



# Professional standard: The three-judge decision-making process

Best practices and recommendations for the civil divisions of the courts of appeal

## 1. Introduction

In April 2014, the National Standing Conference on Substantive Aspects of the Civil Divisions of the Courts of Appeal [Landelijk Overleg Vakinhoud Civiele Hoven (LOVC Courts of Appeal)] set up a working group and instructed it to develop a professional standard. The working group chose the subject of the three-judge decision-making process, an important subject for the courts of appeal.

This working group consists of eight persons, two from each court of appeal.

The working group consulted academic literature on the three-judge decision-making process and compared the working procedures applied at the courts of appeal.

Based on these insights, the working group has drawn up a draft document on the three-judge decision-making process. It lays down best practices and makes recommendations that could serve as a professional standard in the final version.

This draft was discussed with and co-read by several academics with expertise in this field<sup>1</sup>, and presented to the appeal courts' civil teams for consultation. The draft was consequently amended and supplemented. The amended document comprised five sections, in addition to this introduction.

The first part (below in Section 2) describes the advantages and necessity of the three-judge decision-making process in the civil appeal court judicial system.

The second part (below in Section 3) outlines general areas of focus and recommendations rooted in academic insights.

The third part (below in Section 4) includes a short description of differences in working procedures between the civil divisions of the courts of appeal.

The fourth component (below in Section 5) discusses the status of the document.

The fifth part (below in Section 6) contains recommendations and suggestions for the three-judge decision-making process in practice in the civil divisions of the courts of appeal.

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<sup>1</sup> Experts in social psychology, philosophy of science, quantitative sociology of group processes, argumentation theory, logic and social choice theory and finally artificial intelligence and law. The following people were consulted: F.S. ten Velden, R. Baas, Professor J.W. Romeijn and Professor J.H. Sonnemans. In turn, Professor Romeijn submitted the findings of other experts.



A bibliography is appended to this document. The footnotes refer to the literature in the bibliography.

The document was discussed in a national meeting held on 2 October 2015 and presented to the LOVC courts of appeal for adoption.

The LOVC courts of appeal adopted the document as a professional standard on 1 December 2015 and it was 'embraced administratively' on 14 May 2018. The latter was the reason to also publish the standard on the Council for the Judiciary's website, which is accessible externally. To this end, an updated version was adopted once again on 16 April 2019. Bar one change, this text is the one previously adopted by the LOVC courts of appeal, with the exception of Section 4. This section contained outdated information and has been rewritten.

The 2014/2015 Professional Standards working group of the LOVC Courts of Appeal consisted of the following people:

- Bert de Hek, Arnhem-Leeuwarden Court of Appeal
- Thea Lautenbach, The Hague Court of Appeal
- Marianne Tillema, Amsterdam Court of Appeal
- Corrie ter Veer, Arnhem-Leeuwarden Court of Appeal
- Ebrien Veldhuijzen van Zanten, 's-Hertogenbosch Court of Appeal
- Marie-José Venner-Lijten, 's-Hertogenbosch Court of Appeal
- Xandra Verscheure, Amsterdam Court of Appeal
- Mathilde Voorwinden, The Hague Court of Appeal

## **2. Three-judge decisions in the civil appeal court judicial system**

Section 16 of the Dutch Code of Civil Procedure provides that, subject to exceptions specified in law, cases brought before the court of appeal are heard and decided by a three-judge panel, consisting of three justices. The law has exceptions for cases (decided at first instance) pursuant to Book 1 of the Dutch Civil Code and for decisions by the cause list judge, but the general rule is that appeal proceedings are decided by a three-judge panel. The working group is assuming that this will remain that way. The Agenda for the appeal court judicial system for 2020 (available on [rechtspraak.nl](https://www.rechtspraak.nl)) assumes the same (p. 8): 'In the interests of the legitimacy of appeals in civil matters, the handling of cases by a three-judge panel will not be affected.' The explanatory notes to this point states inter alia: 'The results of recent research indicate that restraint should be exercised in limiting three-judge decision making, given the demonstrated differences between decision making by a single-judge division and that of a three-judge division when it comes to making mistakes when judging a dispute. [...] the consultation on the draft agenda [has] reinforced the view that three-judge appeal proceedings are essential,



both for the parties to the proceedings and for society.’<sup>2</sup>

The Agenda establishes a link between the legitimacy of appeal proceedings and three-judge decisions in appeal proceedings. That relationship is (at any rate) legitimate for two reasons. First, litigants will be more inclined to give judgments handed down by three judges more weight than judgments handed down by one judge. It will not be easy for those who are proven right at first instance and who are judged wrong on appeal to recognise the benefits of the judgment on appeal if the judgment was awarded by only one judge in both first instance and on appeal.

Moreover, it follows from research<sup>3</sup> that in many cases a decision made by three judges is less likely to be at risk of errors than a decision made by a single judge. In addition, the involvement of three judges deepens the debate and sheds light on the case from various perspectives. A three-judge ruling is a synthesis of three opinions. For this reason, three-judge decisions have advantages from a qualitative point of view, or rather: they potentially have advantages. The potential advantages will only materialise if certain conditions are met. We discuss those conditions in the sections that follow.

### 3. Academic insights in broad outlines

Arriving at decisions as part of a team is not something that is confined to the judicial system. There is a lot of academic research available on the process that arises when several people take a joint decision. Based on specific literature on this subject,<sup>4</sup> this section provides a brief overview about the circumstances under which decision making as a team is most effective, and about the pitfalls and points for attention that can be identified in this context.

#### 3.1. Three-judge decisions: differentiating between individual level and group level

It is useful to distinguish between the individual level and the group level in three-judge decision making. To reach a three-judge decision, the members of the panel must first form their own individual opinions. It is important that this individual opinion is formed independently, without being influenced by other panel members, and then is brought into the group together with the opinions of the other panel members, after which the panel arrives at a joint opinion together. Although the group strives for consensus, this does not detract from the importance of the panel members critically assessing not only one another’s contribution, but also their own. This requires encouraging individual

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<sup>2</sup> However, it should be pointed out that a Bill to amend the Code of Civil Procedure in connection with the single-judge hearing of appeals in sub-district court cases was brought before the House of Representatives, Parliamentary Papers 33 316. The minister of Justice and Security withdrew this bill on 22 November 2017 due to a lack of support in the Upper House. The Quality and Innovation Programme did not affect the matter.

<sup>3</sup> Cf. Bauw, Van Dijk and Sonnemans 2012 and 2013, Ten Velden and De Wilde (2013), Baas, De Groot-van Leeuwen, Laemers (2010), Ten Velden and De Dreu (2012). It is worth noting incidentally that R. Baas in Nijmegen obtained his doctorate on the subject ‘*Meervoudige and enkelvoudige rechtspraak: eender of anders*’ i.e. ‘Three-judge and single-judge case law: the one or the other’.

<sup>4</sup> See Baddely and Parkinson (2012), Kahneman (2011), Kraaijeveld and Weusten (2014), Myers (1982) and Nickerson (1998) and, focusing on the judicial decision-making process, Ten Velden and De Dreu (2012), Kornhauser and Sager (1986), Rachlinsky (2012), Ten Velden and De Wilde (2013).



diversity and opposing opinions so that as many points of view as possible come to the fore. Only once a joint decision has been formulated is it appropriate to strive for uniformity and consensus. Unanimity is a factor that plays a role at group level, but it does not preclude individual differences from continuing to exist. Many of the pitfalls mentioned below are related to ignoring the distinction between these two levels.

### **3.2. Completeness of the information and processing of information**

The quality of the decision-making process stands or falls with the quality of the information exchange and information processing that underlies decision making. Information exchange ensures that all group members have access to the same information and that this information is as complete as possible. Having said that, as a general rule group members tend to seek out information that confirms their views, i.e. information that is in line with their initial preference, and then discuss this information rather than looking for information that disproves their initial opinions<sup>5</sup>.

This in itself is a concern. If the information is incomplete, an additional pitfall is that an initial judgment is formed on the basis of that incomplete information and then the focus is on finding information that confirms that opinion, while information that disproves that opinion, which emerges at the court session or in chambers, is not given sufficient attention. This is compounded by the fact that group members have a tendency to attach great importance to shared information (known to all members of the group) and to discuss it, and not to mention information that they have not shared in a discussion or to take it lightly<sup>6</sup>.

Efforts should be made to ensure that there is an intensive, systematic way of sharing information (and opinions), in which all alternatives are thoroughly evaluated.

### **3.3. Systematic way of forming an opinion**

Gathering and processing information – and the simultaneous process of understanding, interpreting and choosing a perspective – can either be done quickly and superficially (based on intuition and automatic processes) or in a thorough and systematic manner.<sup>7</sup> Different circumstances can influence the way in which information is processed and judgments are reached, in the sense that it may be simplified. For instance, information is seen as sufficient if group members are under time pressure<sup>8</sup> and a preference or opinion is more likely to be accepted as right/correct if all group members agree quickly.<sup>9</sup> Under these circumstances, groups then switch to superficial ways of processing information and reaching an opinion. This is when there is a danger of distortions in the decision-making process, due for instance to tunnel vision, selectively withholding information or failing to mention it. As far as intuition is concerned, it can be influenced by all kinds of hidden external factors. Gut feelings are indispensable, but they can also be misleading. It is therefore important to test a perception based on intuition against rational considerations as much as possible. Rational dialogue serves to identify errors in

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<sup>5</sup> Nickerson (1998), Ten Velden and De Dreu (2012), Ten Velden and De Wilde (2013).

<sup>6</sup> Ten Velden and De Dreu (2012), Ten Velden and De Wilde (2013).

<sup>7</sup> See Kahneman (2011) for an intelligible overview.

<sup>8</sup> See Ten Velden and De Dreu (2012), Ten Velden and De Wilde (2013).

<sup>9</sup> Ten Velden and De Dreu (2012).



thinking and reasoning, and to compensate for the effects of social and psychological shortcomings.<sup>10</sup>

Another aspect that should not be overlooked is that it can make a difference to the outcome of a case if the decision is taken in parts rather than as a whole, i.e. the 'discursive dilemma'. Paradoxically, the outcome of three-judge decisions taken in three parts may differ from decisions taken in one go one.<sup>11</sup>

### 3.4. Interrelationships and external pressure

If those taking the decision have too much confidence in one another, this may lead to inadequate information processing and loss of information within the group. For example, if each group member implicitly assumes that he or she has overlooked information, for instance that person has been temporarily distracted, but that one of the other members of the group will have taken note, relevant information may go unnoticed altogether.

When a member of the panel speaks in deliberations in judges' chambers, a 'production block' may occur among the other members: expressing one's own arguments and opinions may be blocked by having to listen to someone else, or may be influenced by the other person's opinion, so that their own initial opinion is not shared with the other group members. This can result in insights and ideas being lost, and sometimes this is unavoidable. In this context, it is important to point out the 'anchoring effect', i.e. the subconscious tendency to use the first piece of information we receive as a starting point for a decision.<sup>12</sup> In light of this effect, it is not only necessary to consider the order in which the group members give their view of the matter, it is also important to be reticent about expressing an opinion on the matter at an early stage before any exchange of information has taken place.

Feeling under pressure from the group members or an external audience can easily impede critical debate and encourage self-censorship. This can be a factor when the panel is composed of experienced and less experienced justices or if it concerns a matter that society is likely to be critical about.<sup>13</sup>

Power and status differences can affect how information is processed and how people decide on a position on the matter. More generally, if the group members are too concerned about their mutual relationships (the context in which the decision making takes place), this may affect the quality of the decision making.

A phenomenon that deserves special attention is 'groupthink', a process that can occur when individuals who work closely form a close-knit group and value consensus so much that it is considered more important than having a critical, rational attitude. The phenomenon of 'polarising effects' is related to groupthink. It refers to the process whereby, once a group opinion has been reached, the group members are so convinced that that opinion is the right one that they risk ignoring any doubts they may have about the correctness of that group opinion.<sup>14</sup>

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<sup>10</sup> Kraaijeveld and Weusten (2014) offer good advice on how to avoid errors in thinking and reasoning.

<sup>11</sup> List and Petit (2004) and Kornhauser and Sager (1986)

<sup>12</sup> See Kahneman (2011) and Ten Velden and De Dreu (2012).

<sup>13</sup> Ten Velden and De Wilde (2013)

<sup>14</sup> Cf. Myers (2012) and Grow et al (2015).



In general, too much emphasis on reaching consensus can get in the way of expressing differing opinions and views. Cooperative groups that are strongly focused on peer relationships and reaching consensus may be inclined to self-censorship and overvalue shared information and interpretations. It is important that the group members present their information individually and continue to do so, even if it undermines the prevailing consensus, and also that they properly process the information that they have not shared.

From the foregoing it is evident that the role of the chairman of the group is essential. The extent to which this person is able to moderate discussions, to ensure that important information comes to the fore and to prevent the effects mentioned above influences the quality of the decision making.<sup>15</sup>

### **3.5. Diversity in preferences and the pursuit of consensus**

Homogeneity of preferences within groups can affect the quality of information processing. If the group members come to a decision quickly and easily, as we mentioned above, they may well be inclined to believe that the opinion suffices. Heterogeneity of preferences may result in additional information being sought and a more thorough processing of that information. It is important that the members of the group are open to criticism. Self-critical assessment of the decision-making process and of one another's opinions, preferences and judgments leads to more relevant information being shared and processed.

Striving for consensus is a good thing, but only after all group members have been given the opportunity to arrive at their own position on the basis of systematic (and shared) information processing. Furthermore, they must be given the opportunity to put forward this position for the group to discuss. If the starting point is that the group has to agree on a position, then those in the group with a dissenting opinion must have their voice heard. The pursuit of consensus promotes systematic and fundamental processing of information. Groups sometimes fail to arrive at a consensus. However, the quality of the discussion held must be such that anyone with a dissenting opinion is ultimately willing to accept the group decision.

### **3.6. From theory to practice**

The recommendations mentioned in Section 6 aim to avoid the pitfalls mentioned above as much as possible. While many of these recommendations seem obvious (it would be disturbing were it not so), the aim here is to offer a basis for the appeal courts' civil divisions to regularly and systematically discuss the specifics of methods that have evolved in practice, and to review them where necessary.

## **4. Working procedures for the civil divisions of the courts of appeal**

Generally speaking, two working procedures are applied in the civil divisions of the courts of appeal.

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<sup>15</sup> Ten Velden and De Wilde (2013)



The first working procedure entails that the decision-making process for a case always starts with an oral consultation (in the so-called 'taking-stock room').<sup>16</sup>

In the second working procedure, for cases where no court session is held, a person is designated who drafts a draft and sends it to the justices responsible for delivering a judgment, who then give their (written) comments on the draft, after which further consultations follow if necessary.

The working group considers the 'taking stock' system to be most consistent with academic insights about the three-judge decision-making process. In the second working method, it is important to be particularly aware of the pitfalls and points of concern that we have outlined.

The recommendations in Section 6 apply to both working procedures.

## 5. The status of this document

The draft of this document submitted for consultation also states that the recommendations and suggestions contained in it may, at a later stage, form the basis for setting professional standards in the field of the three-judge decision-making process (and may be more widely supported by the entire judiciary). When this draft was discussed, it emerged that many colleagues wanted the document to be given the status of a professional standard once it had been adopted.

The working group has no objections to that; on the contrary.

In her preliminary advice to the Dutch Lawyers' Association, Ruth de Bock<sup>17</sup> draws attention to the fact that in court decisions there is a lack of systematic attention to the quality of the content. The development of professional standards can contribute to enhancing this quality. Professional standards can help judges and justices to ensure and guarantee a certain degree of quality. A professional standard for three-judge decisions can thus contribute to the quality of the work within the courts of appeal, and the civil divisions in particular.

A professional standard can also help the professionals for whom the standard is intended to counterbalance financing and organisational pressures. A professional standard for the three-judge decision-making process supports the widely held opinion of the appeal court judges that three-judge decisions have clear advantages.

Finally, an important requirement for setting a professional standard has been met, namely that it is supported by the professionals for whom it is intended. A professional standard should not be imposed from above ('top down'); instead it should originate from the professional field ('bottom up'). Even if this document is a professional standard by nature, the working group believes that this document is first and foremost a reflection of the professionalism felt collectively, and not so much a protocol that should not be

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<sup>16</sup> [Translator's note: 'voorraadkamer' in Dutch is a play on words. The literal translation would be 'stockroom'. The closest a translation comes in English is the 'taking-stock room'.] Although all kinds of objections can be raised about this term, it has become common parlance and we will continue to use it here.

<sup>17</sup> De Bock (2015).



deviated from. This is rooted in particular in the nature of the subject matter, the diversity of the cases to be handled and the professional autonomy of judges. The standard is for the professionals, and not vice versa. That principle is in no way contrary to the nature of a professional standard.<sup>18</sup>

## **6. Recommendations and suggestions for a sound three-judge decision-making process**

Below we list the recommendations and suggestions for three-judge decisions. They are set out as follows:

- preparation and information sharing
- division of tasks and management in the preliminary phase and during court sessions
- the decision-making process
- written elaboration, drafting
- written elaboration, co-reading

After the recommendations and suggestions, we list their intended objectives.

### **6.1. Preparation and information sharing**

Recommendations/suggestions:

- Give and take the time for independent individual preliminary forming of perceptions and opinions of the matter at hand
- Read the entire file from start to finish, including all exhibits referred to in the pleadings and other documents, insofar as they are pertinent to appeal proceedings
- If the entire file has not been read, mention this to the other members of the panel
- Exchange relevant literature and case law and check individually whether it is comprehensive
- Be aware of influencing of others' perceptions and opinion forming through exchanging notes, relevant literature and case law, drafting reader's guides and informal exchange of opinions at this stage
- Report any documents that are missing in the file immediately after discovery
- Objectives:
  - To make the most of the advantages that the three-judge decision-making process offers, as described above, by (1) ensuring that the information is comprehensive; and (2) processing the information thoroughly
  - To avoid influencing the forming of perceptions and opinions

### **6.2. Division of tasks and management in the preliminary phase and during court sessions**

Recommendations/suggestions:

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<sup>18</sup> Noordegraaf et al (2014).





- Manage the composition of the panel and ensure that this is key in the process, i.e. do not let the panel compose itself
- Strive for diversity in terms of the judges on the panel, taking into account professional knowledge and expertise, skills, competencies, experience and background. If possible, avoid long-term permanent combinations of staff
- As a general rule, hold a preliminary discussion before the session, briefly taking stock of the provisional positions and the questions that still need to be answered.
- Appoint the presiding judge of the panel as the one responsible for the organisational matters, the control of the file, the course of the session and the chamber, and so on.
- Rotate the chair among the members of the panel; in principle, do not let the deputy justice preside.
- Provide opportunities for training courses in presiding over court sessions and chamber consultations
- Make sure that observers are given the opportunity to ask questions and make comments at the session
- If necessary, interrupt the session for consultation in chambers to identify any points still to be discussed and questions to be asked, and to discuss whether it is advisable to submit (alternative) settlement options, such as a compromise or mediation
- Preferably, the division of tasks between the drafter and the co-readers should happen after the preparation phase and after hearing cases in chambers
- Specifically discuss who monitors the progress and settlement of the case after hearing cases in chambers and who takes the lead if there are any further points to be decided, particularly if the drafter is not the presiding judge

#### Objectives:

- To ensure that the individual group members remain critical and alert
- To use the available knowledge, expertise and experience to the best possible effect
- To avoid tunnel vision and groupthink, i.e. the process as described above, which may occur when individuals who work together become a close-knit group
- To prevent the group members from influencing one another and not preparing thoroughly enough through division of tasks
- To encourage members to bring their various points of view to the table so that all these views can be taken into consideration
- To safeguard the proper course of the procedure
- To remove any barriers to speaking out and asking questions
- To create the possibility of adjusting initial opinions

### 6.3. Adopting decisions

#### Recommendations/suggestions:

- Start with a round of first impressions, whereby the group considers whether the matter as a whole should be debated immediately or whether the discussion should be per sub-topic or ground for appeal



- Manage the order in which group members speak in chambers (on the understanding that the basic premise is that the presiding judge should be the last to give his/her opinion); this applies particularly to less experienced or new members, for example by giving this person the opportunity to speak first
- Give each member of the combination time to form and express their opinion and, above all, allow time for open debate; then check whether all aspects of the case have been discussed and establish whether a decision has been reached
- Allow counter-arguments against the lines of decision-making process to be heard, for instance by having someone take on the role of devil's advocate or by having everyone involved write down their point of view prior to the discussion
- Strive for unanimity for as long as possible; if there is a dissenting opinion, spend time and effort inquiring into the arguments for this opinion and consider whether it can be accommodated in the grounds for the decision and/or the decision itself; discuss whether it would help to have the person with the dissenting opinion compile the draft
- If there are time constraints or further investigation is appropriate, plan another time for hearing cases in chambers
- Once the hearings in chambers are over, provide an opportunity for giving feedback by (and to) the relevant justices and clerk of the court about the progress of the preparation, the court session, the chambers and the role of the presiding judge

#### Objectives:

- To ensure that there is equality in the discussion and to create a calm atmosphere and room for discussion
- To ensure that the exchange of ideas is as broad and open as possible
- To ensure systematic and thorough processing of information so that information is comprehensively processed
- To ensure that there is a full and frank debate
- To be conscious of the consequences of dividing the decision into parts (the discursive dilemma)
- To lower the threshold for all those involved to give feedback

#### 6.4. Written elaboration, drafting

##### Recommendations/suggestions:

- Make a draft of discussions as soon as possible after sessions in chambers (ideally within one to two weeks)
- Note down any cases of doubt in the draft, and mention the arguments for and against the various choices
- Cite relevant literature and case law in a footnote or in a note to the draft, attach it to the draft or create a digital file and share it with the co-readers
- Include the sources of the relevant court documents in the draft or refer to them in footnotes or using stickers in the case file
- Be meticulous about the data, citations, sections of the law, references to case law and literature, and consecutive numbering of legal grounds



- If necessary, circulate in the interim a draft of any crucial points that deviate from the sessions in chambers or hold another session in chambers
- Objectives:
- To avoid time constraints and the negative impact of allowing time to lapse when arriving at a decision
- To avoid as much as possible the effect that the draft may be driving the decision (tail wagging the dog)
- To ensure that the debate is carried out without reservation and thus making the most of the three-judge decision-making process
- To avoid co-readers having to look things up and correct things unnecessarily

### 6.5. Written elaboration, co-reading

Recommendations/suggestions:

- Manage the sequence of co-reading; this creates a balanced distribution in the amount and weight of the cases that the individual justices have to read
- Agree on who is responsible for ticking off facts, data, numbers, personal details, etc. and monitoring the order for costs
- Check the draft for factual and legal correctness, readability, make sure it is easy to understand and is persuasive, and make minor corrections to the margin of the draft (preferably digitally); check the operative part of the judgment thoroughly
- Comment on any material changes to the draft in a footnote or in a note (possibly in the form of a dissenting opinion, as specifically as possible and always digitally) or formulate an alternative ground in the digital text under the ground in question in the draft and support this commentary with arguments
- Make sure that (hand-written) comments are clearly legible and make sure that it is clear who has made the comment; as a co-reader make it clear which amendments are considered to be material
- As the (next) co-reader, take a position on the doubts and/or proposals for changes raised by the drafter and/or previous co-reader, insofar as they are important.
- If there is a comment about a substantial change to the draft, always ensure that the draft is circulated again or that another session in chambers follows
- Always let a dissenting opinion be known, even if it is still possible to agree with the outcome reflected in the draft
- For substantial matters, always confer with the whole panel
- Be alert to excessive readiness to accept the draft and willingness to please the drafter
- In principle, co-read a draft within two weeks; let it be known if that cannot be achieved and state the expected period of time within which the draft will be co-read
- Design a system in which the course of the draft procedure can be tracked

Objectives:

- To avoid overlooking crucial information



- To avoid having too much confidence in one another, which may lead to inadequate information processing and loss of information
- To broaden the debate
- To curb the tendency to simply rely on a draft conceived by experienced and trusted colleagues
- To safeguard the advantages that a three-judge panel has
- To make the most of the three-judge decision-making process

## 7. Bibliography

Below is a selection from the literature on or related to the subject (including the literature mentioned in the footnotes). The bibliography was completed in the spring of 2015.

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