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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

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A Modest Proposal to Prevent Economic Meltdowns

BY PAUL E. KERSON

Paul E. Kerson

How was Bernie Madoff able to misappropriate $65 Billion?

How did AIG and Citibank manage to lose untold billions requiring a Federal Government bailout?

Could it be that we 21st century Americans have been done in by our own cleverness? Is it just too easy to complete a multi-million dollar transaction electronically in the blink of an eye? Does the sheer speed of the personal computer and the internet actually encourage fraud?

Think of the slow, ponderous, deliberate wealth and power transfer systems left to us by prior generations who were obviously far more clever than we are. This assumes that the absolute standard of a clever society is one that is able to prevent the kind of massive financial failure we have witnessed in the past year.

A New York Last Will and Testament still must be signed in ink by the testator and at least two witnesses. The Witness Statement must by signed and stamped in ink by a Notary Public.

A New York deed must be signed in ink by the Seller and signed and stamped in ink by a Notary Public.

A New York nominating petition for a candidate for public office must be signed in ink by a certain number of registered voters depending on the office. The petition must be witnessed by a registered voter in that same district or by a Notary Public.

We have used these 18th century methods of transferring wealth and power into the 19th, 20th and 21st centuries for one reason alone – because they work very well to prevent fraud and abuse. All of them have one thing in common – the person doing the transferring of significant wealth or power is watched over by one or more other people who have little or no stake in the transaction.

Even the most honest person sitting alone at a computer screen is tempted to cut corners. This is much less likely if a Notary Public is standing over one's shoulder holding the stamp. After all, the Notary's sole function at the will signing, the real estate closing or the candidate's nomination is to verify the truth of the transaction.

So here is a very modest proposal that should save us untold grief in the future: Congress should pass a law requiring that all stock, bond and mortgage derivative transactions of over $100,000 be notarized by a Notary Public not otherwise involved in the transaction.

Oh, I can hear the financial boys hooting, "But that will slow us down, capital will not be able to flow freely over the internet, we will have too much paper."

And that, my dear readers, is exactly the point – Stock, bond, and mortgage derivative transactions should all have exactly as much notarized paper as wills, deeds and nominating petitions.

Or would you rather have dozens and dozens of Bernie Madoffs, AIGs and Citibanks? Would you rather have Federal Government bailouts and prosecutions far into the distant future?

As far as I can determine, our system for verifying the truth of wills, deeds and nominating petitions has NEVER suffered from the kind of systemic failure we have seen in the securities field this past year.

We have always been a bottom-up country, not a top-down kingdom. Put the Notary Publics of our country in

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Queens County Bar Association Participates in ABA Bar Leadership Institute

CHICAGO—Joining some 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI), March 12-14 was President-Elect Guy R. Vitacco, Jr. and Executive Director Arthur N. Terranova of the Queens County Bar Association.

The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer organizations, and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such associations.

Mr. Vitacco and Mr. Terranova joined ABA

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CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

David H. Rosen, Esq.

This article continues from Part II, which was published in the March 2009 issue of the Queens Bar Bulletin.

Limitations

A new concluding sentence has been added to CPLR 205(a), [57]addressing the question of dismissals "for neglect to prosecute." The phrase is in quotation marks, since it is not completely clear what dismissals fall within that description. 205(a), you will recall, is the "second-chance" provision, which allows recommencement of an action, even if the limitations period has expired, if the action was originally timely commenced and terminated for any reason other than the four listed, one of which is a dismissal for neglect to prosecute. [58] The new sentence in CPLR 205(a) states: "Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

It is unclear from the language of the amendment what its intended scope and effect are. Is it intended to limit the class of cases excluded from 205(a) to those where the dismissing court issued such a detailed order? Or, is it intended merely to guide dismissing courts in the proper content of the dismissal order? Or is it intended as a wide-ranging limitation, that dismissals for any conduct falling under the undefined heading of "neglect to prosecute" are invalid unless there has been a general pattern of delay?

The CPLR gives a similar name to only one ground for dismissal: the dismissal "for want of prosecution" pursuant to CPLR 3216. Other dismissals, however, clearly come within the meaning of "neglect to prosecute," and hence have not gotten the benefit of the second chance. *Andrea v Arnone, Hedin, Casker, Kennedy & Drake* [59]was such a case, and it apparently provoked the amendment to 205(a). It was another in the line of recent Court of Appeals cases in which the Court has taken a firm line against litigation delays. In *Andrea*, a dismissal for [60] failure to disclose was held to be the equivalent of a dismissal for failure to prosecute. When the plaintiffs thereafter commenced a new action after the limitations period had expired, they were there-

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being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2009 SPRING CLE Seminar & Event Listing

April 2009

Tuesday, April 21	Judiciary Night
Wednesday, April 22	Selection of a Jury
Thursday, April 23	Basic Criminal Law Seminar – Part 1
Wednesday, April 22	No Fault Arbitration 2009
Thursday, April 30	Basic Criminal Law Seminar – Part 2

May 2009

Thursday, May 7	Annual Dinner & Installation of Officers
Thursday, May 14	Lawyers Assistance Seminar
Tuesday, May 19	Bankruptcy Seminar
Thursday, May 21	All You Might Want to Know About LLC's

June 2009

Monday, June 8	Juvenile Justice Seminar

CLE Dates to be Announced

Elder Law
Labor Law
Real Property Law
Surrogate's Law
Taxation Law

New Members

Yvonne Eze Agbontaen
John Christopher Almberg
Tanweer Sheikh Ansari
David Joseph Barry
Athena Buchanan-Alleyne
Rosa Maria Celeste
Saul Elliot Cohen
Salvador Vincent Delgado
Joyce Elie
John Michael Faris
Michael Fenton
Keisha Godfrey
Wei Gu
Elizabeth Leigh Knapp
Peter A. Laserna
Diane Matero
Darice Guzman Piotrowski
Cory J. Rosenbaum
Thomas Matthew Ryan
Milana Tepermayster
Jay M. Weinstein

Necrology

Hon. Joan M. Durante

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help.

To learn more, contact QCBA LAC for a confidential conversation.

Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

Queens County Bar Association Scholarship Fund

Dear Members:

The Queens County Bar Association's Scholarship fund was created to offer financial assistance to law students who are residents of Queens County or attend law school in Queens County.

The recipients of the QCBA Scholarship are carefully chosen based on academic achievement, community service and financial need.

Your tax deductible donation will help to support and recognize those law students who provide community service to the residents of Queens County. It also enhances the good name of our Association.

As President of the Queens County Bar Association, I urge you to support this valuable community-based program.

Sincerely,

STEVEN S. ORLOW
President

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PRESIDENT'S MESSAGE

A Note to Our Young Colleagues

We just recently held our annual Jubilarians' Night where we honor and celebrate those among us that have practiced law for half a century. To many of us, and especially those whose careers are near the beginning stages - perhaps the first five years or so, – it may be difficult to contemplate someone having spent half a century working the vineyards of the law.

Needless to say, in a field presenting as many challenges with such frequency, as our chosen profession, it is self-evident that Jubilarians have faced the "ups and downs" we might expect.

To attain the longevity we witness among the Jubilarians, each must have developed some means to address the strains and tensions associated with an active and challenging law practice. Nothing contributes more to frustration, anger and, ultimately disgust with an activity, one's profession or otherwise, than a persistent and increasing barrage of annoyances and distractions about which one feels helpless to affect or alleviate.

Steven Orlow

On Jubilarians' Night, we had eighteen Jubilarians, the common factor being their long standing membership in the Queens County Bar Association. While there exist many and varied good reasons for membership in our Bar Association (refer to my article in the 2009 Annual Directory) not the least of which is that it gives you a means to deal with many of the stress-causing factors.

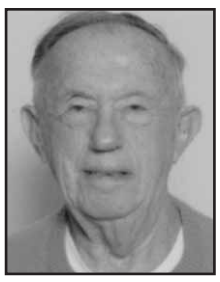
Factors including conditions in the particular court or part in which you practice, the rules or procedures that you must contend with, the proclivities of individuals (judges, other attorneys, clerks and officers) that you are subjected to, all weigh heavily on the quality of professional life you experience – and for all these issues and more, the Bar Association stands ready to assist you in an attempt to alleviate the stresses and strains that you face.

I would also suggest that a new member, in particular, take advantage of the opportunity of socializing with members of the bench at the various meetings that we have where attendance by sitting Judges is usual. Most notably, among these, is our annual Judiciary Night which this year will take place on Tuesday, April 21, 2009 at our Association headquarters. What finer way to familiarize yourself with those before whom you may soon appear than to sit down and have a meal, or have the opportunity to discuss issues of concern, with those same individuals. There is a certain level of comfort in appearing before a Judge with whom you recently spoke, and with whom you have created a sense of familiarity. While, of course, no advantage in terms of decision making can, or should be expected (and I can tell you of some doozies in my own experience where it seemed to work the opposite way), it does contribute to a lessening of stress levels when this type of familiarity can be established.

To this end, I encourage you to make the very most of your Association membership and join one or more committees. It is through our active committee system that change and improvement can be most effectively implemented. It will be a great step in your path to, one day, being honored as a Jubilarian too.

A Generation on Trial: Nazis before the German Courts

BY FRITZ WEINSCHENK



Fritz Weinschenk

I was born in Mainz, Germany, in 1920 and attended the regular German school system. When the Nazis assumed power in 1933, all Jews, myself included, were kicked out of school. My family and I were fortunate to escape from the "fatherland" (for which two of my uncles had died in World War I) in 1935. I spent the war years in the U.S. army, seeing action both in Normandy and the Pacific. In 1946, I joined the U.S. army's Counter Intelligence Corps in defeated Germany and served there until 1950. I witnessed the disastrous denazification program, the Berlin airlift, the founding of the federal republic, and the cold war in close proximity.

After my return in 1950, I studied law under the G.I. Bill and was admitted to the New York Bar in 1953. Besides specializing in trust and estate matters, I became involved in restitution and indemnification cases in aid of Nazi victims.

One day in 1964, I was called to a meeting with the head of the legal division of the German Consulate in New York, which had meanwhile been considerably expanded. This gentleman with the prefix "von" to his name, (denoting him as a member of the German aristocracy) explained to me that a German-speaking American attorney was urgently needed to aid the German authorities in assembling proof of Nazi crimes for cases then pending before the German courts. Vital evidence had to be procured from the United States, but for reasons of international law, the German authorities were unable to act on their own in a foreign jurisdiction, and therefore needed a local "commissioner" authorized to apply to local courts and issue witness subpoenas, if necessary. He shoved a thick file labeled "District Attorney's Office, Hamburg" in my direction and told me that about two hundred witnesses, most of them residents of the New York area, would have to be sworn according to local law, interrogated and deposed. The irony of the Jewish kid who was thrown out and later given a hot reception at Omaha Beach becoming "commissioner" for the courts of the former persecutors twenty years later did not entirely escape me, and a host of moral questions gave me pause, but times had changed. A new Germany was trying to bring the perpetrators of the greatest crime in history before the bar of justice. I felt that, however small, I could perhaps make a contribution to achieving that end. I agreed.

Thus started a second career, which would stretch out over thirty years and comprise more than two hundred cases involving over a thousand witnesses. I managed to juggle this between my "day job" and my family commitments.

German – and, generally, continental European criminal procedure differs vastly from our own practice rooted in the common law. Instead of grand juries, "examining magistrates", usually judges, would assemble the evidence to see whether a crime has been committed. Since 1977 they have been replaced by district attorneys. Felony cases are tried not by judge and jury, but by a panel of three judges assisted by two "jurors", lay persons who are supposed to lend a "human" touch to the fact-finding process, but who usually – so I was told – subordinate their views to those of the judges sitting with them. Judges are neither elected nor appointed, but are civil servants – members of the state or federal judicial system, somewhat akin to "hearing officers" in an American administrative agency. There are other marked differences: German criminal felony trials do not provide for a continuous session in which the State and the defense examine and cross-examine witnesses before the jury which decides the facts, but of a series of hearings stretching out for weeks, months and even years. Cross-examination is conducted by the parties posing questions to the witness through the judges.

We may scoff at this system as being prone to arbitrariness, lack of contact with the "real" world, trial by bureaucrats, and "positivism" – going by the letter of the law no matter how perverse the outcome. In turn, Europeans find our system, particularly that of electing judges, quaint, to say the least. I have seen German jurists stare in disbelief at New York taxis bearing advertisements for judicial candidates on their roofs. However, in the course of time, working with judges and prosecutors who came to New York, in some cases for lengthy periods, I found that, in the end, the

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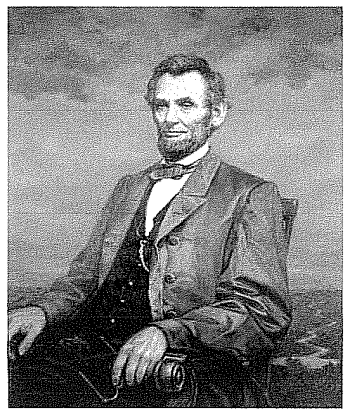
THE CIVIL COURT OF THE CITY OF NEW YORK
PRESENTS

QUEENS COUNTY COMMUNITY LAW DAY

A Legacy of Liberty – Celebrating Lincoln's Bicentennial



FRIDAY MAY 1, 2009
12:00 p.m. - 2:00 p.m.

Queens County Civil Court
89-17 Sutphin Boulevard
Jamaica, New York

Resource Tables - Free Legal Information & Free Refreshments

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Maintaining America's Global Competitiveness in a Time of World Economic Crisis

BY: ALLEN E. KAYE

America's economy is in a tailspin. As our nation struggles to reverse the downward spiral and get back on course, America's H-1B program has come under fire. And when H-1B's are discussed, emotions run high. Recent articles have targeted the program as 'anti-American" and "unpatriotic," but what exactly is America's H-1B program designed to do? Let's set the record straight!

The H-1B program is a long-standing part of our nation's business immigration system. It was developed to give U.S. employers access to highly skilled, professional foreign talent (often students who have been educated here in U.S. universities) for up to six years and as a means for U.S. companies to stay ahead in their respective global markets. Data proves that H-1B petitions track the economy. When hiring is down, the number of H-1B petitions goes down. The program is self-adjusting. However, when the economy improves, there is no corresponding escalator. Thus, during the boom years, businesses were hamstrung by a quota that did not take into account the needs of the international marketplace. The program remained capped at 65,000 visas per year for bachelor's degree positions, with another 20,000 for advanced degree holders who graduated from U.S. universities.

Now that the economy is not booming, judicious admission of international professionals is more important than ever. Where the program was used to fill in labor shortages that no longer exist, companies have stopped using H-1B workers in those occupations. But even companies that have been laying off workers need isolated, specific skills to better compete in the international marketplace and effect their own recovery. U.S. businesses MUST have access to specialty skills without having to locate operations outside the U.S. to obtain them. Otherwise, the entire nation's economic recovery will be severely hobbled.

Allen E. Kaye

There remain vital areas that require that our system make adequate provision for future needs. Studies have shown that over the next ten years, the U.S. may need two million more K-12 teachers in this country. We will also need 250,000 new math and science teachers by the end of 2010. Further, nearly 80 million baby boomers are expected to leave the workforce sometime soon. In 2004, the U.S. produced 137,000 new engineers, compared to China's 352,000. It is well-documented that America is well behind the curve in producing sufficient skilled professionals to make our country "tomorrow's center" for innovation. Recent economic events have not changed these facts; they have made it all the more important that we deal with them.

The H-1B visa category is used by universities, school districts, hospitals, research organizations, and businesses competing in our global marketplace to fill needed specialty occupations. "Let's say a school district in rural Iowa or in poor urban area of Chicago needs a math or science teacher to help students be prepared to compete and innovate in our global economy," said Charles H. Kuck, President of the American Immigration Lawyers Association (AILA). "Does it really make sense for our children to go without, or should we encourage the entry of qualified educators from abroad? What about our research institutions developing new medical cures or our hospitals trying to care for an increasingly large aging population? We have to recognize that while not a panacea, the H-1B visas program, when used according to law, provides a critical resource to help drive our future economic success."

Hiring the H-1B professional seems like a good solution so long as the reason for lack of interest by U.S. workers is not low pay and as long as protections are in place to ensure that qualified U.S. workers are not replaced by foreign labor. In fact, H-1B regulations require that workers on these visas are paid the HIGHER of the prevailing wage or the actual wages of comparable U.S. workers within the company. This wage protection insures that H-1B professionals are not used as "cheap labor. In addition, H-1B regulations do not allow a company to use the H-1B category to break a strike or lockout - or to replace U.S. workers laid off the same job," Kuck stated. "In other words," Kuck noted, "protections against those abuses already are in the law."

In addition to the wage protections in the law, the fact is that H-1Bs cannot be "cheap labor." H-1Bs are hired at a high transaction cost. The government charges most employers $2,320 per application, on top of the additional legal and human resource expenses that come with an H-1B hire. Also, if the H-1B worker is fired, the employer must buy his plane ticket home-an often expensive proposition.

To put the impact of H-1B professionals in perspective, with a U.S. workforce of about 145 million, the new H-1B allotment each year accounts for less than one-tenth of one percent of the U.S. workforce.

Enforcement of the H-1B protections and requirements is critical to create a level playing field for employers and employees alike, which is why part of the fees paid by H-1B sponsoring employers

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How I Spent My Summer Vacation

BY RICHARD N. GOLDEN*

"The gates are closed . . . you cannot board the plane". The words were spoken with the authority not unlike the New York State Supreme Court clerks advising counsel that the calendar has already been called and your case has been marked "off calendar, no appearance." I was stunned and shocked.

Then the self incrimination took hold. I asked myself: Why did you schedule a Real Estate Closing this morning?

As a single practitioner I was trying to squeeze in a few more billable hours before leaving on a ten-day summer adventure that I hoped would take me 19,330 feet above sea level to the summit of Mt. Kilimanjaro, the snow capped crown of Tanzania.

My flight was to depart from Newark International Airport at 4 p.m. "That gives me plenty of time to complete a closing scheduled to begin at 9 a.m."

How could I be so wrong!

I arrived at the closing expecting to finish quickly, drop off my briefcase and pick up my 50 pound back pack. However, when the client arrived without a certified check I began to realize I made a mistake scheduling a closing 7 hours before my flight!

The next six hours were the most stressful in my life. Everything and anything that can go wrong at a closing . . . did.

After sitting in bumper to bumper traffic on the Cross Bronx Expressway I arrived breathless at Newark International Airport at 3 p.m. making my rebuttal argument:

"The plane is not scheduled to depart for Kilimanjaro for another hour and my only baggage is the pack on my back. Surely, there is time to get on the plane."

Equity was on my side. I continued my plea. "I have been training to climb Mt. Kilimanjaro for the past 10 months. If I cannot board this plane the psychological pain will be irreparable. I could already hear the snickering of my "friends" gleeful and gloating that I failed in my audacious attempt to conquer Mr. Kilimanjaro. Suddenly I felt a real connection to Icarus after he tried to soar too close to the sun and crashed to earth.

My entire body began to perspire at the thought of coming home nine days short . . . getting no closer to the summit of Kilimanjaro than the airport gate.

"If you allow me to board the plane neither the Airline or the other passengers will incur the slightest inconvenience or expense."

I was erudite, forceful, yet respectful. I was certain that the gate keeper would appreciate my argument and allow me to pass. I was wrong.

My plans to trek Kilimanjaro began ten months earlier. I considered all uncertainties . . . except arriving late at the airport. I researched on the internet and spoke to physicians specializing in foreign travel regarding the possibility of contracting Malaria, Hepatitis and Yellow Fever. I took a series of seven injections to protect myself. I was warned that there is no water filtration on Kilimanjaro. Therefore, I searched for the best water

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An Analysis of the Motion to Set Aside a Verdict: Subsection I[1]

BY ANDREW J. SCHATKIN*

This article proposes to analyze one of the grounds set forth in CPL Sec. 330.30 of the Criminal Procedure Law of the State of New York entitled *Motion to Set Aside Verdict: Grounds For*. Those grounds were 1.) *Subsection (2) that during the trial there occurred, out of the presence of the Court, improper conduct by a juror or another person, in relation to a juror, which may have affected a substantial right of the defendant; and 2.) Subsection (3) That new evidence has been discovered since the trial, which could not have been produced by the defendant at the trial, even with due diligence on his part, and which is of such a character as to create a probability that if the evidence had been received at trial, the verdict would be more favorable to the defendant*.[1]

This particular article will analyze and consider Subsection (1) of the Statute, which states that *a ground appearing in the record, which if raised upon appeal from the Judgment of Conviction would result in reversal and modification of that Judgment by the Appeals Court*.

In general, it may be said, in interpreting this statute that the trial court must have authority to Set Aside a Verdict on grounds which, if raised on Appeal, would require reversal or modification of a Judgment.[2]

Andrew J. Schatkin

A good example of this rule is found in People v. Carthens[3]. In that case, the Appellate Division First Department held that the trial court did not have authority to set aside a jury verdict convicting the defendant of Criminal Possession of a Controlled Substance in the Second Degree, because it believed there were questions as to whether the defendant received a "fair trial" and because there was "grave risk" that an innocent man had been convicted.

The power to set aside a verdict on this ground is measured by Statute and, not, as a matter of discretion, in the interest of justice.[4]

In short, the Motion to Set Aside a Verdict on this ground is purely statutory.[5]

The Motion to Set Aside a Verdict, under this Statutory Subsection, must be made subsequent to the verdict, and not after sentence. The proper remedy to correct an error after sentencing is the method of direct Appeal.[6]

Having considered the general rules, let us now consider the various grounds for reversal or modification. The absence of the Judge from the court during summation to the jury is a ground for a new trial.[7] However, though it has been held, that receiving a verdict in the absence of the defendant was ground for a new trial, it has also been held, on the other hand, that defendant's absence during a conference in chambers prior to the commencement of trial during which certain issues were narrowed, relative to the Sandoval Hearing, did not require reversal of the conviction on the charges of Sodomy, First-Degree Sexual Abuse, and Unlawful Imprisonment, where prior to the commencement of the trial, the court recited, on the record, in the presence of the defendant, discussions that occurred in chambers regarding prior convictions so as to confer upon the defendant the opportunity for meaningful participation and the defendant's explanation resulted in a Decision by the court with respect to five out of seven prior incidents favorable to the defendant.[8]

At times, the comments or conduct of the court can be a ground for a reversal or modification. For example, in People v. Gundersen[9], the Appellate Division Second Department held that the manner in which the trial court redacted the statement made by a non-testifying co-defendant unfairly prejudiced the Assault defendant.[10]

It has been held that the death of a Judge before passing on a Motion for a New Trial, under this Statute, and where the death of a court stenographer made it impossible to obtain a transcript of the minutes of the trial, can result in the granting of this Motion.[11]

Ineffective assistance of counsel can be a ground for reversal or modification. For example, in People v. McDonald[12] the Court of Appeals held that counsel misinforming the defendant, a lawful permanent resident alien, that his guilty plea to drug charges would not subject him to deportation because he was a long-term resident of the United States, and his three children were American citizens by birth and lived in the United States, constituted ineffective assistance of counsel.[13]

In general, a ground for reversal cannot be merely where the verdict is against the weight of the evidence, although this can be the case. For example, in People v. Colon[14] the New York State Court of Appeals held that the trial court erred in setting aside the Judgment or verdict of conviction, where the court's decision to vacate was based in substantial part on the weight of the evidence and possibility of innocence, and not based on any error, which, if raised upon Appeal, from the

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Once Upon A Time In The Bronx

BY STEPHEN J. SINGER

Stephen J. Singer

Never go to the Bronx. It is truly unsafe at any speed. I had made that promise to myself many years ago following several actual and most unfortunate incidents which had taken place there and involved the personal safety of anyone traveling near any of the courthouses in the Grand Concourse area of 161st Street.

First, I was at the Supreme Court Building during the same week when an assistant district attorney was shot and killed during his lunch hour by a stray bullet, within two blocks of the courthouse. Next, a few months later, a defense attorney was mugged and killed outside of night court when leaving the Criminal Court Building. Finally, as I was leaving the Supreme Court Building a year later, I witnessed a young woman being kidnapped and dragged into a car, literally from the steps of the building. I ran inside and found a Court Officer who came out with me in time to witness the car speeding away. We did get the license plate number and the Officer immediately called the incident in to the 911 reporting system in my presence. We both waited diligently for the police to arrive so that we could provide as much information as possible. After approximately forty-five minutes when no police car had come, we gave up and considered it just another Bronx tale. That is my personal experience with the level of violence that occurs regularly in that borough, to everyday people, minding their own business, who just happen to be in or about the area of the courthouses, which is why I swore off encouraging any further business in that area.

Unfortunately, ten or more years after the preceding incidents, after not having been in the Bronx for most of that time, I was called upon to attend with a client who had an outstanding warrant for a violation of probation in the Bronx Criminal Court. Had I not been representing him on a very serious felony matter in our own county, I would have simply referred the matter to one of the local Bronx attorneys I know. The man pleaded with me to go with him when he surrendered on the warrant and I acknowledged that my presence should by all rights speed up the process and might even have some influence in having him released without posting additional bail.

I arranged to meet the client in front of the Criminal Court warrant part inside the "new court building" at 11:00 a.m., not anticipating much pedestrian or vehicle traffic since it was a beautiful summer morning before the Labor Day weekend. Coming across the Triboro Bridge proved

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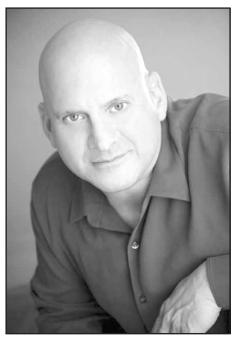
THE CULTURE CORNER

In April, the highlights of the cultural season in New York City should invite you to visit the Metropolitan Opera on Manhattan's Upper West Side, the Brooklyn Academy of Music ["BAM"] on Fulton Street in Brooklyn, and the 92nd Street Y on Manhattan's Upper East Side. The spellbinding soprano Angela Gheorghiu, a beautiful opera star with a golden voice, performs in *L'Elisir d'Amore*. BAM presents Shakespeare's *The Merchant of Venice*. The 92nd Street Y closes its chamber music spring 2009 season with a powerful new original work.

THE METROPOLITAN OPERA:
Angela Gheorghiu Returns in *L'Elisir d'Amore*
Opposite Massimo Giordano, Rolando Villazón, and Joseph Calleja

Donizetti's comic masterpiece *L'Elisir d'Amore* returns to the Met with **Angela Gheorghiu** reprising her acclaimed portrayal of Adina and three tenors singing the role of Nemorino for the first time with the company: **Massimo Giordano, Rolando Villazón**, and **Joseph Calleja**. Other members of the cast also making role debuts include Franco Vassallo as Belcore and Simone Alaimo as the quack Doctor Dulcamara. In the final two performances, Nicole Cabell sings the role of Adina for the first time at the Met. **Maurizio Benini** conducts all performances, which begin March 31 and run through April 22. The production is by John Copley; Beni Montresor created the set and costume designs, and Gil Wechsler the lighting design.

When **Angela Gheorghiu** sang Adina at the Met in 1999, the *New York Times* critic said "her singing had an appealing fluidity, ample variety and an admirable consistency from top to bottom." Earlier this season, Gheorghiu sang the role of Magda opposite her husband Roberto Alagna as Ruggero in the Met's new production of *La Rondine* that opened on New Year's Eve. More recently, she appeared in the Met's 125th Anniversary Gala on March 15, singing an aria from *Faust* and a duet from *Simon Boccanegra* opposite Plácido Domingo. Next season she will sing the title role of *Carmen* for the first time on any stage in Richard Eyre's new production. *Carmen* will be transmitted worldwide as part of *The Met: Live in HD*. The Romanian soprano also reprises the role Violetta, one of her most renowned interpretations. Last season, she sang Mimì in *La Bohème*, which was transmitted *Live in HD*. Mimì was the role of her Met debut in 1993. Gheorghiu's other roles at the Met include Marguerite in *Faust*, Juliette in *Roméo et Juliette*, Amelia in *Simon Boccanegra*, Liù in *Turandot*, and Micaëla in the premiere of Franco Zeffirelli's production of *Carmen* (1996).


Howard L. Wieder

Nicole Cabell, who made her debut earlier this season as Pamina in *The Magic Flute*, sings Adina in the season's final two performances of *L'Elisir d'Amore*. Next season she will make her Met role debut as Musetta in *La Bohème*. The young American soprano earned international attention as the 2005 winner of the BBC Cardiff Singer of the World Competition. Her other engagements this season include Léila in *Les Pêcheurs de Perles* at the Lyric Opera of Chicago, her first Countess in *Le Nozze di Figaro* at Cincinnati Opera, and Micaëla in *Carmen* at Berlin's Deutsche Opera.

Massimo Giordano sings the role of Nemorino for the first time at the Met after having added two other roles to his repertory with the company earlier this season: Alfredo in *La Traviata* and Rodolfo in *La Bohème*. The Italian tenor made his Met debut in 2006 as Des Grieux in *Manon* and sang Rinuccio in *Gianni Schicchi* in Jack O'Brien's new production of *Il Trittico* in 2007 (part of *The Met: Live in HD* series).

With Nemorino, **Rolando Villazón** makes his second Met role debut of the season following his first Edgardo in *Lucia di Lammermoor* with the company in January. Next season, for the first time at the Met, the Mexican tenor sings the title role in a new production of *Les Contes d'Hoffmann*, by Bartlett Sher, which will be transmitted as part of *The Met: Live in HD* series. Villázon made his Met debut opposite Renée Fleming in *La Traviata* in 2003. Since then he has appeared as Rodolfo in *La Bohème*, the Duke in *Rigoletto*, and headlined a special gala performance with Anna Netrebko in 2007, celebrating the Met's 40th anniversary at Lincoln Center.

Joseph Calleja sings Nemorino opposite Nicole Cabell in the season's final *L'Elisir d'Amore*. He made his Met debut in 2006 as the Duke in *Rigoletto*, a role he reprises this season from April 1 to 17. He also participated in the Met's 125th Anniversary Gala on March 15, singing Rodolfo's famous Act I aria from *La Bohème*. Last season he sang Macduff in *Macbeth* at the Met. This season the Maltese tenor sings Rodolfo at the San Francisco Opera; the Duke in *Rigoletto* at the Hamburg State Opera and the Bavarian State Opera in Munich; Edgardo in *Lucia di Lammermoor* at the Frankfurt Opera and Berlin's Deutsche Opera; and Alfredo in *La Traviata* at the Vienna State Opera and the Royal Opera, Covent Garden.

Franco Vassallo sings Belcore for the first time at the Met. He made his debut in one of his favorite roles, Figaro in *Il Barbiere di Siviglia*, in 2005, sang it again last season, and will reprise it next season. He has also performed Riccardo in *I Puritani*, which was transmitted as part of *The Met: Live in HD* series in 2007. The Milanese baritone sings major roles in the Italian and French repertoire, including Marcello in *La Bohème* (Royal Opera, Covent Garden), Germont in *La Traviata* (Berlin's Deutsche Opera), Enrico in *Lucia di Lammermoor* (Los Angeles Opera, Vienna State Opera), Renato in *Un Ballo in Maschera* (Bavarian State Opera), and Valentin in *Faust* (San Carlo, Naples).

Italian bass-baritone **Simone Alaimo**, a bel canto specialist, made his Met debut as Assur in *Semiramide* in 1993 and in 1995 sang the title role of *Le Nozze di Figaro*. With Dulcamara, he adds another buffo role to his Met repertoire, which includes Don Magnifico in the Met premiere of *Cenerentola* (1997), the title role in the 2006 new production of *Don Pasquale*, and Don Basilio in *Il Barbiere di Siviglia* (1996).

Maurizio Benini returns to the opera and the production of his 1998 Met debut. Since then he has conducted frequently at the Met, largely in the bel canto repertoire and in works of Verdi. Last season he was on the podium for *Norma*, and next season he returns to conduct *Il Barbiere di Siviglia*, which he also led at the premiere of Bartlett Sher's production in the 2006-2007 season. He also led the production when it was transmitted worldwide live in HD. The Italian maestro also conducted the Met's 2006 new production of *Don Pasquale*, as well as *Luisa Miller*, *Rigoletto*, *La Traviata*, and *Faust*.

Under the leadership of General Manager Peter Gelb and Music Director James Levine, the Met has a series of bold initiatives underway that are designed to broaden its audience and revitalize the company's repertory. The Met has made a commitment to presenting modern masterpieces alongside the classic repertory, with highly theatrical productions featuring the greatest opera stars in the world.

The Met's recently announced 2009-2010 season will feature eight new productions, four of which are Met premieres. Opening night will be a new production of *Tosca* starring Karita Mattila, conducted by Levine and directed by Luc Bondy. The four Met premieres are: Janáček's *From the House of the Dead*, conducted by Esa-Pekka Salonen and directed by Patrice Chéreau, both in Met debuts; Verdi's *Attila*, conducted by Riccardo Muti in his Met debut; Shostakovich's *The Nose*, conducted by Valery Gergiev and directed and designed by William Kentridge in his Met debut; and Rossini's *Armida* with Renée Fleming, directed by Mary Zimmerman. Other new productions are Offenbach's *Les Contes d'Hoffmann,* conducted by Levine and directed by Bartlett Sher; *Carmen* with Angela Gheorghiu in the title role, conducted by Yannick Nézet-Séguin and directed by Richard Eyre, both in Met debuts; and Thomas's *Hamlet* with Natalie Dessay and Simon Keenlyside, conducted by Louis Langrée.

BAM'S PRESENTATION
OF Shakespeare's *The Merchant of Venice*

The Merchant of Venice
By William Shakespeare
Watermill Theatre (UK) and Propeller production
Directed by Edward Hall
Set design by Michael Pavelka
Lighting design by Ben Ormerod

BAM Harvey Theater (651 Fulton Street)
May 6–9, 12–16 at 7:30 pm
May 10 & 17 at 3 pm
Tickets: $25, $45, $65

Artist Talk with Propeller
May 7, post-show (free for same-day ticket holders)
BAM Harvey Theater (651 Fulton Street)

BAM is delighted to present a new staging of Shakespeare's *The Merchant of Venice* from Edward Hall's award-winning company Propeller. Last at BAM with renowned productions of *The Taming of the Shrew* and *Twelfth Night* (2007 Spring Season), comedies that revel in the trials and inevitable tribulations of roman-

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Maintaining America's Global Competitiveness in a Time of World Economic Crisis

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are used to fund the enforcement of the H-1B regulations, as well as training programs for U.S. workers. Penalties for failing to comply with the labor protections of the H-1B category as to wages, posting requirements, etc. include a provision that a company may be barred from serving as an H-1B petitioner in the future. The typical legally compliant company uses the H-1B category because it needs skilled professionals to enhance competitiveness. This need continues in specific specialty niches in our economy, even when economic times are tough.

What is the predictable result of a reduction or loss of the H-1B category? Companies will be forced to locate overseas, where a high skilled worker pool is available, or outsource needed labor. "We need an H-1B reality check," said Kuck. "The simple solution is not cutting off an aid to our economic independence, but instead continuing to use legal immigration tools that help us improve our children's and our country's future."

The Culture Corner

Continued From Page 6

tic love, Propeller returns with an audaciously compelling interpretation of *The Merchant of Venice*, critically acclaimed in its recent U.K. run. Edward Hall and Propeller aim to rediscover Shakespeare by staging his plays with great clarity, speed, and imagination. Their adherence to the original men-only tradition onstage underscores Shakespeare's intricate tanglings between the sexes and animates the physical life of the production with the poetry of the text.

BAM will present 11 performances of *The Merchant of Venice* in the BAM Harvey Theater (651 Fulton Street) on May 6–9 and 12–16 at 7:30 pm, and May 10 & 17 at 3 pm. Tickets—priced at $25, $45, and $65—may be purchased by calling BAM Ticket Services at 718.636.4100 or online at BAM.org.

Shakespeare's *The Merchant of Venice* is a work that poses still-incendiary questions about truth, morality, and prejudice. The story revolves around Shylock, an observant Jewish moneylender caught between his faith's strictures and the demands of Christianity. In this astute production, Hall and the company reveal the play's underlying absurdities—the virtue in vice and vice in virtue—while delivering an unsparing rendition of the harrowing bargain at its core.

Director **Edward Hall**, a member of a major theatrical family, made his U.S. directorial debut in 2003 with *Rose Rage* at the Chicago Shakespeare Theatre—a production which he and Roger Warren adapted from *Henry VI* parts I, II, and III. This production subsequently transferred to the Duke Theater in New York, where it received four Jeff Awards including Best Play, Best Director, and Best Ensemble Cast. The original production, for which he received an Olivier Award Nomination for Best Director and the TMA Award for Best Touring Production, opened with Propeller at the Watermill Theatre in Newbury, U.K. and subsequently toured to the Haymarket Theatre in London, as well as internationally. He made his New York directorial debut with Propeller at BAM with *A Midsummer Night's Dream* in Spring 2004, which was nominated for several Drama Desk Awards. Hall and Propeller returned to BAM in 2005 with *The Winter's Tale* as part of the Next Wave Festival and subsequently in spring 2007 with a double-bill of *The Taming of the Shrew* and *Twelfth Night*. A former director with the Royal Shakespeare Company, Hall has received a South Bank Show Award for *Henry V* for the Royal Shakespeare Company. Career highlights include directing Natasha Richardson on Broadway in *A Streetcar Named Desire* and Kenneth Branagh in an acclaimed National Theatre production of *Edmond*. He also directed the Olivier Award nominated production of *A Funny Thing Happened on the Way to the Forum* at the National Theatre.

The all-male **Propeller** was formed in 1997 in conjunction with the Watermill Theatre to create an ensemble for Edward Hall's *Henry V* and has been praised for its original interpretations of Shakespeare's works including *Henry V*, *The Comedy of Errors*, *Rose Rage*, *A Midsummer Night's Dream,* and *The Winter's Tale*. Both *Henry V* and *The Comedy of Errors* toured extensively in Europe, South America, and the Far East. Hall and Propeller aim to perform Shakespeare's plays with a contemporary aesthetic while maintaining emphasis on the spoken word, and to continue developing relationships between performers and audiences. "Working with a minimum of money and fuss, and a maximum of ingenuity and imagination," says The Daily Telegraph (U.K.), "Propeller has become one of the finest and most distinctive acting ensembles in the country."

The **Watermill Theatre** (U.K.), a year-round, regional producing theater created in the mid-60s, is a converted 19th-century mill situated in gardens beside the Lambourn River in the Berkshire countryside. The Watermill Theatre has brought new energy to its historic space, featuring a wide range of productions, youth theater, education, and outreach. A floor plan conducive to the Shakespearean presentation of plays "in the round" and the building's small size provide the opportunity for theatergoers to receive an intimately authentic theater experience. The theater's professional reputation for producing quality work attracts high caliber artists and production personnel, which in turn creates opportunities for works to tour throughout the world.

Designer **Michael Pavelka** is an award-winning international scenographer who has designed over 130 productions worldwide, many of which have been new plays and new musicals. He is a longstanding collaborator with director Edward Hall and has won Manchester Evening Standard Awards for Hall's *A Midsummer Night's Dream* and *Galileo* (for best production and best design, respectively). He was awarded the Barclays Theatre Award for Best Touring Production for his work on *Rose Rage* in 2002 and his designs for ensemble performance have been developed at major companies including The Chicago Shakespeare Theater, the National Theatre, and the Royal Shakespeare Company.

Lighting designer **Ben Ormerod** has varied and award-winning work that covers theater, dance and opera. He is hailed as one of the most exciting lighting designers in the U.K. Ormerod has designed for the Bristol Old Vic, the Royal Shakespeare Company, and has worked with Edward Hall on many productions such as *Rose Rage*, *A Midsummer Night's Dream*, and *The Winter's Tale*.

The 92nd Street Y

Since 1974, **artistic director Jaime Laredo** has brought some of the world's finest players and repertoire to the 92nd Street Y for ***Chamber Music at the Y***. For this season's final concerts, **Tuesday, April 28 and Wednesday, April 29, 2009**, the **Kalichstein-Laredo-Robinson Trio**, one of the series' regular and most popular groups, returns to take the stage with the **Miami String Quartet**. Also part of the Y's *New Horizons* series, **the program celebrates the eve of Pulitzer-prize winning composer Ellen Taaffe Zwilich's 70th birthday** with the **world premiere of her Septet for Piano Trio and String Quartet, co-commissioned by the 92nd Street Y** and a consortium of nine other organizations.

Zwilich writes of the Septet: "My greatest joy is writing for performers whom I can be sure will not only deliver the notes accurately, but will project the meaning behind the notes. To have musicians who will bring their own imagination and deep understanding to a performance is an inspiration to me. So I approached the writing of my Septet for The Kalichstein-Laredo-Robinson Trio and The Miami String Quartet with great anticipation and pleasure."

"The fact that there is no model for such a Septet made the pre-composition process a most enjoyable exploration, "Zwilich further comments, "While the instrumentation of the Septet provides an almost orchestral palette—and it was interesting to explore that aspect—I also love the idea of seven artist-performers, each of whom can be a stunning virtuoso one moment and a thoughtful partner the next, and I relish the electricity that results from those shifting roles."

The concerts include two additional works: **Luigi Boccherini's String Quintet in E Major, G. 275**, which features his famous Minuet, often considered the cellist/composer's most famous melody; and **Robert Schumann's Quintet for Piano and Strings in E-flat Major, Op. 44**, composed during his "year of chamber music" in 1842 and premiered by his wife Clara in January 1843 at the Leipzig Gewandhaus.

Each evening will be preceded by a pre-concert interview with Zwilich by pianist Joseph Kalichstein at 7pm..

After three decades of great success, many recordings, and newly commissioned works, the **Kalichstein-Laredo-Robinson Trio** continues to dazzle audiences and critics alike with their performances. Pianist Joseph Kalichstein, violinist Jaime Laredo and cellist Sharon Robinson have set the standard for performance of the piano trio literature for more than thirty years. The Trio balances the careers of three internationally-acclaimed soloists while making annual appearances at many of the world's major concert halls, commissioning spectacular new works, and maintaining an active recording agenda. The ensemble kicked off the 2008-2009 season at Wigmore Hall in London, with the complete Beethoven cycle. In addition to performing the world premiere of Ellen Taaffe Zwilich's Septet for Piano Trio and String Quartet at the 92nd Street Y, the Trio will present premieres at the Kennedy Center, Detroit Chamber Music Society, and Virginia Arts Festival.. The group has worked extensively with the Miami String Quartet, as well as the Guarneri and Emerson String Quartets, allowing the opportunity to explore the rich literature for strings and piano.

At a time when the musical offerings of the world are more varied than ever before, few composers have emerged with the unique personality of **Ellen Taaffe Zwilich**. Her music is widely known because it is performed, recorded, broadcast, and – above all – listened to by a diverse and global audience. A prolific composer in virtually all media, Zwilich's works have been performed by most of the leading American orchestras and by major ensembles abroad. She is the recipient of numerous prizes and honors, including the

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The Culture Corner

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1983 Pulitzer Prize in Music (the first woman ever to receive this coveted award), the Elizabeth Sprague Coolidge Chamber Music Prize, the Arturo Toscanini Music Critics Award, an Academy Award from the American Academy of Arts and Letters, a Guggenheim Fellowship, four Grammy nominations, and the NPR and WNYC Gotham Award for her contributions to the musical life of New York City. Among other distinctions, Zwilich has been elected to the Florida Artists Hall of Fame, the American Academy of Arts and Sciences, and the American Academy of Arts and Letters. In 1995, she was named to the first Composer's Chair in the history of Carnegie Hall, and she was designated Musical America's Composer of the Year for 1999.

Praised in *The New York Times* as having "everything one wants in a quartet: a rich, precisely balanced sound, a broad coloristic palette, real unity of interpretive purpose and seemingly unflagging energy," the **Miami String Quartet** has quickly established its place among the most widely respected quartets in America. The ensemble has appeared extensively throughout the United States and Europe, including performances in New York, Boston, Los Angeles, San Francisco, Cologne, Istanbul, Lausanne, Montreal, Hong Kong, Taipei and Paris. The Quartet's interest in new music has led to many commissions and premieres. Such highlights include a commissioning grant from Chamber Music America for a piano quintet from Maurice Gardner, a world premiere performance of the quartet *Whispers of Mortality* by Bruce Adolphe, a quartet by Philip Maneval, Maurice Gardner's Quartet No. 2 and *Concertino* as well as premieres of Robert Starer's Quartet Nos. 2 and 3, and David Baker's *Summer Memories*. Commissions include a work by composer Annie Gosfield, commissioned by the Santa Fe Chamber Music Festival, a joint commissioning by the Chamber Music Society of Lincoln Center and the VA Arts Festival of a new piano quintet by Bruce Adolphe, and a new work by composer Stephen Jaffe commissioned by the Philadelphia Chamber Music Society.

Tickets are $48 Premium Orchestra or Premium Balcony/$38 Orchestra or Balcony (Ages 35 and younger, $25) *and may be purchased by calling 212.415.5500, visiting* **www.92Y.org/concerts**, *or at the box office. The* ***92nd Street Y*** *is located at 1395 Lexington Avenue at 92nd Street.*

HOWARD L. WIEDER *is the Principal Law Clerk to Justice Charles J. Markey in State Supreme Court, Queens County, Part 32. Mr. Wieder writes the "Culture Corner" and "Books at the Bar" columns that appear regularly in this journal.*

Marital Quiz

BY GEORGE J. NASHAK JR.*

George Nashak

Question #1 - When an adverse party is called as a witness may it be assumed that such adverse party is a hostile witness?

Your answer -

Question #2 - When an adverse party is called as a witness, may the direct examination assume the nature of cross-examination by the use of leading questions?

Your answer -

Question #3 - When an adverse party is called as a witness, can he or she be impeached by prior statements made either under oath or in writing?

Your answer -

Question #4 - When the remedy, for the violation of a Family Court order, is incarceration, is the burden of proof "clear and convincing evidence" or "beyond a reasonable doubt?

Your answer -

Question #5 - At the time of trial, the parties children were three and seven years of age, was it error for the trial court not to order the defendant to contribute to the children's college education?

Your answer -

Question # 6 - Is a provision in a separation agreement that the father would provide total support of the children without the contribution from the mother, enforceable?

Your Answer -

Question #7 - May a mother counterclaim in a divorce proceeding for emotional pain and suffering due to the father's removing the children to a foreign country and depriving the mother of her visitation with the children?

Your answer -

Questions #8 - Is the failure of the non-custodial parent to make payment of child support, sufficient basis to deny visitation?

Your answer -

Question #9 - Before ordering interim visitation, is the court required to conduct a hearing?

Your answer -

Question #10 - In defending an action for divorce based upon an abandonment, must the defendant plead justification for leaving the marital residence as an affirmative defense?

Your answer -

*Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a partner in the firm of Ramo Nashak & Brown.

ANSWERS APPEAR ON PAGE 16

BURN, BERNIE, BURN

BY ROBERT E. SPARROW

He conned them all
Just a few were paid off –
So many were screwed
By Bernie Madoff,
With life savings
Bernie made off

When things appear
Too good to be true
They generally are –
Then, time to rue
and sue
nobody knew?
He could have taught Ponzi
A thing or two.

And, as with sociopaths
We know, of course,
There is not a flicker
Of shame or remorse…

Life savings wiped out
And charities destroyed,
And Bernie smiles
Seems hardly annoyed –
a mental void
a case for Freud

You're a monster, Madoff,
An inhuman smell,
Pervades your existence
May you burn in hell!

Overhauling Our Legal System

BY ARNOLD H. RAGANO

Senescence, what does this symbol portend
Pregnant with afright or a docile friend?
Our checkered halt in the morass of laws
Will obfuscate its myriad flaws –

The withered leaf in autumnal grace
Sheds beauteous lives with glorious lace –
As age proceeds with gradual leaps
Our laws deteriorate with arcane beliefs –

The jurisprudence of ancient tribes
Expeditiously shed with no distracting jibes –
Our system-encrusted with hoary outworn lustre
With joint talents we'll ameliorate and muster.

COURT NOTES

The Following Attorneys Were Disbarred By Order Of The Appellate Division, Second Judicial Department:

Kevin J. Keelan, admitted as Kevin Joseph Keelan (January 27, 2009)
On April 14, 2008, the respondent pleaded guilty in the County Court, Westchester County (Cacace, J.) to aggravated unlicensed operation in the first degree, a class E felony, in violation of Vehicle and Traffic Law (VTL) §511.3, and driving while intoxicated, an unclassified misdemeanor, in violation of VTL §1192.2. By virtue of his felony conviction, the respondent automatically ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(b).

Gary G. Gauthier (February 3, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges of professional misconduct concerning his breach of fiduciary duties with respect to his attorney trust account.

Peter A Takvorian, admitted as Peter Andrew Takvorian, a suspended attorney (February 3, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself against pending charges that he, *inter alia*, engaged in the unauthorized practice of law while suspended.

Edward Marvin Cohen, a suspended attorney (February 10, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against pending charges of professional misconduct emanating from his conviction of the serious crime of attempted criminal possession of a forged instrument in the third degree.

Joel D. Tenenbaum, admitted as Joel David Tenenbaum (February 17, 2009)
The respondent was disbarred by order of the Supreme Court of the State of Delaware dated February 6, 2007. At the time of that order, the respondent was already under a three-year suspension following an order of that same court dated August 5, 2005. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

The Following Attorney Was Suspended From The Practice Of Law By Order Of The Appellate Division, Second Judicial Department:

Mark S. Kosak (February 18, 2009)
The respondent was suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest based upon his failure to respond to numerous letters and subpoenas served upon him by the Grievance Committee.

The Following Attorney Was Publicly Censured By Order Of The Appellate Division, Second Judicial Department:

Martin Schnee (February 17, 2009)
Following a disciplinary hearing, the respondent was found guilty of employing an unenforceable and improper retainer containing a provision rendering the initial payment nonrefundable, and neglecting a legal matter entrusted to him.

The Following Suspended Attorney Was Reinstated To The Practice Of Law By Order Of The Appellate Division, Second Judicial Department:

Fred A. Schwartz, a suspended attorney
(February 3, 2009

Diana J. Szochet

The Following Voluntary Resignor Was Reinstated To The Practice Of Law, Subject To Payment of Registration Fees For Delinquent Periods, By Order Of The Appellate Division, Second Judicial Department:

Edward J. Hayward, admitted as Edward Joseph Hayward, voluntary resignor
(January 27, 2009)

At The Last Meeting Of The Grievance Committee For The Second, Eleventh and Thirteenth Judicial Districts, The Committee Voted To Sanction Attorneys For The Following Conduct:

Failing to timely register as an attorney with the New York State Office of Court Administration (OCA) (8)

Neglecting an immigration matter (2)

Neglecting an adoption case and failing to communicate with the client

Neglecting a divorce proceeding and failing to timely respond to communications from Committee staff

Holding him/herself out as an attorney

———————Continued On Page 19

PHOTO CORNER

Past Presidents and Golden Jubilarians Night
March 23, 2009

Chanwoo Lee, Vice President, QCBA

Doug Krieger, Gerry Chiariello, Allan Botter and Paul Goldstein

Agnes Kirschner, Hon. Phyllis Orlikoff Flug and Susan Beberfall

Agnes Kirschner, Les Nizin, Herb Leifer and Annamarie Policriti

Gerald Chiariello, II, Peter LaLumia, Bob Bellone and David Wasserman

Connie Kaufman, Hon. Sid Strauss, Sanford Kaufman, Doug Krieger, Steve Wimpfheimer and Matt Lupoli

David Cohen, Arthur Terranova, Michael Getnick, Leslie Nizin and Seymour James

Ed Rosenthal, Hon. Arthur Cooperman, Hon. Denis Butler and Hon. Charles LoPresto

Guest Speaker Michael Getnick, President Elect of the NYSBA

Herbert Leifer, Agnes Kirschner and Annamarie Policriti

Golden Jubilarians Herbert Leifer, Douglas Krieger, Alexander Orlow, Sanford Kaufman, Paul Goldstein, Hon. Joseph Dollard, Allan Botter and Robert Bohner

Greg Brown, Art Terranova and DA Richard Brown

Photos by Walter Karling

PHOTO CORNER

Past Presidents and Golden Jubilarians Night
March 23, 2009

Joe Carola, Chair, Program Committee

Hon. Arthur Cooperman, Arthur Terranova, David Cohen and David Adler

Hon. Seymour Boyers, Herbert Rubin and Hon. Allen Beldock

Hon. Sid Strauss and Sanford Kaufman

Seymour James, Hon. Carmen Velasquez and Tim Rountree

Mona Haas, George Nicholas and Hon. Carmen Velasquez

Past Presidents, Standing: Douglas Krieger (81-82), Hon. Joseph Dollard (85-86), Edward Rosenthal (02-03), Paul Goldstein (94-95), George Nashak (05-06), Hon Sidney Strauss (90-91), Herbert Rubin (71-72), A. Paul Goldblum (79-80) Sitting: Steven Wimpfheimer (99-00), David Cohen (07-08), Leslie Nizin (00-01), David Adler (98-99), Joseph Baum (92-93), Seymour James (01-02), Jules Haskel (73-74), Robert Bohner (93-94)

Tim Rountree, Bob Bohner and Dave Adler

Seymour James, Hon. Phyllis Orlikoff Flug and Michael Getnick

Photos by Walter Karling

A Generation On Trial Nazis Before The German Courts

Continued From Page 3

search for the truth underlies the ultimate aim of both systems.

The history of the Nazi trials in the German courts is largely unknown in the United States. After the 1945 surrender, the German criminal justice system slowly recovered from the results of thirteen years of Nazi perversion and started to right the wrongs of the past thirteen years. In the shadow of the Nuremberg trial and the other Allied prosecutions, the German courts, limited in their jurisdiction by the skeptical occupiers,[i] tried their first cases: an ex-general who had ordered the summary execution of a "deserter", Nazis who had denounced innocents to the Gestapo, participants in the "Kristallnacht" progrom [ii], and personnel of the Nazi euthanasia program. Although the results during the first few years were meager, the number of investigations, trials and convictions rapidly increased. By 1970, the German courts had handed down 6,181 judgments against Nazi criminals, 12 of whom were sentenced to death and executed.[iii] Already in the early fifties the German public, including many jurists, had come to believe that German guilt had been "whitewashed" by the Nuremberg and other Allied trials as well as their own proceedings. Consequently, Nazi criminality appeared to be done with. However, history was to turn out quite differently.

The turning points came in the middle fifties: in 1953, the German indemnification law for Holocaust victims made mountains of documents submitted by claimants for compensation accessible to prosecutors. With the onset of the cold war, West Germany became an important ally of the Western powers, and restrictions on German jurisdiction were more and more relaxed and finally dropped altogether. From then on, it became possible for German prosecutors to investigate the activities and personalities involved in the Holocaust in the Eastern European areas. In May 1956, a former high Nazi official, who deemed himself safe through the passage of time, had the gall to claim his civil service pension. He was recognized by a victim as having committed multiple murders in Nazi-occupied Memel, a city in the Baltic. He was arrested, tried in the Felony Court of the city of Ulm, and convicted. The case made headlines all over Germany and Europe and revived the dormant prosecutorial activities into Nazi criminality. However, the Ulm case proved to be only the tip of the iceberg.

As a result of the ever-increasing waves of investigations and the discovery of new crimes, the attorneys general of the several West-German states decided to create an agency in the City of Ludwigsburg for the large-scale investigation of Nazi crimes without regard to jurisdictional or time limitations. This agency, employing prosecutors, historians, linguists, criminal investigators and other specialists, was to initiate large-scale investigations without limitations of time or place, collect the evidence, and send the completed dossiers to the district attorneys of the various cities in accordance with certain ground rules. The results were large-scale multiple prosecutions of entire groups of defendants such as camp - personnel, "Einsatzgruppen" (Special Squad) units, military police and Gestapo agents involved in murderous activities, mainly in the Eastern areas. By the sixties, a new generation of jurists who had only experienced the third Reich as children or not at all had taken over from the older prosecutors and did not hesitate to prosecute and adjudicate the "deeds of their fathers" with zeal and determination.

The basic law of the German proceedings against Nazi criminals was and is the Penal Law of 1871[iv] which posits that murder, manslaughter, assault, arson, false imprisonment, and other felonious crimes are delicts which have always been in full force and effect despite their non-prosecution by the Nazi courts. Thus, these prosecutions were not "victor's justice" foisted upon the Germans by the victorious Allies, as some conservatives maintained, nor were they – in the eyes of non-German skeptics, attempts to "wash the Germans clean" of guilt. They were simply a mandate of the German law. Between 1945 and 2003, German prosecutors initiated investigations against 106,496 subjects. Of these, 6497 cases went to trial and ended in convictions.[v]

Contrary to American practice, defendants in German criminal cases, although not compelled to testify against their interest, are permitted to state their answers to the accusation at length, a sort of plea with an explanation. In Nazi cases, the defendants seldom denied the event itself, but consistently denied their presence or their active participation in the horrors they were accused of.

German practice requires the background and biography of the defendants to be included in the judgment. A perusal of the biographies of the death camp defendants frequently reveals no more than a public school education and a career in the SS, the Gestapo, or the criminal police. Among the ranking commanders, higher standards of education, usually university degrees or professional degrees, prevailed. Most defendants were utterly lacking in remorse or regret, with rare exceptions.

There are three types of witnesses in Nazi crime cases: the perpetrators, the victims, and the experts. The comrades of the defendants as witnesses usually stonewalled the proceedings, and in the words of private Schultz in "Hogan's Heroes", maintained: "I know nothing". They were not about to testify against their comrades, either out of loyalty to their former comrades or in fear of incriminating themselves.

The Holocaust survivors as witnesses were asked to relive the most horrendous events of their lives. To ask persons in deathly fear at the critical time to identify particular defendants and verify their presence was a difficult, often emotionally draining experience for the witness as well as the interrogator. Of course, there were notable exceptions: witnesses with impeccable memories or those who had to labor under defendants they came to know well, or witnesses who had specific, individual encounters with the accused. I spent many evenings on the phone persuading unwilling witnesses to undergo the torture of having to relive the most horrendous events of their lives.

The experts in Nazi crimes cases were mainly historians and criminologists. Their role became extremely important in one vital aspect: the almost universal defense of "I only followed orders." Almost all defendants in these cases claimed duress, in that by not following the inhuman orders they would themselves have become victims in the iron-fisted Nazi system. They pointed to the activities of the "special court martials" which sentenced thousands of "deserters" to death in summary proceedings. However, experts were able to demonstrate to the satisfaction of the courts that refusals to carry out illegal and inhuman orders did not result in the claimed drastic punishment meeting the standards of genuine duress (which would excuse the crime), but only in admonition, reduction in rank, or, at most, transfer to a fighting unit. Thus the "duress" defense was rejected by all German courts, including the Supreme Court.

Have the perpetrators of the greatest crime in history been brought to justice? Can justice in a vast crime which subjected millions of totally innocents to death ever be achieved? The answer must be: of course not. Having said that, it must be noted that the German criminal justice system has certainly attempted to achieve the impossible. The 6,000-odd adjudications[vi] by painstaking courts adhering to international norms of "due process" demonstrate a national effort. There are certainly a number of black holes which enabled some gravely incriminated individuals to escape justice: the leaders of the "Reich Chief Security Agency"[vii] the judges who sentenced thousands to death under Nazi lawlessness, the doctors who performed human experiments (Mengele is just the tip of the iceberg) and other cogs in a vast killing-machine who were never discovered. On the whole, however, the stern face of justice has reached most of the principal Nazi perpetrators. The findings of the courts, if anything, give the lie to the Holocaust deniers and serve as an enduring record of the Nazi crimes. Looking back, I am satisfied that, however small, I was able to contribute to that end.

[i] By order of General Eisenhower, the German judicial system, one of the main pillars of the Nazi regime, had been dissolved immediately after the Allied occupation, but was slowly reconstituted in the Western zones of occupation by the three Allied Military Governments.

[ii] On the night of November 7, 1938, Nazi mobs burned down synagogues in all major German cities, plundered more than 8,000 Jewish-owned businesses, and murdered 100 Jews. The term "Kristallnacht" (night of broken glass) derives its name from the shattered windows of the looted stores.

[iii] In 1948, the Germans abolished the death penalty.

[iv] German-Jewish jurists made important contributions to the German criminal code, promulgated in 1871 by Bismark's government, whose important parts, except for statutory updates, are still in effect today.

[v] Report of the Zentrale Stelle in Ludwigsburg,. Since 2003, no major trials have been reported.

[vi] Two Dutch jurists, Prof.Mgr. C.F. Rueter and Dr. D.W.De Mildt, have compiled a verbatim record of German judgments in Nazi-rimes cases which have now reached 26 volumes. More are coming.

[vii] The "Reichssicherheitshauptamt", the central supervisory agency for the Holocaust, existed from 1939 to the war's end, at times with 3000-odd collaborators. Adolf Eichman, the Nazi criminal executed in Israel, was one of the department heads.

Queens County Bar Association

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REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Queens County Bar Association, after due and timely notice, in accordance with the provisions of the By-Laws of the Queens County Bar Association, have nominated the following list of members for the positions to be filed at the coming election at the Annual Meeting of the Association on March 6, 2009.

TO THE QUEENS COUNTY BAR ASSOCIATION:

We, the undersigned, members of the Nominating Committee do hereby respectfully report that pursuant to the provisions of Article VI, Section 3, of the By-Laws of the Queens County Bar Association, we have nominated for the respective offices the following named members:

OFFICERS 2009-2010

For President	GUY R. VITACCO, JR.
For President-Elect	CHANWOO LEE
For Vice President	RICHARD M. GUTIERREZ
For Secretary	JOSEPH F. DEFELICE
For Treasurer	JOSEPH J. RISI, JR.

FOR FOUR MEMBERS OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS (expiring May 31, 2012)

JENNIFER M. GILROY
RICHARD H. LAZARUS
GARY F. MIRET
JAMES R. PIERET

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS AS IMMEDIATE PAST PRESIDENT (expiring May 31, 2012)

STEVEN S. ORLOW

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF ONE YEAR (expiring May 31, 2010)

GREGORY J. NEWMAN

NOMINATING COMMITTEE

Joseph A. Baum	Cheree A. Buggs	Lucille S. DiGirolomo
Edward H. Rosenthal	Madaleine S. Egelfeld	Stephen J. Singer
Spiros A. Tsimbinos	Wallace L. Leinheardt	Steven Wimpfheimer

The following members have been designated by petition, pursuant to the By-Laws of the Association, as candidates for election to the office of members of the Nominating Committee to serve for a period of three years (expiring May 31, 2012)

DAVID N. ADLER GEORGE J. NASHAK, JR. LESLIE S. NIZIN

THE ANNUAL MEETING of the Queens County Bar Association will be held in the Bar Headquarters Building, 90-35 148th Street, Jamaica, New York on FRIDAY, MARCH 6, 2009, at 4:00 P.M.
The election of officers will take place at that time, together with such other business as may regularly come before the meeting. **SINCE NO INDEPENDENT NOMINATIONS HAVE BEEN FILED WITHIN THE TIME LIMITED BY THE BY-LAWS, THE ELECTION WILL BE PRO FORMA.**

Dated: Jamaica, N.Y.
February 13, 2009

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fore not given the benefit of the six-month extension of CPLR 205 (a). An interesting facet of the case was that when Supreme Court denied defendants' motion to dismiss on limitations grounds, it indicated that it had not intended the earlier dismissal to be "for failure to prosecute."

The Appellate Division reversed and dismissed the actions, and the Court of Appeals affirmed the dismissals, holding that it was not bound by Supreme Court's statement, since the basis for the dismissal was clear from the record.

Left unstated are the effects of a judge's failure to set forth the specific conduct, or of the failure of that conduct to "demonstrate a general pattern of delay." Under CPLR 3216, for example, a general pattern of delay does not necessarily need to be shown before the court enters a dismissal. That section allows a dismissal for failure to file a note of issue within 90 days of the service of a demand to do so, and the court is given specific authority to start the process in motion "on its own initiative." That CPLR 3216 is "extremely forgiving of litigation delays" has been well established by the Court of Appeals in *Baczkowski v Collins Const. Co*., and *Di Simone v Good Samaritan Hosp*. [61]If the defendant moves for dismissal under 3216, or if the [62] plaintiff proactively moves for an extension of time to file, dismissal will not be had if the plaintiff can show a reasonable excuse for delay and a meritorious claim.

On the other hand, it is now commonplace for a court to issue a CPLR 3216 demand, and a subsequent dismissal, sua sponte. Where the court has itself issued the 90-day notice, and the 90 day has come and gone without the note of issue having been filed, the court will frequently thissue the dismissal order without further notice to the plaintiff. Such an order would normally fall within the class of dismissals excluded from the benefits of 205(a), and yet the court would not have complied with the directive to set forth specific conduct showing a pattern of delay.

Rather, the order would at best describe one particular failure. The plaintiff would of course be entitled to move to vacate the sua sponte dismissal, and if he did, the court could then evaluate whether there had been a pattern of neglect. But what if the plaintiff did not move to vacate, but merely started a new action? If the new action needed the benefits of 205(a) to be timely, would the dismissal order be sufficient to exclude the case from 205(a)? Or, what about the facts in *Andrea v Arnone* itself? The conduct that led to the dismissal order was clear from the record, but not from the order itself. Is entitlement to the 205(a) extension now to hinge entirely on whether the dismissing judge takes the trouble to specify the pattern of delay in the dismissal order? What if, as happened in that case, the dismissing judge has no qualms about dismissing the case before him, but generously feels that the plaintiff should get another chance? Is the court now foreclosed from looking at the record and seeing the neglect to prosecute that is clearly there?

These questions remain unanswered.

In what has become a regular occurrence, the time limitation for actions involving phenoxy herbicides in Indo-China (Agent Orange) has been extended yet again, this time to June 16, 2010. This installment has a twist, in that the start date of the period covered has been moved back, from December 22, 1961, to February 28, 1961. [63]

Miscellaneous Statutory Changes

A new judicial district has been created, comprised of the county of Richmond. The thirteenth [64] district comes into existence as of January 1, 2009. There should be no outward change in the operation of the court.

In a new statute providing for copies of public records in forms other than paper, there was a [65] minor amendment to CPLR 8019 relating to fees for preparation of records in non-paper form.

The rule of the Chief Judge relating to fiduciary appointments has been amended, retroactive to January 1, 2007, to provide that a person or entity awarded more than an aggregate $75,000 in compensation during a calendar year is barred from compensated appointments during the following calendar year. The amendment raised the triggering point from $50,000. [66]

Motion Practice - Summary Judgment - Sufficiency of Papers

In *Smalls v AJI Indus., Inc*. Court of Appeals reiterated its frequent holding that the [67] proponent of a summary judgment motion must make a showing of its entitlement to judgment as a matter of law. If it fails to do so the motion should be denied, whatever the merits of the opposing papers.

The plaintiff was a passenger in a car driven by an driver described by the Court as a "novice," and whom the Appellate Division opinion noted was also unlicensed. Misjudging a turn on a wet roadway, the driver hit a parked dumpster owned by defendant AJI, injuring the plaintiff.

AJI moved for summary judgment, and Supreme Court denied the motion. The deposition testimony of the police officer was that he had seen the dumpster parked close to the curb, but could not recall whether or not it was in a safety zone. The majority opinion at the Appellate Division accepted the officer's testimony as sufficient to satisfy AJI's initial burden, and reversed on the grounds that the plaintiff and driver failed to raise a triable issue of fact as to whether AJI had placed the dumpster improperly in a driving lane or safety zone.

The Court of Appeals reversed, since the testimony of the officer was at best equivocal, and did not establish whether or not the dumpster was in a parking lane or not. AJI thus failed to make out a prima facie case of entitlement to summary judgment. Whether or not the opposing parties raised a triable issue of fact was therefore not an issue.

Motion Practice - Summary Judgment - Timeliness - *Brill* Doctrine

The Appellate Division opinion in *Crawford v Liz Claiborne, Inc*., focused on whether a [68] de minimis delay in moving for summary judgment was necessarily fatal under the *Brill* doctrine, with the majority holding that it was. The Court of Appeals, however, found the motion timely and *Brill* inapplicable.

The action was for unlawful discrimination on the basis of sexual orientation. The note of issue was filed on May 15, 2006. Pursuant to directive in the preliminary conference order, motions for summary judgment were to be made "per local rule," which at the time meant within 60 days, that is, by July 14. Defendants' motion for summary judgment was made on July 19. In the meantime, the local rule had been amended to adopt the 120-day period of CPLR 3212, but the individual assigned Justice had adopted an individual rule shortening the time to 60 days. Counsel's excuse for the late motion was that she was unaware that the court had shortened the time. Supreme Court accepted this explanation, considered the motion on its merits, and granted it.

The Appellate Division rejected it. Forgetting that "hoary maxim," ignorance of the law is no excuse, the court viewed this excuse as nothing more than law office failure, which is not [69] generally accepted for purposed of CPLR 3212. The main difference between the majority and the strong - and somewhat bitter - dissent was the dissent's view that a court retains inherent discretion to excuse de minimis delays, even after *Brill*, and the majority's insistence that *Brill* requires an excuse for any lateness, even one that in other contexts would be considered de minimis. The dissent found this an entirely unwarrantable interference in the trial court's exercise of discretion.

The dissent was founded on what it viewed as confusion and ambiguity over the source of the rule shortening the time period to 60 days, and whether the period had been shortened at all.

The majority found it in what it saw as a clear reference to a local rule in the preliminary conference order, the dissent found no such rule in the record. It found, instead, a rule applicable only to the individual judge's Part. [70]

The Court of Appeals found *Brill* inapplicable to the case. The assigned Judge had no individual rule at the time of the Preliminary Conference Order, and so the Preliminary Conference Order expressly adopted the local rule. The local rule in effect at the time of the filing of the note of issue allowed for 120 days to make the motion, which was therefore timely. The matter was remitted to the Appellate Division for consideration of the merits of the order granting summary judgment.

Papers

Have you ever thought that the requirement to personally sign each paper submitted to a court, pursuant to 22 NYCRR 130-1.1 (a), is a mere bothersome technicality? Have you ever been tempted to (shall we say) sidestep it? Note well the determinations of *In re Shapiro* and [71] *In re Moroff*. In these disciplinary cases the respondent attorneys were found to have repeatedly [72] submitted summonses and complaints and other papers with signatures not their own.

They were found out in the District Court, Suffolk County. Their firm wound up paying sanctions in that court of $35,000, and the cases directly involved were dismissed (without prejudice). The Supervising Judge of the District Court, Suffolk County, directed the respondents to make new filings, with true signatures, in each of their other cases. The District Court had to deal with 4,600 new filings.

But wait, it gets worse. The respondents, apparently realizing they were in real trouble, voluntarily reported their misconduct to the Administrative Judge of the Civil Court in the City of New York. Justice Jeremy Weinstein was assigned to hold status conferences as to their matters in the Civil Court, and concluded that all of their filings, amounting to thousands of documents, were invalid as not bearing the required signatures. Rather than dismissing the actions, he directed the filing of sworn statements ratifying each of the signatures on each of the documents. He also imposed sanctions in the total amount of $40,000, which the respondents' firm paid.

But wait, it gets worse. The respondents were found guilty of professional misconduct in filing fraudulent documents with the court, and have been suspended for six months each. Is anyone still tempted to cut this particular corner?

Pleadings

The general rule for specificity of statements in a pleading is only that they be sufficiently particular to give the court and the adversaries notice of the transactions and occurrences intended to be proved, and to state the material elements of each cause of action or defense. [73] Fraud cases present an exception, found in CPLR 3016(b), which provides that "the circumstances constituting the wrong shall be stated in detail." How detailed does that have to be?

The Court of Appeals held in *Pludeman v Northern Leasing Systems,* [74]a case involving imputations of corporate fraud to corporate officers and directors, that CPLR 3016(b) is met by allegations which state facts sufficient to allow an inference of fraud. While the " the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud."

Here, the plaintiffs were prospective customers of the corporate defendant in the leasing of office equipment. The fraudulent conduct complained of was that plaintiffs were presented with contracts in such a way that three of four pages were deliberately hidden, and that the hidden pages contained onerous terms of which the plaintiffs were not informed. The scheme was allegedly perpetrated as part of a consistent and nationwide pattern over a period of years.

The allegations against the individual defendants were only that they were involved in the fraud as corporate officers and that under the circumstances they must have known of the fraudulent conduct and participated in it. That is to say, there were no specific allegations of any fraudulent conduct against the individual defendants.

The Supreme Court denied the individual defendants' motions to dismiss for failure to state a cause of action, and the Appellate Division affirmed, but with two dissenters. The dissenters would have dismissed due to the absence of allegations of actual knowledge by the individual defendants.

The Court of Appeals affirmed and upheld the complaint. In cases of corporate fraud, corporate officers and directors are individually liable if they had knowledge of the fraud or participated in it, whether or not they profited individually. While CPLR 3016(b) clearly [75] requires more than the mere "notice" pleading of CPLR 3013, and while it must inform the defendant of the detail the allegedly fraudulent conduct, that does not mean that the complaint must set forth "unassailable proof of fraud." It will be met where the stated facts will allow "a reasonable inference" of fraud. The problem, of course, is that the specific activities are peculiarly within the defendants' knowledge, and to require more would make it impossible for a defrauded plaintiff to state a claim with sufficient particularity.

The court found that the allegations in the complaint were sufficient that they allowed an inference that the corporate officers and directors sued in fact had knowledge of the fraudulent conduct. The plaintiffs, unrelated to each other, all made similar allegations. The allegations are sufficient to raise the inference that the scheme originated with corporate officers and not from the sales agents. Since the specifics of each individual defendant's participation in the marketing scheme are necessarily not within the plaintiffs' knowledge, the complaint was properly regarded as sufficient at this early stage, subject to later disclosure.

There was a dissent by Judge Smith, who

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would have started by adopting the view of this pleading requirement prevailing in the Federal courts. The FRCP has a similar rule to the CPLR, and the rule as stated by the Court of Appeals for the Second Circuit is that claims of [76] fraud must be supported by "particularized facts to support the inference that the defendants acted recklessly or with fraudulent intent" and sufficient to support "a strong inference of fraud."[77]

Judge Smith acknowledged that the Federal test is not significantly different from the one applied by the majority. His dissent focused primarily on the application of the rules to the facts. He found that the complaint was completely devoid of individualized allegations against the individual defendants, and that there was insufficient support for the inference of misconduct against them. The corporate defendant is a lessor of the equipment in form only, but is in reality a lender which advances money to equipment distributors and takes back rental payments economically equivalent to interest. The sales force which is alleged to have conducted the fraudulent scheme are not alleged to have been directly supervised or instructed by the corporate defendant, and so there is no basis for an inference of fraud against the corporate officers. Judge Smith in fact found that the essence of plaintiffs' complaint was not to the allegedly fraudulent concealment of the lease terms, but to the harsh terms themselves. He found this to be a claim of unconscionability, not fraud.

Trial Practice - Dead Man's Rule

The Dead Man's Rule (CPLR 4519) precludes a party to an action or proceeding (or a person interested in the event) from testifying against the personal representative of a decedent concerning a communication or transaction between the witness and the decedent. The issue in *Matter of Zalk* was whether the Rule applied to an attorney disciplinary proceeding where the [78] estate of the decedent client was not directly a party, but stood to gain or lose depending on whether the respondent attorney was found guilty of misconduct. The charges related to the handling of the decedent's sale of real property by the attorney, and his claim that there was an oral agreement between him and the decedent that he would be entitled to retain a large portion of the $200,000 down payment as a fee.

The only evidence tending to show that the attorney had not converted and misappropriated client funds, by taking the money out of his escrow account, was his own testimony as to conversations and transactions with the deceased client. Without that testimony, the only evidence was that he held client funds in his account, and applied them to his own use without any written agreement as to his fee. The difference to the respondent attorney case was stark: with the testimony admitted, the referee recommended dismissal of four of five charges, and recommended a public censure as to the fifth. Barring the testimony, the Appellate Division sustained the most serious charges and suspended him for two years.

Richard Zalk, the attorney in this case, had represented the decedent, Ruth Gellman, for services relating to an apartment complex she owned. These services, extending over a period of years, were apparently not particularly significant, and Zalk did not bill Gellman for them. Zalk claimed that he and Gellman had been friends for years, and that their oral understanding was that he would eventually be paid for all of his services when the complex was sold. The sale occurred in 1998, and Zalk represented Gellman throughout. According to Zalk, his services as to this transaction were significant, including persuading the broker to lower his fee by a third and persuading the purchasers to pay it. The sale was for $2 million, of which $1.4 million was in the form of a purchase money mortgage.

Zalk claimed that after the closing he met with Gellman in order to calculate the balance in the escrowed down payment after expenses, so as to write a check. Gellman told him that he was to keep the balance of the down payment as a fee for his services over the ten years he had represented her. He sent her a letter declining the offer, but (according to his testimony) telephoned him to insist that he keep the down payment as his fee.

Her insistence as to this was repeated during her final hospitalization. One of Gellman's daughters was present during the conversations, but she neither corroborated nor denied Zalk's testimony as to them.

After Gellman's death, Zalk took $100,000 from the escrow funds for his own use. $62,000 remained in the escrow account. Eventually, Gellman's daughters, as administrators of her estate, complained to the Disciplinary Committee. He was charged, among other violations, with conduct involving dishonesty, fraud, deceit or misrepresentation, with misappropriation of client funds, and with conduct adversely reflecting on his fitness as a lawyer.

The dispute over the Dead Man's Rule arose at a disciplinary hearing before a referee.

The Disciplinary Committee argued that the rule prevented him from testifying as to any transactions or conversations with Gellman. The referee, looking at the "plain language of the statute," the referee found that the disciplinary hearing was not against Gellman's executor, administrator or survivor, and therefore the Rule did not apply. While Zalk would not be allowed to testify if the administrators sued him to recover the money, he could not be barred from testifying to defend himself in the disciplinary proceeding.

After hearing Zalk's testimony, and finding him a credible witness, the referee found no reason to doubt that at the least he believed he had an oral agreement with Gellman, and no basis for a finding of dishonesty, fraud, deceit or misrepresentation. He recommended dismissal of all charges except that of conduct adversely reflecting on his fitness as a lawyer, due to his failure to obtain a writing from Gellman as to the agreement on the fee. Besides, the "fact remains that it looks awful when a lawyer makes an oral agreement with a sick, elderly woman in which she gives him a significant portion of her assets."

He found that in view of Zalk's 36 years of practice with no disciplinary history, his

cooperation with the investigation, his acknowledgment of error in not making a written record of his agreement with Gellman, and a list of positive references, the referee rejected the Committee's recommendation of disbarment and recommended a public censure.

The Appellate Division hearing panel disagreed with the referee as to the applicability of the Dead Man's Rule. The proceeding should have been viewed as against the interests of the Gellman estate, since the court could order Zalk to make restitution. It directed a remand to the referee.

Zalk moved to confirm the referee's report and accept the sanction of censure, and to disaffirm the report and recommendation of the hearing panel. The Committee cross-moved to affirm the hearing panel's conclusion of law but disaffirm the remand to the referee. The Committee's cross-motion sought to have the court review the record de novo and to disbar Zalk, or impose some other sanction.

The Appellate Division disaffirmed both the referee's report and recommendations, and those of the hearing panel. Reviewing the matter de novo, it found that the Dead Man's Rule applied to that part of the disciplinary proceeding which was to determine whether or not there had been misconduct, but not to that part which was to determine an appropriate sanction.

Whether or not Zalk was found guilty of professional misconduct certainly affected the interests of the estate insofar as it affected their right to restitution. As to the appropriate disciplinary sanction, however, the estate had no interest, and therefore his testimony could be admitted in mitigation of his misconduct. Finding him guilty of conversion of client assets and misappropriation of client funds, in addition to conduct adversely reflecting on his fitness, the Appellate Division imposed the sanction of a two-year suspension. There was one dissent, which took a stricter view, and would have barred Zalk's testimony entirely and imposed a harsher sanction.

The Court of Appeals held that the Rule was not applicable, and that the respondent attorney was allowed to defend himself by testifying as to transactions with the decedent. The Court agreed with the referee that the Rule barred Zalk's testimony against Gellman's executor, administrator or survivor, but instead against the Disciplinary Committee, which is none of those. That an outcome in Zalk's favor would affect the estate's ability to obtain reimbursement from the Lawyer's Fund for Client Protection, or would rule out their assertion of collateral estoppel in an action against Zalk did not make them parties to the disciplinary proceeding.

The Dead Man's Rule applies only where the testimony is against the executor, administrator or survivor of a decedent. It does not bar testimony merely because it might adversely affect their interests in some later proceeding. The Court therefore reversed the\ Appellate Division, and sent the matter back for further proceedings.

Settlement

In *White House Manor, Ltd. v Benjamin* the Court of Appeals dealt with a situation [79] where an interested non-party to litigation made itself a party by stipulation, and accepted certain obligations. When the new party failed to live up to those obligations, what was the trial court's authority to enforce the stipulation? What was the procedural vehicle for doing so?

The underlying dispute involved a 3.43 acre parcel of land in Elmsford, New York, in Westchester County. The property was originally part of a larger parcel of 8.03 acres, sold by the defendants Joan Levy, Jerald Levy and Rose Benjamin ("the Levys") to the plaintiff White House Manor, and subject to a mortgage from White House to the Levys. When, in 1995, White House failed to keep up the mortgage payments, the Levys took the smaller parcel back in lieu of foreclosure. The dispute which led to this lawsuit arose due to the fact that the smaller parcel had not been separated for real estate tax purposes, and White House wound up paying taxes on the entire 8.03 acre parcel, instead of only the 4.6 acres it actually still owned. The Levys, for their part, were looking to sell or build on the 3.43 acre parcel, but needed to get approval from the Town of Greenburgh, which could not be obtained without expensive sewer work. They marketed the property with the proviso that any purchaser would have to bear the cost of subdivision and of obtaining any approvals from the Town.

This lawsuit was commenced in 1999 to recover White House's excess tax payments

from the Levys on an unjust enrichment theory. They counterclaimed for contribution from White House on the costs of obtaining approval for subdivision of the property.

Shortly after the commencement of the lawsuit, the Korean Presbyterian Church of Westchester bought the 3.43 acre property from the Levys, contingent on obtaining approvals from the Town and on making a monthly payment of $2,000, which was expressly made in addition to the purchase price and not refundable in the event the contract was never consummated. There were provisions made for the extension of the Church's time to obtain the approvals and complete the transaction. These extension provisions proved necessary, since the Town had imposed a three-year building moratorium. In May of 2003, the Levys and the Church extended the contract to extend the option period on condition that the Church continued to make the $2,000 monthly payments, and with the Church to make the pro rata share of the taxes from the date of the extension agreement to the date of the closing.

Within a few weeks of the extension agreement, the Levys, White House and the Church all entered into a stipulation of settlement of the lawsuit. The Church agreed to be a party to the stipulation, since as contract vendee it had an interest in the outcome. As part of the stipulation it agreed to make the pro rata tax payments to White House's attorney until the closing of title under the contract, the completion of the subdivision, or the termination of the contract by default of either the Levys or the Church. This stipulation was "so-ordered" by the court.

After still further extensions of the contract, in January of 2005 the Church stopped making the $2,000 monthly payments, and the Levys claimed to have found out that the Church had stopped pursuing the application for subdivision with the Town. In March of 2005 the Church purported to terminate the contract and demanded return of the $380,000 down payment. The Levys refused, claiming that the Church's failure to continue pursuing approval for the subdivision constituted a wilful default under the contract.

With this dispute going on, neither the Levys nor the Church paid the pro rata share of the taxes to White House. White House moved in the unjust enrichment lawsuit, to enforce the stipulation against both the Levys and the Church. The Levys cross-moved for a declaration that the Church had defaulted under the contract as amended as well as under the stipulation, and sought relief for the default.

Supreme Court granted both motion and cross-motion. It entered judgment against the Church declaring it in breach of the contract, the later amendment, and the stipulation of settlement, declared that the Church had forfeited the down payment, ordered the Church to turn over to the Levys all documents relating to the applications to the Town and all engineering plans

57. L.2008, c. 156, § 1, eff. July 7, 2008

58. The others are: a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, and a final judgment upon the merits. Both the the recommencement and service of the summons must come within six months of the termination.

59. Andrea v Arnone, Hedin, Casker, Kennedy & Drake, ___ NY3d ___, ___ NYS2d ___, 2005 WL

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2777555 (10/27/05)
60. See, Kihl v Pfeffer, 94 NY2d 118 (1999); Brill v City of New York, 2 NY3d 648 (2004); Miceli v State Farm, 3 NY3d 725 (2004).
61.Baczkowski v D. A. Collins Const. Co., 89 NY2d 499, 655 NYS2d 848 [1997]
62.Di Simone v Good Samaritan Hosp., 100 NY2d 632, 768 NYS2d 735 [2003] discussed above.
63. L. 2008, ch. 143
64. L. 2007, ch. 690
65. L. 2008, ch. 223
66. Rules of the Chief Judge, § 36.2(d)(2)
67. Smalls v AJI Indus., Inc., 10 N.Y.3d 733, 853 N.Y.S.2d 526 [2008]
68. Crawford v Liz Claiborne, Inc., 45 AD3d 284, 844 N.Y.S.2d 273, 2007 NY Slip Op 08301 [1st Dept., 2007]
69. The Appellate Division gave the maxim airs by putting it in Latin, but we'll translate.
70. The dissent was quite strong about the discretion issue, finding the reversal to be "officious intermeddling [which] intrudes upon the autonomy of the IAS court, interfering with its prerogative to control its calendar and introducing uncertainty and confusion into its proceedings." There were other points of disagreement. The copy of the note of issue in the motion record did not bear the clerk's date-stamp indicating when it was filed. The majority looked into the court file to find a copy with the date-stamp, taking judicial notice of it, and that is where the filing date of May 15 was found. The dissent found this to be a "sua sponte enlargement of the record." Compare the court's refusal to take judicial notice of an affidavit in the file, in Walker v City of New York, 46 A.D.3d 278, 847 N.Y.S.2d 173 [1st Dept., 2007]. The bitterest point of contention, though, was that the majority found it necessary to direct the reassignment of the case to a different Justice, without any actual finding of misconduct, and albeit with great care to avoid criticizing the original Justice, on the grounds that the plaintiff "raised a reasonable concern about the appearance of impartiality." [sic] The dissent found this to be "an affront to the motion court." The Court of Appeals did not address this issue.
71. In re Shapiro, 55 A.D.3d 291, 863 N.Y.S.2d 784 [2d Dept.,2008]
72. In re Moroff, 55 A.D.3d 200, 863 N.Y.S.2d 800 [2d Dept.,2008]
73. CPLR 3013
74. Pludeman v Northern Leasing Sys., Inc., 10 N.Y.3d 486, 860 N.Y.S.2d 422 [2008]
75. Polonetsky v Better Homes Depot, 97 NY2d 46, 55 [2001]
76. FRCP Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."
77. Eternity Global Master Fund Ltd. v Morgan Guar. Trust Co., 375 F3d 168, 187 [2d Cir 2004], quoting Shields v Citytrust Bancorp, Inc., 25 F3d 1124, 1129 [2d Cir 1994]
78. Matter of Zalk, 10 N.Y.3d 669, 862 N.Y.S.2d 305 [2008]
79. White House Manor, Ltd. v Benjamin, 11 N.Y.3d 393, ___ NYS2d ___, 2008 NY Slip Op 09003 [2008]

How I Spent My Summer Vacation

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purifying system and also asked my physician for diarrhea medication. I was also aware of the risks of High Altitude Sickness and got a prescription for Diamox which was to help the body absorb oxygen at the higher altitudes where the oxygen was at least 20% less than at sea level. With all of this preparation, and all of the potential obstacles I anticipated it was incomprehensible that my quest to reach the summit of Mt. Kilimanjaro would end in failure at the airport gate.

For ten months I followed an aerobic and strength training regimen. Kilimanjaro is sometimes referred to as the mountain of the strong warriors. At 56 years of age I was no longer a young man but, in my mind, I was not ready to join the AARP. I knew that I would have to train hard to keep up with my fellow Kilimanjaro trekkers who were, on average, twenty five year olds. I was warned that Mt. Kilimanjaro would not only test my strength and endurance but it would also challenge my resolve. I was warned that the mere vision of the steep grade and the magnitude of the mountain has sent more than one climber retreating to lower ground. After ten months of training I lost 18 pounds. I felt I was ready, physically, mentally and emotionally to challenge Mt. Kilimanjaro. However, I did not expect my resolve to be tested before I even got on the first of two flights I needed to reach my destination. But there I was in Newark airport, with a backpack full of gear ready for an adventure of a lifetime and not going anywhere.

There are times when plans just do not go as expected.

This was one of those days. I began to formulate a new plan. If I could not get on this flight when could I get on the next flight to Kilimanjaro? For the next two hours I was on the telephone to a half dozen airlines and American Express Travel Service. I considered the possibility of ascending Mt. Kilimanjaro in 4 ☐ days rather than 5 ☐ days thereby being able to return on the original scheduled flight. However, this would have meant less time to acclimate to the higher altitude. I was not willing to rush the ascent. All of the information I had received was that the climb had to be slow and steady and I needed to give my body time to adjust to the "thin air". Therefore, I needed to get, not only a new departure flight, but also a new return flight. Finally, I was able to find a flight leaving Newark Airport on the next day but my new returning flight would be coming into Kennedy Airport. I had to call Africa and ask if my guide, three porters and cook could delay our ascent by one day, which also meant I would be descending one full day later. The expedition to the summit of Mt. Kilimanjaro required a well trained and equipped support team. Once you are on the mountain there are no convenience stores to pick up whatever was left behind. I was relieved when I was assured in Swahili by my African guide: ""Acuna Matada" No Problem.

I congratulated myself for having overcome the first challenge in my quest to summit Mt. Kilimanjaro.

But, now I had to call home and tell my wife I missed the flight and I would need a ride to Newark the next day and . . . "by the way . . . . next week can you pick me up from Kennedy Airport?" My wife was very helpful,but to this day she will be quick to remind me "Are you leaving enough time to get to your appointment . . . You haven't forgotten the flight to Kilimanjaro!! Forget? How can I forget when she routinely reminds me!!! The next day my wife drove me to Newark with more than four hours to spare. I was not taking any chances.

For the next 5 ☐ days I trekked continuously upward through five distinct ecological zones. It was similar to walking from the equator's rain forest to the northernmost alpine deserts. Above 12,000 feet I began to experience the symptoms of Altitude Sickness (lack of appetite, headaches, dizziness, nausea, and diarrhea). At the end of each day of the arduous trek I had to remind myself that I was on vacation. No electricity, no running water, aching muscles and the five symptoms of altitude sickness. How could I doubt that I was on vacation! No one said the challenge to summit Mt. Kilimanjaro would be a walk in the park.

My African guide encouraged me with the most commonly spoken Swahili on the mountain: "poli poli" slowly. One step at a time.

In my daily journal I confessed to myself that this trip was not merely to experience African culture and not merely to experience the unique geology and geography, nor was it to see the most humbling view of the night sky filled beyond comprehension with billions and billions of stars. In large part this trek was to challenge my physical endurance and mental resolve.

The final push to the top of Mt. Kilimanjaro began at 11 p.m. on the fifth day of the trek. Climbing for the next five hours in total darkness I approached the summit in the middle of a blizzard. Struggling against the howling wind I tried to unfurl my homemade banner. I tried to ignore the subfreezing temperature and biting wind as I posed for a photo with my message of encouragement to my family and a reminder to myself: CARPE DIEM.

**Editor's Note:* Richard N. Golden is a solo practitioner with offices located in Forest Hills, New York.

Marital Quiz

ANSWERS TO MARITAL QUIZ ON PAGE 8

Question #1 - When an adverse party is called as a witness may it be assumed that such adverse party is a hostile witness?

Answer: Yes, *Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)*

Question #2 - When an adverse party is called as a witness, may the direct examination assume the nature of cross-examination by the use of leading questions?

Answer: Yes, in the discretion of the trail court. *Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)*

Question #3 - When an adverse party is called as a witness, can he or she be impeached by prior statements made either under oath or in writing?

Answer: Yes, *Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)*

Question #4 - When the remedy, for the violation of a Family Court order, is incarceration, is the burden of proof "clear and convincing evidence" or "beyond a reasonable doubt?

Answer: "Beyond a reasonable doubt." *Rubackin v. Rubackin 2009 NY Slip Op 1488 (2nd Dept. 2009)*

Question #5 - At the time of trial, the parties children were three and seven years of age, was it error for the trial court not to order the defendant to contribute to the children's college education?

Answer: No, it was premature and no evidence was offered concerning the children's academic ability, interest in attending college or choice of college. *Bibas v. Bibas 871 N.Y.S. 2d 648 (2nd Dept. 2009)*

Question # 6 - Is a provision in a separation agreement that the father would provide total support of the children without the contribution from the mother, enforceable?

Answer: No, if the court finds that this provision does not provide for adequate support for the parties' children. An inadequate child support provision contained in a separation agreement is "voidable and cannot bind an appropriate court from remedying the inadequacy." *Pecora v. Cerillo,* 207 A.D.2d 215; 621 N.Y.S. 2d 363 (2nd Dept. 1995)

Question #7 - May a mother counterclaim in a divorce proceeding for emotional pain and suffering due to the father's removing the children to a foreign country and depriving the mother of her visitation with the children?

Answer: No, it is against public policy. *Eller v. Eller* 136 A.D.2d 678; 524 N.Y.S. 2d 93 (2nd dept. 1988)

Questions #8 - Is the failure of the non-custodial parent to make payment of child support, sufficient basis to deny visitation?

Answer: No, *Resignato v. Resignato* 213 A.D.2d 616; 624 N.Y.S.2d 440 (2nd Dept. 1995).

Question #9 - Before ordering interim visitation, is the court required to conduct a hearing?

Answer: No, if the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest. *Rosenberg v. Rosenberg* 2009 NY Slip Op 1633 (2nd Dept. 2009)

Question #10 - In defending an action for divorce based upon an abandonment, must the defendant plead justification for leaving the marital residence as an affirmative defense?

Answer: No, it is permissible to plead justification as an affirmative defense, but it is not necessary since it is not a claim that would take the plaintiff by surprise. The complaint must allege that the defendant had abandoned the marital residence without cause or provocation. *Gulati v. Gulati* 2009 NY Slip op 01948 (2nd Dept. 2009)

An Analysis of the Motion to Set Aside a Verdict: Subsection 1[1]

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perspective Judgment or conviction, would require reversal or modification of the Judgment, as a matter of law, by the Appellate Court.[15]

Prosecutorial misconduct, if objected to and preserved at trial, can be a ground for the granting of this Motion.[16] People v. Robinson[17] is exemplary of the how and when prosecutorial misconduct can be a ground for a reversal or modification. In that case, the Appellate Division Second Department held that the defendant was entitled to a new trial in view of cumulative effect of prosecutor's errors; i.e. the prosecutor and supervisor "prepped" the police officer during recess regarding his direct testimony and in order to rehabilitate him on cross-examination; the prosecutor improperly elicited testimony from the prosecution witness, which bolstered identification testimony of an undercover officer, and improperly suggested, during her summation, that the defendant and his co-defendant were "sophisticated businessmen" to whom undercover officers and "buy" money were not new.

Prosecutorial misconduct can be found in summation by the prosecutor. For example, in People v. Anderson[18] the Appellate Division Second Department held that the prosecutor misled the jury by pointing to the absence of evidence the prosecutor knew existed, and reversal thus was warranted, where during summation and after trial, the court excluded the exculpatory portion of the defendant's statement indicating that the defendant had been with a certain person at the time of the crime, and the prosecutor argued that the defendant had not told the police that he was with such a person.

Similarly, in People v. Brown[19], the Appellate Division Second Department held that the prosecutor's conduct during summation, consisting of comments on the defendant's failure to testify, misstatements concerning the evidence, and references to matters not in evidence, denied the defendant a fair trial.[20]

Where there is an inconsistent verdict that rises to the level of repugnancy, this can be ground for a reversal.[21] Similarly, although not exactly, in People v. Jackson[22] the Appellate Division Second Department held that the fact that verdicts were repugnant and inconsistent was moot, or at least the contention to that effect, in view of the modification of the verdict on Appeal.[23]

Another topic in connection with this, is the area of speculation-based verdicts, as a ground for reversal or modifications. People v. Marin[24] is relevant. In that case, the Appellate Division Second Department held that although jury verdicts are not to be set aside lightly, a verdict, however, based upon speculation and conjecture cannot stand.[25]

Surprise, in general, cannot be a ground for reversal.[26]

The same is true of examination of witnesses, as a ground for reversal or modification. Thus, in People v. Ortiz[27], the Appellate Division First Department held that any error in the trial court's evidentiary rulings precluding proposed cross-examination of the prosecution witness regarding inconsistent statements or omissions of material facts, was not of a nature requiring reversal as a matter of law, so as to warrant vacating the verdict prior to sentencing, where a robbery defendant failed to preserve challenge to ruling precluding witness' impeachment, with his prior statement to the police, and other proposed impeachment evidence, was not so fundamental that it would have outweighed or neutralized witness' other testimony or that of the victims.

There is also an issue that suppression of evidence can be a ground for reversal or modification. For example, in People v. Barreras[28], the Appellate Division Second Department held that suppression by the prosecution of material evidence provided by a missing witness to the prosecutor during the progress of the defendant's trial, on the charges of Burglary and Grand Larceny, was clearly a violation of the prosecutor's duty of disclosure sufficiently significant to deny defendants right to a fair trial, and entitled the defendant to a new trial.[29]

There is a rule that the trial court's authority to Set Aside a Verdict under this Subsection, is not a matter of discretion. Thus, in People v. Adams[30], the Appellate Division First Department held that the trial court's authority to set aside or modify a verdict is limited to a case of error, which, if raised upon an Appeal, from a prospective Judgment of conviction, would require a reversal or modification of the Judgment, as a matter of law by an Appellate Court.[31]

There is a further rule that this Motion cannot be granted by matters outside of the record. Thus, in People v. Spirels[32], the Appellate Division Fourth Department held that the defendant's Motion to Set Aside the Verdict was improperly based on matters outside the record.[33]

It has been held that the right to confrontation is a ground for reversal or modification. For example, in People v. Connyers[34], the trial court held that its prior ruling, permitting the People to introduce into evidence in their case-in-chief two 911 calls as "excited utterances" was of Constitutional dimension and therefore subject to analysis, on motion to set aside jury's verdict, under intervening United States Supreme Court decision holding that the Sixth Amendment's Confrontation Clause barred use of "testimonial" statement made by a witness, who did not appear at the criminal trial, unless the witness was unavailable to testify at the trial and was subject to cross-examination at the time the statement was made.

It has been held, however, and this is important, that the interest in justice rationale is not a basis upon which a trial court can set aside a verdict.[35]

There is law on the issue of immunity as a ground for reversal or modification. Thus, again, in People v. Pratto[36], the trial court held that the prosecutor's refusal, in prosecution for criminal mischief and resisting arrest, to grant immunity to potential defense witnesses who had been charged with refusal to aid a police officer in arresting the defendant, did not provide the basis on which the trial court could set aside guilty verdicts; the defendant made no showing that the testimony by those potential witnesses would have resulted in a more favorable verdict.

There is a rule that a speedy trial claim cannot be reargued as a motion to set aside a verdict of guilty. See People v. Jules[37].

Finally, there is law that a missing witness charge can be a ground for reversal or modification. Thus, again, in People v. Jules[38] the trial court held that it had jurisdiction to review the defendant's motion to set aside a verdict finding him guilty of offenses arising from a domestic dispute with his spouse, on the ground that the court erred as a matter of the charge; while the jury rejected the defendant's testimony that the spouse's injury was accidental, a missing witness charge could have had a material impact on the jury's deliberation of the element of intent, and thus, if the defendant had been entitled to a missing witness charge, it would have been reversible error to deny the request for the charge.

CONCLUSION

A number of rules have emerged on the interpretation and understanding of Subsection (1) of this Statute. First, the Motion must be based on purely statutory grounds, and the court's discretion is not involved. Second, the Motion must be made subsequent to the verdict, and not after the sentencing. The remedy after sentence is a direct Appeal.

There are various grounds upon which the granting of this Motion can be based. They include the absence of the judge from the court at some stage of the trial; the absence of the defendant from a part or aspect of the trial; comments or conduct of the court; the death of the court stenographer, making it impossible to obtain a transcript of the minutes of the trial; ineffective assistance of counsel; prosecutorial misconduct; the verdict being against the weight of the evidence, although this is not a very strong ground and is rarely the basis for the granting of the Motion; inconsistent and repugnant verdicts; speculation-based verdicts; examination of witnesses; suppression of the evidence; and others.

This article has been tentative at best, and has simply sought to isolate the rules and parameters in connection with the granting or denial of this motion. It is hoped that this article, or essay, will provide a guide to the Criminal law practitioner, when confronted with when and how and the chances that exist in making and obtaining success in making this peculiar and particular Motion.

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ENDNOTES

1 The case law cited in this article has its source in the annotations of McKinney's Consolidated Laws, Sec. 330.30, Volume 11A, West Publishing Company.

1 At any time after rendition of a verdict of guilty, and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.
That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of a verdict; or
That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial event with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

1 People v. Patino, 259 AD2d 502, 687 NYS2d 636 (2nd Dept. 1999); People v. Sheltray, 244 AD2d 854, 665 NYS2d 224 (4th Dept. 1997); People v. Garcia, 237 AD2d 42, 668 NYS2d 5 (1998)
3 171 AD2d 387, 577 NYS2d 249 (1st Dept. 1991)
4 See People v. Thompson, 177 Misc.2d 803, 678 NYS2d 845 (S. Ct. Kings Co. 1998); People v. Addison, 174 Misc.2d 873, 667 NYS2d 208 (St. Ct. Bx. Co. 1997)
5 See also People v. Rivera, 108 AD2d 829, 486 NYS2d 258 (2nd Dept. 1985); People v. Suarez, 98 AD2d 678, 469 NYS2d 752 (1st Dept. 1989); People v. Knapper, 230 AD 487, 245 NYS 245 (1st Dept. 1930); People v. Cole, 1 Misc.3d 531, 765 NYS2d 477 (S. Ct. Kings Co. 2003); People v. Thompson, Supra.; People v. Frangipane, 171 Misc. 610, 13 NYS2d 429 (Kings Co. Ct. 1939); People v. Rodgers, 184 AD 461, 171 NYS 451 (1st Dept. 1918)
6 See People v. Workman, 277 AD2d 1029, 716 NYS2d 198 (4th Dept. 2000); People v. Richards, 266 AD2d 714, 698 NYS2d 785 (3rd Dept. 1999); People v. Walker, 26 Misc. 2d 940, 206 NYS2d 377 (Ct. of Gen. Ses. NY Co. 1960)
7 People v. Silver, 240 AD 259, 269 NYS 765 (1st Dept. 1934)
8 See also People v. Balkum, 155 Misc.2d 479, 589 NYS2d 132 (Monroe Co. Ct. 1992) and People v. Perkins, 1 Wend. 91 (1828)
9 255 AD2d 454, 682 NYS2d 215 (2nd Dept. 1998)
10 See also People v. Anderson, 256 AD2d 413, 682 NYS2d 231 (2nd Dept. 1998). Cf. People v. Gil, 251 AD2d 121, 674 NYS2d 651 (1st Dept. 1998); People v. Matthews, 175 AD2d 24, 573 NYS2d 156 (1st Dept. 1991)
11 See People v. Rao, 271 NY 98, 2 N.E.2d 275 (1936) and People v. Foreman, 13 AD2d 500, 212 NYS2d 338 (1961).
12 1 NY3d 109, 769 NYS2d 781 (2003)
13 On this See and Cf. People v. Rodriguez, 10 AD3d 540, 782 NYS2d 35 (1st Dept. 2004); People v. Clark, 6 AD3d 1066, 776 NYS2d 656 (4th Dept. 2004); People v. Williams, 305 AD2d 804, 759 NYS2d 580 (3rd Dept. 2003); People v. Morgan, 271 AD2d 248, 706 NYS2d 390 (1st Dept. 2000); Shields v. Duncan, 2003 WL 22957008
14 65 NY2d 888, 493 NYS2d 302 (1985)
15 See People v. Phillips, 11 AD3d 406, 783 NYS2d 373 (1st Dept. 2004); People v. Cohen, 9 AD3d 71, 773 NYS2d 371 (1st Dept. 2004); People v. Garcia, 237 AD2d 42, 668 NYS2d 5 (1st Dept. 1998); People v. Brown, 141 AD2d 657, 529 NYs2d 552 (2nd Dept. 1988); People v. Ramos, 33 AD2d 344, 308 NYS2d 195 (1st Dept. 1970)
16 See People v. Collins, 12 AD3d 33, 784 NYS2d 489 (1st Dept. 2004).
17 190 AD2d 697, 593 NYS2d 279 (2nd Dept. 1993)
18 Id.
19 256 AD2d 414, 682 NYS2d 229 (2nd Dept. 1998)
20 See also and cf. on this People v. Devino, 254 AD2d 9, 688 NYS2d 114 (1st Dept. 1998); People v. Amato, 238 AD2d 432, 656 NYS2d 360 (2nd Dept. 1997); People v. D'Alessandro, 184 AD2d 114, 591 NYS2d 1001 (1st Dept. 1992); People v. Rodriguez, 174 AD2d 763, 571 NYS2d 786 (2nd Dept. 1991); People v. Collins, 72 AD2d 431, 424 NYS2d 954 (4th Dept. 1980); and People v. Hodges, 171 Misc.2d 226, 654 NYS2d 279 (S. Ct. Queens Co. 1997)
21 See People v. Wimms, 80 AD2d 837, 436 NYS2d 332 (2nd Dept. 1981)
22 111 AD2d 253, 489 NYS2d 534 (2nd Dept. 1985)
23 See also on this, People v. Holder, 189 AD2d 783, 592 NYs2d 397 (2nd Dept. 1993); People v.Gladney, 195 Misc.2d 520, 760 NYS2d 309 (Dist. Ct. Nassau Co. 2003); People v. Stapleton, 94 MIsc. 2d 850, 406 NYS2d 223 (S. Ct. NY Co. 1978)
24 102 Ad2d 14, 478 NYS2d 750 (2nd Dept. 1984)
25 See also on this, People v. Adams, 272 AD2d 177, 709 NYS2d 509 (1st Dept. 2000) and People v. Johnson, 163 Misc.2d 256, 620 NYS2d 200 (S. Ct. Bx. Co. 1994)
26 People v. Jones, 188 AD2d 331, 591 NYS2d 159 (1st Dept. 1992); People v. Marks, 2 Parker Cr.R. 673, 10 How. Prac. 261 (1854); and People v. O'Brien, 4 Parker Cr.R. 203 (1854).
27 250 AD2d 372, 672 NYS2d 327 (1st Dept. 1998)
28 92 AD2d 871, 459 NYS2d 828 (2nd Dept. 1983)
29 See also on this People v. McCrone, 12 AD3d 848, 784 NYS2d 683 (3rd Dept. 2004); People v. Goston, 9 AD3d 905, 779 NYS2d 699 (4th Dept. 2004); People v. Downing, 7 AD3d 462, 777 NYS2d 480 (1st Dept. 2004); People v. Arac, 297 AD2d 560, 747 NYS2d 87 (1st Dept. 2002); People v. Whittman, 254 AD2d 32, 678 NYS2d 100 (1st Dept. 1988); People v. Kulzer, 155 AD2d 882, 547 NYS2d 716 (4th Dept. 1989); People v. Pugh, 107 AD2d 521, 487 NYS2d 415 (4th Dept. 1985); People v. Prato, 182 Misc.2d 558, 700 NYS2d 365 (Dist. Ct. Suffolk Co. 1999)
30 272 AD2d 177, 709 NYS2d 509 (1st Dept. 2000)
31 See also People v. Thompson, Id.
32 294 AD2d 810, 742 NYS2d 457 (4th Dept. 2002)
33 See also on this, People v. Demeritt, 291 AD2d 726, 738 NYS2d 727 (3rd Dept. 2002) and People v. Thompson, Id.
34 4 Misc.3d 346, 777 NYS2d 274 (S. Ct. Queens Co. 2004)
35 People v. Pratto, Supra.
36 Id.
37 2 Misc.3d 1002 (A) 2004 WL 396-487
38 Id.

Once Upon A Time In The Bronx

Continued From Page 5

a daunting task in and of itself because of the never ending construction project on the bridge, the rough roadway and the like ways never ending traffic congestion. Once I got to the Bronx side of the toll booths the traffic should have eased considerably, but it just so happened that the Yankees were playing Boston that afternoon, so that I crawled my way to the Grand Concourse exit on the Major Deegan.

Once I was able to exit, a maneuver further complicated by the always present broken down truck in the right lane in the Bronx, I immediately recognized all of the old, familiar potholes on the Concourse which, of course, had not been repaired during my ten year sabbatical from the area. Hoping against hope that my car would not lose a tire or suspension part, I loped along at a very moderate speed, also avoiding the endless stream of wild eyed drivers of illegal taxi vehicles which abound there. When I arrived at the block before 161st Street, I came to a dead stop. The Yankee game traffic had caught up with me. In order to avoid the "rip-off" parking fees apparently charged by any of the lots even remotely close to the Stadium, many of the attendees were seeking parking in the surrounding area; mostly it seemed, close to the courthouses.

The police officers, who were standing in fair numbers on 161st Street, had done nothing except further exacerbate the traffic congestion with their impromptu traffic "control" measures. When I finally crawled into the only parking lot available, the women at the entrance gate were demanding twenty-five dollar flat parking fees, just because they could, and to take advantage of the Yankee game parkers. Of course, one could avoid the flat fee of twenty-five bucks, if you were willing to shop in the stores in that shopping center and purchase a minimum of twenty plus dollars worth of merchandise …. a sort of going and coming proposition. Thus far, my trip to the Bronx was as anticipated, quite horrid.

Now that things were moving along, pretty much as planned, I maneuvered my way across 161st Street, amidst the shouting and cursing from Yankee fans in their automobiles, who somehow were shocked at how slowly the parking line was moving. I did manage to cross the street without incident and entered the "new court building", a truly imposing structure. Of course, the warrant part had been relocated for the day back to the "old court building" because it was ere of a holiday weekend and they were on skeleton staff. I now had to reach my client, who, with his limited linguistic skills and perhaps limited intellect as well, would never figure out that he had come to the wrong place. Because of all the construction in the area (the "new court building") there was no cell phone signal available.

There were no street level pay phones in the area … what was I thinking, this is the Bronx and such instruments would not survive an hour if left there unguarded … so that I had to enter the court building and search out a pay phone that appeared to be less diseased than the others and in working order. I had no idea how much they charged for such a call in this day and age, but took a chance on a quarter … I only had two. The first one was duly swallowed by this graffitied, once black and chrome monster, and failed to produce a dial tone. My remaining quarter did work in the next phone and I was successful in redirecting the client.

We met up and entered the courtroom together. I asked one of the Court Officers to direct me as to the procedures I need follow in order to add this fellow's case to the calendar. In truth, the personnel were very nice. They were so surprised to see a real life "retained" lawyer that they treated me with great respect. I traveled to the Criminal Clerk's Office, another two floors down, and hoped to find an attorney courtesy window so that I could proceed quickly. Of course, there was none. To make matters worse there was only one Clerk on duty because of the impending holiday and although the line was not that terrible (only 9 people ahead of me), the Clerk was involved in an interminable conversation with an elderly Hispanic lady who spoke very little English and always had, it seemed, one more question. I was confounded. I took a shot and went to the fine payment window, figuring that they had computers as well, and begged a favor from the Clerk there. He did ultimately provide me with the paperwork so that I could have the case added to the court calendar.

We returned to the courtroom … my client insisted on staying with me at every turn, out of fear I suppose, which only added to my personal embarrassment at obviously not being familiar with any of the court procedures in that locale. We handed in our paperwork and sat through some ten other surrenders … mostly involuntary jail cases. The Judge, a man with no sense of humor, remanded virtually everyone. The only reason for hope was that we had come on a voluntary basis. At 12:30, the Sergeant, having pity on me as a stranger in a strange land, advised me to go to lunch as our court file had never arrived from the Clerk's Office. We were doomed, it appeared, to spend additional time (unremunerated, I might add) in Hell town.

Somehow, the Defendants were of a lower class than our Queens criminals, the courthouse seemed seedier, and the streets were dirtier than the Boulevard of Death, that I was used to. All of the area buildings were quite ancient, and therefore in great need of resurfacing and repair. It was quite depressing. The next imperative was to find a relatively safe place within which I might pass the next hour or so before I had to return to court. I managed to locate a Diner. It proved to be passable and was accordingly populated entirely with cops and assistant district attorneys. Apparently there were Defendant eateries, defense counsel eateries, and this one. I selected a safe grilled cheese sandwich and a cup of tea … figuring there wasn't much that could be done to a commercially packaged tea bag. The bill for the grilled cheese and two cups of tea was $7.44…..which I found to be slightly excessive, especially in this second class area. Clearly, knowing that the place was relatively clean and that there wasn't much competition on that level, the owners took advantage.

I had some time to kill and decided to return to the area where I had last seen my car, just to make certain that it had not already been dissembled and shipped to Curacao or some other distant place. What a mistake. That little venture involved crossing 161st Street twice … once going and once returning. My car was still there; although it appeared to have acquired an extra layer of dust in the interim (I'm quite certain that was only my imagination). As I attempted the return trip to the court building, in the midst of dodging various motorized vehicles … and they do seem to have an inordinate number of motorcycles in the Bronx … I misstepped in one of the multiple potholes/sinkholes on 161st Street, badly twisting my right foot. My eyeglasses and pens went flying but I managed not to fall down (otherwise, dear reader, you would not be joining me at this moment). Various pedestrians delivered my belongings, taking pity on an elderly person no doubt, and remarking that I should "get a lawyer and sue"… a typical New York reaction to be sure. The speaker then noticed I was carrying a legal file and laughed, noting that I obviously was a lawyer. I had no response, except "Thank you."

Limping into the building I spied the Chief Clerk, who just happened to have been the Chief Clerk in Queens in the distant past, and was a friend. We chatted for a while in his office and he arranged to have my file present in the courtroom for the 2:00 p.m. calendar call. I had lucked out … or so I thought. I limped upstairs to the warrant court, hoping against hope that my client would return from lunch on time and that the Probation Officer would also appear. Without her, they would never call the case. Everyone it seemed was equally anxious to leave the area as soon as possible and both parties arrived to meet me at the courtroom door. I was ecstatic!

Sitting in the front row, as close to the Court Clerk as possible, I was able to verify that my client's court file was there and that we were supposed to be called first. The Judge entered, looking even more dour than he had in the a.m. session. He must have had lunch in one of the Defendant eateries, I thought. Of course, we were not called first. The Clerk provided super courtesy to all police personnel who dragged some unfortunate into that room on a warrant and called their cases first. After several of those, it was finally our turn. Just as the case was being called, the Probation Officer leaned over to me and said "You're not going to be too happy with me after this." Surely, this was the signal of some major catastrophe in the making.

After noting my appearance, without the Judge so much as acknowledging my existence, the P.O. handed me a new set of specifications (charges, to you civil people). It would seem that my client had not been completely forthright with me. How shocking. In addition to the new felony charge I was representing him on in Queens, he had been previously violated for exactly the same type of misdemeanor that he had been placed on probation for, had been caught driving without a license (only because the schmuck had been playing his radio too loud … exactly what I would do if I were breaking the law at the same time), had failed to report to his P.O. on numerous occasions, had failed to report the new arrest in Queens, etc., etc., etc. We were doomed. This Judge, and in all fairness I could not disagree, remanded the client immediately. There was little I could say or do and failed to change his mind. This wonderful result was adding substantial insult to my physical and mental injury of the moment.

I limped into the jail area to retrieve my client's car keys and parking ticket (how could he have driven there with that driving record, with no license and having just been convicted of his second charge of "Aggravated Unlicensed Operation"), his several very heavy gold chains and bracelets, cell phone (much nicer than mine, of course) and wallet. We said our goodbyes and I promised to call his wife and return the belongings to her. We were both quite unhappy.

I limped back to my car … my foot was throbbing quite seriously now, paid the $25.00 parking fee and proceeded to make an illegal left turn onto 161st Street because I was so anxious to leave the area. None of the numerous police personnel in the area seemed to notice or perhaps it was such a trivial violation in that neighborhood that it did not deserve any attention. I did make it back to Queens and almost kissed the ground on Queens Boulevard, I was so happy to have survived. Naturally, the wife of the client was not available to retrieve his belongings until she finished at her own job at five o'clock, so that I was stuck until almost six. Given the poor result of the day, I could hardly argue.

My foot still hurts and I am now walking with a cane. Never go to the Bronx. It is truly unsafe at any speed.

Queens County Bar Association Participates in ABA Bar Leadership Institute

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President H. Thomas Wells, Jr. of Birmingham, AL, and ABA Executive Director Henry F. White, Jr. in sessions on bar governance, finance, communications, and planning for a presidential term.

Various ABA entities briefed the participants on resources available from the ABA for local, state, national, and specialty bar associations and foundations.

The BLI is sponsored by the ABA Standing Committee on Bar Activities and Services and the ABA Division for Bar Services as part of the Association's long-standing goal of fostering partnerships with state and local bars and related organizations. Cooperating ABA staff entities included the Division for Media Relations and Communication Services.

For BLI information, contact Karyn Linn, Staff Director of the Field Service Program, ABA Division for Bar Services, 321 N. Clark St., Chicago, Illinois 60611-3314, phone: 312/988-5350, e-mail: linnk@staff.aba net.org.

With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

A Modest Proposal to Prevent Economic Meltdowns

Continued From Page 1

charge of securities transactions. As things currently stand, the top-down federal Securities and Exchange Commission will NEVER be able to police the Internet. It is only by requiring notarized paper that we will get back to some reasonable standard of honesty and reliability.

It is not the Internet or the technology that is the problem. The problem is the inability of imperfect human beings to act ethically when sitting alone with a machine that allows them to think no one is watching as they cut just a little corner. Hundreds of thousands of people each cutting a little corner leads to today's mess.

Does anyone really believe that Bernie Madoff is the only larcenous soul out there on the Internet?

Paul E. Kerson is a Member of the Board of Managers, Associate Editor of this Bulletin, and Chair of the Bar Panels and Human Rights Committees.

Court Notes

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in violation of an order of suspension

Having been convicted of Driving While Intoxicated, a misdemeanor

Failing to appear at numerous court appearances without explanation

Failing to return an unearned fee following substitution by another attorney; putting his/her interests ahead of a client's; and engaging in "sharp tactics" with a *pro se* litigant

Improperly delegating responsibility to issue a payoff letter at a closing to a third party, thereby compromising the interests of both the purchaser and lender whom the attorney represented, and appearing at a closing without adequate preparation

Permitting the person who recommended the attorney's employment to direct his/her professional judgment

Failing to properly maintain his/her escrow account

Disparaging a client in court, thereby prejudicing or damaging the client

"Loaning" money to a client to cover for loan actually made by *another* party and failing to advise all parties to seek independent counsel

Failing to adequately supervise the work of a non-lawyer employed at the attorney's firm

Diana J. Szochet, Assistant Counsel to the State of New York Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts, and President of the Brooklyn Bar Association, has compiled this edition of Court Notes. The material is reprinted with permission of the Brooklyn Bar Association.