On July 22, my birthday, you called asking for your share of the Disney money, which had just come in the day before. I remember the date because you didn't even wish me happy birthday, for the first time in 22 years, just demanded, "Where's my money?" Just for the record, under the contract, your payment wasn't due for 60 days. When I gave you your check that day, my accompanying note stated the obvious: "We are too far apart to find a middle ground." I was supposed to have a finished manuscript from you, "acceptable to the publisher in form and substance and ready to set into type" on July 31. We were running out of time, the text was still in rough draft form, and I couldn't afford to hold up the project while I fought with you over almost every change I wanted. There was a lot of money on the table and no sign of willingness for you to, at least, try to produce the kind of book I could have confidence in. You were being so openly hostile, in fact, I felt I had no choice but to take over the book and finish it without you. Sometime during the fracas, you began communicating your negative opinions of me to Misha, who reported them to me: I didn't know what I was doing, I was incompetent, I had no experience with this kind of book, my writing was bad, etc., etc. I called you and asked you not to involve Misha in our dispute and you agreed that the matter was between you and me. Despite your promises, however, you broke your word repeatedly after that. And though you later offered to work with my manuscript, there was too much water over the dam by then. Misha had decided that she wanted to tell me her story all over again and so I was making countless trips to Millis. Still, I continued to try to keep you involved, sending you chapters to review as Misha and I worked on them. But all summer long you displayed your displeasure, pretending (?) you didn't see me when I was out in the back driveway, cutting off conversations in a way that let me know you wanted no part of me. In the first week of September I sent my version of the book to the German publisher. Soon after, we received a signed contract — purchase price \$160,000. Despite this dramatic success, three weeks ago when I was at Misha's house to get her final corrections, she told me you had confided to her just recently that the book was an "embarrassment" to you, the same expression you used to me months ago.

Vera, when we talked a couple of days ago you accused me of being autocratic. Please bear in mind that no portion of the book had been written when we signed our contract, though ordinarily a publisher buys a virtually finished manuscript. No publisher, other than a "vanity press" house, would agree to give an author — any author, no matter how famous or successful, let alone an unknown one — *carte blanche*, in the literal sense of that expression. The publisher always has the final say, hence the language in our contract, which is standard: the manuscript must be "acceptable to the publisher." That's not autocratic, that's the way it is. The plain fact is that you did not fulfill the terms of the contract. The manuscript as submitted was not acceptable, and you flatly refused to cooperate in making it so. Moreover, your repeated negative comments to Misha undermined her confidence in me and the book to such an extent that the German contract was still unsigned up to November because Misha was worried and wouldn't approve the manuscript. Just today, I got her okay. Ironically, part of the reason you were credible to her is because I respected your relationship with Misha and never said anything negative about you, only that you and I "disagreed." When I spoke with you at lunch a few days ago I acknowledged that it was unfair that you should have your name tied to a book that you feel is an embarrassment to you, and I offered you an alternative: Take your name off the book as co-author and write yourself an acknowledgement taking credit for the work you did perform, that you are proud of. You replied that you did not want to take your name off. I am not happy with that answer. There's another side to this story: mine. Based on the early responses to the book, your assessment seems to be wrong. The book is getting excellent reviews from all the people who have read it — from the German publisher who's paying one of the largest advances Palmer & Dodge has ever gotten from a foreign house, to the French publisher, to the Japanese who are holding a book auction right now, to Misha's friend, the two Holocaust survivors and the French professor to whom Misha gave it. As each of these successes comes in, I am flooded with a sense of unfairness. While I still do not want my name on the book, I don't think it's fair that you take credit for a work that you (one) didn't do, and (two) fought tooth and nail to block, right up to the bitter end. This project has developed in ways none of us could have anticipated at the beginning. I think you and I need to talk about how things stand today, and what we should do about the situation, because I am not satisfied



with the arrangement we agreed to before all this happened. I hope we can come to an agreement that we both feel is fair. I signed the letter, as I always did all written communications to Vera, "Love, Jane." I called Sandy and asked her what I should do about Vera. "She's a close friend of mine," I said. "I want to be fair to her." "If she's so unhappy with the project, it's better to get her out completely," Sandy said. "Why don't you figure how many hours she's got into this and what her time is worth by the hour and make a generous offer to buy her out? Keeping her around will only cause more problems down the line."

Neither of us knew then how prophetic that remark would turn out to be.

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Chapter 11

Brett and I talked on the phone and decided that Sandy's advice made sense. How much should we offer Vera, was the next question. I called Misha to ask her help in estimating how many hours Vera had put into the book. Misha and Maurice were meticulous about documenting every little detail of the process of creating the manuscript and, sure enough, Misha had kept a record of the meetings at her home where Vera took down her story in notes and on tape. Misha had been telling me repeatedly that Vera was giving her too little of her time and she had documented their meetings to the minute. Misha's record of those meetings and, later, her meetings with me, became trial Exhibit 74. Next to the first notation for a meeting with Vera, which had been scheduled for 8/18/95, Misha had written, "goes dancing, can't see me before 9-1 for work." Between September 1, 1995 and May 30, 1996, the final deadline in the Collaboration Agreement for their completed manuscript, Vera met with Misha at her house twelve times, totaling 25.5 hours. Beside 6/7/96 Misha had written, "last time I saw Vera Lee, we discussed the collaboration and her difference with the publisher (Jane)." From that point on, Misha kept a detailed record of my time with her as well. Next to the date 07/15/96 she wrote, "Jane took over, I had to spend the whole day going over the whole manuscript for 8 hours in a row." Between July 4 and November 18, she recorded 14 sessions with me, including four over the phone, totally 76 hours, three times as much time as Vera had put in. Seven of those sessions were each eight hours long. Underneath my hours with her, Misha wrote: "There were several additional phone working sessions which I did not record in my calendar." About a year later, in May, 1998, after she learned that Vera had filed a lawsuit against her, Misha called me to vent her anger. "I write her a letter," she said, "and tell her what a lousy job she do." "Don't send it," I advised her. "Let your lawyer handle it. If you want to get it off your chest, you can send it to me." The following is the text of the fax (trial Exhibit 126) she sent me [the broken English is as she wrote it]:

*Here is what I would like to write to Vera on this day of June 05, 1997 To Vera: In comparison with how our last conversation went: M. I am going to lose my house. V. Where are you going? M. I don't know. V. Let me know where you will be. I shouldn't have expected a lot of compassion from you, never did receive a phone call from you asking how I was doing, I didn't call you any more, realizing that this was what you called friendship. I think I was very kind with you, I never complained when you preferred leaving early to go dancing instead of working on the book, which actually was a contractual obligation. When one knows that you had clearly told me you did not like writing this kind of story, then why did you not refuse? When one knows how you worked – I have the dates of your working visits with me, you worked very occasionally and rarely more than 2 hours at a time – I am not surprised the publisher had enough of it. You never protested and when I told you to protest you said that anyway it was pointless because the publisher always had the last word. On July 15, 96 we had an appointment you, Jane and me to talk it over, you refused to come. So, I don't see why you now want me to bear the responsibility for your cowardice. You said you did research work. You gave wrong dates for the story I told you 1941 as a start date, you said 1940, as it happens I was right. Is this serious work? Allow me to tell you you act as a coward, if the book had not been successful you wouldn't have made a fuss, but now it is different. I consider I respected my commitments towards you and I even consider you are very generously paid for having contributed so minimally to the manuscript.... You did everything to ruin this book, sowing doubt in my mind, banking on the fact I did not handle the English language as well. I had to give the manuscript to two different and very competent people to be certain; both liked it and found it well written while you said it was a "embarrassment" after it had been reviewed and reworked by Jane. When I think I trusted you, it is sickening. I had to reimburse the people who helped me out and loaned me money,*



*while you, who thanks to this book are making money (on my back), you have not even once inquired on my fate. So far for the friendship you said you had for me and in which I was a fool enough to believe.... The fact of the matter is that everybody likes this book. Now it is a little late for regretting to have preferred dancing to working more seriously on the manuscript.*

Misha's reference in that letter to losing her house was a constant theme from shortly after I first met her. She spoke about it in almost every conversation with anybody who would listen and in the interviews she gave to local newspapers. I was one of the people who loaned her money. When there was some kind of an international tax glitch with the transmission from Italy to the States of the advance for the Italian book and the money was held up for months, Misha was frantic. Maurice took to calling and dunning the Italian publisher, much to Elaine's embarrassment. I advanced her \$5,000 out of my own bank account. From the beginning, I always drove the hour's trip to Misha's house to deliver a check whenever any payments came in from sales of foreign rights, even though Mt Ivy wasn't contractually obligated to pay these for sixty days. Sandy was concerned, too. She volunteered to pass around Maurice's resume to some of her own contacts in the business world that she thought might be able to use his services. (He had worked in high positions for several multinational Fortune 500 companies.) Misha told me that several of her neighbors were lending her money to pay her mortgage. At one point I heard that Maurice was bagging groceries in a local market. We were all worried about them. The writing had gone easier once I gave up trying to elicit cooperation from Vera and took over the job of writing the book myself. Misha and I worked well together, so long as I was willing to put in all the time she wanted from me, which I was. I would sit with her at her kitchen table going over drafts and making changes. Maurice was always nearby and available to translate anything Misha didn't understand. Sandy and Elaine had been working out the terms of the **Disney option and the contract was signed on June 1, 1996**. (An option, as Sandy would later explain from the witness stand, is the right to own and control a property for a specific period of time. The purchaser pays a certain amount of money to have the exclusive right to develop the property for that period of time.) The Disney deal put rocket fuel into Palmer & Dodge's marketing tank. There was a whole bundle of potentially highly profitable rights that Mt Ivy had acquired through the Publishing Agreement that now would be split up and sold separately. Sandy later testified that she sent out hundreds of promotional packages. Before we had a finished book from the printer, each included a portion of the manuscript as it was being written, or later the page layouts and a mock up of the cover, plus press clippings and a cover letter from Sandy. These fat packages went to scores of foreign publishers who might buy translation rights and to all the major players in the media such as Time Warner Audiobooks who might want audio rights, and periodicals such as People magazine who might want serialization rights. Every cover letter included the sentence, "The film rights to Misha have been sold to Walt Disney Television..." Soon that endorsement was enhanced by the tag line, "...with Preston Fischer (White Fang II) directing." She also included the line: "The German rights have already been sold to Wilhelm Heyne." The Disney name and the prestigious German publisher lent so much cache to the project that the fact that the book hadn't even been published yet was no obstacle to drawing interest. It had been Elaine's triumph to nail both the Disney contract and the huge German deal. Unfortunately for me, she then set her sights on the French.

5.8.07

## Chapter 12

I was the proverbial one-armed wallpaper hanger. My daughter, Liza, who had run the office for me when my first publishing company was booming, was now married with a baby, so she was rarely around. She was still the president of the second publishing company, Mt Ivy Press, Inc., my title was Publisher. She signed our contracts and she would come in and write checks to pay Mt Ivy's bills, but just about everything else fell to me. Besides writing the book itself, a necessity I had not anticipated, I was overseeing all the steps required to get the book ready to go to press. I wanted to go first class. No paper cover for this project; I wanted a hardcover with a full color dust jacket. After doing some research I came across an illustrator who did pastels of children with lovely, luminous eyes and engaged him to produce our original cover art. The final drawing depicted the face of a little girl surrounded by wolf pups. As the word-processed manuscript neared completion, I had the graphic designer pour it into page layouts. Because of the technology of the computer, these looked like typeset text but could be easily altered, if necessary, right up to the minute we went to press. Now I had

something that looked more "finished" that could be used for promotional purposes. I could see immediately that Misha had been warmly embraced by the Jewish community around her.

**She had recently connected with her Jewish roots for the first time and joined a temple.** She had been speaking publicly about her Holocaust experiences to small groups. I met her rabbi and members of her congregation who all expressed wholehearted belief in her remarkable story. She said that she had just recently found the courage to speak her truth and relive the pain of her harrowing childhood fleeing the Nazis. **I believed her story, too, but still there was the possibility that others might have doubts.** With this in mind, I knew impressive blurbs for the back cover would be crucial. No one I talked with doubted that she was a bona fide Holocaust survivor. However, her account of living among wolves had the potential to make her story questionable. I wanted to know if that piece of the story was credible so I sent the manuscript to Joni Soffron, Education Director of the North American Wolf Foundation. Joni and her husband ran a small sanctuary in Ipswich Massachusetts with a dozen or so full-blooded wolves. They gave lectures on weekends to educate the public and advocate for the protection of the species. "Could it be possible that wolves would adopt a human child?" I asked her. **Joni said she had no doubt that it was possible,** but very rare.

"The Romulus and Remus myth has captured our imaginations for centuries," she told me. "There are some more modern accounts, but they're not well documented. "You have to remember," she went on, "humans established settlements in wolves' habitats and hunted them to the point of extinction. European wolves learned thousands of years ago to steer clear of man. Those that didn't, didn't live to pass on their genes. People equate wolves with the mean ones in the Three Little Pigs tale and Little Red Riding Hood. We grow up thinking wolves are bad. But wolves are not aggressive toward humans. It's just the opposite; wolves avoid humans."

"What about wolves and children?" I asked. "Because they're so wary there would no opportunity for a wolf to run across a human child," Joni answered. "Only under bizarre circumstances, such as a war, would a child be alone in the forest far away from protective adults. Wolves are social animals who take very good care of their young. Only the alpha pair breeds but the whole pack looks after the pups. There are virtually no documented accounts of a human being attacked by a wild wolf. And, yes, absolutely, it is possible that a small child might be accepted as a pup." Joni's blurb said: "Misha's loving description of the true nature of wolves will dispel many myths and touch the soul of all who read it."

The next person I thought to ask for a blurb was Nobel laureate **Elie Wiesel**, perhaps the most famous name in Holocaust literature. As it happened, he was teaching at Boston University at the time. I called the main phone number at the school and got the direct number for his office. "Does Mr. Wiesel give blurbs for books written about the Holocaust?" I asked his secretary. He does, she replied but he was out of the country, at the time. "If you send me a manuscript, I can give it to him and he will be in touch with you if he feels he can offer some words about your project." I packed up the page layouts and a color copy of the front cover and sent it off that day, hoping Elie Wiesel would get back to me before the book went to press. He did, about six weeks later. **In a short note he said he had read the book and found it "very moving."** Yeah! Those were just the words I'd hoped for. One of the feature articles (not a book review) that I had placed in the *Boston Globe* had said the book contained "...the miraculous material from which fairy tales are woven." Not exactly an endorsement of the authenticity of the story but a good quote, and it went on the back cover, too.

Leonard Zakim, the Executive Director of the New England Anti-Defamation League, was a much beloved figure in the Jewish community. He was young, in his forties, and had been battling cancer for years. I had met him at some function or other and asked him if he would read the manuscript and give us a blurb. What came back was perfect: "A scary 'must read' for anyone interested in the Holocaust. Humans acted 'like animals' and animals acted 'humanely.' Her story is heartwarming and bone-tingling, all the more so for being true." Lenny's was the only review that explicitly endorsed the authenticity of Misha's account. Lenny died shortly after the book was published but his name lives on. Boston's famous "Big Dig," the largest civil engineering project in the world at the time, produced its crown jewel in the form of a magnificent suspension bridge that is named in Lenny's honor.

I got several other blurbs, one from an author in the Palmer & Dodge stable who had a book that was listed in the *N.Y. Times* Best Books of the Year, 1990, and another from a rabbi who was the chaplain at Brandeis. There was one more blurb that came back just before press time from a woman author of a Holocaust novel. Unexpectedly and at the last minute, she decided she didn't want her name associated with this project. She gave as a reason reason that she questioned the truthfulness of Misha's tale. Unfortunately, the cover was already printed so we had bright yellow stickers printed up that said, "AN INSTANT CLASSIC!" and placed them over her blurb. I also sent off galleys to two Holocaust historians. The first, **Lawrence Langer** taught history at my alma mater, Simmons College. I thought he might be willing to give an alum some feedback. He was away, too, but I mailed off the package with a cover letter explaining that we had a deadline and expressing appreciation for

any thoughts he might care to share. The second Holocaust historian to whom I mailed the book was **Deborah Dwork**, an associate professor at Yale. She had recently published a book of her own, *Children with a Star: Jewish Youth in Nazi Europe*. I had a cordial conversation with her about the project I was working on. I had read her book, I told her, and thought it was very interesting. She agreed to read the manuscript and said she'd get back to me. I also sent a set of the galleys to Vera for her to review before we went to press. Though it might be several weeks before I heard back from the historians, I could make final adjustments right up to press time so I wasn't concerned. I now had a finished cover and pretty clean insides, what's called in the industry "the galleys." The French and German publishers had been waiting impatiently to get the manuscript so they could start on their translations. I ran off more copies and mailed them abroad.

Sandy called me one afternoon to say the German publisher had contacted Palmer & Dodge to ask assistance in setting up an interview for Misha with a writer from *Der Spiegel*, Germany's most influential newspaper. He was flying to the U.S. in a week and the German publisher, Heyne Verlag, was worried. The Germans had the impression that the reporter was going to **write an unfavorable article suggesting that the story was a hoax**. The German book wasn't published yet. I later realized the publisher had given the reporter a copy of the galleys in English that I'd recently sent them. The reporter, it turned out, spoke English fluently. We met him at Misha's home. Misha and Maurice had prepared a lovely lunch and we ate outside surrounded by many species of birds who also were dining at the assortment of feeders set up around the yard. The man was charming and friendly, but he asked questions, and then follow-up questions, and then follow-ups to follow-ups. **I had the uncomfortable feeling that he was doubtful of Misha's story**. We said cordial goodbyes at the end of the afternoon and he went back to Germany. Several weeks later Sandy sent me a copy of the article from *Der Spiegel*. It was in German but someone had translated it. Heyne Verlag, it said, was soon to release a book about a Holocaust survivor who claimed to have lived with wolves. **The story they were about to publish, according to the article, appeared to be a fake**.

Misha was angry about the article but she was resigned. "Let them not believe if they want not believe. I don't care what they think. I know the truth." I had also sent a set of galleys to the French publisher, Laffont, and I soon learned that there were problems there, too. Just before the layouts were to go to the printer, they faxed a list of historical inaccuracies several pages long. Sandy called me to tell me that Charles Ronsac, the head of Laffont, had himself caught the errors and was concerned lest our book had already gone to press. "Are they thinking of canceling their book?" I asked, worried.

**"No, they're rewriting those sections right now to make them accurate."** Thank heavens our book hadn't been printed yet. I studied the list. The discrepancies and glaring errors were mostly related to known historical facts and dates. For instance, Vera had written: "Germany's surprise attack on Russia in December 1941....." Ronsac caught the error: "This is incorrect. It took place in June 1941. (December 1941 was the date of Japan's surprise attack on Pearl harbor.)" And Vera had written: "Belgium, Winter 1945 "The war was still going on..." Ronsac noted the mistake: "Belgium had been liberated for a long time. Liberation of Brussels, September 3, 1944" I called Misha. "Did Vera ever plot your path on a map of the countries you passed through?" I asked. "No, she just write down like I tell her from my memory," Misha replied. "Did she ever make a timeline of the events going on in those places, like particular battles, at the time you were passing through?" I asked. "No, I just tell her from what I remember. Sometimes I not remember so good." I was taken aback. This was the work of a scholar on whom I had relied completely? During the writing of the book Misha and Vera had quarreled over the date when her journey began. Vera insisted that it had to have begun a year earlier than Misha's memory of it. Out of unquestioning trust, I supported Vera. Now I wondered how many more inaccuracies were imbedded in the text.

"We have to make a map and a timeline," I said to Misha. I was again worried about meeting our deadlines. "I'll go back and check the entire manuscript for discrepancies, not just the ones the French found," I said. I then attempted to contact Vera. Vera had told me that she spent time at the library doing research but she had not provided me with any of her research materials or even the titles of books she'd used in her research. I got no response from my phone calls and knocks on her door. It appeared that Vera had gone away. I could see her car in the driveway between our houses and it hadn't moved for days. I would not hear from her for a period of almost six weeks after I sent her the galleys. I worked day and night on the manuscript and **made all the revisions and corrections requested by Laffont** with no help from Vera. I fact-checked every tiny detail. I researched the vegetation and animals of the regions Misha traveled as well as animal behavior, the foods available at relevant times and places, the clothing and scenery, farming and weather conditions and survival techniques applicable to extreme conditions. I read Holocaust survivors' accounts, spoke with survivors themselves, obtained a tape of a TV program based on photos of the Warsaw ghetto and interviewed its producer. I read books on wolves and interviewed more people who worked directly with them.

Maurice agreed to get a map of Europe and trace Misha's path. I began matching up the map of Misha's journey with a historical time line. I was surprised at how much documentation I was able to find that coincided with Misha's story. In one encyclopedia I found a drawing of the Warsaw Ghetto and the surrounding area that showed the Jewish cemetery, the train tracks running nearby, and the lake in which she bathed, exactly as she had described them to me. Another book, an old, worn tome entitled *They Fought Back*, described a resistance fighter named Misha Gildenmann. He had operated in the forests of the Ukraine around the time that Misha described meeting up with a camp of resistance fighters led by a man named Misha. (She said she never knew his last name.) I mailed her the book and didn't hear back from her for almost two weeks. When I finally reached her, she told me she was speechless when she saw the book with a photo of the man whom she so admired. She expressed no interest in trying to contact him, however. Later I was to pursue that line of inquiry myself. At first I was thrilled to discover all this corroboration. Then it occurred to me that if I so easily could find this information at my local library, **Misha could do so as well**. She could have used it to fabricate a very convincing story.

However, Misha herself barely spoke English, let alone read it. But Maurice, who never left Misha's side during interviews, meetings, or anything connected with the book, was completely fluent, both in spoken and written English. Everybody who knew of her story called it "incredible." I heard the word over and over. As time went on I began to realize that the word "incredible" has contradictory meanings. On the one hand it means *so extraordinary as to seem (but not to be) impossible*; on the other it means *not to be believed*. Was it possible that people used that word, consciously or not, to hedge their belief in the veracity of the story without seeming to do so? After all, what greater injustice could one inflict upon a Holocaust survivor who bares her soul to bear witness than to disbelieve her? Misha insisted that her story was the absolute, literal truth. I once asked her if she had ever contacted *Yad Vashem*, the organization in Israel that maintains a database of over three million victims of the Holocaust. She answered that she didn't know her family name and thus had no way of searching the records. She only knew her mother was called "Gerusha" and her father was "Reuven". She knew her mother was a Russian Jew, her father a German Jew. But she didn't know any last names. She was never told her surname, she insisted, because it would have identified her to the Nazis as Jewish. She was called only Mischke, which she later changed to Misha, she said, in honor of the resistance fighter. She also said she didn't know her date or place of birth but she "had the impression" that she was seven years old in 1941. After her parents were arrested by the Nazis, she was placed with a family that gave her the name Monique Dewael, which she continued to use after the War for lack of her true name. She said she went to "town hall" to try to research her name but was unsuccessful.

In the early 1960s, she had a son by a previous marriage, she said. His surname was Levy. The absence of any surnames was an insurmountable obstacle to conclusively documenting her story. But that didn't make it untrue, I thought. Surely in the chaos of the Holocaust many people's identities were lost. Charles Ronsac, himself a Holocaust survivor, had accepted Misha's story and gone ahead with publication of the French book as an authentic account. Most of the people who met Misha were persuaded by her charisma and the sheer force of her personality alone. I didn't know what to believe. Did she live with wolves? Or were they just big dogs that seemed like wolves to a young child? Did she see and experience all the things she recounted or did she only hear about them second-hand and incorporate them seamlessly into her own memories. What was true? What was not? **My truth was that I had no idea what the truth was.**

4.8.07

### Chapter Thirteen

#### Chapter Thirteen

I gave Professor Dwork a couple of weeks to read the galleys and then I called her. The friendly, receptive person I had spoken with earlier on the phone was gone, replaced by someone who seemed irate. "It's a fantasy, and not a good one at that," she said, huffily. "How do you know?" I asked. "It's full of historical inaccuracies. But beyond that, to suggest that a child so young could accomplish what she did, well, **it's just ridiculous.**" Later I recounted this reaction to Vera in a letter. "The manuscript was recently reviewed by a Yale professor, herself the author of a definitive work on children of the Holocaust. She was asked to give blurb for the back cover. Because of the questionable dates she refused. For instance, she stated that 1940 was much too early for the beginning of the story. According to her, the incidents Misha recounts of hiding and staying away from windows would not



have been necessary until later, not 1940 as you had written it. She also would have been starting out at six, which is less plausible than seven. Misha herself said that she thought her parents were arrested in '41 but you doubted her and apparently you never sat down with her to measure the mileage to see if she could have made it to the Warsaw Ghetto by July 1942 starting out in the fall of '41. This measuring, plotting and timing should have been done for the whole book, in fact, and wasn't. When I asked Misha and Maurice to do this it turned out she could have gotten to Warsaw in just four months walking at a leisurely five miles a day. Such embarrassingly fundamental discrepancies could have ruined the book had they not been caught before publication."

I chalked up Professor Dwork's negative reaction to the historical errors that Vera had left in the book and wrote her a note of apology, explaining that the ghostwriter, herself a prominent scholar, had not fact-checked the manuscript. Ironically, Professor Dwork's endorsement of the historical appropriateness of Misha's, rather than Vera's, starting date reinforced my confidence in the authenticity of the story. But when I spoke with Professor Langer, his reaction was just as skeptical. "The coincidences are too pat, too contrived," he said. "She just happens to get into the Warsaw Ghetto right before it burns down, but she doesn't have a tattoo. And she manages to escape over a wall. Why didn't everybody escape over that wall? You can't publish it as factual."

When I reported back to Misha the feedback I'd gotten from the scholars she responded as she always did, with a shrug of irritation. "If they no believe, that's their problem, not mine," she answered, as usual. The reaction from the Alaska Wolf group to whom I'd sent the galleys was as positive as the historians' was negative. Yes, wild wolves might accept a human child in their midst. It was not incompatible with known wolf behavior but, though there was some anecdotal evidence of such occurrences, there were no well-documented cases. One day I witnessed with my own eyes something that seemed to confirm what the wolf experts were saying. Misha had been invited to speak at Wolf Hollow, just an hour or so north of Boston. It was a sunny, warm day with a nip of fall in the air and we gathered in the parking lot outside the fenced pen that houses a pack of full-blooded wolves. Wolf Hollow consists of a small house that Joni and her husband, Paul, lived in, with a picture window in the living room that looked out into the large wire-fenced enclosure that was home to more than a dozen adult wolves. At one side of the house was a gift shop that sold wolf bumper stickers, wolf dolls, wolf books and other such materials. Outside, around the high chain link fence that enclosed the spacious pen, was a second wire fence, about three feet away from the inner fence, that was there to keep curious fingers from poking into dangerous territory. There were rows of bleachers arranged around the enclosure where visitors sat to hear the lecture and around it all a stockade fence that shielded the whole affair from view from the road. Those of us who were there with Misha were invited to go in between the fences so we could be closer to the wolves. "No fingers through the wire," Joni cautioned. "They think anything that comes through is something to grab." Not to worry. These were clearly not dogs we were looking at.

Dark and shaggy, they were enormous, with golden, upturned eyes outlined in black. When they panted, their lips drew up at the corners as if in a smile and their teeth were formidable to behold. I was standing next to several other people, holding my grandson, Matthew, who was just a toddler. The wolves were milling purposelessly around the pen, until two huge gray and black wolves spotted Matthew and approached the fence where I stood with him in my arms. One pushed its black nose against the fence and sniffed vigorously. At that instant, the second wolf dove for his neck, roaring a heart-stopping growl that could have come from hell itself. The first wolf went down, legs kicking in the air, but immediately sprang back up and charged his attacker full force, fangs bared, paws flying. I heard Joni from the far side of the pen scream, "Get the baby out! Get him out of there!" She was gesturing wildly to me. Clutching Matthew I quickly retreated outside the outer wood fence from where I could hear the fight subside as quickly as it had begun.

I saw Joni in the gift shop a few minutes later. "What was that all about?" I asked. "Oh, that happens all the time," she replied. "When there's a small child in the audience they all get excited. There haven't been any puppies here in a long time. They all love puppies. When they see a small child the dominant wolf will assert the right to approach the child first. All that growling and teeth-baring is just for show." Matthew was listening to this exchange intently. That night when I put him to bed, I asked him, "Were you scared when the wolves began fighting right in front of you?" "No," he answered, "they just wanted to see me better." A revelation! That was both sides of the equation, I thought. The wolves, on the one hand, wanting to get close to a human child. The child, on the other, not being afraid. **I had seen a microcosmic enactment of Misha's story.** After the incident with Matthew, I had gone back into the pen area between the inner and outer fences. I stood for a long time admiring the wolves. The animals were in full coat, which they shed when the weather gets hot. But at this time of year their fur is so thick they could sleep on the ground in temperatures down to thirty below.

There were big "dog houses" in the pen which Joni explained were required by the licensing



authorities, but the wolves ignored them and slept in the open all winter long. During one of the demonstrations given to the public I had seen Joni's husband offer one animal a dog treat that he held between his teeth. The wolf placed his front paws on Paul's shoulders and gently removed it with his front teeth. It was impressive. A wolf on its hind legs stands over six feet tall! This was a trick that fell into the category "Don't try this at home." Joni explained that the pack regarded her husband as an alpha male. She, on the other hand, was way down in the pecking order and they would push her around, sometimes pulling her jacket right off her back. As I stood at the fence thinking about all this, a huge, blond wolf strolled over and lay upside-down on the ground in front of me as if she wanted her tummy rubbed, like any dog. The fur on her underside was thick and fluffy, so inviting I just wanted to rub my hand on her upturned belly and feel her wild warmth. But I knew better. Although the rolling over behavior is so familiar to every dog-lover, these animals are not dogs. "Oh, no," I said to her. "I'm not reaching my fingers in there with you." I took one step back from the fence to let her know I wasn't going to oblige her with a rub. Still, she seemed to be trying to get my attention. I placed my hand flat against the chain link fence and waited. Within a moment, the wolf rose and gently sniffed my palm, looking into my face with those other-worldly golden eyes of hers. Then, in a flash, she lapped her soft tongue across my palm. My heart soared! I had been kissed by a wolf! I was high on that experience for days. I didn't think any man would be able to equal the swept-away power of that kiss for a long time.

### 3.8.07

#### Chapter Fourteen

The manuscript was as clean as I could make it in the time I had left and it was time for the final layouts to be sent on disk to the printer. I had insisted that Misha sign off, in writing\*, on the entire book before I sent it. Still, there was one persistent problem that hadn't been cleaned up: how to resolve the mess with Vera.

When we began the project Vera and I had briefly discussed whether her name would appear on the cover with Misha's name. I had left open the possibility that it could. As I was rewriting the manuscript I had tried to preserve as much of Vera's text as possible, although Brett had repeatedly suggested removing everything she had written. I was still hoping that we could come to some mutually acceptable resolution and that, once that was accomplished, we could be friends again. I had mentioned to Vera that, given her dissatisfaction with the project, she might actually prefer not to have her name associated with it and simply be paid for her time.

Misha was as unhappy about the situation with Vera as I was. She and I had several discussions about how to handle Vera's attribution. Her name would be on the copyright, I told Misha, because she had original material in the text. But there was nothing in the Publishing Agreement that specified that Vera's name should be on the cover or anywhere, for that matter, other than on the copyright.

I asked Misha to fax me a copy of the Collaboration Agreement. (Misha had neglected to send it to me as she'd promised to do the day it was signed.) The document specified: "Authorship credit shall be given as follows: **Misha Levy Defonseca** with Vera Lee.\*" The agreement was silent as to a required location for Vera's name.

Mt Ivy had no part in drafting this Collaboration Agreement, was not a signatory to it and, according to Brett, was therefore not bound by any of its terms. (I didn't even know what it contained before Misha faxed it to me and I read it for the first time as we were composing the Acknowledgments.)

The Acknowledgments page is traditionally where authors who don't write their own manuscript thank their ghostwriters, sometimes in very veiled language to conceal the existence of a behind-the-scenes real author. (Celebrities do this all the time.) But the Collaboration Agreement Misha and Vera signed specified that Vera would be identified by name and Brett and I agreed that it would be best to abide by its terms. We settled on language that met the precise wording of the Collaboration Agreement: "with Vera Lee." In the Acknowledgments on the first page of the book, Misha expressed her appreciation to her pets, her husband and her son, in that order, and then to Vera: "I am grateful for the opportunity to write this book *with Vera Lee* as co-author of the initial manuscript. She helped me to pour out my memories in French and then organize them in English."

Misha and I had discussed this for several days and she had faxed me an Acknowledgments page\* thanking a score of people without even a mention Vera. I urged her to set aside her grievances and she finally agreed that what Brett and I had drafted was a fair way to give Vera her due credit. On the reverse of that page I added another expression of gratitude from the Publisher to "Vera Lee for her assistance as co-author of the original manuscript of this book."

Christmas was less than a week away, a season I associated with happy activities with Vera. This year would be different. I knew it was time to try to resolve our differences and move on. "Because of our many years of friendship," I wrote to Vera, "this is a difficult letter for me to write. Enclosed is a bound copy of the layouts for the book. As you can see, your name does not appear on the cover. The issues behind this decision are several and I will go over them here."

I then listed five points that Brett had said were breaches of contract:

"First the length. Even using the smallest standard format (5.5 X 8.5) and setting the text in a large font with generous leading, it took an additional 20percent new copy to make up the 250 pages specified in the contract.

"Second: the style was unacceptable primarily because it was too juvenile in tone. The Italian agent confirmed these concerns in a letter stating that the Italian publishers to whom she'd showed it were worried that the book would be viewed as a YA (Young Adult) title.

"Third, the chronology was inaccurate and incomplete.

"Fourth: The deadline was missed. Despite my urging and Misha's repeated requests for more of your time, the manuscript was not in publishable form on the agreed upon date which caused us to miss the original pub date for the Fall '96 list.

"And fifth, all the negative things you said to Misha about the changes scared her so much that she refused to sign off on the book until November—this clearly was contract interference between Misha and Mt Ivy."\*

Brett and I had talked about several options that we were prepared to offer Vera. My letter went on:

"So now we are in no-man's land because all these problems with the manuscript as submitted and the extensive additional text and revisions required to get the book into publishable form were not anticipated in the contract.

"We want to be fair to you and work out a new agreement that makes sense to all parties. While you are, of course, entitled to full credit for the work you performed, putting your name on the cover credits you with work you did not perform and to which, obviously, you are not entitled to claim credit. Twenty percent of the manuscript is new material adding to the length, another percentage of your original manuscript was deleted and replaced, and the remainder was materially rewritten. Your contribution above and beyond Misha's is now a relatively small portion of the whole."

I went on to offer Vera several options:

"An acknowledgement giving you credit for the work you did and 25 percent of all the original percentages under the present contract.

"Alternatively, in view of your dissatisfaction with the final text you may want to be out of the whole business. In that case, here's another option: You may go over the enclosed manuscript and mark whatever you believe to be your exclusive contribution and these [portions] can be deleted or materially changed so that they no longer constitute your intellectual property.

"A third option would be that you assign your copyright to Mt Ivy for a flat fee, perhaps percentages of the foreign rights contracts... presently under agreement (German, French and Italian)....

I closed with some news about the movie: "We have been informed by Disney that they will not be going forward with the movie. It seems that there was a corporate shake-up and the people who developed our project were let go, and with them went plans for the movie. It's a disappointment which people familiar with the ways of Hollywood tell me 'happens all the time.' The drama rights are up in the air at the moment."\*

I slid the letter into the mail slot in her front door with a sense of sadness.

More than a month passed before I heard back from Vera. I had no idea where she had gone during this critical five-week period right before the book went to press. Finally, in a terse, one-page letter she wrote,

"Yesterday, January 29, I received your memo, which was dated 12/20/96.

"At the time I agreed to write the book, you gave me your assurance that my name would appear on the cover. When you tried to convince me subsequently to take my name off, I refused and still do. As for your suggestion that we change our agreement regarding my share of royalties, that is completely unacceptable.

"If you considered my work unsatisfactory when you read the manuscript I handed you on May 15, 1996, two weeks prior to the proposed deadline of May 30, I was entitled, at the very least, to written notice identifying the problem and the opportunity to cure or remedy it,

"I am offended that you are trying now to renegotiate our original contract. I have spoken with a lawyer about this matter and can make no concessions on it. It is non-negotiable."

I had a sense of unreality reading this letter from my former best friend with whom I used to communicate so well. Had she not heard me asking again and again that she rework the manuscript to

make it less childish? Why would she want her name on the cover of a book that she had clearly told me she hated?

Some time later I got a nasty note from a friend of Vera's accusing me of treating our mutual friend unfairly. I wrote to Vera again, pointing out that she was gone when the French publisher notified us of the errors in the text. "Vera, these glaring errors (a number of which occur in the area of your expertise: France) and many more related discrepancies buried in the text would have destroyed the book. Ironically, my hyper-vigilance, which you have resented for so long, has been responsible for saving Misha, Mt Ivy and also you, yourself, from the most agonizing public embarrassment...."

I again proposed that Mt Ivy pay her "several thousand dollars," computed on the basis of earnings to date, and promised her a check "almost immediately."

"I hope that we can put this painful matter to rest once and for all," I wrote. "You have not responded to any of the previous communications, but I think it best for all concerned to resolve this as soon as possible. Unless I hear otherwise from you, I'll get a check and a new agreement together for you next week."\*

This time I heard back from Vera the next day, February 3rd. In a letter, she insisted that she had submitted a whole manuscript two weeks ahead of schedule, that the chronological problems were due to Misha's faulty memory, and that I had taken the manuscript out of her hands before she had a chance "to clean it up and bind it all together...."

"I shall not take the time to answer point by point the various reasons you adduced in the letter I received last week," she wrote, "but they appear to be excuses for not honoring our original contract.... At this point I shall simply reiterate... this matter is non-negotiable. If you insist on disregarding it, I shall have no alternative but to take legal action. Copy to: Frank Frisoli, Esq."\*

The next week Brett carried out a piece of business that seemingly had become inevitable: he wrote Vera a formal letter notifying her that she was in breach of the publishing agreement and offering to purchase her interest in the manuscript for nine thousand dollars, to be paid within seven business days of acceptance of the offer. Brett's letter\* spelled out the five points I had made in my earlier letter to her regarding the problems with the manuscript. His letter went on to say,

"Your inappropriate and unprofessional behavior caused delay both in publication in the U.S. and in the sale of foreign rights. Such behavior caused extreme duress to the Author whom you knew to be stressed already from the effort of telling her agonizing life story; thereby jeopardizing completion of the project.

"If we are unable to resolve this matter amicably, we will withhold your royalty and proceed to arbitration to determine your compensation." I felt sick that things had come to this but at least maybe there might be a resolution to the conflict soon.

The news about the **Disney debacle** was a blow but Elaine wasn't worried. She had other strong possibilities in mind. The end of the Disney project took some of the time pressure off — that was a relief — and it meant that we would not be printing fifty thousand books right away. Besides, we were hearing from a steady stream of foreign publishers interested in purchasing translation rights. An Italian publisher had just agreed to pay twenty thousand dollars and the Japanese translation right just sold for six thousand dollars. I even got inquiries "over the transom", as it were, at my home office from foreign literary agents asking if rights were available for their markets, or sometimes the publishers themselves called long distance from abroad. I had two different Israeli publishers calling me, a Korean publisher, and one in the U.K..

My friend, Linda, did a lot of business abroad. She worked for a company that licensed, manufactured and imported home furnishings in those third world countries that you see on the labels of goods in every store in America. Hearing about all the foreign interest we were getting she made a suggestion.

"Do you have an offshore corporation set up to capture those earnings?" she asked.

"No, what's that?" I answered.

"Most of the companies I know who do a lot of business abroad set up offshore subsidiaries," she told me. "There are a lot of tax advantages."

When I raised the question with Brett, he was enthusiastic. "You do it as a wholly-owned subsidiary," he explained. "Here's the corporate structure: Mt Ivy Press, Inc. is the general partner of Mt Ivy Press, L.P. That stands for Limited Partnership. That's a very common way to organize a business because it offers certain advantages and protections. Mt Ivy Press, L.P. would own Mt Ivy Press International, Ltd., based in the British West Indies, or some other place that offers these kinds of financial services."

"Is it legal?" I asked, totally confused.

"It's completely legal," he replied. "The reason your friend knows so many small and big

companies that do this is because of the tax advantages. When you earn money in the U.S. you pay taxes on it the year you earn it. If money earned offshore stays offshore, you don't pay taxes on it until you bring it into the country. So you can leave the money out there until you need it. When you bring it in, then you pay taxes on it. It gives you time to plan how best to put the money to work for the business. For instance, to develop more books, which takes time."

"Is this something we should do?"

"Since it seems like Mt Ivy's earnings are going to be coming primarily from abroad for a while, it would make sense to set up a foreign subsidiary."

"What about money earned in the U.S.? Like from bookstores?"

"That stays in the U.S. in Mt Ivy's regular bank account. It doesn't get sent anywhere. You pay taxes on it the usual way. The offshore account is only used for foreign money."

"Is this what drug lords do?"

"Sure they do. Like anything else, the system can be abused. Drug lords also launder money through otherwise legitimate American businesses right here at home."

"Do we report the foreign money on the twice-annual royalty reports we send our authors?"

"Absolutely. They are entitled to know about it. A percentage of it is theirs in the form of book royalties. They would get their regular royalty payments at the time the payments are due them under the Publishing Agreement. Think of it as just a bank account that isn't in Boston or New York, it's outside the country. But the terms of the contract apply to that foreign money, just as if it had been earned here and was being banked here."

"Do we have to notify anyone?"

"A publisher has no obligation to tell its authors what bank they use. But we do have to notify Palmer & Dodge, because they'll have to set it up on this end and figure how they want to handle their commissions."

Brett knew a company in the British West Indies that, for a nominal fee, would incorporate Mt Ivy Press International, Ltd., engaged in international book publishing, with a bank account at Barclays Bank, Turks and Caicos Islands, to receive funds originating in Europe. It was all done with a few faxes back and forth, not much more than opening any bank account, anywhere. We notified Palmer & Dodge that all funds coming from foreign publishers were to be deposited to that account. Palmer & Dodge arranged with the foreign publishers for their commissions to come off the top and be sent directly to them.

It felt to me like we were all set to take over the world!

But back home I still had another complicated issue to deal with. Because there was so much material that I had contributed to the book I had to decide what to do about the copyright in that material. I had no desire to have my name appear as an author, so Brett and I drafted what is called a "work for hire" agreement between Mt Ivy and me. It is a common practice for newspapers, magazines, film studios, advertising agencies, in fact any company that uses writers, to have this kind of contract with their employees. A work for hire contract gives an employer ownership of the copyright in anything written by employees as part of their job. Under the agreement I signed, I was considered an employee of Mt Ivy Press and Mt Ivy Press, my employer, owned the copyright.

With the Disney movie gone, I revised the estimate of the number of books we'd need in the first printing. I calculated that we'd require about **ten thousand to begin** to load the pipeline while we generated the publicity needed to drive books off bookstore shelves. I put in the order to the printer and we waited for the finished books to be delivered. I specified that fourteen hundred books were to be shipped directly to my office to be used for publicity purposes and the rest would go to PGW's warehouse in California.

"Why you go print not so many books?" Misha asked, disappointed, when I told her.

"Because we can always go back and print more when we have the publicity to justify a larger print run," I explained. "Otherwise we just have books sitting in a warehouse, running up storage fees and tying up necessary working capital. It could take a year to get the publicity up to speed."

I explained to Misha that the United States was not Europe. We were not Ground Zero for the Holocaust and so **Americans tended to be significantly less interested in the subject of the Holocaust than Europeans**. It would be a harder sell here than abroad. Also the U.S. was a huge market, unlike Europe, which was broken up into many countries. Mt Ivy's strategy would be to generate sales in specific markets, piece by piece, while working on national publicity that could give the book a coast-to-coast boost. I had been discussing the possibility of getting the book on Oprah with Shirley Sandler, Mt Ivy's new publicist. Shirley was a real go-getter and she believed she could do it.

"Oprah can make a bestseller overnight," I told Misha. "That's what we're shooting for."

Just before the layouts went off to the printer I sent a memo\* to Sandy notifying her of a change

in the copyright for the book:

“Because of extensive rewrites required to prepare the manuscript for publication, Mt Ivy will appear as a holder of the copyright along with Misha. The French publisher, as well as the others, should be notified that we are prepared to sign onto their contracts. Mt Ivy has made Vera an offer to purchase her rights for a lump sum. At the moment the matter is unresolved so we do not know whether her name will appear on the copyright.... I expect the matter will resolve quickly as the book is about to go to press.”

We went to press with no agreement with Vera, despite our best efforts to find a fair and equitable resolution of our differences.

2.8.07

### Chapter Fifteen

The Book was out and the press party had been a huge success. Brett had used some of his own frequent flyer miles to bring Misha's son, **Morris Levy, from Seattle** for the big event. Morris was a pale, withdrawn young man, in his thirties. Whenever I happened to see him during the party he was standing off to the side, not mingling. At one point, I went up to him and introduced myself. “Have you read the book?” I asked. He replied that he hadn't. “Did you know about your mother's wartime experiences?” I asked, expecting him to answer in the affirmative. “No,” he replied, without further explanation. “Are you going to read the book?” I asked. “Yes, I'll read it on the plane going home.” That was the end of the conversation. A couple of weeks later I asked Misha why her son didn't know about her life during the war. “I not want to upset him with the truth,” she answered. “Well, what did he think of the book? Did he read it?” “I dunno. I not talk to him since he go home,” she answered, noncommittally.

From our press party and the many press releases I sent out and phone calls I made, we got squibs in the Globe, the Herald, the Providence Journal and numerous community newspapers. The local TV affiliates all did interviews with Misha that ran on the news that night. Several local radio stations planned interviews. I had sent copies of the book to all the Holocaust museums (over fifty) in the country and set up a trip for Misha to speak at the **U.S. Holocaust Memorial Museum in Washington, D.C.** I also had sent copies of the book to all the Jewish newspapers in the US (over one hundred) with a request that they send me a clipping if they did a review. That mailing resulted in quite a few clippings. Misha seemed pleased. I had a desk drawer full of appreciative little notes and cards\* that she had been sending me. One said, “Thank you for always selecting the best.... Thank you for your constant efforts.” “Dear Jane, This card remembers me a lot the time I was happy in the middle of no where. I hope so much people go to understand that as well as you do. Thank you.” And another, when I advanced her money from my own pocket, was signed “Love, Misha” And another, after the press party, “Dear Jane, We want to thank you again — and your family and people around you — for all the efforts made for the reception. It was a success, we appreciate it very much, and so did all the people who came. Congratulations to you too. We are going to drink the champagne to our mutual success. Shirley and I had decided that her efforts would go toward national publicity, mine would be local. She would target national publications like People magazine and national TV shows. Shirley had gotten the name of a producer on the Oprah Show and her direct line and had sent a press kit, fingers crossed. She was also planning to go after 20/20 and Sixty Minutes. I began setting up book signings in local bookstores. I was focusing on the major chains in our area, Borders and Barnes & Noble. Between them they controlled three quarters of all bookstore sales. In order to get their buyers to stock the book, it was critical that we generate sales for them. The best way to do that was to set up book signings in as many chain outlets as possible and have Misha speak a bit about her story to whomever showed up.

I worked with each bookstore's publicists to have them pay for advertising and to get the event listed in the calendar section of local papers. Whenever possible, I'd have a reporter there to interview Misha. According to Misha's records,\* between May and October of '97, Misha had fifteen signings, most with the chains — Barnes & Noble, Walden Books, Lauriat's, Borders, Brentano's. I concentrated on outlets in the Boston area because the local author angle made it relatively easy to get the store to commit to a signing. If we could show a break-out in this one area it would encourage the chains' buyers to try the book in other localities. To replicate the plan in local markets across the country, I set up another system. I was thrilled when American Program Bureau agreed to add Misha to its distinguished stable of presenters. Having a speakers' bureau representing an author is a tremendous boon to a publisher because the bookings generated create publicity in far-flung, distant markets.

The organization that hires the author pays for travel, accommodations and meals, relieving the



publisher of the considerable expense involved in putting an author on the road to flog a book. Even better, from the author's point of view, there were tidy speaker's fees to be earned for a relatively small amount of work on the part of the author. Misha had signed an exclusive contract with American Program Bureau. Shirley's husband, Harry, was busy lining up bookings for Misha in several distant cities. It was a fabulous deal for her. The first bookings he landed were for three to five thousand dollars apiece, all expenses paid. Her contract provided that she also would have expenses paid for someone to travel with her on all her engagements. Harry told me he expected that her fees would go up over time if her speeches were well received. APB sent out a follow-up questionnaire after each engagement soliciting comments on the quality of the speech. Favorable comments, he explained, became part of the selling materials for future bookings and helped to drive up the speaker's fee.

Misha's first appearance was to be in Fort Wayne, Indiana. I went along on that first trip. I had done the advance work — booking a radio interview and lining up two reporters from the Fort Wayne Journal Gazette to attend the various events. They each wrote separate pieces on Misha, one on her appearance before the Fort Wayne Jewish Federation and one on her speech to the Fort Wayne Library that ran prominently on May 4 and May 5, complete with photos. I had also set up a book signing for her at The Little Professor, a large, independent bookstore.

**But as soon as the book was out, the bloom was off the rose as far as working comfortably with Misha and Maurice was concerned.** On April 20, [1997] just a couple of weeks after the publication date, the criticisms and complaints began. Misha and Maurice had set up book signings in their little hometown at a shop where she bought feed for her wild animals and a card shop where she had personal relationships. The card shop, Maurice wrote me, "sold 98 books!!" **He was delivering newspapers to earn some money** at the time and so had time to canvass the area bookstores. Not surprisingly, the book was not in every bookstore he visited, although it was on order in some. In a letter\* Maurice wrote, "What is the use of doing radio interviews, having press interviews and TV coverage if the book is not in the stores? These are lost opportunities. And I would like to know what kind of promotion is being done or planned by you, by the distributor (whom you always praised especially for marketing) and, of course, by the book shops where Misha is scheduled to have a signing "She was so pleased by yesterday's signing and so disappointed by the Brookline Barnes & Noble one that you have to make sure the next ones are well prepared otherwise she will have the feeling of wasting her time and she will lose her motivation." I spoke with him and explained that he had the process backwards: WE create demand for the book, THEN bookstores stock it, not the other way around. And our distributor, PGW, distributes books; PGW doesn't do promotion. That's our job. The signings that Misha was booking herself were wonderful, I said, but they were attended by members of her community, her friends and their friends, who were coming out to support her. It was a much harder sell in the competitive, impersonal world of big chain bookstores where she was completely unknown. He seemed unconvinced and ended the conversation by demanding that I immediately deliver the rest of the one hundred free books Misha was to receive under the Publishing Agreement. I was a little uncomfortable about sending all those books at once. Mt Ivy's was an unusually generous allowance (the standard book contract provides for ten free books for the author) but I believed in the publisher supporting the author's promotional efforts.

The contract specified that they were for promotional purposes only, not for her to sell. Since Mt Ivy had been sending out promotional copies to everyplace she spoke, I didn't understand why she needed so many books right then. "You know you can't sell them," I said to Maurice. "You can't compete with your own publisher." "No," he said, "we don't sell them." He understood that, he assured me. I felt uneasy. I had already sent them fifty books. Where had they all gone? I suggested that they wait and take some of the allotment from the second printing. He hinted pointedly that Misha would be disinclined to continue to do her publicity engagements unless I immediately provided the rest of her free books. Back Yard Bird Watchers, a shop where Misha purchased feed for her animals, was hosting an event. They would need books to be delivered in time for Misha's appearance. I told Maurice I would take care of it and then called the shop owner and made the arrangements. The next letter\* from Maurice, dated April 26, 1997, was even more critical: "We asked you several times now to deliver the balance of the 100 books Misha is entitled to by contract. Now is the time for the promotion, not at an eventual reprinting. This will serve as the written confirmations of your repeated refusal to deliver these books. "Misha will respect her commitment and do the signing at The Backyard Bird watchers on 5-10. I delivered them one box of books today, after [the shop owner] called. She was upset by the way you treated her, you succeeded in de-motivating her. Thank you!! And by the way I did not appreciate the way you handled our phone conversation yesterday either." To keep the peace, I relented and sent along the rest of the free books.

## Chapter Sixteen

The letter from Vera's lawyer, dated May 20, 1997, arrived little more than a month after *MISHA* was published. It accused Mt Ivy of interfering with Vera's contractual relationship with Misha by persuading "Ms. Defonseca to breach her contract by failing to give proper authorship credit as required under the [collaboration] agreement...." Said breach "caused [his client] to suffer a diminution in her future capacity to earn income which capacity would have been substantially enhanced had the proper authorship credit been given as required by the agreement."\* The letter continued: Demand for a reasonable offer of settlement is made pursuant to Chapter 93A of the General Laws of the Commonwealth of Massachusetts. Brett and I talked on the phone. "What exactly does he mean by 'proper authorship credit as required by the Collaboration Agreement?' I asked Brett. "The French edition doesn't have her name on the cover. Neither does the Italian book; it has the same attribution that we gave her in the American book." Frisoli had sent a similarly menacing letter to Misha who had promptly gotten herself a lawyer, Donald Orkin. Donald Orkin, I learned much later by reading a deposition he gave in one of the related cases, had done some *pro bono* work for Misha and Maurice in connection with financial problems they were having before I met them — a possible bankruptcy, credit card debt and foreclosure on their house which he had been able to forestall. Orkin immediately wrote to Mt Ivy alleging that Mt Ivy had unilaterally crafted the form of Vera's authorship credit and demanding that we indemnify his client "from all losses, costs, damages, and attorney's fees that she has and will incur by reason of Ms. Lee's claims against her."\* Brett found this logic a bit ironic. "Misha has her lawyer draft a collaboration agreement that Mt Ivy had nothing to do with, she and Vera sign it and now Vera wants to sue both of us under Misha's collaboration agreement. And WE should indemnify HER? It's HER collaboration agreement that's causing the problem. She should indemnify US!" Of course, we knew that such a situation would be the kiss of death for the book. I wrote Orkin back explaining that "nothing in the book went in without consultation with Misha and her explicit approval. The determination regarding the attribution given Ms. Lee was a joint decision based on Misha's, as well as Mt Ivy's, dissatisfaction with Ms. Lee's failure to perform her duties under the collaboration agreement and the publishing contract." My letter continued: "Ms. Lee's claim that Mt Ivy interfered with her contract with Misha is ironic given the fact that Mt Ivy and Misha had been working on a book deal for a year before Ms. Lee became involved, and, in fact, it was Mt Ivy that brought her into the picture, not the other way around."\* Brett flew to Boston for the day and he and I met with Misha and Maurice in Orkin's office in Needham to discuss what to do about Vera. Misha was worried and angry. Orkin had read both of the contracts and was dismayed at the claims contained in Frisoli's letters. Brett felt that we were on solid ground in meeting the terms of both contracts. Neither contract specified a location where Vera's name should appear in the book. I couldn't believe that Vera actually would go through with this crazy threat of a lawsuit. The outcome of that meeting was that we were all prepared to form a united front. On June 16, Donald Orkin sent a scathing letter to Frisoli affirming Mt Ivy's position that Vera had been provided her "proper authorship credit" in his client's Acknowledgments and again in the Publisher's expression of gratitude. He continued: "My client categorically denies your client's allegations with regard to the issues of 'authorship credit'.... Nothing more is required under the terms of this Agreement." "Your client is fully aware," Orkin's letter continued, "that the Publisher practically rewrote your client's unacceptable initial manuscript.... My client questions your client's alleged claim for 'damage to her professional reputation' in view of the fact that your client had, on many occasions, stated to the Publisher and to my client that 'the final manuscript of the book was an embarrassment to her' and that 'the Publisher's approach to the subject matter was totally wrong.' It is ironic that your client is asserting authorship claims against my client and is making a claim against Mt Ivy for unpaid royalties despite her numerous slanderous remarks about the book. "I must advise both you and your client that if your client persists in her alleged claims, my client will assert claims against Ms. Lee for breach of contract as well as for emotional pain and suffering. "With regard to the emotional pain and suffering of my client, we allege that my client has become severely depressed as a result of your client's false accusations [and is] being treated by a physician...."\* Orkin's letter went on to list the five breaches regarding the inaccurate, incomplete and unacceptable manuscript that Brett had listed in his earlier letter and concluded, "Finally, with regard to your written threat to initiate court action, I must again call your attention to the terms of the Collaboration Agreement between the parties. Paragraph 12 requires that any dispute be referred to arbitration...."\* An attached letter from Misha's doctor, on letterhead of Southwood Community Hospital, stated: "On June 10, 1997, Mrs. Defonseca was seen by a therapist at this facility at which time she presented in crisis. She reported increasing feelings [sic] hopeless and helpless due to financial concerns which were a direct result of her recent notification that she is a defendant in a lawsuit brought by the writer of her recently published book."\* On June 12, Brett fired off Mt Ivy's response that covered pretty much the same territory as Orkin's letter but added: "We feel that your

client breached her obligation to both Ms. Defonseca and Mt Ivy Press, L.P. by abandoning the project when she could not accept editorial direction nor make the required changes.... Moreover, Ms. Lee has attacked Misha Defonseca emotionally and caused a deep schism of confidence to develop between Misha and Mt Ivy press which... continues to negatively affect the project."\* On June 23 Frisoli responded to Orkin, apparently undaunted. "As a practical matter, my client's only real problem with Ms. Defonseca is lack of authorship credit which was to be provided on the book. If your client is not willing to address a reasonable resolution of the issue, then we should discuss the matter off proceeding to arbitrate the matter. In such an event, however, my client will pursue the matter of damages for breach of contract. The arbitration provisions do not apply to the breach of Chapter 93A..."\* Frisoli was talking about going around the arbitration clause in the contract that might have put the problem to bed quickly and without the need for generating huge legal fees for Misha and Mt Ivy. Chapter 93A allows for treble damages. This was a serious threat. "Isn't he interfering with OUR contractual relations with Misha by threatening her like this?" I asked Brett. "She's a nervous wreck. She's going to cave in."

1.8.07

### Chapter Seventeen

I took some more books over to Harry at American Program Bureau. Harry included a book in every promo package he mailed for Misha. Most publishers didn't provide freebies like this because of the expense but I felt the book helped to make the sale. I didn't ask Misha to reimburse Mt Ivy out of her speaker's fee and I never took a commission on the dates. "I was going to call you," Harry said. "We heard back from the people in Fort Wayne. Here's their letter with a critique of her speech." "Oh? Did they like her?" I took a seat in the one chair in his tiny office and took the envelope he held out to me. "I've seen better," Harry replied. The letter was very diplomatic but the bottom line was that her speech hadn't gone over that well. "Did you hear the speech?" Harry asked. "I did. And frankly I had my concerns. She barely made any references to the book or her experiences during the war. She went way off the track, talking about the injustices humans have inflicted on animals, and the injustices the white man did to Native Americans. The tone was one of scolding and blaming. She kept talking about how cruel and horrible mankind is, forgetting that the people in the audience had paid good money to hear her speak. Her tone was a bit off-putting, I thought. But everyone clapped so I thought it was just me." "They may clap to be polite, but that doesn't mean they liked the speech," Harry said. "Can you work with her to put together something more about the book and less about the injustices of the entire world?" I said I'd try, but it wouldn't be easy. Misha had a mind of her own. Over that summer after the book came out I worked sixteen hours a day on the promotion. I spoke with Sandy daily about the progress with sales of the foreign rights, updating her on what was going on with the publicity and sending her the numerous clippings that were resulting from our efforts. I was also trying to keep Misha busy with speaking engagements that would pay her something as Maurice had still not found satisfactory employment. I, myself, still had taken no money from Mt Ivy. I lived frugally off income I had from the rental of my big house while I had moved to the smaller servants' quarters on the top floor. I was beginning to think that it was time to put the house on the market. The rift with Vera made it painful to be sharing the adjacent corner lots with her and see her coming and going so close by. I had thought I would stay next door to Vera forever, to be there to help her as she got older, as if she were a member of my own family. Now it was too close. I called a realtor and set up a time to meet with her. I had obtained a list of all the Hadassah groups in Massachusetts. Hadassah is an international volunteer women's organization that supports Jewish causes. Virtually every temple or congregation has an affiliated Hadassah. I got the names of the person at each one who was responsible for setting up events and bringing in speakers. In Hadassah, I found a group of warm and welcoming women, anxious to hear Misha's story. I had books delivered ahead of Misha's appearance for her to sign and the organization would send me a check. I would arrange for Misha to receive an honorarium, usually around three to five hundred dollars, on which I took no commission. But again, the comments after her speeches were polite but with barely hinted-at reservations. Often the person making the remarks would say how much they respected what Misha had endured in the Holocaust but — it's just that — well — If I urged them to speak frankly they would, with apologies and embarrassment, tell me that they felt a little put down at being included in Misha's sweeping condemnation of all humans. They also wished she would talk more about the experiences she recounted in the book.

I had been working with a group called "Facing History and Ourselves" in an attempt to get Misha added to their roster of speakers. Headquartered in Brookline, Massachusetts, with offices in Chicago, Cleveland, Denver, Los Angeles, Memphis, New York and San Francisco, this educational

organization was and is a leader in teaching tolerance and understanding and in fighting racism, prejudice and anti-Semitism. Facing History, established in 1976, reaches 1.6 million school children a year in over eighty countries. My long-range plan for the book was to get it included in school curriculums all over the country, from the junior-high-school level up. A first step would be to align Misha with a prestigious group like Facing History. The organization sent speakers of all persuasions who had suffered various forms of injustice and hatred into the schools to talk about their personal experiences. I donated three cases of books to be used in their anti-Semitism program. As a preliminary step to adding Misha to their speakers' list, Facing History invited Misha to speak at a gathering of the key members of their group who were in charge of setting up school programs all over the state. They wanted to hear what she had to say and evaluate her delivery. I tried to tell Misha gently that this was a very important group and I offered to help her work on her speech to make it consistent with what I understood their programs to be about. Misha refused. <sup>3</sup>I go to speak my truth,<sup>2</sup> she insisted. "I not go to say what they want me to say, to be what they like. I go to be myself." On the appointed day, September 15, 1997, I accompanied Misha to the Facing History offices in Brookline. We were ushered into a large room, full of people who worked for the organization and a number of volunteers. Many of the attendees appeared to have read the book because Misha was greeted warmly and given a glowing introduction. But what followed left me speechless. I could see the looks of displeasure on the faces of the people in the room as Misha rambled on. When we left I said to her that I thought her speech was more negative than they expected and I wasn't sure she would be invited back. The next day I called my contact there and got an earful of concerns. Bottom line: They didn't think they could use her at this time. Perhaps if she worked on her speech they would reconsider. I called Misha on the phone and broke the news as gently as I could. She responded angrily, defending her right to speak freely and if anyone objected, that was their problem.

As usual, Maurice was listening in; I could hear his breathing on the line. Several days later I received a fax from Misha and Maurice saying, "Facing History wants to put Misha in a box." Maurice recently seemed to be taking over the job of being Misha's personal secretary and his tone was often belligerent. Here is the letter I faxed back on September 25: "Dear Misha and Maurice, First, I don't agree that Facing History wants to put Misha in a 'box.' I see it another way. Facing history has worked with hundreds of survivors over the past 20 years. They, more than anyone, understand that all survivors, including Misha, have suffered more than anyone who was not there can even imagine. They also respect the fact that each survivor's story is different and unique. But experience also teaches them that a person's suffering can result in immense rage. Facing History works with over a million school children a year. Children are confused by rage and it frightens them. (Most adults are upset and frightened by it, too. I think sometimes it is the quality in what Misha says, not the message itself, that puts people off.) Facing History has an excellent reputation to protect and they are very careful about who and what they place before the tender minds of the children in their care. I think it is understandable that they are very cautious. But Facing History realizes that the most powerful speakers are the survivors themselves. Their words carry an impact that a mere teacher can never deliver. So they are anxious to work with survivors to develop a speech that works well in the classroom. That is what they have asked of us. What got them concerned about Misha's speech was her telling about lancing her infections with a knife, about biting people, and several other things she mentioned that day. They don't know Misha and so they don't, perhaps, realize that she speaks very differently to children than she does to adults. (I explained this to everyone I spoke with.) I think also there was a level of anger and negativity in the speech that day that gave them concern. As I said to Maurice on the phone, Misha is free to express any feelings she has in her private life. But when she is before the public, she is there as a performer. An actor can't say anything he wants on stage. The audience expects him to stick to the performance they came to see. The performance can still be moving and true, but it must stick to the script. Misha has tremendous natural ability as a speaker and with time and work she could be truly excellent. Facing History has asked for a copy of a speech and an assurance that she would stick to the script. If Misha doesn't want to work with facing History, she may turn down this opportunity. I know her health is a concern and, of course, that comes first. In fact, I am not pushing Misha to do any of the engagements I've tried to develop for her. This is my job and my responsibility to her. It is not my place to try to force her to accept any engagement. I think we both understand that her appearances mean book sales, so we are both on the same side." I added, prophetically, "A year from now I don't want her to accuse me of not doing enough to promote this book." Which, of course, is exactly what happened. In response to my letter, I received from Misha a package, wrapped in brown paper, containing a number of gifts I had given her accompanied by another angry letter. Shirley and I spoke on the phone every day, sometimes several times a day. I expressed my frustration to her over Misha's unwillingness to cooperate with the promotion efforts I was making on her behalf. But thankfully, Shirley seemed to be making pretty good headway on her own. She had received interest from *People* magazine in doing a short book review. Then one Friday



afternoon, Shirley called me, all excited. "20/20 is interested!" she gushed, hardly able to contain herself. "The associate producer just needs to talk with her superior. She loves the book! Just one catch: They have some questions about the authenticity of the story." Shirley recalls that she was excited the whole weekend about the possibility that a big network TV show would do a story on Misha. But on Monday, the balloon burst. Shirley called me to say that 20/20 had backed out saying that since there was no way that they could verify the story, they had decided not to pursue it. So sorry, but thank you very much for bringing it to our attention. Shirley and I were disappointed but Shirley still had hopes that she might be making some headway with Oprah's producer. At the same time, things were looking up with Elaine, too. There were several parties interested in the movie rights.

1.8.07

## Chapter Eighteen

When Misha and Maurice didn't show an interest in tracking down Misha Glidenman, I took it upon myself to try. I contacted Yad Vashem in Israel, requested to speak with a researcher and asked her if they had any record of a Ukranian partisan named Misha Gildenman. He was known to have operated in the Ukraine, I explained, where he was known affectionately as Diadia Misha. Yes, they knew of him, she answered immediately. He was a big hero. He had died some time after the War. He had a son, Simcha, who had also passed away a few years ago. My heart sank. It seemed the trail was cold. But then a glimmer of hope: There was an address for Simcha's widow, Chana, in Rochevet, Israel. "Would you like her phone number?" the researcher asked. What a stroke of luck! I would need someone fluent in Hebrew to speak with Diadia Misha's daughter-in-law by phone. I had met two young women students at Brandies when I was setting up a speaking engagement there for Misha and they had offered to read the manuscript and critique it. Now I called Daniella HarPaz, who was fluent in Hebrew, and asked if she could come to my house and place a phone call to Chana Gildenman in Israel. I still have the notes from that conversation, taken down by Daniella in Hebrew and then translated by her into English. Danielle and I improvised a loose script for the call. As I sat listening, not comprehending a word of Hebrew, Daniella began by identifying herself and telling Chana Gildenman that she was looking for information about a young girl who might have wandered into Diadia Misha's camp and been sheltered there for a time. This child had lived with wolves. Had Chana ever heard of such a child? The little girl grew up and took the name Misha in honor of this man. Mrs. Gildenman grew excited. Yes, she said, she had heard from her father-in-law about a child he had saved. "When my father-in-law found this little girl she had really long fingernails," she recounted. "She was very strange." Diadia Misha "looked out for her and kept her with him all the time." The child spoke Yiddish. "She said to him in Yiddish, 'Ikh hob zikh geshpilt mit volfn.'" "I played with wolves." She "one-hundred percent believes" these stories, she said. Simcha, Diadia Misha's son, was born in 1923, and was in the camp all the time with his father, she continued. She and Simcha had married after the War. Simcha told her about a child who was wild, filthy, with long hair and nails. "He'd never seen nails so long on a child," Simcha had recalled, years later. "We always wondered what happened to the child after the war," Chana said. She would love to meet Misha Defonseca and would like to invite her to come to her house, she said. "Please tell her to write to me; I have photos to show her. If I can say one thing, she should know that Diadia Misha's family survived the War and they welcome her with open arms," Chana concluded. When Daniella hung up the phone we looked at each other with eyes wide and mouths agape. "Could this be the real thing?" we wondered. But there were some glaring discrepancies. Misha Defonseca didn't speak Yiddish as a child. In the book she had written: "When [my parents] didn't want me to know what they were saying, they talked in German or Yiddish or Russian, instead of French." And Chana had no name for the child. How many filthy children wandered alone across war-torn Europe? Hundreds? Thousands? Tens of thousands? It was second- or third-hand hearsay, a titillating story but inconclusive. And most puzzling of all, why hadn't Misha and Maurice done this research themselves? The book that I had found, *They Fought Back*, published by Shoken Books, described Misha Gildenman as "the legendary commander of a detachment of Jewish partisans numbering in the hundreds." His memoirs of that period, *The Destruction of Koretz*, were published in Paris in 1949. Yet Misha Defonseca described how after the War she had looked for a Ukranian partisan named Misha for years, to no avail. "For years after the war," she wrote, "whenever I met a Russian, I would inquire, 'Do you know a partisan named Misha?' ...I never learned anything..." And here more than fifty years later I had found him, his full name, his son's name and his closest living relative, in a couple of phone calls. It was puzzling. I mailed Chana Gildenman a copy of the book but never heard anything more from her. The French edition had been out in France for months now, and was also available in Belgium where many Belgians spoke French. I had hoped we might hear from someone back in the old country who would send Misha a letter proclaiming, "I was



there! I know you! Do you remember me? My name is —.” Nothing like that happened. I had expected we might get some independent confirmation of Misha’s story but it was not forthcoming, at least not yet. But something else happened that set our hearts all aflutter. Shirley called one afternoon in late summer. “Are you sitting down?” she asked. “What? What happened? What is it?” I answered. “Sit down! Are you sitting yet? Good. Oprah’s interested! They want to put together a show around Misha!!! Yeeeeee!!! “Oh, my God,” I screamed. “I don’t believe it!” “We have to give them some good material,” Shirley said. They have to fill up half an hour.” “What about filming her at Wolf Hollow? Why don’t you pitch that idea. With a shot of her howling with the wolves. It’s certainly different from Oprah’s usual fare.” I knew we could count on getting that shot. I had heard Joni explain at her lectures, “Wolves howl for many reasons. They howl to establish territory, they howl when preparing to leave on a hunt, they howl to let other members of the pack know where they are and they howl just as a sociable gesture.” Joni’s lectures always ended with her asking the audience to start a howl. Everyone would be a bit embarrassed at first but then we’d all throw back our heads and try to simulate what we thought a wolf howl should sound like. Amazingly the wolves would always join in and it was a thrilling thing to hear. Shirley said she’d be talking to Lisa the next day and would run the idea by her. Meanwhile I got on the phone to Joni Soffron. “Oprah’s interested in doing a show on Misha. I know. I can’t believe it either. Would it be possible to film Misha with your wolves?” “Sure,” Joni said immediately. “I could pull the three most submissive animals out of the main pen and put them in a smaller enclosure. I’ll work with Misha to introduce her to them. It’ll be great!” Dealing with Misha and Maurice was becoming increasingly difficult, however. Misha, more and more, hid behind Maurice, avoiding phone calls and demanding that Shirley and I communicate with her in writing by fax. Just finding out if she was available for a booking might take a couple of days of waiting for an answer. Then there was the endless stream of complaining, critical faxes from Maurice. Maurice kept telling me Misha was in therapy and asking me to speak with her therapist about how I should be treating her. It seemed to me to be totally inappropriate that Maurice should suggest such a thing and, even more so, that the therapist should agree to it. I didn’t want to speak with her therapist. I was her publisher, for heaven’s sake, not her assistant shrink, her loan officer, her unpaid booking agent, and the emotional dump. I wanted a simple business relationship, where I could just do my job and make the book a success, without all this drama. I was already being pulled way beyond the terms of the contract in paying Misha before payments were due, in advancing her thousands of dollars from my own pocket, in being available for her phone calls at all hours of the day and on weekends. I felt I was dealing with a bottomless pit of need. What I didn’t need was a prima dona. I needed someone who would do what she had agreed to do under the publishing contract, without all the micro-managing from her husband and without all the complaining. Misha was also having problems with American Program Bureau. She wanted paid first class tickets for herself and a friend on every engagement. Harry explained to her that two first class tickets might cost as much as the whole speaker’s fee and would be a deal breaker. Maurice complained about the clause in the contract giving APB the exclusive right to book Misha for engagements paying over a certain amount, (I think it was \$2,000.) He wanted to book dates for her himself without limitations and keep the commissions. Harry was getting exasperated, and I didn’t blame him. At one point I consulted a psychiatrist — for me, not Misha — because I felt like I was losing my mind dealing with the two of them. “The mixed messages are making me crazy. They make demand after demand and then they refuse to cooperate when you try to accommodate them,” I said to him. I didn’t know if Misha was nuts or not but I knew for sure was I headed in that direction working with her. It took every bit of patience and diplomacy I could muster to try to keep this Oprah thing on track. Misha and Maurice were fond of sending me faxes telling me how wonderful the French publisher was, how they treated her like a queen, advancing her money, looking after her every little need. There was no missing the point. Why wasn’t Mt Ivy lavishing this kind of attention on her? Why wasn’t Mt Ivy doing more to pamper her? Why wasn’t Mt Ivy making her the overnight success that she expected and deserved to be? Shirley and I commiserated daily. With the steady barrage of complaints that not enough was being done to promote the book, one would expect unstinting cooperation when a publicity opportunity was offered, which happened all the time, by the way. Misha had a thick scrapbook of clippings, many of which, to be fair, she herself had generated in small local papers. But the big ones, the ones in major newspapers and the ones that got picked up by the Associated Press and distributed through syndication around the country, had come from Mt Ivy, and mostly Shirley. In fact, thanks to Shirley, the People magazine piece had run with a favorable review of the book, albeit with an expression of incredulity regarding the authenticity of the story. Despite the publicity efforts made by Shirley and me, Misha and her husband became increasingly hostile and recalcitrant. Maurice, who in a former incarnation had been CEO at Honeywell Bull in Amsterdam, Brussels and Boston, and CEO, in Paris, at Philips NV, a global electronics company, seemed to have found his new calling in life as his wife’s personal agent. “Why wasn’t the book taking off in the U.S. as quickly as it had in France?” he would ask. “Would it do any

good to explain that France is smaller than Texas? — that the two countries are not comparable?” I asked Shirley rhetorically. We both understood that we needed national coverage on a much larger scale and we needed Misha’s cooperation. That’s why the Oprah opportunity was so crucial. Despite all the negativity coming from Misha and Maurice, Shirley was determined to do everything in her power to get Misha on the Oprah show. She made excuses to Oprah’s producer, Lisa Moran, saying that Misha’s dreadful childhood had undoubtedly left her with terrible scars and that’s why she sometimes seemed hard to deal with. Shirley is a kind, compassionate person whose impulse it was to put the best face on every challenge with this troublesome person. She never got to the point of saying, I’m doing my best and all I get is complaints. For the little I’m earning, I’ve had enough. Over a period of months Shirley kept in touch with Lisa, being exquisitely careful not to become a pest by calling her too often, while at the same time trying to keep the project in front of Lisa so she wouldn’t forget about it. She was conducting a delicate negotiation that required skill and sensitivity. I could only wait, holding my breath.

1.8.07

### Chapter Nineteen

Shirley had pulled it off! On October 16, at 10:00 am, we all met at Wolf Hollow with one of Oprah’s producers who had flown in from Chicago the night before. There was a pick-up crew, moonlighting from their jobs at a local TV station, comprised of one cameraman and one soundman. A few high, feathery clouds drifted in a gray sky and a nip of fall was in the air, but the light was perfect for filming. Joni had separated from the main pack the three least aggressive wolves who all happened to be pitch black, making them look very menacing despite their low caste. They were in a smaller pen when we arrived. Other than the animals, the pen was completely empty, with a hard dirt floor thinly covered with grass. One wolf had discovered a mouse hole at the far end of the pen and was totally absorbed in exploring it, sniffing and digging furiously. The producer from Chicago, a no-nonsense, no chitty-chat, thoroughly professional black woman worked with the cameraman to set up the shot. The wolves would be herded over to one end of the pen near the camera. Because there was a high chain link fence around the area, the cameraman would need to be inside to get a clear shot. The soundman had a boom microphone so he would be able to remain outside the fence with the producer. An involuntary look of relief swept his face as this decision was made. Joni would be inside with the wolves, just out of camera range with her assistant, a young woman, behind her. Shirley, Sandy and I stood well back so as not to be a distraction to anyone, most particularly the wolves. Misha watched the preparations calmly. She was wearing a light-weight, cream-colored jacket and dark slacks. Her platinum blond hair was newly colored and her signature yellow-green eye makeup was in place. Once the camera and mic were set up, Misha was to enter the pen and call the wolves to her. Joni had a plastic bag with cubes of some kind of orange cheese that she handed to Misha. “Put this in your pocket and take it out when you get inside the pen,” she told Misha. “They love cheese. They should come right over. I’m not sure the great hunter over there is going to cooperate,” Joni worried aloud, indicating at the wolf at far end of the pen. “He’s been at that mouse hole all morning.” Joni and her assistant entered the pen and moved out of range of the camera. Misha stood near the cameraman by the entrance to the pen. Just before she went in I heard her say to the producer at her side, “This is the first time I will be with wolves since I was a child.” “Places everyone,” the producer called. “We’re rollin’,” the cameraman answered. The producer opened the gate and Misha stepped inside. At first the wolves ignored her. She began to call to them in French, holding out a chunk of cheese in her hand. Two of the wolves slowly approached her, noses outstretched and sniffing. When they picked up the scent of the cheese they immediately came right up to her and she began feeding them from the packet she held in her hand. At this point the mouse-hunter lost interest in his quarry and came over, too. Misha was cooing to them in French, and they seemed to accept her, milling around and sniffing her hands, her jacket, her slacks. At one point Joni called out, “Misha, squat down so your head is on the same levels as theirs so the camera can get your faces side-by-side. Misha did that and the wolves began sniffing her face and bumping her gently with their shoulders. She was smiling broadly, enjoying every moment of this magical experience when one of the wolves, tail wagging playfully, put a paw on Misha’s shoulder and, leaning on her, pushed himself up to a half-standing position. At this, Joni called, “Misha, stand up. He’s going to knock you over.” Misha did as she was bidden and slowly stood up. Before everyone’s astonished eyes, the wolf rose up with her on its hind legs, both paws on her shoulders, taller than she by almost a foot. It happened so fast, no one saw it coming. In an instant, the wolf had taken Misha’s head in its mouth. Misha bent down and turned her head to accommodate the bite. She was facing me and I could see her face, still smiling, with fangs clearly visible at both temples. We all stopped breathing. Joni, from the back of the pen called out sternly, “Down! That’s

enough! Get down!" and instantly the moment was over. Joni distracted the wolves with more cheese as Misha exited through the gate. Oprah's producer got to her first. "Are you okay? Are you okay?" she asked, panic in her voice. "He not go to hurt me," Misha answered. "I'm okay." But there was a thin trickle of red on her white jacket from a tiny nick on her ear where a fang had pressed too hard. I hastily grabbed a wad of Kleenex from my purse and rushed over to her. "You're bleeding," I said. "From your ear. Are you hurt anywhere else?" Misha touched her ear with her fingers and felt the blood, seeming surprised. "No. Nothing hurts." She dabbed at her ear with the tissues and, within a minute, made an astounding suggestion. "I go back in." The producer couldn't say NO! fast enough. "Let's do the interview in front of the big pen now," she said, putting her arm around Misha's shoulders reassuringly. "You'll stand on the outside of the fence this time, with your back to the wolves, and I'll ask you questions." Misha nodded brightly. She seemed absolutely unscathed. They began setting up the next shot, placing the camera where it would have a long view way to the back of the pen. The producer had a list of questions that she wanted to ask Misha, mostly about her experiences with wolves that she had recounted in the book. She went over them one by one with Misha, encouraging her to speak slowly and enunciate clearly. "When we're done talking, I'd like to get a shot of you howling with the wolves. That will be our wrap shot." Misha nodded that she understood. As all this was going on, I went to Joni for an explanation of the startling piece of wolf behavior we had just witnessed. "It's a sign of acceptance," she told me. "They do that to their young. In fact, a domestic dog will take a smaller dog's head in its mouth, playfully. Most of us who own dogs have seen this behavior and thought nothing of it. It's just scary when a wolf does it. Actually, it's a gesture of affection." Misha stood in front of the wolf pen and answered questions for about fifteen minutes as the camera rolled and the wolves milled around in the background. Then the producer asked her to demonstrate how she had howled with wolves when she was alone in the wilderness. Misha cupped her hands to her mouth, lifted her head and let out a long, sliding howl that rose on the air like smoke. She stood still and we all waited, silently, for a response. The wolves began pacing, vocalizing in low growls, seeming agitated, but none responded to the call. Again Misha cupped her hands, raised her head and howled, and again the wolves paced and growled but none responded. "Damn," I thought, "they're not in the mood. We're not going to get a howl from them." Misha tried again, raising her head and letting out a long, plaintive cry that hung in the air for what seemed like minutes. When she stopped, there was a long silence and we all held our breath. Nothing. Just when it seemed that there would be no reply, a deep, throaty tone emanated from somewhere and rose, growing stronger, wavering and sliding, to a high, full crescendo. Where was it coming from? The cameraman raised his lens and adjusted the zoom far into the distance. Way back in the pen, one solo wolf stood on a low hummock, her head raised to the heavens, her muzzle shaping the heart-thrilling, blood-curdling song of wildness that once was the voice of this land before the arrival of the white man. It couldn't have been a more dramatic, theatrical moment if it had been scripted. When it was over, the crew packed up and left Wolf Hollow, heading to Misha's house to film the menagerie that filled every corner of its rooms and yard. Shirley and I didn't go. We felt that a piece of high drama had already been caught that day. The next week Shirley called Lisa to see what she had to say about the filming. "What did you think about the wolf taking her head in its mouth?" she asked. Lisa told her that the whole staff had gathered to watch the footage and been struck speechless. "We can't air that part," she said. "It's too much." When Shirley repeated this conversation, I immediately understood. Oprah was being sued at the time, by the beef industry, for making an unflattering remark about the relative unhealthiness of red meat. "And Oprah thought she had a problems with the meat producers! Imagine if anything had happened here! And on tape yet!" But they did want to go forward with scheduling a taping of the second part of the show in the studio with Oprah herself in Chicago. Lisa would get back to us with a date.

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Chapter 20

Shirley was working with Lisa Moran to design a format for the in-studio portion of the show. Because Misha's English was so heavily accented, the production team felt that it would be helpful to have Misha's family on the show with her. They had met Maurice when they filmed their home. They wanted to know who else they could add and Shirley told them that Misha had a son, Morris, who lived on the West Coast. They liked the idea of Morris joining Misha on air to talk about what he knew of his mother's earlier life and how he felt about it now. They also wanted Maurice to be on the show. I mailed Misha a newspaper clipping about the revolutionary effect Oprah Winfrey has had on the book

business, how a bit of attention from Oprah made bestsellers out of nothings overnight. A book's selection for Oprah's Book Club typically resulted in sales of more than a million copies. Forty-six Book Club titles in a row became bestsellers. Her show was viewed all over the world, in more than one hundred countries. We were not being picked for the Book Club but this exposure might be even better; it was a whole segment about Misha's life. It would boost sales for the foreign publishers as well, a portion of which would come back to Mt Ivy. When Shirley proposed the "family package" idea that Lisa had requested to Misha she was taken aback at the response. No, absolutely not. Maurice couldn't be on the show because he had to stay home and care for their animals and her son couldn't take time off from his job. And she wanted the Oprah people to pay airfare for her friend Odette to go along to keep her company. Shirley and I were appalled. Shirley did not relay this information back to Lisa, hoping that we could help Misha understand how important this appearance would be to the success of the book. Misha was refusing to talk with me since I had confronted her about the content of her speeches, so I spoke briefly with Maurice about the importance of Misha's cooperation in putting together the show that the Oprah staff wanted. I mentioned again the importance of Morris' availability and even offered to pay for having someone pet-sit their animals so that Maurice could go with Misha as the Oprah people had requested. Maurice insisted that Misha would do the show alone. I tried to explain that WE don't tell Oprah's people how to do HER show, THEY tell us. We should fall down on our knees and be grateful for their interest and then bend over backward to accommodate them, I said. Maurice criticized Mt Ivy's handling of promotional events, complaining that he wanted more involvement as the events were being set up. He then broadly hinted that Misha would not do publicity unless he were allowed to speak with the contact person for every event first. On October 5, 1997 I sent him this letter: Dear Maurice. I am still not clear what your point is. Does Misha want to do publicity dates or not? If she does, then they will be handled by and through Mt Ivy, according to the terms of the contract. I'm sorry but it is not possible to put you or Misha in direct contact while events are being set up. She will be informed once plans are solidified and she can accept or reject as she chooses. Nor is it possible for me not to be involved. Regarding dates for the Providence Holocaust Museum, I booked those dates and arranged to have Misha paid. Neither I nor Mt Ivy took a commission on the \$1,400 Misha will earn. Whatever your involvement regarding the issue of price, all I know is that [the contact person] called me to say she was considering canceling the event after speaking with you. That is why I am insisting that all promotional events be handled by Mt Ivy, as specified under the contract. I have been in constant contact with [the people at] Facing History. They have been very direct in explaining what Facing History is looking for in its speakers. Working with them would be a privilege and an honor. I would like to know that I have Misha's cooperation in my effort to develop a speech that both they and Misha feel comfortable with. Maurice, I think all this bickering only serves to undermine the book's chances. I suggest that we all make an effort to put aside the hostility that's been in the air lately and get on with the business of working together to make the book a success. A short while later Lisa told Shirley that the Oprah staff was working on setting a date for the studio taping in Chicago. I was ready to order jeroboams of Dom Perignon. We were both nervous wrecks with anticipation that it was finally, really going to happen and dread that it might not. Lisa wanted to set up a telephone pre-interview with Misha A.S.A.P. and asked when that might be convenient. Shirley tried to call Misha and was unable to reach her. Nobody answered at her home. The next morning Shirley finally reached Maurice who told her that Misha was in Rochester, New York on a speaking engagement but he didn't have a phone number for the hotel where she was staying or even the name of the place. He would get back to her. I was on pins and needles waiting for Shirley to call and tell me that she had located Misha. Hours passed and we heard nothing. At last Shirley got the number where Misha was staying and called Misha to tell her that an Oprah producer wanted to interview her, then and there, over the phone. She then called Lisa and gave her the number where Misha could be reached. And then we heard nothing from Misha. Friday came and went. The passing of the weekend seemed to take a month. Monday morning Shirley finally reached Lisa. Nothing could have prepared me for the call I got from her after they talked. The date was off. Lisa felt Misha was too hostile to be a guest on the show. During the phone call Lisa had commented that she'd seen the footage of Misha howling with the wolves at Wolf Hollow and thought it was powerful. Misha had responded, "Yes, I used to howl with the wolves. I also used to pee with the wolves. Do you want to see me do that too?" I was aghast. My heart sank. What was she thinking? "Is it off completely?" I asked Shirley. "Maybe not," Shirley answered. "I explained again that Misha was a Holocaust survivor and that sometimes she comes across a little rough. I said we'd work with Misha to help her understand what was expected of her. Lisa said she'd stay in touch." I called Maurice and asked him to set up a meeting with Misha at any restaurant she preferred. I wanted to try to clear the air and salvage the Oprah show. He called back and gave me a date, October 22, at a restaurant I knew Misha liked, where I hoped she would feel comfortable. When I arrived punctually for the meeting, I was surprised to see that Misha wasn't



there. Instead, Maurice was sitting at a table with two of Misha's friends: Chris, a neighbor, and Odette, her hairdresser. They all had half-finished drinks in front of them as if they'd been there for some time. "Where's Misha," I asked, taking a seat. "She's not coming," Maurice answered. "Her therapist advised her not to come because it would be bad for her health. She can't work with you. You have to work through us." In retrospect, I realized I should have said, No thank you and left right then. Instead, I sat there and prepared myself to listen to what they had to say. They all ordered dinners; I had a salad. I was not feeling hungry. I had the clear sense that I had walked into a trap. For two hours I listened to a lecture on what was wrong with the way I was promoting this book. I had the spinning feeling that I was losing my mind. I had an Oprah show in the palm of my hand and here I was listening to these three ignoramuses with not one iota of experience in publishing or book promotion between them criticizing me and arguing with me over everything I said and did. Because the Holocaust was not a burning issue for Americans as it was for Europeans, I had told Misha from the outset, it would take at least a year to get this book up and running. They complained that the book should have had overnight success, not a reasonable expectation. Yet the Oprah show could launch the book overnight and now, listening to these three, they seemed to be intent on sabotaging it. Here's the kind of dialog that went on all through dinner: They said: Why were there so few people at some book signings? You're not doing your job. Why don't more bookstores stock the book? I answered: Because Misha was a complete unknown I had to get a newspaper to cover her book signings in order to create interest and bring in a crowd. That wasn't always possible. Sometimes the bookstores would kick in and pay for advertising and sometimes they wouldn't. It wasn't always in my control. They said: Why didn't I agree to pay Odette's way when she accompanied Misha on speaking events, such as the trip to an Alaskan wolf preserve I had been working on. I answered: Because it's not my responsibility to pay for Misha's friends. Odette is free to go with her but not at the publisher's expense. They said: The French publisher had agreed to pay for Odette to accompany Misha to France. Mt Ivy should do the same here. I answered: Well, that's Laffont's decision. I have lived up to my responsibilities under the contract and then some, booking paid speaking engagements for Misha adding up to thousands of dollars. Did the French publisher do that? No, they did not. They said: Misha wants more control over the format of the Oprah show. I answered: It's their show. They set the rules. They said: Misha needs a written marketing plan from you with details about all events, names, times, places, contact persons. I answered: It's not possible to do that. In doing publicity, you don't know which contact that you made months ago could turn into a booking. You throw out seeds but you never know which ones will germinate. I was especially circumspect on this subject because I knew from experience that even mentioning plans in the works was dangerous. If some event we were developing did not "germinate" Misha and Maurice would throw it in my face as my failure to do my job. For that reason Shirley and I only contacted Misha when speaking events were confirmed. I also knew that giving Maurice a contact name and number before everything was nailed down would lead to his getting involved in the booking, a very unprofessional situation. This had happened again recently with American Program Bureau when Maurice had contacted one of Harry's clients with whom Harry was in the middle of negotiating a booking. Harry was understandably upset. When they asked me where things stood with the Oprah show I said, truthfully, I didn't know. I said Misha's remarks to the producer had not gone over well. The producer had not indicated that the show was going forward and I was disinclined to try to pursue it given the state of things. Long story short, the discussion that night went around and around in circles until I finally had had enough. I paid the bill for their dinners and stood up to leave. They remained seated at the table. I sensed that they were staying behind to talk about me. I could feel my blood pressure was up. There were several other possible engagements that I had mentioned, against my better judgment for the reasons above, at the table. It now became apparent that these would very likely not happen. One was an event with a wolf organization in Connecticut on November 2 that would be covered by The New York Times. Another was a trip to Alaska in connection with a wolf refuge there. Now I had visions of everything going down the drain. The next day, October 23, 1997, when I had calmed down, I faxed this letter to my absent author: Dear Misha, Our meeting last night confirmed my concerns about whether you are able to handle what is required of you to promote this book. According to Maurice, and also Odette and Chris, you were not at the meeting because you are very upset and unable to meet with me face to face. Although Maurice has given me your therapist's number, I will take his word that the therapist feels it is better for you not to deal with me directly. I am sorry to agree with his assessment at the end of the meeting last night that nothing had been resolved. We can bicker together or we can sell books together; we can't do both. Misha, you have changed your mind about the Nov. 2 date several times now. As of this morning you were once again willing to do it. In fairness to the people sponsoring the event, however, I am not confident that you will not change your mind again if something comes up between you and me in the interim. I do not want to put the wolf people and the nature center in the position of being embarrassed or inconvenienced should you change your mind again. Therefore, this afternoon I



canceled this date. I am presently putting on hold all other plans for promotional events requiring your participation. To name just one, as I mentioned last night, I have been working on a trip to Alaska for a joint promotion with a wolf preserve there. WalMart is one of their sponsors and my interest was in meeting with a WalMart representative about getting the book into their huge retail market. Regarding the possible Oprah date, given your absence from the table last night, I am not convinced that we should pursue trying to schedule a booking on Oprah at this time. My inclination right now is to discuss with the producer the possibility of setting up a later date, perhaps a couple of months from now, if and when you feel better. There is always the risk that they may not be interested later. However, given what happened when you spoke with the producer in Rochester, I am concerned that you will be unprepared and may inadvertently say something to alienate her again. At the slightest word that makes her or any of the Oprah staff uncomfortable, the booking could be cancelled again and then there will be no way to save it. I'd rather try to put off the date and see if the level of friction cools enough for us to work together to assure a reasonable chance for success. Misha, I am sorry to hear that you are upset. I hope that you feel better soon and that you will give me a call when you are ready to get back to work. In the meantime I will continue to promote the book in ways that do not require your involvement." I signed the letter, "Best wishes," and copied Donald Orkin, Misha's lawyer at the time. Orkin responded in a letter the same day: Dear Jane, This letter is being sent to you as the representative of Mt Ivy Press to "clear the air" relative to any past misunderstandings between the parties. Misha's goal is to make the book a success. She is aware that she has obligations to make personal appearances and she stands ready, willing and able to attend all scheduled appearances. Misha will not refuse any scheduled engagement provided she is advised in writing. However, Mt Ivy cannot and should not "control" the content of her speech. Misha reserves the right to say whatever she wants within the framework of the context of the book. There seems to be an issue of "control" in Misha's eyes. Therefore, Misha feels she can perform her speaking obligation in a better way if you are not present. Misha prefers to attend all speaking engagements with a friend. Hopefully, this arrangement will prove itself to be the best way to make the book successful and everyone will benefit financially. If the above is not acceptable to Mt Ivy, then my client reserves the right to replace Mt Ivy with a more suitable Promotor. Given that Misha was always bemoaning the fact that she had no money, let alone enough to pay for her own professional publicist, it was obvious who that "Promotor" would be: Maurice.

1.8.07

### Chapter Twenty-one

I heard back from Misha and Maurice by fax the next day: Dear Jane, Misha is able to handle what is required of her to promote this book and proved it since the launch April '97 and very recently by her trip to France and Belgium where the French edition is in the best seller list two weeks in a row since publication. Misha was not at the meeting because as Maurice explained to you because her therapist and Maurice convinced her not to be present, not because she is unable to meet you face to face. Misha is indeed very upset by your behavior and by nothing else. About Connecticut, Misha did not change her mind several times, the date November 2 was clearly reserved and kept free to go to Connecticut, we had said and written we wanted more information before making a firm commitment. Some information was provided by you at this very meeting and Maurice had to ask for more details the next morning. Odette who understands Misha and who tried apparently unsuccessfully to explain to you how to proceed, was kind enough to volunteer to do the trip with Misha. Again you very well know from past experience she never comes back on a commitment made and she never counts her efforts or her time. If you want to put everything on hold here again it is your responsibility, at the meeting Odette, Chris and Maurice tried to convey their concern in the hope you would understand how to handle, you obviously didn't hear or understand or you don't want to. We are all convinced you have gold in your hands with MishaS. Concerning the Alaska project, Odette indeed made clear she was willing to accompany Misha. The book is still Misha's story and is about her life. If you negotiate a deal we would appreciate being timely and completely informed especially if it involves appearances by Misha. Regarding the Oprah date, you have repeatedly said it was important to do it as quickly as possible. Misha is ready and feels great for this. The letter closed with another demand for a written "marketing plan." I faxed the letter to Shirley, then called her. "I feel like I'm being asked to jump through hoops to get the smallest bit of cooperation from them. Do you know how many authors would KILL to have a publisher working this hard for them? Who does she think she is? She's a complete unknown, not some Hollywood superstar." The Oprah staff had been

impressed by the book, with its story of courage and survival despite horrific odds. It was an inspiring, uplifting tale. I had fought with Misha to keep out her bitter, rage-imbued "philosophy." That philosophy was completely contrary to Oprah's upbeat message and would surely put the kibosh on this booking if she were allowed to air it to the staff. Between the prima dona attitude and the negative message, she was going to sabotage this amazing opportunity. "All I'm asking her to do is talk about what's in the book and nothing more: 'This is what happened to me and I survived.' How hard is that?" I said to Brett. "What she needs is a reality check," he replied. Shirley agreed, but she didn't want to be the person assigned to bringing Misha around. In desperation I tried writing to Misha's lawyer, hoping he would be able to impress upon his client the need for cooperation in the delicate Oprah negotiations. I prefaced the letter with a phone call to him explaining that I would like to enlist his help in smoothing out some rough spots with his client. Here is my Memorandum to Donald Orkin dated 10/27/97: I just wanted to update you following our last phone conversation. Friday afternoon, we spoke with our contact at the Oprah Winfrey Show who reiterated that they are not making a firm commitment but they are still <sup>3</sup>very interested.<sup>2</sup> We did not discuss a date for the taping of the studio interview. As you know I am concerned that Misha is not in a frame of mind to accept coaching and I have no confidence that she can handle this without careful guidance. You and I had talked about the possibility of her working with my publicist, Shirley, since she has been unwilling to deal with me. I spoke with Shirley and she feels that she is not the right person to oversee this engagement, although she would be willing to work with Misha on simple matters such as scheduling. Frankly, if Misha continues to refuse to work with me I don't think this is going to work. I would only reiterate that under our agreement it is Mt Ivy's responsibility to promote the book and Misha's responsibility to make herself reasonably available for same. Lately I have not been able to even speak with Misha; I only get Maurice who is considerably less than cooperative himself. I'd also like to bring up another matter. (This is not meant in an adversarial way. On the matters at hand, you and Mt Ivy share the same interests: We both want Misha to be a success.) My agent at Palmer & Dodge called from the Frankfurt Book Fair last weekend and mentioned that she had learned that Maurice had called the Italian publisher and also one of their European sub-agents complaining that Misha had not received money for the sale of the Italian rights. In fact, Maurice was in error as to what Misha was owed. Last June I advanced Misha all but \$200 of what she has coming to her. Misha is not a party to the Italian contract; her share is paid through Mt Ivy. I had specifically told Maurice that it was improper for him to call the Italian publisher. My agent told me Maurice's intervention is an embarrassment to Palmer & Dodge and moreover, if it continues, it could jeopardize future deals. On a related note: As Brett told you, Vera and I have taken several steps toward a possible settlement. I have just learned that within the last few days Maurice called her to inform her that Misha and I are not getting along. I can only speculate as to the reason for his passing along this information after so many months of no contact. However, again, I feel that his interference works against Misha's best interest. If Misha and Maurice are concerned about their precarious financial situation, their current actions only delay the time when their problems may resolve. I would appreciate any help you can offer to put this project back on track. Looking back I can see that the reference to Maurice contacting Vera indicated the turning point when Maurice decided to set aside Misha's differences with Vera and join with Frank Frisoli, Vera's lawyer, to oppose me. The enemy of my enemy is my friend, as the saying goes. I was unaware how dangerous the situation was becoming at the time. I was just doing my best to make the book a success with very little cooperation from my authors. If I couldn't talk to Misha directly I decided I would try to explain the Oprah situation in writing. Anyone who's ever watched her show, which is untold millions of people, knows Oprah is a very positive, optimistic, caring person. Making the world a better place has been the unflagging focus of her amazing career. Misha had a signature line that she repeated in almost every speech: "If I were in a sinking boat with a dog and a human, I'd throw the human overboard and save the dog." This statement was shorthand for Misha's entire "philosophy." It was the opposite of everything Oprah stood for and had built her empire on. Things were at such an impasse I felt I had nothing to lose. What follows is a series of letters back and forth, all of which would become trial exhibits. The following letter was dated October 30, 1997: Dear Misha, You know we have had interest from a very important television show. Oprah herself is very much in control of that show. She is a very positive person who believes that everyone has a capacity for growth and change. She uses her enormous influence to try to make the world a better place. Through her TV show, she appeals to the goodness she believes all people hold within themselves. It would be a shame to lose the opportunity for you to appear on her show, and that may be where we're heading. I received a letter from Donald Orkin following the meeting you and Maurice had with him last Monday. Misha, I'm glad that you are willing to work hard to promote the book, as indeed you have done in the past. He stated that he believes the present conflict between us arises from your feeling that I am trying to "control" you. I certainly understand why that would upset you and why you do not want to be controlled by me. I myself would not wish to be controlled by another person. Perhaps the

situation at the moment can be defined this way: You need to feel that I am not trying to control you. I need to feel that I have your cooperation and that you will not say or do anything that works against the book's chances of success. Don [Orkin] also states in his letter, "Misha reserves the right to say whatever she wants within the framework of the book." When Don tells me that, I get worried. When Maurice writes me that you want to deliver your "message" without accepting any guidance from me, I feel very uneasy. Am I worried because I cannot control you? No, I am worried because I do not believe we have agreement about just what is "within the frame work of the book." If it were the book alone that you were talking about, there would be no problem. But I have seen too many times when some of the things you've said, things that definitely are NOT in the book, have offended people. Misha, I talk to people all the time after your speeches. This is what they tell me: People feel your pain when you describe how you suffered, but you lose them when you suggest that your being a victim somehow makes you an expert on human nature. When you declare that you are an animal, not human (suggesting that you are in some way immune to human faults and superior), and then portray yourself as the judge and jury over all mankind, condemning the whole human species, people feel you go over the top. If you were to say, "I have trouble trusting humans," people would feel compassionate. Such a statement is understandable, especially given what you have experienced. But when you say, "humans are untrustworthy," or suggest that human nature is basically evil, people are offended. There are many reasons why they react this way: That statement insults average folks who are trying their best to live a morally correct life - that description fits most people who come to hear you, in fact. And what about those in our society who routinely act heroically, such as policemen and firemen who risk their lives to help others? Most people have experienced in their own lives hundreds of big and small acts of kindness, unselfishness and even courage from their fellow man, and have done the same for others. Have you also not had such experiences? Closer to your own history, to suggest that humans are basically evil dishonors those survivors of the camps who helped each other at the risk of their own safety. And it demeans the courage of the Righteous Gentiles who risked their own lives, and the lives of their families, to save Jews. But most of all, your negative description of the whole human species offends because it's not true. Some humans are untrustworthy. Some are even what most people would call evil. But some people will sacrifice themselves for their principles and will fight to the death defending another's human rights. Can you close your eyes to them? When you talked to Oprah's producer last week you apparently went into a dissertation on the harm humans do to their fellow humans, citing the American Indian as an example. It seems you understand, admire, and feel a kinship with these primitive people who lived in harmony with nature and animals. The white European settlers felt no such kinship. They felt superior to the dark "savages" they found living on the American plains. And so they exterminated them. Likewise the Nazis believed they were superior to the Jews. Superiority is the justification of every tyrant who ever has sought to persecute and exterminate "the other." What is the message of this book? To my mind, the message is not, "The nature of man is evil"; the message is simply, "This is what I saw. This is what happened to me." What happened to you was horrible. That's the message. There's no preaching or blaming, most of all, there's no moral superiority in the book. Superiority is the justification of every tyrant who has ever sought to persecute and exterminate "the other." Please think about what I have written here. I do not care what you say in private; it is not my business what you believe in your heart. I don't care what you say in speeches you arrange for yourself. But when you are representing the book in an "official" capacity (including APB dates) I think we need to have an agreement about what the "official" message is. I'd like to be able to work out an understanding that we both feel comfortable with. There are several other dates pending but I will not pursue them until we talk." In the meantime, Brett (who was also an accountant) had prepared royalty statements as required by the Publishing Agreements and mailed them to Misha and Vera. The statement contained a minor error which Frank Frisoli had pointed out to him. Brett was recovering from a massive heart attack and been hospitalized for an extended period. It was the beginning of a long siege of serious health problems. On November 11, 1997 Brett wrote a memo to Frank Frisoli: Pursuant to our phone conversation, please find attached the corrected accounting for royalties. I apologize for any confusion. I appreciate your speaking with me and still would look forward to a reasonable proposal from you to resolve our differences. Mt Ivy recognizes that your client is entitled to something for her services, However, as explained in my previous letter it is our position that she has, by her actions, at minimum modified the contract and, at worst, breached it. Accordingly, we do not know what she is entitled to and will make no payment until this issue is resolved. Vera's royalty statement was attached. Brett and I surmised that Orkin finally had had enough of being caught in the middle of the Defonseca's squabbles. We presumed, given their financial situation, Orkin had been handling this case on a pro bono, that is for free, basis. Brett worried that without a lawyer, Frisoli would be free to contact Misha and Maurice directly, to try to exploit their dissatisfaction with Mt Ivy to his client's advantage, just when we were trying to work out a settlement with Vera. The same day Brett sent this

memo to Misha: As you are aware we have received a call from one of Oprah's producers offering us a possible date for a show. I spoken with Don who advised he was not involved in being a communicator to you. Jane spoke with Don last week and he made on your behalf several demands for extensive, unc customary arrangements in order for you to agree to promote the book and suggested that Jane give you a "proposal." In response, I refer you to Paragraph 9 of the contract between you and Mt Ivy dated 1/18/95. Specifically the contract states, "The marketing, publicity and promotion of the Work shall be the responsibility of the Publisher exclusively" and requires you to be "reasonably available for the purpose of promotion of the Work via personal appearances, radio and television appearances or such other methods of publicizing the Work as determined by the Publisher." While we continue to be willing to agree to any reasonable requests to provide for your comfort in marketing the book, we are not renegotiating the contract at this point. Mt Ivy will honor all reasonable requests to provide for your sense of well-being within the framework of the contract. Please contact Jane to work out details regarding the Oprah date. If you intend to do this engagement it is imperative that all negotiations with the Oprah show continue to be handled by Mt Ivy exclusively according to the terms of the contract lest there be another major problem similar to the last one. In reply I got a letter from them saying that Misha was ready, willing and able (parroting Orkin's words) to participate in publicity. The letter was addressed to Jane Daniel, General Partner, Mt Ivy Press. When he read the letter Brett's alarm bells went off. "Ready, willing and able, my ass. She's been impossible to work with but they're making a paper trail, showing that she's being cooperative. Orkin probably told her she would be in breach of the contract by not participating in publicity. And they're addressing you as the general partner of Mt Ivy Press, L.P., a limited partnership. You are a limited partner and therefore protected from a suit. The general partner that would have liability in a suit is a company, Mt Ivy Press, Inc., a corporation. They're trying to fabricate a record of you as the general partner, so they can go after you personally instead of just suing the company. Now that Orkin seems to be gone, they may be talking to Frisoli about joining with Vera in a suit against you personally," Brett said. Brett immediately fired off this memo to Misha: "I am in receipt of your fax dated today. Thank you for confirming your willingness and interest in participating in the Oprah program. Jane is awaiting your call. For your information, Jane is employed by Mt Ivy Press, L.P. as the Publisher; she is not the General Partner."

1.8.07

## Chapter Twenty-two

October 1997 was a hellish month for me. On top of the problems with Misha and Maurice, I still had not come to a resolution with Vera. I remembered the person I had trusted without reservation. That person, it seemed, had changed so much I didn't recognize her. I tried one last letter, six pages long, pouring out my heart, pleading with her to work with me to find a solution to our impasse. Here is part of that letter: Dear Vera 10/18/97 It's very difficult for me to make myself confront what's happened between us these last two years. Over and over again, I've avoided it. Now, as I sit here typing at last, I feel very emotional, not sure what to say or how to say it. One thing I know. I never would have believed it if anyone had told me a couple of years ago that our friendship would come to such a bitter place. How could it? You were the one rock in my turbulent life for more than twenty years, the one person I could always count on to be on my side. For all those years you were the safest person in my world. I could tell you anything, I told you everything, and I always knew that you would listen and respond with the truth as you saw it, not necessarily what I wanted to hear, but always what I needed to hear. You were my reality test, so clear-minded, so reasonable. I understood that whatever you said was spoken as a caring friend who had only my best interest at heart. You were the first person I called when I was upset. You were the first person I called when something good happened. At the end of a frustrating day, we would sit together in your kitchen or mine and gab for an hour or so and, by the time we parted, I would feel the weight of the day's struggles lift from my shoulders. We did this night after night for more than twenty years. Yours was usually the first Christmas present I bought every year. We were each other's New Year's Eve date during the years when we both were without men. We went out together on our birthdays. We had so many laughs, so many good times, so many comforting rituals that went on for years: One seafood antipasto and two Old Fashioneds apiece at Legal Seafoods, the annual Jane's birthday trip to



New Bedford for lunch and a visit to Allen Haskell's nursery. Gardening across the driveway, comparing roses and discussing mulch. [My husband and my son] mowed your lawn, [your son-in-law] snow-blowered my side of the driveway. You kept me sane when my marriage failed. You listened without judging, you comforted me when I was down. You were the person who encouraged me to dream. As we sat on my lawn, me feeling broken and defeated, my marriage a shambles, my life a mess, you asked me, "What do you want to do, Jane?" And I said bleakly, "I have no idea." "Think about it," you said and the next night when we met for our evening drink I said, "I think I want to do PR." But I had no idea how to get into it. "Think about it," you said. "You probably know someone in the business whom you can call." So I thought about it and I began making calls and within a few months I was working for [a company] doing PR. From there I started my own business and wrote a best-selling book. You were always so proud of me. You always said, "You can do anything, Jane" and I'd say, "No Vera." And you'd say, "Yes you can. When I describe you to other people I always say 'Jane can do anything.'" I knew it was always your weakness to blame yourself too quickly, to be too nice, to let people push you into doing things you didn't want to do. I asked you to write down a promise to yourself not to do that. You stuck the paper in a book. Years later you pulled it out to show me. You felt guilty at the drop of a hat. We talked about it often. I encouraged you to take assertiveness training classes. You were always trying to be a good girl, always trying to please everybody, last of all yourself. [When you broke up with your long-time boyfriend] you didn't want another man. You just wanted to dance. Go for it, I said. I brought you ads I'd clipped from the Personals pages of Boston magazine, "Retired gentleman, likes to dance." We shopped at Loehmann's for a tango dress. Red, tight, sequined, with a slit and fringe you added to boot. I admired you tremendously. I thought you were the classiest lady I had ever met. To my mind you didn't need to do anything to please anyone, other than to be yourself. How did we get where we are today? We are two decent people. Better than that, we are two very bright, talented, good women who shared a remarkable friendship. For the first time in two plus decades we've faced a crisis without our most trusted compass, each other. In one of our last conversations, at George's on Washington Street, we confided that we each had wanted to pick up the phone to call for advice. "What would Jane say about this?" "What would Vera tell me to do?" You offered that the problem was that we had broken the old rule, Never mix business and friendship. But we've broken that rule before. We knew each other so well. How many discussions had we had about finding satisfaction in life? You wanted glory, didn't care about money per se. I cared nothing for glory, in fact recoiled at the mere thought of being famous. I wanted financial security. When we started the book you were barely interested - so disinterested that I wrote the draft when Misha asked you for a writing sample with your "impressions" of her. But Disney was interested. Perhaps the book would be a success. You would be co-author; your name would be on the cover. I was the publisher. Some glory for you, some financial rewards for me. We signed a contract, both of us hardly reading it. The contract, like all publishing contracts, required that the manuscript be acceptable to the publisher. But we had had a couple of disagreements over [another book project.] Just to be sure we were on the same wavelength, before the book was started I asked you if you were comfortable about my having a say in the way the book was written. No problem, you said. Not my story, no emotional investment. Whatever you want is fine, you said. I just want my name on the cover. The glory. I thought we could put our fine minds together and create something wonderful, shooting ideas back and forth as we had done so many time before. I wanted no credit for anything I contributed. I never cared whether a particular sentence or idea came from your brain or mine. We were so close, it was the same thing either way. When the book came out, you would get both glory and financial reward, I would get financial reward and my company would get glory. Plenty to go around. If all had proceeded that way we still would be friends today. But you began to resent and resist my influence over the manuscript. I knew what had to be in this book, knew it with a certainty that I felt in the marrow of my bones. I wanted the book to be more than a journey of miles. I wanted it to be a journey of one human heart from innocence, through despair, finally to peace. Stick with the action, you said. I wanted more than a chronicle of the events of Misha's life, I wanted a travelogue, with vivid descriptions of nature to balance the horrors she witnessed. Bad writing, you said. Slows the action. Bad writing, you told Misha. Too much description. An embarrassment. Misha argued with me to take the descriptive passages out. A while ago off the Internet I got a review from the Orlando Sun Sentinel. When I read it I almost cried. This is what the reviewer wrote: "The vivid imagery [mine] describing the dense, virgin forests of Central Europe is among the best passages in the book. Like the landscapes of a Brothers Grimm story, the horrors of the Holocaust are offset by the beauty encountered deep in the fairy tale woods: 'Once Misha came across a patch of wild violets so thick that the ground seemed to be spread with a robe of royal purple. I rolled back and forth and turned somersaults on them, releasing their exquisite fragrance. In the forests birch clusters were as supple as a corps of ballerinas, their slender trunks identically inclined.'" When Misha and Maurice told me that you had said that I was inexperienced and incompetent I felt the pain of a knife in my back. Yes, you didn't agree with the



direction I wanted to take, but how could you say that about me? You were my friend. This was my livelihood. When the Misha project started to go off track, I began working feverishly. I set about interviewing Misha all over again. (I learned recently that I spent three times as much time interviewing Misha as you did. She had the dates and times marked on her calendar.) I sat at my computer all day, seven days a week, and many nights until one or two in the morning. Still hoping I might salvage something of our friendship, I tried to preserve as much of your manuscript as I could work into my very different style. All the while I was terrified that you would so upset Misha that she would back out of the project. I researched survival in extreme conditions (rubbing numb feet with snow does not prevent frostbite, [as you had written] it exacerbates it. I researched the birds and mammals of Europe (jackdaws, rooks, storks, polecats), their habitat and behavior. I talked to wolf experts, asked them detailed questions, gave them the manuscript to review before it went to press. I researched crops, foods and landscapes. I researched edible flora and fauna. When the French publisher and the Holocaust historian caught your errors, I did all the historical research again from scratch. I had Misha plot her journey in miles and figure her traveling speed. I created a time line matching historical detail with Misha's accounts. I found a book that confirmed the conditions in Belgium in 1941, exactly as Misha had reported. It confirmed the starting date as 1941, not 1940 [as you had written.] There was not one fact, not one quick, casual mention or descriptive detail, that I didn't check and re-check a half-dozen times. When all was said and done, seventy percent of the text of the final book was my writing, including almost all of the descriptive material and almost all of the emotional content, what I believe is the book's 'heart.' If this book ever achieves any significant measure of success it will be because I worked like a dog for it. It will be in spite of your efforts to undermine my confidence in my own vision and Misha's confidence in me. How could I put your name on the cover? Where are we now? What can I say? I will never understand what happened. All that is left it seems is a piece of paper, the contract. You didn't live up to your obligations under that agreement; where do we go from here? We are looking at the possibility of a costly and protracted legal battle that would demean every good memory we hold together. I've lived through such a legal battle. You were with me. We both know how agonizing such conflicts are. Everybody loses but the lawyers, we used to say. Vera, I brought this book into being. I found Misha. I had been working with her for a year before I offered the project to you. I am offering to purchase your copyright. Mt Ivy's royalty statement for the first accounting period is due by the end of this month. Were you in compliance with the contract, your share of the foreign rights payments to date would be about \$12,500. There are virtually no domestic royalties for this accounting period because no payments were received from our distributor, PGW, prior to June 30. Shipments to date for the next accounting period are 4,269 minus 208 returns, or 4,061 books of which your portion would have been approximately 58 cents per books or \$2,335.44. I asked Brett to put together these numbers for me. Attached is his summary of book sales and shipments including the foreign rights income to date and a copy of PGW's statement. I recognize that you put in time and energy, though I believe it was far less than what was required to do justice to this book and far less than what was required under the contract. I ask that you name a figure that you would be willing to accept and, if it is reasonable and am able, I will meet your price. For all that's happened, for all I've written here, my first impulse still is to close this letter: 'Love, Jane'" Vera wrote back that she had found my letter very moving but she had decided she needed a "gladiator" (her former boyfriend's word for a lawyer) to protect her. I sent a short note saying, "I understand." What I thought I understood was that Vera felt she needed a lawyer to help her negotiate a settlement. What I never in my wildest dreams imagined was that her lawyer would pursue me relentlessly for ten years attempting to destroy me.

1.8.07

### Chapter Twenty-three

The more impossible, the more uncooperative, the more intractable Misha and Maurice became, the more demands they made of Mt Ivy. They poured out a constant stream of letters demanding information that no publisher is ever obliged to supply to an author. "If they spent as much effort working on Misha's diction and developing a good speech as they do telling us how to run our business, we'd be on *The New York Times* bestseller list right now," I said to Brett. Here are a couple of examples from a letter from Maurice dated November 16, 1997: "Our question based on a possible Oprah show was: How many books do you plan to reprint, how will you manage to get them in the bookstores nationwide? Now that the Oprah show possibility is delayed we think it is reasonable to ask you as a publisher to commit to: 1. a written nationwide marketing and promotional plan

and 2. a timely and reasonable quantity of reprints with assurances that the books be available in the book stores nationwide, the day Oprah, or any other show is aired." "The Oprah show gives publishers a heads-up in advance so we can print more books," I told Brett. "There is not a chance in hell that I would print several hundred thousand books until a show was taped and in the can and we were given a firm air date. I'm not going to get stuck with mountains of books and an author who won't do publicity. I have no confidence that she will cooperate with the Oprah staff or with us. It seems that she says one thing, 'ready willing and able,' but her every action leads in the opposite direction." "She keeps talking about these little dinky dates she books for herself that pay her a few hundred dollars plus what she makes from selling books. Those dates put a few dollars in her pocket and sell a handful of books but it takes national publicity to drive significant sales in bookstores. And that she's not willing to do." Shirley couldn't figure it out either. "You'd think she'd be ecstatic about doing Oprah. This is what she's been saying she wanted, a big publicity push, and now she's playing all these games. Nobody is even allowed to speak with her directly." We both felt that Misha's difficult nature was the result of the traumas she suffered as a Holocaust victim and we tried to keep that in mind and remain compassionate. Shirley kept in touch with Lisa Moran, not letting the backstage animus we were dealing with distract her from her mission. By some stroke of finesse and diplomacy she was able to explain away the negative impression that had resulted from the earlier phone interview with Misha. It was a testament to her ability to evoke compassion on behalf of someone scarred by life's injustices. Shirley believed that once there was a firm date for a taping, Misha would decide to come around and cooperate. She just couldn't imagine that Misha would throw away an opportunity like this. "She may be displeased about some minor things but she would be cutting off her nose to spite her face to screw this up," Shirley said. And we had a chance to find out. The Oprah people called with another in-studio date! But they still wanted to include Morris and Maurice. That was a sticking point we didn't know how to get around. Although we suspected that Orkin was trying to extricate himself from Misha's publicity disputes, we hoped he might use his influence one last time to encourage her cooperation. Here is Brett's letter to Donald Orkin trumpeting the good news and pointing out to Orkin the numerous ways Mt Ivy had tried to appease Misha and win her cooperation. We have received a call from one of Oprah's producers offering us a possible date for a show. It is Jane's inclination to ask for a later date, given Misha's recent demeanor. That course of action, however, would entail the very real risk that we may not get an offer again. Does Misha wish to do this engagement or not? We need a response by 5:00 pm today. Jane tells me that in her conversation with you last Friday you reiterated Misha's unwillingness to cooperate in the marketing of the book unless her demands for extensive, uncustomary arrangements are met and suggested that Jane give you a "proposal" for appeasing her. Mt Ivy has more than lived up to its contractual obligations. Regarding promotion and marketing there have been scores of articles generated by the publisher, including one in People magazine. Misha also has appeared numerous times on radio and television. Foreign rights have been sold in several countries and several more are pending. To date, Misha has earned approximately \$50,000 directly through Mt Ivy's efforts, exclusive of engagements she arranges herself. Moreover, Mt Ivy has extended Misha courtesies that go well beyond the requirements of the contract, including: 1. Making 4 early payments, totaling approximately \$25,000, 60 days prior to due date. 2. Advancing a payment of \$5,000 [the Italian deal], six months prior to due date. 3. Acting on her behalf to secure a contract with APB, a speakers' bureau, so that she may receive payment for speeches made to promote the book. Currently, the asking price for her services is \$5,000. Mt Ivy has provided APB with several thousand dollar's worth of books. 4. Arranging for the sale of the French rights through our agent, Palmer & Dodge. 5. Arranging to deliver to her a shipment of over \$2,000 worth of books, cash payment for which, under the contract, was due Mt Ivy upon receipt. My Ivy waived this requirement. Moreover, Mt Ivy has always been willing to accommodate any and all reasonable requests pertaining to Misha's comfort. Therefore, there is no reasonable basis for her behavior. Frankly, we have trouble understanding the basis for Misha's intransigence, given that her goal and the Publisher's are identical: success for the book. Please get back to Jane or me with your response on the Oprah question by the end of the day, as time is of the essence. As it turned out, all this soon became moot because Lisa called Shirley a few days later to say there had been another scheduling conflict and she was postponing the date. Shirley and I were disappointed but relieved. We decided to back off from pushing for another date for the time being. "Misha was never going to agree to having Morris and Maurice on the show," I said to Shirley, with uncharacteristic pessimism. "It was going to implode on us as soon as the Oprah people began dealing with her directly." She and I still had a shred of hope, though it was wearing thin by now. We thought maybe, with time, Misha would come around. Things didn't get better. They got worse. The complaining letters, pages and pages long, kept coming, demanding that Mt Ivy do more to publicize the book while telegraphing a message of hostility so intense it would obviously be impossible to work together. Moral superiority, condescension, and sarcasm characterized the tone

of each communication. Just one example: Instead of expressing gratitude for the opportunity to work with American Program Bureau, arranged for her by Mt Ivy, and to earn up to \$5,000 for a single speech, not to mention the free books Mt Ivy had provided to support that effort, she wrote: "APB: The contact was made so Mt Ivy wouldn't have to make the expenses to have Misha travel throughout the U.S. We were never informed that APB received several thousand dollar's worth of books though we repeatedly asked what was done with the 2000 (?) books allegedly used for promotion." Brett had answered them that the detailed information they kept demanding was not required under the contract. In fact, it was not required under any standard publishing contract. Still they would ask endless questions and demand written explanations on publicity, royalties, foreign rights sales, book shipments, on and on and on. Brett or I would write back, answering the questions and then another letter would arrive asking the same questions all over again. They accused Mt Ivy of playing games with the book's earnings, in spite of the fact that we supplied the back-up documents, third party records in the form of PGW's statement of sales through bookstores and Palmer & Dodge's statement for the income from the sale of foreign rights. The only direct-to-the-public sales Mt Ivy made were the books sold at Misha's speaking events, where she could see firsthand the number of books sold. Still Maurice would demand explanations for endless "inaccuracies", such as books that I donated to Wolf Hollow as a thank you for Joni's allowing us to film her wolves. Misha knew about this donation and had actually expressed wholehearted approval, yet Maurice would cite those free books as examples of books that we were not including in our accounting, as if we were hiding sales. They knew we gave unlimited free books to Palmer & Dodge, APB and Shirley for their marketing and promotion efforts. I had given a free book to everyone who attended our press party. I had donated cases of books to Facing History to use in the schools. They knew all this but still they acted as if there were something sinister in those free books. "We're not required under the contract to account for free books, only books that were sold and that we owe royalties on," Brett said. Still, Maurice kept repeating that Mt Ivy's reports of sales, particularly those at Misha's speaking events, were wrong and continued to accuse Mt Ivy of mis-reporting "just to confuse us." To be fair, royalty statements are very difficult to read for reasons having to do with the way sales are computed in the industry. Books are actually shipped to bookstores on a "sale or return" basis, translation: "on consignment." When unsold books are returned, the statement will reflect a minus against books shipped. And to make matters more complicated, in the industry, books are sold at all different prices, one discount for small for independent stores, another for big chains and another sliding scale for discounts based on number of books sold. I could never prepare a royalty statement myself, and sometimes even I, after ten years in the business, needed help reading one. "They have so many friends willing to help them," I said to Brett, "why don't they get a friendly accountant to explain it to them. No matter how hard we try, they accuse us of bullshitting them or of hiding money." In fact, we had been careful to observe the terms of the contract by sending timely royalty reports to both Misha and Vera that included bookstore sales through PGW and sales of foreign rights by Palmer & Dodge, the funds from which were deposited in our offshore account. This we did, although the court had frozen their royalties when it froze Mt Ivy's earnings. As for the breakdown in communication, both Misha and Maurice were now insisting that all communication with them be in writing only. That included anybody connected with Mt Ivy, even Shirley. Sometimes when Shirley had a possible interview for Misha, it might take days to hear back, by which time the opportunity might have passed. I wrote letter after letter, trying to establish a minimally civil dialogue. Here's one letter, dated December 4, 1997: Dear Misha, Regarding your last fax it seems that Brett's letter is clear: It is not required under the contract that communication with you be solely in writing. In order to be able to "go forward", we need to re-establish a normal and ordinary business relationship, which includes the opportunity to speak on the phone and have meetings when necessary in an atmosphere of cooperation, tolerance, and good will. If you are sincere in your stated desire to "go forward," please call me and set up a time when we can meet to discuss future plans. Jane The response, a letter stiffly addressed "Dear Mrs. Daniel," stated: I received your short letter dated December 4 which unfortunately doesn't answer nor my concerns nor questions. In order to go forward we need not only a normal and ordinary business relationship to be re-established I need clear and complete answers to my legitimate questions and the certainty that my publisher will keep me timely informed in the future. Treat me correctly. I did not survive all this and come to the land of liberty and free speech to be a puppet in your hands. For me making a speech is something very deep, truthful and serious and I want to do it honestly. How can I trust someone who does not even inform me on how the sales of my book [are going], forgetting it is my story you are doing. She had recently received the October 31, 1997 royalty statement covering the first six-month period as required by the contract, with complete information on all sales. The second statement wasn't due for five months, on April 30, 1998. "Would Simon & Schuster or Random House respond to these incessant questions? Hell, no! What does she want," I said to Brett, "a daily sales report, in writing? If I gave her all the things she

wants I'd never have time to do anything else." It was Chinese water torture. "Face it. They don't want to resolve these differences," Brett said. "They want to keep the pot boiling, no matter how hard we try to accommodate them. Notice they keep saying it's HER story. They don't want to work it out; they want to take over the book.<sup>2</sup> "It's worse than that," I answered. "If they were deliberately trying to kill the book, they couldn't do a better job than what they're doing right now." I had no idea at the time how prophetic that statement would be. Years later I understood the reason for their intransigence. People who do things that seem unreasonable to others may have a motive that is reasonable to them, and they may have their reasons to keep it hidden. It would be years, years filled with turmoil and duress, before I would learn what was really going on with Misha and Maurice.

Download: 21 february 2008. As is.  
<http://bestsellerthebook.blogspot.com/>

Addenda

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## Thanks and Explanations from Jane Daniel

*Publisher, Mt Ivy Press*

I'd like thank the thousands of readers of this blog for taking the time to examine the words I have written and the documents I have posted here. Visitors have come from all over the world, from Japan to Australia to Denmark to Thailand and a score of other countries, and many more from Belgium, France and the U.S., and they just keep pouring in.

As many of you know, over the last several days a firestorm has erupted over the confession by Misha Defonseca that her book, *MISHA A Memoire of the Holocaust Years*, was a hoax. Originally published in the U.S. by my company, Mt Ivy Press, and later to become an international bestseller and the subject of a French movie, the hoax has survived for an astounding two decades.

In the past week, I have been interviewed by the media and contacted informally by people asking for explanations. Several issues in particular get raised over and over, so I'd like to respond to a couple of them here.

The first question goes like this: Why did you publish the book when you knew it was not, or might not be, true? Did you do it because you "smelled the money"?

The second question also revolves around the subject of money, and it goes: When you and your company were sued, the court found that Mt Ivy had hidden money in an offshore account and failed to pay Misha and her ghostwriter, Vera Lee, their royalties. What do you say to that?

The two get lumped together into this notion: Irrespective of what we now know about Misha's wrongdoing, based on the court's findings, the publisher must also have done something bad to get hit with a \$33 million judgment. In other words, where there's smoke there's fire.

I'll begin with the first question, Why publish when the story might be fake?

Historically, publishers rely on the author's warranty that all statements of fact are true (*see warranty clause from Mt Ivy Press' publishing agreement on this blog*) and by custom there has been little or no obligation on the part of the publisher to vet the manuscript, other than superficially, before publication. There is a good reason for this convention. A publisher may decide to print a book entitled "I Was a Space Alien's Love Slave", without a disclaimer as to the tale's authenticity. Or the book may be more serious, such as "I Was Illegally Targeted by the C.I.A.", a topic that may be impossible to authenticate if matters of national security are involved.

The publisher tosses a book out into the marketplace and the public is entrusted with the freedom to decide whether to buy it, or to read it, or whether or not to believe it. The system represents the ultimate power to the people and, given the rash of fake autobiographies (such as the whopper told by Margaret "Jones", published by Penguin) that have recently been exposed, the arrangement works well.

Now, let's consider the Misha book. According to Slate Magazine, Misha Defonseca had been polishing her invented persona since as early as 1989. At the time I met her in 1994 she had been warmly embraced by the local Jewish community and I, like millions of others to follow, fell under her spell.

Contrary to some people's assumptions, I did do extensive research in preparing the manuscript for publication as I have earlier recounted on this blog. But, remember, I had no personal information to go on. I had no name, no date or place of birth, no names of anyone who knew the woman who said she had been given a "false" identity when her parents were arrested by the Nazis in 1941. Everyone said there was no way to verify this story. Should that have been a red flag? Not necessarily. My research showed that children who lost their families in war not infrequently lost their identities as well. What if Misha's story of being a "lost child" had been true? Few would suggest that she should have been barred from telling it in print because it could not be verified.

In adopting the persona of an innocent Jewish child, one of the Holocaust's most heartbreaking victims, Misha had devised a nearly perfect disguise. In her new role as Holocaust survivor, she wrapped herself in a Teflon mantle of moral superiority that few dared to challenge lest they be accused of being anti-Semitic.



How do we know this? Because in Belgium, several who publicly spoke out against her were accused of just that. [Serge Aroles](#), a Belgian surgeon, has divulged that he was so labeled for questioning her account of living with wolves. [Le Meuse reported that one of Misha's childhood friends who tried to alert the media that the story was false](#) was told that she was “jealous” and that she was “playing with fire” for “mocking another person’s misery.” In this country, in more than a decade, only two American journalists publicly questioned Misha’s truthfulness, but neither offered a scrap of concrete evidence to support their views.

In fact, there is a new post on this blog from Marc Metdepenningen, the Belgian journalist who [broke the story in \*Le Soir\* that Misha's father, Robert DeWael, was a known traitor to the resistance who sold out his comrades to the Gestapo](#). This reporter has been subjected to a wave of public hostility, challenging his research and motives, which on March 9 led *Le Soir* to [publish the damning documents that his research unearthed](#). (See link to *Le Soir* article on this blog.)

As to why a publisher chooses to publish one particular book or another — of course, we do it based on the expectation that we will make a profit on our choices. A publisher is in business to make money; a publisher is not the gatekeeper of the truth. Does anyone really want to suggest that publishers should decide for us what we should read and what we should believe? The founding fathers placed a high social value on freedom of the press. In light of recent developments, their confidence in the fourth estate appears to have been well founded.

The second question boils down to, “Given the \$33 million judgment against them, what did Jane Daniel and Mt Ivy Press do to warrant such an outcome?”

The answer is already on this blog. For those of you who have read the entire story so far, that IS what Mt Ivy Press and I DID in the creation of this book, told from the agreed-upon exhibits from the trial. The real question is “What happened AT THE TRIAL to bring about that result?” That’s a long story, enough to fill a book. I will get to it all in due time. The chapters I've posted here end with Mt Ivy's attempts to get Misha to cooperate in appearing on the Oprah show. Here's a hint: There is enough information out there now for readers to figure out why she refused to do Oprah and how this ties in with the hoax.

This much I will tell you now. There was not one penny of money earned by Mt Ivy Press that was not accounted for. Misha herself, and Vera Lee’s lawyer, Frank Frisoli, have made much over the fact that the authors never received royalties. Here is how that happened. When Frank Frisoli, on behalf of his client, Vera Lee, filed a suit against Mt Ivy Press, the complaint included Mt Ivy’s U.S. distributor, Publishers Group West (PGW), and Mt Ivy’s literary agent, Palmer & Dodge, as “reach and apply”

defendants. The term reach and apply indicates that these parties were holding money on behalf of Mt Ivy that the plaintiff wanted to claim.

In fact, virtually all of Mt Ivy's income came through these two sources: book sales in U.S. bookstores from PGW, sales of foreign and subsidiary rights from Palmer & Dodge. Immediately after they were named in the suit, both PGW and Palmer & Dodge dropped their representation of Mt Ivy. Thus, just a year after publication of the book, all of Mt Ivy's future income was instantly curtailed.

That left whatever was in the pipeline from sales that had already occurred. Mr. Frisoli then filed a motion with the court to have Mt Ivy's income paid into the court. The motion was granted. But the effect was that the royalties that might have been due Defonseca and Lee were now frozen as well. Both authors filed motions to order Mt Ivy to pay their royalties – which the court denied. So, in fact, the reason they received no royalties was a direct result of actions taken by Vera Lee's attorney, Frank Frisoli. (The legal proceedings I've described here can be found on the docket sheet, MICV 1998-02456, Middlesex Superior Court.)

As for the offshore account, you can read about that in the chapters I've already posted here. To summarize: All earnings from the book, including those held in the offshore account, were not only NOT hidden, they were reported in the royalty reports prepared for the authors by Mt Ivy Press in accordance with the publishing agreement.

There was money already in the offshore account when the court order freezing Mt Ivy's earnings went into effect, but the court refused to order Mt Ivy to pay royalties to Defonseca and Lee. That offshore money ultimately went to pay legal fees. Mt Ivy had no profits whatsoever from this book. Frank Frisoli himself acknowledged at trial that I never took a salary. In fact, I never made a penny. On the contrary, I loaned tens of thousands of dollars to the company to pay legal fees, \$17,000 of which I never recovered. My lawyer, Molly Sherden, walked me through all the money issues on the witness stand. In his opening statement Mr. Frisoli advised the jury to "follow the money." In his closing statement, he dropped this advice.

Offshore entities, by the way, are completely legal and are often used for tax purposes by companies doing business internationally. Like a personal retirement account with taxes deferred until you access the money, a company pays taxes on offshore earnings only when they are brought into the U.S. As for money being "hidden", no author is entitled to know what bank the publisher keeps its money in. Authors are only entitled to know how much of that money is due them. That's what appeared in Mt Ivy's royalty reports.

So how DID the huge judgment come about?

Misha fooled the whole world for twenty years. She needed to fool only twelve jurors and one judge for

ten days at trial. A Holocaust survivor has the stature of a secular saint in the public eye, on a par with Mother Theresa. In representing herself as a Jewish Holocaust survivor in court she committed perjury. Misha testified that she was cheated by Mt Ivy, and Vera Lee did the same. In effect, they corroborated each others' version of the money, as well as other counts in the complaint.

I have heard people say, "Well, the appeals court upheld the judgment so that must mean something fishy happened." That view reflects a misunderstanding of the appeal process. In fact, an appeal is not a process for re-examination of the evidence presented at trial. The basis for an appeal is judicial error only, e.g. Did the trial judge follow the proper procedures and apply the relevant laws correctly? In other words, an appeal is about the trial judge, not the litigants. A trial may have an unjust outcome even when a judge follows all the rules to the letter. The basis for the appeal I filed was narrow and technical: subject matter jurisdiction. My appeal alleged that the judge in state court allowed into the trial matters of copyright law that were the exclusive jurisdiction of federal court.

I have consistently maintained that the evidence did not support the judgment. How can any of the findings from this trial be free from the taint of what we now know is a massive and deliberate fraud? Sunlight is the best disinfectant, admonished Justice Brandeis. There is more to this story than what has come out so far. When all the facts are known, it will become clear that Mt Ivy Press and I did nothing, NOTHING, wrong. "Where there's smoke, there's fire" cuts both ways. Misha threw up a massive smoke screen for two decades, engulfing the trial and the aftermath. Justice was consumed in a blaze of lies.

An interviewer asked me how I felt toward Misha now that she has been exposed. I answered with an expression told to me by one of the investigators in Belgium who helped uncover the evidence: "The day you met Misha was the day you should have fallen and broken your leg when you got out of bed." I deeply regret whatever part my publishing company and I played, albeit unknowingly, in facilitating Misha's fraud. It is most unfortunate when an iconic figure abuses the public trust. Truth also has a very high social value.

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Latest

## Massachusetts judge rejects Holocaust memoir suit

By DENISE LAVOIE – 2 days ago

BOSTON (AP) — A woman who fabricated a best-selling memoir about surviving the Holocaust by living with wolves has won a Massachusetts court battle with her former publisher.

A judge dismissed a lawsuit Tuesday filed by publisher Jane Daniel against Misha Defonseca (dee-fohn-SAY'-kuh) and her ghost writer. He said Daniel had missed a one-year statute of limitations.

Daniel sued this year after Defonseca admitted she made up the story of her tortured childhood in her 1997 book, "Misha: A Memoire of the Holocaust Years."

Daniel argued that the court should overturn a jury decision that forced her to pay Defonseca \$32.4 million in a fight over the book's profits.

AP 9 october 2008

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15.10.08

## Bestseller Available Now!

### Now Available from Amazon

Hello to those of you who have been following this blog since I started it last July, and welcome to any newcomers.

It's been a long time since I've written anything here, though there have been many related postings.

I began my blog by putting up chapters of a book I had begun, "Bestseller!" which was about a bestselling Holocaust memoir that my tiny publishing company had published. That "memoir" spawned a massive lawsuit and resulted in a \$33 million verdict against me. When I began the blog, I explained that I was writing "Bestseller!" in real time and that I didn't know how the story of my struggle would end.

Through an amazing twist of fate, I was contacted by a forensic genealogist who had read my blog. She was able to prove that the memoir was a massive literary fraud. I had hoped that the truth would allow me to overturn the \$33 million judgment that was awarded to the perpetrator of the hoax and her co-author. For many months I had been feeling my way in the dark, but when the truth was revealed I had high hopes that I would, at last, find justice.

"Bestseller!" was ready to go to the printer when the story took yet another surprising turn. The complaint I filed to overturn the \$33 million judgment (based on fraud on the court) was dismissed. I will now be filing an appeal. That will be my last chance to find justice. If the appeal fails, my eleven-year struggle will end in defeat. I will lose everything – including my home, which is also my livelihood (I run a B&B.)

At the last minute I added a postscript to the book that explains what my complaint was about and what happened. I am posting it here. The rest of the bizarre, fascinating, appalling account is in the book. It is a scathing indictment of our legal system.

I want to extend my appreciation to the kind souls, many total strangers, who have expressed their support. You, dear ones, have helped me through some very dark times.

- Jane Daniel

*At the heart of justice is a divine spirit. It sprouts from the same seeds as life itself. And although we can define neither life nor justice, we are able to recognize injustice, the supreme form of which is to surrender to the status quo and to sanctify the myths and fantasies that breed it, among which is the national legend that in America there is liberty and justice for all. - Gerry Spence*

**BESTSELLER!** by Jane Daniel ISBN #9780615237510 Trade Paperback • 302 pages \$19.95 Publication Date: November 1, 2008

Pre-order for deliver as soon as the book is available.

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## Post Script: Does the Truth Matter?

Monday, October 13, 2008

I write this just as this book is going to press.

Following Misha's confession, my new attorney, Joe Orlando, prepared a complaint to overturn the judgment against Mt Ivy and me. It was filed on April 8, 2008, almost six years to the day since the judgment entered. To overturn a judgment, the rules required that I go back to the same court that issued the judgment. For me it was returning to the scene of the injustice, hoping for a better outcome.

The issues we placed before the court went to the heart of the case: the effect of the hoax on the trial.

Mass. Rules of Civil Procedure, 60 (b) sets a time limit of one year for bringing an action to overturn a judgment on the basis of five causes, including a mistake, newly discovered evidence, fraud, etc. We were well beyond the time limit for causes (1) through (5). But at the end of the paragraph, there is 60(b)(6) which provides relief "where there is something more," some kind of "extraordinary circumstances." Fraud *on the court*, committed by an *officer of the court*, rises to this "extraordinary" level and has no statute of limitations.

A lawyer is an officer of the court. Misha was her own lawyer for almost a year, signing under pains and penalties of perjury the required pleadings. A *pro se* litigant is bound by the same obligations and constraints under Mass. Rules of Civil Procedure that apply to an attorney. Joe said the courts have overturned judgments for conduct far less egregious than Misha's brazen fraud. "If this case doesn't present an extraordinary circumstance, I can't imagine what would!" he said.

One of the cases we relied on involved a matter of legal fees. An attorney representing himself in suing his client had, in a nutshell, pulled a fast one on his client to collect his fees. The court, in this case, found that the attorney's conduct rose to the level of "something extra" such that it warranted a reversal of the judgment against the client.

Misha had stepped into the shoes of an attorney, we argued, thus becoming an officer of the court. In this capacity she had committed fraud on the court in holding herself out as a victim of the Holocaust, one of the most horrendous events in human history. The sympathy and credibility she gained from the judge and jury profoundly influenced the outcome of the case.

We had been sued for failing to fulfill the terms of the contract. However, we argued, the contract was *void ab initio*, invalid from the outset, because both Misha and Vera had warranted in their Publishing Agreements that "all statements of fact are true" and the story is "authentic," a warranty that they both violated. Had the court



known at the time about the hoax, all of the accusations against us would have been examined through a completely different lens. In fact, without a contract, there never would have been a trial. The case would have been thrown out on summary judgment.

Frisoli, on behalf of Vera, and Misha (again representing herself) filed motions to dismiss my complaint. A hearing was scheduled for August 28, 2008 in Middlesex Superior Court. I notified the media. National Public Radio reported on the hearing; we listened to the broadcast as we drove to the courthouse. The Associated Press sent a reporter and a photographer. *The Gloucester Times* was there. There were others I didn't recognize. Many supporters showed up including Sharon, Karen, Barbara and Ginny. Rosian and Susie got to the courthouse but were directed to the wrong courtroom.

When we entered the courtroom there was a press camera tripod in the corner and the benches were full. Ramona Hamblin was sitting beside Misha and Maurice in the front row. She would not be representing Misha, I knew, because the Board of Bar Overseers website listed her as "administratively suspended." Misha had gained weight and Maurice sported a new mustache.

Judge Timothy Feeley took the bench. He had only received the papers on this case that morning, he told the lawyers, apologetically.

Joe spoke first. He presented his arguments in a low-key and measured tone. The case law supports our position, he said. Courts have overturned verdicts for far less egregious conduct than what occurred in this instance. Misha was an admitted liar. Her conduct in exploiting the suffering of the victims of the Holocaust for her own financial gain was a heinous act. The fraud permeated the trial. It was more than fraud; it was fraud on the court. Rule 60(b)(6) was designed to catch just such extraordinary miscarriages of justice as this.

Frisoli spoke next. He was wearing another of his matching outfits, this time a baby blue seersucker suit with a blue shirt and tie. In his usual hyper-excited manner, voice too loud, gesturing profusely, he explained that Misha hadn't admitted that she lied; her story was simply historically inaccurate. Her "alleged" admission was like the repressed memory of a sexually abused child. And, in any case, the statute of limitations on fraud had long expired. He went through the usual litany of character assassinations I'd heard so many times before. I couldn't bear to watch him; I fiddled with my rings in my lap while he spoke, "Foreign rights diverted ...lies... money hidden from my client in an offshore account... Framingham jail...." He went on and on.

Then Misha read from a prepared statement, citing statutes and case law. Her statement appeared to have been written by a lawyer. In her broken English, she explained that she didn't intend to defraud the court; she really believed her story.

The judge then asked several questions about whether the fact that the book was not a true story had any bearing on its marketability. Did it matter that the story wasn't true? Frisoli said it didn't. Joe replied that Misha's aura convinced the court that everything she said was true.

Were there any expert witnesses? the judge wanted to know. Joe answered that there was never an independent auditor. We would welcome the opportunity to have an auditor examine the company's finances if the judgment were to be overturned, he said.

And then it was over.

Outside the courthouse I gave interviews to several reporters. A TV crew from Providence shot footage that aired that night on New England Cable News. From the corner of my eye I saw Frisoli emerge through the glass doors of the courthouse and walk toward me as if to catch my eye. I turned away and he proceeded toward the entrance to the parking garage. When he had exited, I turned my head to be sure he was gone and, just as I did, he popped back through the door. Grinning a gloating smile, he raised one hand and wriggled his fingers at me. "Bye-bye, Jane," he said in a sing-song, taunting voice.

Karen saw the gesture and moved to stand beside me. "He makes me sick," she hissed. Sharon said to me later. "I wonder if the judge understands that the \$33 million was the *award* based on Misha's estimate of what the book should have been worth, plus punitive damages; it was not the book's real *earnings*."

The AP story went out on the wire and was picked up all over the world. It was obvious from the headlines that the reporters didn't understand the money issue either. The gist of the story was the same; the headlines differed.

## **Author of Faked Holocaust Book Fights Publisher for Millions**

### **Memoir faker fights publisher**

### **Author of book hoax fights for profits**

### **Author of hoax memoir asks judge to toss lawsuit**

### **Author of faked Holocaust book fights for her millions**

### **Fake book author wants profits**

### **Author of faked Holocaust book fights for millions**

### **Despite lies, US author of faked Holocaust book fights to keep \$33 million**

## Author of faked Holocaust book fights for millions

The best headline came from the little Gloucester Daily Times:

### Does the truth matter?

On October 9, 2008, Judge Timothy Feeley issued his ruling. Here are excerpts:

*The court is not condoning or minimizing the fraud and misconduct alleged in the case. If true, the allegations in the complaint are, as claimed by the plaintiffs, deeply disturbing on a number of levels. The Holocaust tragedy is a subject that deserves respect from all, and no one should attempt to obtain personal gain from the unconscionable slaughter of millions. People should not profit from their own misconduct.*

*However, this is not an action against Defonseca for her misdeeds. This is an action by plaintiffs seeking relief from judgments entered by this court six years ago. The question is not whether relief from judgment might have been appropriate at some time; the only question is whether such relief is appropriate now.*

*I find nothing extraordinary about the allegations of fraud, misrepresentations and misconduct in this case. This case lacks the "something extra." Plaintiffs argue that Defonseca's role as a pro se litigant invested her with some kind of special obligation to the court and made her fraud, misrepresentations and misconduct particularly egregious. The court disagrees. The misconduct did not arise out of [her pro se] status, and the harm to plaintiffs was not aggravated by that status.*

*The substance of the book may have given flavor to the trial, but it was the conduct of the parties, and particularly the conduct of Daniel, that was the subject of the trial and the basis for the judgment in the case. Defonseca's fraud, misrepresentations, and misconduct did not go to the heart of the case. It did not establish the basis for the jury's and the court's verdicts against the plaintiffs. Accordingly, this court finds nothing exceptional or extraordinary about the fraud, misrepresentations and misconduct in this case to justify the use of Rule 60(b)(6).*

*A 'fraud on the court' occurs 'where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. A party seeking to demonstrate fraud on the court must prove 'the most egregious conduct involving a corruption of the judicial*

*process itself.'*

*Defonseca's fraud does not rise to the level of "fraud on the court." Her misrepresentations and fraud did not prevent the court from providing plaintiffs a fair and impartial trial.*

*The Supreme Court stated that independent actions under Rule 60 (b)(6) "should only be available to prevent a grave miscarriage of justice." Here the fraud is certainly of the sensational variety, and not to be condoned, but refusing plaintiff's relief from a six-year judgment does not constitute a grave miscarriage of justice.*

*Whether Defonseca should profit from or be punished for her bad conduct is not the question for this court. The only question is whether Defonseca's bad conduct should absolve plaintiffs from their own bad conduct six years after entry of judgment. It bears noting that it is not, as claimed by plaintiffs, Defonseca's conduct that caused harm to plaintiffs. It was their own bad conduct that not only caused a jury to find against them across the board, but caused a Superior Court judge to fine their conduct so egregious that it warranted treble damages and attorney's fees.*

The motion to dismiss the claim was allowed.

"We're filing an appeal," Joe said.

To be continued ....

POSTED BY JANE DANIEL AT 8:52 AM 1 COMMENTS

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31.10.08

Letter received from Vera Lee's Lawyer

## FRANK J. FRISOLI, PC

FRISOLI AND FRISOLI  
ATTORNEYS AT LAW  
797 CAMBRIDGE STREET  
CAMBRIDGE, MASSACHUSETTS 02141

### October 27, 2008

Dear Ms. Daniel,

As you are aware, the Gloucester District Court entered an order requiring you to comply with the settlement agreement dated August 16, 2007 and suspended, at my request, the sentence of the 20 days in the House of Corrections that had been imposed upon you for violation of order of the court. Now that your frivolous action to set aside the judgment and revoke the execution held by my client has been dismissed by the Superior Court, you need to deal with me to resolve these outstanding issues or I will proceed to bring the matter back before Gloucester District Court and ask that the court revoke its suspension of the sentence previously imposed upon you. I will also seek additional sanctions by reason of your failure to comply with the agreement.

I have spoken with Coldwell Banker relative to the possibility of re-listing [your house] for sale. I am requesting that you make the premises available for inspection.... If you are not agreeable to permitting the inspection of the premises, please advise me so I do not waste my time driving to Gloucester.... I will be accompanied by the realtor Ginger Attaya and Attorney Orestes Brown when I visit as we would like to re-evaluate the marketability of the property at this time.

I understand your attorney has been quoted in the press as advising that you intend to appeal the dismissal of the litigation you filed seeking to vacate the judgment and revoke the execution. By this time I am sure you have the benefit of counsel's advice as to the probability of success with respect to such appeal. I am suggesting that you clearly understand that the only possible benefit you could incur from appealing is trying to delay the inevitable and that there is no reasonable basis to appeal as the decision of the court is consistent with the law. If you are seeking to delay the sale of the property, I am willing to discuss with you the possibility of you making some additional



payments on the outstanding execution in consideration of our agreement to defer action with respect to the sale of the real estate.... In light of the fact that you are in breach of the agreement, one remedy I have available to me is seeking an order that you vacate the house immediately and take possession of same. While I am not seeking to do that at this time, it remains an alternative that will be considered in the future.

In short, I am sending you this letter advising you that you need to talk to me about the present situation so we can reach some understanding or I will take further action at Gloucester District Court which I am sure will prove unpleasant to you. While I prefer to resolve this matter in a reasonable manner through negotiation with you and your attorney, I will deal with it however I have to, based on your response or lack thereof.

Very truly yours,  
Frank J. Frisoli, Esq.

Update: On October 28, 2008, my attorney, Joseph Orlando, filed a Notice of Appeal of the order of the court dismissing my complaint against Misha Defonseca for fraud on the court. — Jane Daniel

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## Daniel Appeal Brief

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS SUPERIOR COURT

MT IVY PRESS, )

JANE DANIEL, )

Appellants, )

) Appeals Court

) No. 2008-P2132

vs. )

)

MONIQUE DE WAEL, a/k/a, )

MISHA DEFONSECA, )

VERA LEE, )

Appellees )

)

## PLAINTIFF'S APPEAL BRIEF

### I. Statement of Issues Presented for Review

1. Did the Court err in granting the motion brought by the defendant, Misha Defonseca to dismiss Counts I and II of Plaintiff's Complaint, pursuant to Mass.R.Civ.P. 12(b);
2. Did the Court err in granting the motion brought by the defendant, Vera Lee, to dismiss Counts III and IV of Plaintiff's Complaint, pursuant to Mass.R.Civ.P. 12(b);
3. With all the facts examined in the light most favorable to the plaintiffs; did the Court err in finding, as a threshold matter, that the plaintiffs could prove no set of facts entitling them to relief from judgment, under Mass.R.Civ.P. 60(b).

### II. Statement of Case

This appeal, and the underlying litigation stem from disputes regarding an "autobiography" authored by appellee Monique De Wael, a/k/a Misha Defonseca (hereinafter "Defonseca") entitled "Misha, A Memoir of the Holocaust Years," (hereinafter, "the book"). The book, purportedly an account of Defonseca's childhood years in Nazi Germany, was ghostwritten by appellee, Vera Lee (hereinafter, "Lee"), and published by appellants Jane Daniel (hereinafter, "Daniel"), and Mount Ivy Press (hereinafter "Mt Ivy").

In 1997, Lee instituted suit in Middlesex Superior Court, C.A. No. 98-2456, against Daniel/Mt Ivy, and Defonseca, alleging, among other things, violations of M.G.L. c. 93A, breach of contract, and other torts related to their respective involvement in the publication of Defonseca's autobiography. As the litigation unfolded, each of these three parties, Mt Ivy/Daniel, Defonseca, and Lee, presented separate claims against each other by way of cross claim and/or counter claim (hereinafter, "underlying litigation").

A trial was undertaken in the Middlesex Superior Court, the Honorable Elizabeth M. Fahey, Justice, presiding, from August 6, 2001-August 20, 2001. At the conclusion of the trial, the jury entered verdicts against Mt Ivy and Daniel in the amount of 3.3 million dollars for all claims brought by Lee, and the amount of 7.5 million dollars for all claims brought by Defonseca. Subsequently, the trial court trebled these verdict amounts, and awarded attorney's fees to both Defonseca and Lee, based on the finding that Mt Ivy and Daniel had violated M.G.L. c. 93A. The resulting verdict against Mt Ivy and Daniel, exceeded 32 million dollars. The court also stripped Mt Ivy/Daniel of any legal interest which Daniel/Mt Ivy had in profits generated by the book thereafter.

Post-judgment, Daniel, by virtue of exhaustive research, and technological advancement, was able to establish that the book, Misha: A Memoir of the Holocaust Years, was a hoax. When confronted with such irrefutable evidence, Defonseca acknowledged publicly in January 2008 that the book was indeed fraudulent. Within thirty-nine days of this disclosure, Daniel and Mt Ivy filed suit in Middlesex Superior Court, C.A. No. 08-1432, seeking to

vacate the judgment entered in the underlying litigation, pursuant to Mass.R.Civ.P. 60(b)(6)(hereinafter referred to as the "current litigation"). In response, Defonseca and Lee filed motions to dismiss, pursuant to Mass.R.Civ.P. 12(b)(6). After a hearing, occurring on August 28, 2008, the trial Court allowed the motions brought by Defonseca and Lee to dismiss. Mt Ivy and Daniel appeal therefrom.

### III. Statement of Facts

In 1993, Daniel founded Mt Ivy Press, a small publishing company. Shortly thereafter, Daniel met with Defonseca in order to hear her remarkable story about her experiences as Jewish child during World War II (App. P. 0002). Among other things, Defonseca related that:

- a. As a Jewish child, age 7, she was living in Belgium, when her parents were arrested by the Nazis in 1941;
- b. She was placed in a foster home, and was given a false identity, Monique DeWael, age four. Such identity was assumed for the purposes of protecting herself from the Nazis;
- c. Defonseca was befriended by a man, who she referred to as "grandfather," whose name was Ernest DeWael, who gave her a tiny compass, and showed her a map of Europe;
- d. When Ernest DeWael expressed to Defonseca concern that the Nazis would come for her, Defonseca set out on a journey "to the East" in search of her parents;
- e. Over the next four years, Defonseca walked three thousand miles across the European theater of war, hiding in forests where twice she was befriended by wolves.

(App. P. 0003).

Defonseca told Daniel that she had been telling her story, and receiving contributions for speaking engagements, since approximately 1989, and had been warmly embraced by the Jewish community in the Boston area and elsewhere. Daniel offered to publish Defonseca's autobiography (App. P. 0003).

Daniel enlisted Lee, a French speaking writer, to ghostwrite Defonseca's story, as Defonseca's command of the English language was limited. To memorialize their understanding, Defonseca signed a collaboration agreement with Lee, intended to set forth the respective rights and obligations of the parties. Additionally, both Defonseca and Lee signed publishing agreements with Mt Ivy, in August of 1995 (App. P. 0003). Both publishing agreements contained provisions warranting, to the publisher, the truthfulness of the account(App. P. 0003-0004).

Following the execution of the various contractual agreements, Defonseca and Lee set about the business of drafting a manuscript. Over time, disagreements emerged between Lee and Defonseca regarding the scheduling of time to work together on the manuscript(App. P. 0004). During the same time frame, disagreements began to arise between Lee, Daniel, and Defonseca, regarding Daniel's editorial dissatisfaction relative to the form, substance, and production of the manuscript(App. P. 0004). To ready the manuscript for publication, Daniel attempted to undertake fact checking, including verifying historical and descriptive details, researching historical events, studying the flora and fauna of geographical locations and investigating behavior of wolves in the wild, etc. The plaintiff also sent the manuscript to wolf experts, and to Jewish scholars and Holocaust experts for review(App. P. 0005).

Enthusiastic endorsements were returned from several luminaries, including the chaplain of Brandeis University, Rabbi Albert Axelrod, Noble Laureate and renowned Holocaust survivor, Eli Wiesel, Leonard Zakim, director of the New England region of the Anti-Defamation League, and the North American Wolf Foundation(App. P. 0005).

Defonseca's account of her experience could not be subjected to standard verification and fact checking techniques, however, due to the absence of certain critical information, including, but not limited to the following:

- a. To protect her from the Nazis, Defonseca reported that she did not know, and had never been told, her Jewish surname;
- b. She had simply been called "Mishke," and had never known her parents by any names other than "Gerusha,"(her mother, a Russian Jew), and "Reuven,"(her father, a German Jew);
- c. Her parents were immigrants to Belgium, hiding out from the Nazis;
- d. She did not know her place of birth, but represented that she suspected it may have been Poland.

(App. P. 0004)

In the course of her research, Daniel learned that, at times, Jewish children of the Holocaust lost their identities when their parents were taken away. Without the names, date, and place of birth of "Mischke," it was not possible for Daniel to check the personal aspects of the story(App. P. 0005).

The American book was published in April 1997, under the title, Misha: A Memoir of the Holocaust Years. The American edition, was followed shortly thereafter by a French version, published by Editions Laffont, under the title, Survivre avec les loups, (Survival with Wolves), the rights to which were reserved exclusively to Defonseca and Lee under their respective publishing agreements. Neither Mt Ivy, nor Daniel, had any input with respect to the French edition, other than to make several specific minor corrections requested by Laffont. Other foreign editions followed(App. P. 0005).

Two significant changes were made in the Laffont editions, and subsequent editions, the rights to which were controlled by Defonseca and Lee. Identifying photographs from Defonseca's earlier life were removed, and the "false identity" of "Mischke" was changed from Monique DeWael, to Monique Valle(App. P. 0005).

Following the inception of the underlying litigation in May of 1998, until March of 1999, Defonseca represented herself(App. P. 0005). In the course of her self-representation, Defonseca filed a counter claim against Lee, contending that Lee had breached her collaboration agreement with Defonseca, and had engaged in other tortious conduct(App. P. 0005).

The counter-claim filed by Defonseca against Lee represented that Defonseca had complied with all of the terms of the collaboration agreement, including that the book was, "based on the author's life experience, accomplishments, and impact upon society"(App. P. 0006).

Additionally, Defonseca, acting pro se, filed a cross claim against Daniel/Mt Ivy, alleging, among other things, breach of contract(App. P. 0006). In the course of her self-representation, Defonseca intentionally, and systematically, filed pleadings with the Court that were materially false(App. P. 0007).

Even after the appearance of counsel on her behalf, on or about March 11, 1999, Defonseca continued to fuel a continuous and unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate the matter. This included perjured testimony at her deposition, and at trial(App. P. 0008-0009).

At the trial in the underlying litigation, the myth of Defonseca's persona as a Holocaust survivor was a central building block founded on Defonseca's perjured testimony, and propagated by her counsel(App. P. 0009).

Indeed, the book itself was introduced into evidence at trial, and was at the disposal of the jury to peruse, read, and contemplate during deliberation. Examples of Defonseca's calculated, perjurious, testimony, included:

- a. That, as a Holocaust survivor, Defonseca was extremely sensitive to threats or false representations;
- b. She was paid \$2,000-4,000 for speeches given regarding her status as a Holocaust survivor;
- c. That Defonseca is, "not very good at fighting people. I used to be with animals";
- d. That Defonseca had to steal in order to eat during the war;
- e. That Defonseca, during the war, had to kill to survive;
- f. Regarding her parents, reported to have been taken by the Nazis and taken to a concentration camp:

"For me, having a movie, it is a memory as to my parents. And I hope that somebody in the world would say I have known them";

"Because a lot of survivors are old now. That is not so much left. And if it continues, I am going to have a lesser opportunity to find somebody, somewhere";

g. Regarding her encounter with wolves in a promotional event sponsored by Mt Ivy at Wolf Hollow in Ipswich, MA, "Those wolves are not the wolves I knew 50 years ago when I was a kid, innocent in the woods."

(App. P. 0008-0009).

The impact that Defonseca's status as a Holocaust survivor would have on the jury was not lost on Defonseca's counsel, Ramona Hamlin. In closing argument, she hammered home the point, arguing to the jury:

a. "And what was she trying to defend herself about? Her life story. The tragedy has already been visited on Misha, that's not in dispute. She lost her parents at 7 years old, and wandered through Europe unprotected for four years. That's not in dispute. That happened to her."

b. "All along the reason that Misha got involved in this project was that Misha wanted to write a book to make a memory for her parents. Misha wrote to Jane in December of 1997, 'Remember you said repeatedly that you wanted to make a businesswoman of me, and I didn't want to. I wanted this book as a memory.'"

(App. P. 0009).

Her false claims of writing her book to locate anyone who knew her parents in the Nazi Concentration camp were geared towards eliciting jury sympathy. The perjurious evidence, presented by Defonseca at trial, in concert with her counsel's propagation of same, yielded the desired result, a massive award in favor of Defonseca against Mt Ivy and Daniel(App. P. 0010).

In a twenty-four page, special verdict form, dated August 20, 2001, the jury found, among other things:

- a. That Mt Ivy Press breached its publishing agreement with Lee;



- b. That Mt Ivy Press breached its publishing agreement with Defonseca;
  - c. That Lee had performed her obligations under the publishing agreement with Mt Ivy Press;
  - d. That Defonseca had performed her obligations under the publishing agreement with Mt Ivy Press;
  - e. That Mt Ivy Press had breached M.G.L. c. 93A with respect to its business dealings with Defonseca;
  - f. That Mt Ivy Press had breached M.G.L. c. 93A with respect to its business dealings with Lee.
- (App. P. 0304-0326).

An appeal was taken to the Appeals Court of Massachusetts, resting predominantly on the theory that the state law claims, involved in the underlying action, were pre-empted by Federal copyright law (17 U.S.C. Sec. 101 et seq.). On May 17, 2005, the Court of Appeals, focusing solely on the pre-emption issue, affirmed(App. P. 0011). At the time of trial, in August of 2001, there was no affirmative evidence available to Daniel that Defonseca's account was, in any way, shape, or form, false(App. P. 0011). During the pendency of the appeal, however, Daniel began to suspect, for the first time, that there may have been certain aspects of Defonseca's account that may not have been the literal truth(App. P. 0011).

Daniel began to look for concrete evidence, one way or another, regarding the truthfulness of the Defonseca account. Towards this end, Daniel contacted several genealogists, who informed her that, based upon the limited information available, they could offer no assistance in researching Defonseca's family history(App. P. 0011).

On or about June 2006, Daniel, in reviewing cartons of documents turned over to her by Mt Ivy's literary agency, post-trial, came upon a photocopy of a signature card for two of Defonseca's bank accounts. A Middlesex Savings bank account form contained the following information: name: Monique(Misha) Defonseca; date of birth 5/12/37; birthplace: Etterbeek, Belgium; mother's maiden name: Donville(App. P. 0012).

For the first time, Daniel had a hint that there may have been inconsistencies in Defonseca's autobiography, to wit, that Defonseca had claimed that she knew neither the place nor date of her birth, nor her family name.

Utilizing the information, Daniel attempted to access vital records in Belgium. However, Belgium has a privacy law which seals all vital records, birth, death, and marriage, for 100 years(App. P. 0012).

Daniel also contacted two private detectives, in order to trace Defonseca's path of immigration to the United States in 1985. However, again, the subject records were sealed and unavailable(App. P. 0012). Daniel then went to the Federal archives in Waltham, MA to search the ships' passengers lists, without success. Daniel also ran the names Donville and Dewael through the database of Yad Vashem, a world-wide repository of names of more than three million Holocaust victims, without a match. Daniel also posted queries, to no avail, on various Belgium genealogical websites(App. P. 0012).

In July, 2007, Daniel began writing a book on the subject of the ten years of litigation associated with the Book and posting chapters as they were completed on the World Wide Web as a blog. Daniel introduced her Book by saying that the end of the story had not yet occurred and asked that anyone with knowledge of the missing pieces of the account contact her. In December, 2007, Daniel engaged the services of a private detective firm with operatives in Belgium, but was still unable to attain any further information regarding Defonseca's origins(App. P.

0012). In January of 2008, Daniel was contacted by Sharon Sergeant, a forensic genealogist, who had come upon her blog on the Internet. Ms. Sergeant offered to assist Daniel in her quest to garner information regarding Defonseca's genealogy and background. Sergeant learned that the book had been translated into 18 languages and made into a full-length feature film in French billed as a "true story." Sergeant initially compared various editions of the book, particularly the French translation and observed two key differences: the "false identity" given to the orphaned "Mischke" by her "adoptive" family was changed from Monique DeWael in the Mt Ivy edition to "Monique Valle" in the French and U.K. editions, and the photographs of Defonseca's childhood in the Mt Ivy edition had been removed from foreign editions(App. P. 0012).

Sergeant then searched various databases, including the Avotaynu database of seven million Jewish names, without a match on the names Valle, Donville and DeWael. She searched Jewish deportation records for a married couple with the first names Gerusha and Reuven and found nothing. Next, Sergeant, observing that there were many references to Catholicism in the book, as well as references to comic strips that had appeared in periodicals circulated in Catholic schools, decided to research Catholic baptismal records in Belgium. In the course of such research, Sergeant discovered that there was a maternity ward in a hospital in Etterbeek, the district in Brussels identified on Defonseca's bank record as her place of birth. Correspondingly, Sergeant obtained the services of a Belgian researcher who visited the Catholic parishes located in this district(App. P. 0012-0013).

Finally, the Belgian researcher located proof of Defonseca's true identity. A baptismal record for Monica Ernestine Josephine DeWael disclosed that she was born on May 12, 1937 in Etterbeek, daughter of Robert Henri Ernest DeWael, and Josephine Germaine Barbe Donville. The family's address on the baptismal certificate was in another district of Brussels, Schaerbeek. Subsequently, an elementary school was located in the same neighborhood as the DeWael family home in Schaerbeek. A week later, the school produced a record indicating that Monique DeWael had been a student at the elementary school in September 1943, right in the middle of her reported 3,000 mile journey(App. P. 0013). At long last, Daniel learned that the name "Monique De Wael," the purported "false identity" given to Mischke in the Mt Ivy book was, in fact, Defonseca's real name.

Daniel posted the two documents on her blog and contacted an outspoken skeptic of Defonseca's story who had been posting his opinions on a Belgian blog, who then notified the Belgian press of the newly-discovered evidence. With the correct name, (DeWael, not Valle, as had been published in the French edition) the Belgian press was able to uncover even more evidence of Defonseca's fraud(App. P. 0013).

On or about March 3, 2008, Le Soir, the leading newspaper in Belgium, published an account in which it was revealed that Defonseca's real father, Robert DeWael, had collaborated with the Nazis and turned over to them members of the Belgium resistance. Confronted with the irrefutable evidence, Defonseca acknowledged, for the first time, in a statement dated 2/28/08, that the memoir was a hoax. In her statement, approximately translated from the French, and reported in the Boston Globe on February 28, 2008, Defonseca acknowledged that every essential element of her autobiography was false(App. P. 0013).

Daniel spent several years working to ascertain whether or not Defonseca's memoir was truthful. It was only with

the advancement of the internet, and the corresponding availability of worldwide networking and information access that the truth regarding Defonseca's true identity, and the corresponding magnitude of the hoax perpetrated by her in her memoir came to light(App. P. 0013).

Once again, once the hoax was identified, Daniel/Mt Ivy retained counsel and commenced suit, seeking relief from judgment, in accordance with Mass.R.Civ.P. 60(b), within thirty-nine days(App. P. 0024).

#### IV. Argument

##### A. Standard of Review

When evaluating the sufficiency of a Complaint, pursuant to Mass.R.Civ.P. 12(b)(6), the Court must accept as true the well proven factual allegations of the Complaint, as well as any inference which can be drawn therefrom, in the plaintiff's favor. *Eyal v. Helen Broadcasting Corp.*, 511 Mass. 426, 429, 583 N.E.2d. 228 (1991). The Complaint should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Nader v. Citron*, 372 Mass. 96, 98, 360 N.E.2d. 870 (1976). A Complaint is not subject to dismissal if it could support relief under any theory of law. *Whitinstille Plaza Inc., v. Kotseas*, 378 Mass. 85, 89, 390 N.E.2d. 243 (1979).

B. Reviewing the evidence in the light most favorable to Daniel/Mt Ivy and resolving all reasonable inferences in their favor, the trial court erred in determining that the plaintiffs could establish no set of facts that would entitle them to relief from judgment, pursuant to Mass.R.Civ.P. 60(b)(6).

In its opinion, the Court concluded that the plaintiff's allegations of fraud, misrepresentation, and misconduct, on the part of Defonseca, fell within the parameters of Rule 60(b)(3), and, correspondingly, did not meet the criteria required for relief under 60(b)(6). Because Rule 60(b)(3) has a one year statute of limitations, the court determined that the claim brought by Mt Ivy/Daniel, was untimely, and, correspondingly, subject to dismissal. It is the position of the appellant, herein, however, that, if ever there was a case in which relief under Mass.R.Civ.P. 60(b)(6) must be permitted, this is it.

It is established law in Massachusetts that relief under Rule 60(b)(6) is limited to instances, "when the vacating of judgment is justified by some reason other than those stated in subdivisions (1)-(5)," *Parrell v. Keenan*, 389 Mass.809, 814, 452 N.E. 2d 506(1983). Here, the facts of this case clearly demonstrate that there is "something more" at issue than a simple fraud, misrepresentation, or misconduct of an adverse party, and, correspondingly, Rule 60(b)(6) relief is appropriate, and the one year limitation rule of 60(b)(1)-(3) does not apply. 11C.A.Wright, *AR Miller & M.K. Kane Federal Practice and Procedure* 2864 @350-351(2d ed. 1995)(Wright), "A judge, considering a Rule 60(b)(6) motion, may consider whether the moving party has a meritorious...defense...whether extraordinary circumstances warrant relief...and whether the substantial rights of the parties...will be affected by granting the motion." *Owens v. Mukendi*, 448 Mass.66,72, 858 N.E.2d 734 (2006). In substance, Rule 60(b)(6) vests, "power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Allowance or denial of motions brought

pursuant to Rule 60(b) are committed to the sound discretion of the trial court. *Teamsters, Chauffers, Warehousemen, & Helpers Union, Local 59 v. Superline Trans.Co.*, 953 F.2d 17, 19 (1st Cir. 1992).

Each of the three factors to be considered by the Court, in *Owens vs. Mukendi*, supra, clearly line up in favor of allowance of the appellant's motion. First, the appellant has a myriad of meritorious defenses that she was not able to advance at trial. Not only was the defense meritorious, but would have required either a ruling in favor of the plaintiff, as a matter of law, with respect to the breach of contract count, either by means of Summary Judgment or directed verdict. Specifically, both Defonseca and Lee warranted, in their contracts with Daniel/Mount Ivy Press, that the accounts given by Defonseca were entirely truthful. The specific language of the warranty provisions contained in the contract were as follows:

A. The Author represents and warrants to the Publisher that, with respect to the Work as submitted by Author, excluding revisions or additions by Publisher (i) the Work is not in the public domain; (ii) the Author and her collaborator are the sole and exclusive owners of the Work and have full power, free of any rights of any nature whatsoever in any one that might interfere therewith, to enter into this Agreement and to grant the rights hereby conveyed to the Publisher, (iii) the Work has not heretofore been published in whole or in part; (iv) the Work is original except for material in the public domain and such excerpts from other works as may be included with the written permission of the owners thereof; (v) the Work does not, and if published will not, infringe upon any proprietary right at common law; or any statutory copyright, or trade names, or patent, or trademark rights, or any other right whatsoever, (vi) the Work contains no matter whatsoever that is obscene, libelous, in violation of any right of privacy, or otherwise in contravention of law or the right of any third party; (vii) all statements of fact are true or based upon reasonable belief, except for facts and identities deliberately misstated to preserve confidentiality or for other valid reasons, provided the Author notifies the Publisher thereof (viii) the Work, if biographical or "as told to" the Author, is authentic, and (ix) the Author will not hereafter enter into any agreement or understanding with any person, firm, or corporation that might conflict with the rights herein granted to the Publisher (App. P. 0297)(Emphasis Added).

As the Court is well aware, a warranty provision in a contract is effective and enforceable, regardless of the state of mind of the parties at the time that the contract was consummated. Certainly, at this juncture, it is beyond dispute that Defonseca knew that she was violating the provision at the time that she executed the contract. It is not clear, without further discovery, whether Lee had similar knowledge. However, whether or not Lee knew of the falsity of the account at the time that the contract was effectuated, is of no consequence. Whether Lee knew, or didn't know, the contract was nonetheless violated by Lee. Correspondingly, both Lee and Defonseca violated their respective contracts with Mt Ivy by providing a false autobiographical account to Mt Ivy.

Had the fact of the hoax been known at the time of this trial, the plaintiffs would have filed a motion for summary judgment with respect to the issue of contractual breach by Defonseca and Lee, and would have won that motion. The jury would have been instructed that, as a matter of law, it must find that Defonseca and Lee violated the

warranty provision of the contract. Instead, the jury entered findings, at the conclusion of the trial, that Defonseca and Lee had, at all relevant times, complied with their respective obligations to Daniel/Mt Ivy under the two publishing agreements(App. P. 0010).

As such, Daniel not only had a meritorious defense, but an ironclad one against Defonseca and Lee alike, that would have guaranteed a different result at trial, had this information been known.

This is to say nothing of the effect that evidence of the hoax would have had on the remainder of the issues that played out at the trial of this matter. Without question, the entire testimony of Defonseca and of Lee with respect to their contractual rights and obligations regarding them would have been nullified had it been known that the fundamental premise of the case, i.e. the truthfulness of the account, was invalid. Certainly every piece of testimony that Defonseca and Lee offered at trial would have been negated.

This is not speculation. When one imagines a scenario in which the plaintiffs are caused to admit, at the outset of a trial, that the book which they submitted to Daniel/Mt Ivy Press was sheer fabrication, presented as fact, no reasonable person could believe that it would not entirely undermine their credibility and effectiveness as witnesses in other, collateral issues.

Moreover, the fact of the hoax would have fit like a puzzle piece into the defenses advanced by Daniel at trial. For instance, Daniel, who had a vested financial interest in promoting the book, contended that she met with resistance on the part of Defonseca to a multitude of efforts to promote the book, including, but not limited to, an appearance on the "Oprah" program(App. P. 0018). Given that "Oprah" is aired in Europe as well as the U.S., it is easy to see, in retrospect, that the reason why Defonseca resisted many of Daniel's efforts to heighten the profile of the book was that increased notoriety would have undoubtedly lead to greater scrutiny of the name change. It also explains Defonseca's insistence of control of the French language edition of the book, wherein Defonseca changed the name De Wael to Valle, and identifying photographs were removed. Defonseca had a vested interest in limiting the information released in the European market, as she faced a substantially greater risk of being "outed" in that forum. In short, the more Daniel tried to push the book, the more reluctance she observed in Defonseca. The fact of the hoax would have bolstered Daniel's testimony that many of the roadblocks encountered in the promotion of the book were laid by Defonseca herself and that, despite Daniel's best efforts, those roadblocks, to a large extent, proved insurmountable.

The court must further ask itself, in addition to hard evidentiary matters, whether or not the underlying story, as related by Defonseca, and her counsel at the trial, impacted the sympathies of the jury, the trial court, and even the Court of Appeals. Defonseca's account, contained in the book, which was provided as an exhibit to the jury, told a story of Jewish child whose parents were taken from her by the Nazis, set adrift in war-torn Europe. Hers was a story of tremendous suffering, but also of perseverance and triumph in the face of seemingly insurmountable odds.

How could any fact-finder not empathize with such a victim? How could any aspect of this trial proceed with any level of impartiality, given the fact that the centerpiece of plaintiff's case was this victimized, yet heroic, woman?



The reality is that no reasonable fact finder could conclude, looking back on this trial, that this did not play a substantial role in the jury's filtering of the facts and evidence. We know that the story held sway with the Court of Appeals which commenced its opinion by stating:

"Shortly after the Nazis seized her parents, seven year old Misha Levy fled alone to the forests and villages of Europe, where she wandered for four years. Along the way, she witnessed atrocities, found herself trapped in the Warsaw ghetto, and killed a Nazi soldier in self-defense. Miraculously, she survived her ordeal, thanks to her strong will and guile, as well as, incredibly, the aid of a pack of wolves, who "adopted" and protected her, providing food, companionship, and affection. Needless to say, her story was compelling" (App. P. 0011).

If her story was compelling to the Court of Appeals, it surely was compelling to the jury in the underlying trial. Conversely, had the jury known that Defonseca had fabricated this hoax, trading on the horrific victimization of the Jewish people by the Nazis in the 1940s, their view, assessment, and evaluation of this witness would have undoubtedly swung in the opposite direction.

In summary, Daniel had not only strong, but unshakeable, legal defenses at the underlying trial that she was unable to advance. Again, these defenses apply equally to Defonseca and Lee. Lee, like Defonseca, as a matter of law, breached her contract with Daniel/Mt Ivy. A finding that Daniel failed to adequately promote the book would, in the eyes of the jury, have damaged not only Defonseca, but Lee. Moreover, the canonization of Defonseca, and demonization of Daniel, led to the inevitable conclusion that Daniel trampled not only Defonseca, but the purportedly innocent ghost-writer as well. Correspondingly, the first of the Owens' factors is met.

The Court must now consider the second Owens' factor, i.e., whether, "extraordinary circumstances warrant relief." If ever there has been a case, in the history of Massachusetts jurisprudence, in which extraordinary circumstances exist, warranting the vacating of a judgment, it is this case. To be sure, there has been a grave miscarriage of justice visited upon Daniel as a result of the fraudulent conduct of Defonseca at trial. Defonseca fabricated a false Holocaust survivor story, ensnared Daniel in its' web, sued Daniel for failing to actively promote the hoax, and recovered a 32.4 million dollar verdict against Daniel, thereby financially ruining her. In effect, Defonseca utilized the Massachusetts court system as an instrument in a plot to profit from her deceit and duplicity, to the grave and irreversible detriment of Daniel. The impact upon Daniel can not be overstated. The judgment obtained by Defonseca and Lee was one of the largest jury verdicts in the history of the Massachusetts court system. A thirty-three million dollar verdict would be devastating to a large corporation, much less to an individual such as Daniel, and a small corporation, such as Mt Ivy. The harm which has come to Daniel, as a result of Defonseca's actions, cannot be permitted to stand.

The extraordinary nature of this situation extends far beyond the impact which Defonseca's hoax has had on this court system, and the underlying litigants, however. Should this Court place its imprimatur upon the judgment in this case, it will serve to diminish and corrode the legacy of Holocaust victims and survivors across the world. One cannot ignore the subject matter of Defonseca's hoax. Put bluntly, Defonseca traded and profiteered upon one of

the greatest human tragedies in recorded history, the Nazi persecution and victimization of the European Jewish population during the 1930s and 1940s. Defonseca, knowing that stories of Holocaust survivors are of great public interest and empathy, and, correspondingly, profitable and marketable, decided to proclaim herself such a victim. She and Lee made money on the backs of the true victims of the Holocaust, and then utilized this court system as a means to further capitalize upon her devious scheme. Furthermore, Defonseca's memoir, subsequently revealed as fabrication, plays directly into the hands of those who would deny that the Holocaust occurred at all. As noted by Chuck Lane, a member of the Editorial Board of the Washington Post, and a teacher of a class on journalist fraud at Princeton University, in an interview with NPR on March 5, 2008: "There is a real harm though...when you have people faking documents about the Holocaust. Unfortunately, there are Holocaust deniers in this world, and that sort of fabrication...can really feed very pernicious views about the underlying truth about actual historical events."<sup>1</sup> Commenting on another false Holocaust memoir, "Angel at the Fence" Ken Waltzer, Director of Jewish Studies at Michigan State University stated, "Holocaust experience is not heart-warming, it is heart-rending. All this shows something about the broad unwillingness in our culture to confront the difficult knowledge of the Holocaust... All the more important then to have real memoirs, that tell of real experience in the camps." Never has this issue been more topical, given the recent statement of Bishop Richard Williams, denying the Holocaust generally, and the use of gas chambers specifically. This remains, sixty years after WWII, an issue of critical social importance.

Should this Court allow the judgment to stand, it would constitute an endorsement of Defonseca's activities, heretofore described. Unquestionably, there will be far-reaching social and historical ramifications should this Court signal that Defonseca's conduct, in some respect, was, and is, tolerable, or otherwise acceptable. This Court should not be complicit in the ratification and perpetuation of Defonseca's scheme, which, ipso facto, cheapens and diminishes the legacy of Holocaust victims and survivors alike. On the other hand, should the Court decide to take the appropriate action, and revoke the underlying judgment, a clear message would be sent to the world at large, that the Massachusetts court system will not tolerate this abject affront to the historical and sociological legacy of the Holocaust.

Further, the ramifications of this case also implicate the interests of the publishing industry as a whole. As the Court is aware, there has been a proliferation of profitable hoax memoirs in recent years. In each of those cases, publishers, such as Mt Ivy, have been victimized by unscrupulous "authors" who warrant the truthfulness of their stories, but then produce a product which is created from whole cloth. As a matter of public policy, publishers and readers alike should be able to rely upon the representations of authors with respect to the truthfulness of the materials introduced into the stream of commerce. The integrity of the publishing institution is weakened and watered down each time a fabricated autobiography finds its way into a reader's hands. Once again, should this Court allow Defonseca's fraud to stand, it would undermine the legitimacy of the publishing houses which, across the world, invest money and take financial risk in introducing to the marketplace important autobiographical literature. The message that this Court would send, if it allowed Defonseca's conduct to stand, would be that the

Courts will endorse and embrace such falsity, so long as it is sufficiently well-concealed, that it is undiscoverable for years after the book has been introduced and the money made by the author. This represents yet another extraordinary aspect of the case, which must be considered by the Court, in determining whether or not equitable relief is due under these facts.

The third Owens' factor is also met. The substantial rights of the parties will be affected by the granting of this motion. There will be substantial changes in the positions of the parties, as they now stand, as a result of the Court's ruling in favor of the plaintiff on this matter. Indeed, this is entirely the point. As the Court in Klapprott, supra, observed, "in simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Indeed, the positions of the parties must change for justice to be served. The respective duties and obligations of the parties must be evaluated by a fact finder in full light of the truth. Only then can the appropriate liabilities be fairly assessed.

In summary, the Court of Appeals must ask itself, is there something more here? Respectfully, the appellant would submit that the facts and circumstances of this case extend far beyond what the trial court characterized as a "fascinating factual background" (App. P. 0397). The implications of allowing this judgment to stand have a wide reaching public policy impact that affects not only the party litigants, but the very core of the Massachusetts judicial system itself. It is easy to be swept away with the mechanical aspects of our justice system, and miss the forest for the trees. Generally, in the interest of finality, application of the rule should have meager scope. But, courts should keep in mind that the purpose of the rule is to accomplish justice. For that purpose, Courts may construe the rule liberally. *Freitas v. Freitas*, 26 Mass.App.Ct. 196, 198, 525 N.E.2d. 438 (1988). When the Court of Appeals looks at itself in the mirror, it cannot be satisfied that substantial justice has been accomplished in this case. Can justice truly be said to have been done, when Daniel was saddled with a 33 million dollar verdict in a trial in which the truth of the memoir was accepted fully by all: judge, jury, defendants? Can the Court of Appeals tell itself that it has served justice, when the writer of a fabricated Holocaust memoir prospered by virtue of a trial, using the mechanism of the Massachusetts judicial system, riding the falsity of those memoirs to the finish line? Can this Court of Appeals feel that it has done its job when the Massachusetts judicial system has been used as a pawn in an unconscionable scheme, to prosper on the backs of Holocaust victims, and on the manipulation of trusting readers? If this Court hesitates in answering yes to these questions, then it must look deeper in its analysis of whether this case truly presents, "something more" than garden variety fraud; implicating societal concerns that span far beyond the relationship of the underlying litigants. This court has the power, created by the legislature, to ensure that the right thing is done in this case. It is not the easy route. It is not the expedient route. It is, however, the step that the Massachusetts judicial system must take to wash its hands of the misdeeds that were perpetuated by the appellees, leading to an erroneous and unconscionable judicial outcome. Indeed, Massachusetts courts have allowed relief from judgment in circumstances far less egregious than those that apply in this case. For instance, in *Harvey & Sons v. North Works Properties Inc.*, 19 Mass. Law Rep. 82; 2005

Mass. Super. Lexis 59 (2005). The Superior Court, sitting in Worcester, vacated a judgment, utilizing 60(b)(6) because the amount of the underlying judgment bore no accurate relationship to the true damages sustained by the plaintiff. The Court, in that case, determined that it simply could not allow such an inappropriate judgment to stand, even though the conduct of the defendant in that case was a precipitating factor in the creation of the erroneous underlying judgment. The court, nevertheless, deemed it imperative to have an accurate measure of damages. The judgment was vacated.

Similarly, the Suffolk County Superior Court in *Suffolk County Sheriff v. Afscome*, 16 Mass. Law Rep. 511 2003; Mass. Sup. Lexis 223 (2003) vacated an arbitration award, because false testimony was given at an arbitration hearing. Based upon public policy concerns, the Superior Court vacated, utilizing Mass.R.Civ.P. 60(b)(6).

The same is true, also, of the Court of Appeals, which has affirmed Relief from Judgment entered by the trial court on some occasions, and imposed it on others. For instance, in *Bowers v. Fordham Appeals of Marshfield & Others*, 16 Mass. App. Ct. 29, 448 N.E.2d. 1293 (1983), the Court of Appeals overruled the trial court's refusal to apply 60(b)(6) to vacate a judgment, in a case where the Court determined that a selectman for the town of Marshfield had entered into a consent agreement, with respect to which he lacked authority to bind the town. So too did the Appellate Division of the District Court reverse a trial court for failing to vacate a judgment, pursuant to Mass.R.Civ.P. 60(b)(6), in a situation where the record reflected that a consent judgment was improperly derived. See *Duco Enterprises Inc., v. Apdelnour*, 1994 Mass. App. Div. 103; 1994 Mass. App. Div. Lexis, 45 (1994).

Similarly, the Appellate division of the District Court affirmed a trial court determination, to vacate, under Mass.R.Civ.P. 60(b)(6), a judgment that had arisen out of a respective transfer of a case, noting that extraordinary circumstances existed, because, "the award of damages exceeded the amount sought in the statement of damages..." See *Nixon v. Petrell*, 1993 Mass. App. Div. 1; 1993 Mass. App. Div. Lexis 1 (1993).

Additionally, in the case of *Kniskern v. Melkonain*, 68 Mass. App. Ct. 461, 862, N.E.2d. 440 (2007), the Court of Appeals upheld a trial court's determination that a judgment needed to be vacated, under Mass.R.Civ.P. 60(b)(6), notwithstanding the lack of any effort, whatsoever, on the part of the individual against whom the judgment had been entered, thereby leading to such judgment, because the judgment, if allowed to stand, would be contrary to the exclusivity provisions of the Worker's Compensation Act. Similarly, the appellate court in *Winthrop Corp., v. Lawenthal*, 29 Mass. App. Ct. 180 (1990), reversed a trial court decision, refusing to vacate a judgment, pursuant to Rule 60(b)(6), because an arbitrator was not armed with full information at the time that the underlying arbitration was undertaken. The Court held that it could not allow the judgment to stand, because it was, "left with the abiding conviction that justice has not been done with respect to the issue of legal fees, a matter of particular concern to the Court." Here again, read fully, at the core of this decision, is the financial outcome to one of the litigants, that simply did not correlate to actual damages. If the unjust imposition of a few thousand dollars in attorney's fees in the Winthrop case, can justify a vacating of the judgment in the Mass.R.Civ.P. 60(b)(6), what of a 33 million dollar judgment against Daniel here?

Thus, it is clear, that trial courts, and appellate courts, under appropriate circumstances, will vacate judgments,

utilizing Mass.R.Civ.P. 60(b)(6), after one year, where justice so requires. When contrasted with these situations, in which it was determined that “something more” existed, because an inappropriate damage award was entered, or because the judgment conflicted with procedure, the case at hand has to be considered “something more, than something more.” Again, in addition to the social policy issues, the appellant herein has a 33 million dollar judgment against her, arising directly out of the fraud and malfeasance of Defonseca, the rewards for which were similarly visited upon Lee, whose financial interests were aligned with Defonseca’s throughout the trial. Thirty-three million dollars is a life destroying award. Daniel’s life has literally been decimated by virtue of this verdict. If other Appellate panels can determine when awards should be vacated, because, in essence, they do not correlate to the true amount of damages that should have resulted, then certainly this case must fall into this category.

C. The Trial Court failed to construe the evidence, and related inferences, in the light most favorable to the Appellants, when it concluded that the fact of the hoax had little or no impact on the outcome of the trial in the underlying litigation.

At the outset of its opinion, the Court acknowledges its obligation to construe the evidence in the light most favorable to the plaintiff, and to accept those allegations made by the plaintiff, in its Complaint, as true. Should not the trial court, in its analysis, have accepted the reasonable inference that the fact that the book, which was at the center of the trial, was a hoax, would have profoundly, and across the board, affected every aspect of the trial? Just as jurors are instructed not to discard common sense at the courtroom’s door, neither should the courts. No reasonable person could conclude that this information, if known to the jury, would not have profoundly affected the outcome of this trial. The entire event was colored by the notion that Daniel breached her contracts with Defonseca and Lee, a fact which, if the hoax were known, would have been an impossible conclusion for the jury to reach. The entire process was infected with the ill-begotten notion that Defonseca, victimized during World War II, was victimized again by an unscrupulous publisher. For the purposes of the motions brought by the defendant, and, in fact, in a real world analysis, the Court was required to accept the inescapable fact that the masquerade of deception as truth at trial not only impacted the trial, but drove the outcome thereof.

Further, the trial court’s presumption that the underlying trial was really all about the conduct of Daniel, within the framework of everybody’s belief that the memoir was truthful, is entirely misplaced. What we now know is that all the evidence against Daniel/Mt ivy on which the court predicated its findings of “egregious conduct”(App. P. 0066) was proffered by a de facto perjurer and a second party who stood to gain immensely from that perjury. Further, how can Daniel be culpable for failing to market a product that was, in truth, valueless? A memoir known to be false will generate no interest in the buying public, and thus has no market value. In fact, history has shown that a responsible publisher, upon learning of the falsity of a memoir, should take affirmative steps to ensure that the work is not marketed or sold at all. And so it was in the latest of false Holocaust memoirs, offered by Herman Rosenblat, “Angel at the Fence.” When Rosenblat’s account of his time in a concentration camp was proven false, the publisher, Berkeley Books, immediately cancelled publication of the book and demanded that the author and



the author's agent return all money that they received for the work. Daniel would have taken the same course, had she discovered the fraud at an earlier time. How can the underlying judgment be fundamentally sound as the trial court states in its opinion, when the building block of the financial losses claimed by the plaintiff in the underlying litigation was a memoir that, at its core, had no market value? Indeed, all would agree that the appropriate course for the publisher to have undertaken, once the fraud was discovered, was to immediately cease to market the book, and, most probably, as the publisher in the Rosenblat case did, demand restitution from the writer. There would have, and should have been, no profits from this book, so how can 33 million dollars in damages awarded Lee and Defonseca arise from a book which, had the facts been known, would not have made dollar one? Further, it is clear that the jury, and later the trial court in its 93A decision, blinded with empathy, were willing to take huge leaps of faith, relative to the evidence in the underlying case. Without the benefit of any expert accountant testimony, judge and jury accepted without specificity that "monies" had been "misappropriated," or "pilfered" by Daniel(App. P. 0060) without identifying the dollar amount of the monies, their source, the manner of pilfering and misappropriating(check, cash, other), any supporting paper trail, or any monies that were unaccounted for by Mt Ivy(App. P. 0060).

In short, both the jury, and, more distressingly, the trial court, blissfully accepted wildly speculative claims of loss, based upon entirely incompetent evidence, all in the name of doing "justice." The proof is in the pudding, absent court/jury infatuation with the romance of Defonseca's story, the staggering verdict in this case would be inconceivable.

D. The plaintiff is entitled to relief pursuant to Mass.R.Civ.P. 60(b)(6) because a fraud occurred on the court at an underlying trial.

Mass.R.Civ.P. 60(b)(6) specifically preserves to a litigant, a right to file an independent action in order to vacate a judgment based upon fraud upon the Court. "A fraud on the Court occurs where it can be demonstrated clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial systems' ability impartially to adjudicate a matter by improperly influencing the trial or unfairly hampering the presentation of the opposing party's claim for a defense." *Paternity of Cheryl*, 434 Mass. 23, 35, 746 N.E.2d. 488 (2001). The doctrine embraces, "only that species of fraud which does, or attempts to, defile the Court itself, or is a fraud perpetuated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Pena v. McGill Dev. Corp.*, 388 Mass. 159, 165, 445 N.E.2d. 1059 (1983).

It is axiomatic that there was rampant and unhindered perjury at the trial of this matter, offered by Defonseca. Indeed, the introduction of the book itself into evidence constituted the admission of perjurious evidence. Beyond the actions of Defonseca as a witness, however, the Court must consider her conduct while acting as her own counsel, pro se, in this action. From the inception of the underlying litigation in May 1998, until March 1999, Defonseca represented herself, filing pleadings, propounding and responding to discovery, and interacting with

the judicial system as pro se counsel(App. P. 007). During this time frame, Defonseca filed numerous pleadings with the Court, which were patently false. While representing herself, Defonseca engaged in a pattern of filing false and fraudulent pleadings with the Court. For instance, in her Verified Answer, Cross Claim, and Counter Claim, filed by Defonseca, acting pro se, on 7/20/98, Defonseca affirmatively represented, in addition to other matters:

- a. "...the work, Misha...is Defonseca's story.";
- b. "Defonseca, who is a Holocaust survivor, is not only deprived of a well-deserved quiet and comfortable enjoyment of a job well done...";
- c. "...that the defendant has fully performed all duties with respect to the relevant contracts...";
- d. "...all actions undertaken by the defendant were undertaken in good faith, and any representations that may have been made by the defendant were true";
- e. That Defonseca and Lee were to write and prepare a manuscript about the life of defendant, Defonseca, "during the Holocaust years...";
- f. That the conduct of plaintiffs herein, Daniel, and Mt Ivy, "caused heightened stress, emotional distress, and pain on Defonseca, who is a survivor and, as such, is very sensitive to threats of misrepresentation, and to any tendency to downplay or sugar coat the events that happened during the Holocaust.";
- g. That Defonseca had experienced, "emotional pain of reliving her story.";
- h. That each of the foregoing paragraphs were personally reviewed by Defonseca and that, "said statements are true and accurate to the best of her knowledge and belief."

(App. P. 0006-0007).

The representations made by Defonseca were made under notary seal. In other pleadings, filed pro-se, she represented:

- a. "all actions undertaken by Defendant in Cross Claim, Defonseca, while acting as her own counsel, and any representations that may have been made by the defendant in cross claim to the plaintiff in cross claim were true";
- b. "to the extent that the Defendant in Cross Claim, Defonseca, owes any duties to Mt Ivy and Daniel, Defonseca has fully performed and fulfilled such duties or obligations."

(App. P. 0007).

Furthermore, Defonseca repeatedly filed pleadings with the Court wherein she represented, pro se, that she had, at all relevant times, complied with her obligations under the publishing agreement with Mt Ivy, a fact now known to be entirely false. She further filed sworn affidavits with the Court, prior to retaining counsel, indicating the following:

- a. That she felt that she had been taken advantage of by Lee, and Daniel/Mt Ivy, with respect to her, "story...without any consideration or respect for what I went through, not only in my earlier life, but during this whole, grueling, and unnecessarily lengthy exercise of reliving my experience, to make the book in English...";
- b. that "my story, and my image belong to me. It is my life. Nobody has the right to exploit or make money from it

without informing me and paying my share of the revenues";

c. That Defonseca was "terribly stressed to have to go over it again";

d. That Daniel had failed to, "gracefully accept" that Defonseca's parents were taken in 1941, as reported;

e. That, due to the alleged failure of Lee, Daniel, and Mt Ivy, to live up to their contractual obligations, she was, "reduced to ask for the help of the Jewish Family & Children's Services for food, assistance";

f. That "Misha's story is not 'Sleeping Beauty's' it is war, a child in the middle of war, and inhumanity at this time";

g. "This interference caused heightened stress, emotional distress and pain on Defonseca who is a survivor and, as such, is very sensitive to threats of misrepresentation, and to any tendency to downplay or to sugar coat the events that happened during the Holocaust."

(App. P. 0007-0008).

It is now irrefutable that these representations, made by Defonseca, while acting as her own counsel, were

knowingly and intentionally false, and intended to inflict disease upon the judicial process and machinery itself.

The trial court herein sets unsupported and dangerous precedent by concluding that pro se litigants do not have to follow any ethical protocols and, further, do not become part of the judicial machinery itself. Public policy objectives, and prior holdings, dictate otherwise. Massachusetts law maintains that, "while pro se parties are not subject to the specific professional canons of ethics, which bind members of the bar, they are, as obligated, at the very least, to refrain from any action which, 'obstructs or degrades the administration of justice, or derogates from the authority and the dignity of the court...'" *Reznik v. Friswell*, 2003 Mass.App.Div. 42, 44, citing *Avelino-Wright v. Wright*, 51 Mass. App. Ct. 1,5, 742 N.E.2d.578 (2001). It is clear that Defonseca, acting as pro se counsel, in her own case, undertook steps which obstructed or degraded the administration of justice, and derogated from the authority and dignity of the underlying trial court. In effect, she had stepped into the shoes of the lawyer who would have otherwise been representing her, thereby incurring corollary ethical obligations. Just as would be the case if an attorney intentionally and systematically filed fraudulent and false pleadings with the Court, Defonseca undertook an attack, not only upon the opposing litigant, but upon the very machinery of the judicial system itself. This is a classic example of fraud upon the Court itself. Indeed, the Courts have not even required that the party initiating such deception be acting as his/her own counsel, but have found fraud upon the Courts based upon the conduct of the underlying parties themselves. The seminal case in Massachusetts with respect to the issue of fraud upon the Court, is *Rockdale Management Co., v. Shawmut Bank*, 418 Mass. 596, 638 N.E.2d. 29, citing *Aoude v. Mobil Oil Corp.*, 892 F.2d. 1115 (1st Cir. 1989). The Court in that case found that the conduct of the litigant constituted fraud upon the Court. Specifically, the Court found, "Rockdale, in proffering a forged document, providing misleading answers to interrogatories, and giving false deposition testimony, to use the words of Aoude, 'has sentiently set in motion an unconscionable scheme, calculated to interfere with the judicial system's ability impartially to adjudicate the matter.'" The Courts have similarly found that the conduct of a litigant, acting in concert with his lawyer to undermine the judicial process, can also constitute fraud upon the Court. *Britt v. Rosenberg*, 40 Mass.App.Ct. 552, 554, 665 N.E.2d. 1022 (1996). Correspondingly, the Court should have

concluded that Defonseca committed a fraud upon the Court while wearing many hats, and utilizing many procedural mechanisms. The icing on the cake, however, is that for many months, Defonseca undertook this fraudulent and deceptive conduct, designed to undermine and defile the judicial machinery itself, while acting as her own legal representative.

This court must determine whether it is prepared to make law that a pro se litigant has none of the ethical obligations to the trial court, as has an attorney. In other words, is this court prepared to say that, a person representing his or herself, inclusive of filing pleadings, and engaging in discovery has no ethical obligation to act, as an attorney would, in an ethical manner? Are we prepared to give a pass to a pro se litigant? The trial court is happy to do so. "Defonseca's role as a pro se litigant did not vest her with some special court sanctioned position which would rendered her fraud 'fraud on the court'"(App. P. 0407). When a litigant puts on the hat of an advocate for the trial court, he/she becomes part of the machinery of the judicial system. He/She is no longer just a party, but part of the very fabric of the system itself. To find otherwise is to undermine the sanctity of the judicial system. We cannot have a situation in which non-lawyer advocates and attorneys play by a different set of rules. Those individuals who act as a lawyer, interacting with the opposing counsel, filing pleadings, undertaking depositions and discovery, must have a concurrent obligation to do so in an ethical manner. When a pro se litigant makes a decision to represent him/herself, thereby becoming entwined with the machine of the justice system, that individual must be required to follow the same rules and ethics to which attorneys are bound. In this case, Defonseca, while acting as her own counsel, knew that the pleadings she was filing were patently false and that the positions that she was taking were unmeritorious. Under such circumstances, it is axiomatic that the machinery of the judicial system has been defiled. When advocates, lawyers, non-lawyer representatives, or pro-se litigants lie and cheat they poison our judicial system, such that the system can not properly function.

Further, the fraud which Defonseca perpetrated on the Court tainted the entire judicial process. As such, none of the resulting findings of the jury were trustworthy, be they related to findings for Defonseca or Lee. While the degree of Lee's complicity is unknown, nevertheless, her own financial interests and the subsequent award against Daniel was inextricably tied to the fraudulent evidence introduced by Defonseca. This was one trial. If the machinery was defiled by Defonseca, so too was it flawed with respect to claims and defenses of Lee.

#### V. Conclusion

The appellant can not emphasize enough the importance which this Court plays in achieving the goal of this justice system, to ensure that the judicial machinery is utilized to advance justice, and not to inflict injustice on the parties. The appellees herein have argued that the passage of time has made the interest of finality paramount, and the disposition of justice subsidiary thereto. In fact, in this case, the opposite analysis is required. It is the passage of time, and the unjust enrichment enjoyed by the appellees herein, which compels judicial action to reverse this wrong. In this society, it is our goal to correct wrongs and injustices once discovered. Hence, when the publisher in the Rosenblat case discovered the falsity of the memoir which it has published, it promptly pulled the book from the shelves, such that further damage might not stem therefrom. So too must this judicial system not

reward the misconduct of Defonseca, unjustly enrich Lee, and punish Daniel, in the name of judicial finality, because Defonseca was clever enough to conceal her duplicity for a substantial period of time. The trial court acknowledges that the implications of this case stem beyond the litigants. As such, the public policy message which this court will send in its decision is paramount. This is not an isolated incident of fraud by a party, but an issue which is having ever increasing ripple effects throughout our society. There are no two ways about it. If this court says, in the interest of judicial finality, that it will not correct a baseless 33 million dollar judgment, imposed upon Daniel, thereby rewarding Defonseca and, potentially, Lee, for their malfeasance, and for trading on the Holocaust, then more of the same can be expected. On the other hand, if this Court puts its foot down, and fixes a wrong, so grievous and with such widespread impact, it will similarly send a message to the world that, the Massachusetts judicial system will stand up for what is right and just, whether it is seven years, or seventy years, after judgment.

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By their attorneys,

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CERTIFICATE OF COMPLIANCE  
IN ACCORDANCE WITH M.R.A.P. 16(K)

I, Joseph M. Orlando, Esq., counsel for the Appellant herein, certify that the within Brief complies with all pertinent rules of Court, pertaining to the filing of such briefs.

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JOSEPH M. ORLANDO, ESQ.

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