



Availability of Immigrant Visa Numbers for March, 2010

BY: ALLEN E. KAYE*

FAMILY-SPONSORED PREFERENCES

The first preference (unmarried sons and daughters of U.S. citizens) category moved three weeks to June 22, 2004 for all chargeability areas, China (mainland born) and India. The Mexico category moved forward three weeks to October 1, 1992. Philippines moved forward eight weeks to March 1, 1994.

The 2A second preference (spouses and unmarried children of permanent residents—subject to per country limit) category moved four weeks to April 1, 2006 for all chargeability areas, China (mainland born), India, and the Philippines. Mexico F2A moved forward sixteen weeks to July 1, 2004.

The 2B second preference (unmarried sons and daughters, 21 years of age or older, of permanent residents) category moved forward four weeks to February 1, 2002 for all chargeability areas, including China (mainland born) and India. Mexico moved forward one week to June 15, 1992. The Philippines moved forward five weeks to August 22, 1998.

The F3 third preference (married sons and daughters of U.S. citizens) category remains at May 22, 2001 for all chargeability areas, China (mainland born) and India. Mexico moved forward two weeks to October 8, 1992. The Philippines moved forward eight weeks to March 1, 1992.

The F4 fourth preference (brothers and sisters of adult U.S. citizens) category moved forward eight weeks to January 15, 2000 for all chargeability areas, China (mainland born) and India. Mexico moved forward one week to December 8, 1995. The Philippines moved forward eight weeks to September 1, 1987.

NOTE: "immediate relatives" (husbands and wives, under 21-years-old unmarried children and parents of U.S. citizens over 21 years of age) are not included in this listing of family-sponsored preferences as they do not need a visa number.



Allen E. Kaye

EMPLOYMENT-BASED PREFERENCES

The E1 first preference (Priority Workers) category remains current for all chargeability areas including China (mainland born), India, Mexico, and the Philippines.

The E2 second preference (professionals holding advanced degrees or persons of exceptional ability) category remained current for all chargeability areas including Mexico and Philippines.

China (mainland born) moved forward six weeks to July 8, 2005. India moved forward one week to February 2, 2005.

The E3 third preference (skilled workers and professionals) category moved forward eleven weeks to December 15, 2002 for all chargeability areas, China (mainland born) and Philippines. India moved forward one week to July 01, 2001. Mexico remains at July 1, 2002.

The EW third preference – other workers (unskilled workers) category remains at June 1, 2001 for all chargeability areas, China (mainland born), Mexico, and Philippines and India.

The E4 fourth preference (certain special immigrants) category remains available for all chargeability areas, China (mainland born), India, Mexico and Philippines (see below for explanation).

The E4 fourth preference (certain religious workers,) category remains available for all chargeability areas and China (mainland born), India, Mexico and Philippines (see below for explanation).

The E5 fifth preference – employment creation (investors) category remains current for all chargeability areas, China (mainland born), India, Mexico and Philippines. Employment Creation (Investors in Targeted Employment Areas) category remained current for all chargeability areas, China (mainland born), India, Mexico and Philippines. Pilot programs are available for all chargeability areas, China (mainland born), India, Mexico and Philippines (see below for explanation).

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When an Attorney Does Not Appear: The CPLR Solution

BY ANDREW J. SCHATKIN



Andrew J. Schatkin

There are times, when an attorney misses a calendar call. This often happens to sole practitioners, but happens to other lawyers, even those in law firms. Sometimes a lawyer forgets, or is so busy that he overlooks the appearance, or arrives there, due to traffic or other difficulties, too late to answer the calendar call. The court has the discretion of marking the case off the calendar. What is an attorney then to do? He is representing a client whose case is very important both to the client and himself or herself. There has been a slip-up. The question arises, and it is the subject of this article, as to whether there is a solution provided in the law.

The answer is yes, and the framework for the solution is found in CPLR Sec. 3404. That section of the CPLR entitled, "Dismissal of Abandoned Cases" states the following: "A case in the Supreme Court or a County Court 'marked off' or struck from the calendar, or unanswered on a Clerk's calendar call, and not restored within one year thereafter, shall be deemed, abandoned and shall be dismissed without cost or neglect to prosecute. The Clerk shall make an appropriate entry without the necessity of an Order."

This statutory section, although it would appear to be clear on its face, and to present no problem in interpretation, in fact, has been subject to a great deal of discussion, analysis, and interpretation in the case law. The section basically states that a dismissal will take place when a case has been stricken from the calendar or unanswered on a Clerk's calendar call, after a year has passed after the striking. The dismissal is automatic at that point, occurring after the entry by the Clerk, without further action involving the Court. The Section states that counsel has the option to restore the case by Motion, within one year, after its being stricken, to avoid it being deemed abandoned and dismissed.

If the case is dismissed, the plaintiff is obliged to restore the case the year following. It should be noted that that part of the statute that says that the Clerk must make "an appropriate entry" without waiting for an Order, has been modified by the Appellate Division, which has held that not even entry by the Clerk is necessary. See *Rosser v. Scacalossi*¹.

An interesting side note is stated in *Ronsco Const. Co., Inc. v. 30 East 85th St. Co.*² and

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Guy Vitacco, Jr. With The Past Presidents

Standing: Guy Vitacco, Jr. shakes hand of Paul Goldstein. Next is Joseph Baum, Edward Rosenthal, Steven Wimpfheimer, David Adler and George Nashak, Jr. Seated: Seymour James, Jr., Stephen Singer, David Cohen, Michael Dikman, Hon. Sidney Strauss, Hon. James Dollard and Gary Darche.



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THE DOCKET . . .

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.

2010 Spring CLE Seminar & Event Listing

April 2010

Friday, April 2	Good Friday, Office Closed
Wednesday, April 7	CPLR & Evidence Update
Tuesday, April 13	West Law Luncheon Seminar 1:00 - 2:00 p.m.
Thursday, April 15	No Fault Arbitration 2010
Monday, April 19	Judiciary Night
Tuesday, April 20	Basic Criminal Law – Pt 1
Wednesday, April 21	Equitable Distribution Update 6:00 - 8:00 p.m.
Thursday, April 22	How to Start a Law Practice at CUNY Law School
Tuesday, April 27	Basic Criminal Law – Pt 2
Thursday, April 29	Selection of a Jury Seminar

May 2010

Thursday, May 6	Annual Dinner & Installation of Officers Terrace on the Park 6:00 - 10:00 p.m.
Monday, May 10	Legal Drafting Seminar 6:00 - 8:00 p.m.
Wednesday, May 12	Labor Seminar
Monday, May 31	Memorial Day, Office Closed

CLE Dates to be Announced

- Elder Law • Juvenile Justice Law • Professional Ethics
• Surrogate’s Court, Estates & Trusts

NEW MEMBERS

Kamal Essaheb	Milana Shimanova
Adam Jason Friedman	Tenaja Thomas
Robert Link	Sara A. Wells
Petal E. Martindale	John Francis Zoll, Jr.
Elizabeth Erin Schlissel	

NECROLOGY

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Lawyers Assistance Committee

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All communication with QCBA LAC staff and volun-

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If you or someone you know is having a problem, we can help. To learn more, contact QCBA LAC for a confidential conversation.
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PRESIDENT'S MESSAGE

As a follow-up to my previous President's Message, please be advised that the Queens County Bar Association and the special committee that I appointed and the Board of Managers have been very busy with regard to the recent developments with regard to the 18B and Assigned Counsel to indigent defendants in criminal cases. Members of the special committee have attended numerous meetings with the Five Bar Associations and have appeared before the City Council at a budget hearing by the City Council's Fire and Criminal Justice Committee. An article of the hearing appeared on the front page of the New York Law Journal on Thursday, March 11, 2010.

The Five Bars did pass the following resolution:

Whereas, the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyers' Association, Queens County Bar Association and Richmond County Bar Association ("the Bar Associations"), pursuant to the provision of Article 18-B of the County law, proposed a Plan in 1966 for the adequate representation of indigent persons charged with a crime;

Whereas, the Judicial Conference of the State of New York approved the Plan on

April 28, 1966, more than 40 years ago;

Whereas, the 1966 Plan provides inter alia, for the combined system of representation of the indigent by a Legal Aid Society and by private attorneys;

Whereas, since the implementation of the Plan and in cooperation and coordinating with the Bar Associations, the City of New York has provided legal services to indigent defendants through a dual system of institutional providers and court-appointed private lawyers;

Whereas, the Bar Association members serve on the oversight panels of both the Assigned Counsel Plan central screening committees of the court-appointed private attorneys, as well as the indigent defense organization oversight committee for the First Department;

Whereas, the Bar Associations have repeatedly expressed grave concern about the chronic underfunding and overburdening of legal services providers to the indigent;

Whereas, the City of New York has issued a request for proposals ("RFP") that contemplates an immediate and far-reach-



Guy R. Vitacco, Jr.

ing overhaul of the original plan and system with respect to indigent representation by virtually eliminating the role of court-appointed private counsel and increasing reliance on institutional providers;

Whereas, the indigent defense organizations oversight committee in the First Department has for more than a decade reported that institutional provider's excessive and increasing caseloads, combined with limited resources, continue to cause them to struggle under caseloads that the First Department has declared to be excessive;

Whereas, the proposed change by the City has been done without notice to or consultation with the Bar Associations who are signatories to the 1966 Plan and, apparently, without studies, hearings or empirical data concerning the effect on indigent defense of abolishing the original plan;

Whereas, the undersigned Bar Associations have grave concerns that the proposed change to the plan under these circumstances will, among other things, have an adverse impact on the State's ability to meet its constitutional obligation to

guarantee indigent accused the effective assistance of counsel;

Therefore, it is resolved that the undersigned Bar Associations renew their commitment to support quality and effective delivery of the constitutionally mandated right to the effective assistance of counsel under the Sixth Amendment to the United States constitution, including but not limited to, adequate funding for every kind of provider, assigned private counsel, as well as institutional providers, to meet that constitutional obligations; and

It is further resolved that the Bar Associations oppose the City's proposed change to the plan under the current circumstances.

Bronx County Bar Association
Brooklyn Bar Association
New York County Lawyers' Association
Queens County Bar Association
Richmond County Bar Association

The Queens County Bar Association will continue to monitor this important development and report to our members the progress that is being made. I would also like to thank each member of the special committee for their attention and hard work to this important issue.

Guy R. Vitacco, Jr.

Beavers Spied on Ceiling of Queens Supreme!!!!

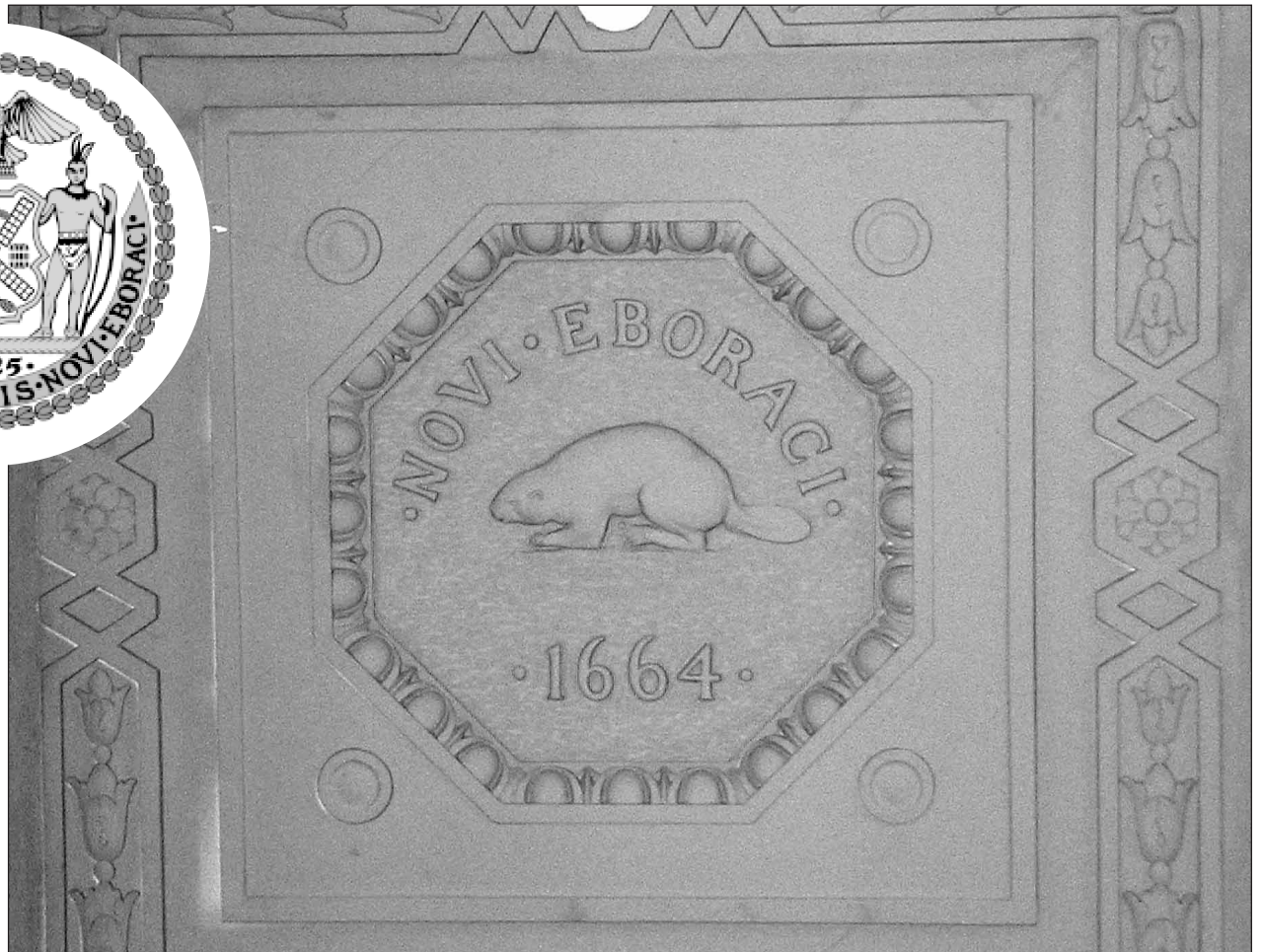
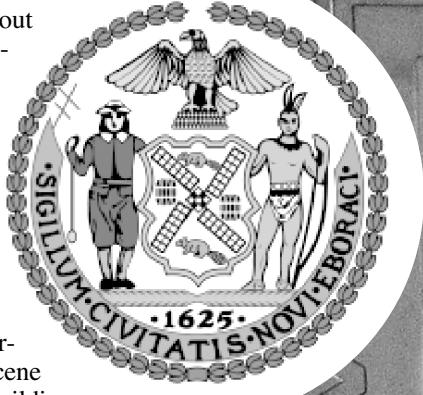
BY MARK WELIKY*

There I was one day deep in thought about some complex litigation question (or dozing off waiting for a calendar call) when my eyes strayed aloft to the ceiling of Queens Supreme Court in Jamaica. There I espied something rather curious. It was the depiction of a beaver, the year 1664 and the words "Novi Eboraci." You might not be surprised to learn that I had no idea what any of it referred to nor why any of this should be on the ceiling of a courthouse. Upon further inspection I found that the same scene appeared on the ceilings throughout the building. Some "legal research" was in order.

It turns out that the three items were all taken from the Official Seal of the City of New York. The seal bears the legend "SIGILLUM CIVITATIS NOVI EBORACI" which means simply "The Seal of the City of New York": *Eboracum* was the Roman name for York, the titular seat of James II as Duke of York. The beaver symbolizes early New York industry (the days of the fur trade) with 1664 being the year that Peter Stuyvesant surrendered New Amsterdam to the British.

An astute observer might comment that there is some

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Correction

It was recently brought to our attention that some of our volunteers who have represented homeowners for foreclosure settlement conferences on a pro bono basis were omitted from the Foreclosure Conference Project Honor Roll that was published in the latest Queens Bar Bulletin (Vol. 73/No. 6/ March 2010). We apologize for our error. The names of the volunteer lawyers who were omitted from the honor roll are listed below*: Jenny Chan, Ade Fasanya, J. Barrington Jackson, Zhijun Liu, Andrew M. Manshel, Narissa Morris, Joseph N. Obiora, Edward H. Suh, Victor A. Weiss. (*as of 2/25/10)

Queens Foreclosure Conference Project
Queens Volunteer Lawyers Project, Inc.

Corrections

Please take note of the address changes below for the following members:

Hon. Richard Latin - Queens Civil Court, 89-17 Sutphin Blvd, Pt 104, Jamaica, NY 11435-3716, 718-262-7391. His court attorney is Nelson E. Timken, Esq.

John J. Lawless - Ragano & Ragano, Esqs, 95-09 101 Avenue, Ozone Park, NY 11416-2519, 718-843-7584, fax: 718-641-8634, email: sinley@aol.com

Hon. Salvatore J. Modica - Supreme Court, 25-10 Court Square, Long Island City, NY 11101-1015, 718-298-1670

Arnold H. Ragano - Ragano & Ragano, Esqs, 95-09 101 Avenue, Ozone Park, NY 11416-2519, 718-843-7584, fax: 718-641-8634

Toba Beth Stutz - 90-50 Parsons Blvd, Ste 203, Jamaica, NY 11432-6052, 718-526-7976, fax: 718-725-0567, email: tbstutz@verizon.net

THE CULTURE CORNER

BY HOWARD L. WIEDER

If you did not *see and hear* Hungarian conductor **IVAN FISCHER'S** superlative rendering of the **complete cycle of Beethoven's nine symphonies** played at Lincoln Center over 4 days from March 25-March 28, you will need to pray that a disc or DVD be made of those magnificent performances. With so much advertising of Fischer's conducting of the Beethoven cycle on the internet, how could you have missed it????

Also at **LINCOLN CENTER**, famed conductor **RICCARDO MUTI** was the guest conductor with the **NEW YORK PHILHARMONIC** for a few excellent concerts in March, with my disappointment expressed below concerning one piece.

IVAN FISCHER CONDUCTS THE BEETHOVEN CYCLE

LUDWIG VON BEETHOVEN died on March 26, 1827 in Vienna, Austria. Beethoven transformed the symphony and the status of the composer. Before him, music had largely been commissioned for the wealthy, with pieces suited for a specific occasion. Beethoven changed that idea. Typical of creative geniuses, Beethoven was true to his own being and refused to write a symphony unless it represented something original within him. So Haydn, who preceded Beethoven, had written over 100 symphonies, most of them very short works, and a lot of them commissioned; Beethoven produced only nine, because Beethoven did not feel compelled to produce another symphony unless it represented a truly original idea. Each of the nine is intricate and broke the previous mold for symphonic writing. With Beethoven, and his success and fertility of imagination, tal-

ented composers did not have to clamor for patrons. The status of the composer, with Beethoven, reached iconic and cult-like status. So daunting was Beethoven's output that Brahms, a modest and gifted genius, who followed Beethoven, was reluctant to produce any symphonies, knowing what a hard act that was to follow!

A controversy that has continued over the past 25 years is whether Beethoven's pieces should be played on period or on modern instruments. There are schools of thought for each camp, and today, it is being accepted that a synthesis of the two schools of thought should be accepted. There is ample room for both, just like no conductor need be confined to Beethoven's metronome markings in his score.

With that backdrop, **IVAN FISCHER**, a



Howard L. Wieder

conductor of Hungarian Jewish descent, has been taking two orchestras close to him, the **ORCHESTRA OF THE AGE OF ENLIGHTENMENT** and the **BUDAPEST FESTIVAL ORCHESTRA**, on tour with a program called "**BEETHOVEN THEN AND NOW: THE COMPLETE SYMPHONIES**."

The **ORCHESTRA OF THE AGE OF ENLIGHTENMENT** plays on period instruments, and the **BUDAPEST FESTIVAL ORCHESTRA** uses modern instruments. In his account of the **complete cycle of Beethoven's Nine Symphonies** that occurred at Manhattan's **ALICE TULLY HALL** and **EVERY FISHER HALL** from March 25 through 28, proved one thing: whether you play on period or modern instruments, *it is the excellence of the musicianship and, importantly, the feeling behind the music that counts.*

Both of those orchestras were superb. Over four days of performances, there was not one concert that flagged in brilliant musicianship and unwavering enthusiasm and passion for the subject matter. I am a Beethoven enthusiast and could not find one flaw with the great sound and approach by both orchestras. The **ORCHESTRA OF THE AGE OF ENLIGHTENMENT** gave me a heightened appreciation for period instruments, whose use I previously dismissed as eccentric. Today, knowledge and practice of period instrument practice, in some manner, is being integrated into every important orchestra on the world stage. The **BUDAPEST FESTIVAL ORCHESTRA** was remarkable. I thought immediately that it could give a good run for the money to the Vienna Symphony Orchestra's as the world's most important orchestra.

During these four memorable days in March, I have never heard Beethoven played with greater gusto, exuberance, dynamism, and enthusiasm than **MAESTRO IVAN FISCHER'S** account! It was a memorable performance that never flagged in enthusiasm. Hearing it, I knew that Beethoven would have loved to have leapt to the stage to congratulate Fischer.

The **ORCHESTRA OF THE AGE OF ENLIGHTENMENT** played on March 25 and March 26 with performances of Symphonies, 1-3, 5, and 8. The **BUDAPEST FESTIVAL ORCHESTRA** played on March 28 and 29 with performances of symphonies 4, 6-7, and closing the program with Symphony 9 - - famous for Beethoven's then revolutionary idea of incorporating song - - Schiller's famous "Ode to Joy" - - into symphonic form.

Both orchestras played with precision and glowingly. The players of every section of the two orchestras responded to Fischer's beautifully transparent and joyful directions. I was in complete awe of **MAESTRO IVAN FISCHER**. During each of the symphonies, his entire body is involved, communicating the direction of the music to the musicians. Fischer challenged them and the listeners to hear a riveting and dynamic account of Beethoven. What a delight to watch him. **Every nuanced wave of the hand or forward thrust of a shoulder by Fischer meant something**, communicating the music and message to his musicians and listeners. He was at one with the music.

The capacity audience kept applauding appreciatively at each of the performances. To their credit, they did not leave their seats till Fischer and the orchestra left the stage.

I own several, indeed numerous, recordings of the complete cycle of Beethoven symphonies - - but none remotely close to the superlative musicianship that I heard from **IVAN FISCHER** and the **ORCHESTRA OF THE AGE OF ENLIGHTENMENT** and the **BUDAPEST FESTIVAL ORCHESTRA**. Congratulations also to the **GREAT PERFORMERS SERIES OF LINCOLN CENTER** for such a coup and for the wonderful and informative handouts to the audience concerning Beethoven and this special series by **IVAN FISCHER** and his acclaimed orchestras.

I have one wish: every New Year's Day, like my late father, I watch the internationally broadcast New Year's Day concert from Vienna of the Vienna Symphony Orchestra play Strauss favorites and ending with the famous Radetsky March, my late dad's favorite. Tickets for that concert are expensive beyond reach. A lottery is held in Vienna to determine to who will have the right to purchase them at phenomenally exorbitant prices, so coveted a ticket it is! The honor of conducting the Vienna Symphony Orchestra for that concert is given to an internationally famous maestro. **I hope that Ivan Fischer will soon be accorded that privilege.** He deserves it!

I know that Ivan Fischer has an impressive discography, and he now records for **CHANNEL CLASSICS**. I encourage you to purchase his recordings.

If you were unfortunate to miss this memorable series, please consider buying tickets NOW for the return of **MAESTRO IVAN FISCHER** and the **BUDAPEST FESTIVAL ORCHESTRA** to Lincoln Center in January, 2011 to play the works of other composers.

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Ivan Fischer

A BOOK REVIEW



**Stolen Masterpiece Tracker:
The Dangerous Life of the FBI's #1 Art Sleuth**
by Thomas McShane with Dary Matera
(Barricade Books, Fort Lee, New Jersey, 2006
\$24.95, 284 pages).

By: Thomas F. Liotti*



Thomas McShane is a witty, energetic, adventure seeking, dogged, retired F.B.I. Agent and an attorney from Long Island, New York who has worked some of the biggest investigations and cases in the world involving art theft, a multi-billion dollar industry which spans the decades, if not centuries. My wife has Bachelor's and Master's degrees in Fine Arts. She has been an artist and over my vigorous objection, often takes me on museum and gallery tours where over the years I have developed a still unrefined appreciation of fine arts. Since I am a litigator and criminal defense attorney, by osmosis, I am acquainted with Mr. McShane's work which is unrivaled in the field of criminal justice.

My interest in Mr. McShane's work was again peaked upon a visit to Boston where my son attended Northeastern University. Just across from my son's dormitory, I visited the Isabella Stewart Gardner Museum where I learned that eleven paintings and two more works of art were stolen from that museum in 1990. Left behind are the blank spaces where they once hung. One of the paintings stolen was Vermeer's, *The Concert*, described by Mr. McShane as being considered the world's most valuable missing painting today, worth more than \$100 million. In addition, several Rembrandt's and Degas' were stolen as well as a Manet. The details that Mr. McShane provides of the theft and investigation following it are extraordinary.

Mr. McShane had an exciting career and he takes us through part of it. Along the way we learn of his role in the ABSCAM investigation, an Eastern District of New York case which netted a United States Senator, several Congressmen and other dignitaries. ABSCAM began as an art theft case and later became the biggest political sting in United States history. Mr. McShane was in the throes of it. The benefit to attorneys is to see what is done to investigate, track and recoup art or other stolen property.

What is shocking and appalling about art theft is the impact such thievery makes on society and civilization as a whole. Stolen art is often destroyed or sold underground where it remains or not seen for decades, if not lifetimes. Multiple generations may thus be affected by the damage or loss of art from the public fora. Mr. McShane's work provided a valuable contribution to old Masters in recovering their work as well as to subsequent generations who will now have an opportunity to view it. This is a workman like guide to this important field, so significant that former F.B.I. Director William H. Webster made Mr. McShane a Senior Investigator to the Bureau's highly acclaimed Art Squad. Art theft is a moral and ethical assault on the Masters who devoted their lives to the creation of beauty and those of us who are now deprived from appreciating it. Much like the Holocaust there is nothing that can ever be done to make up for these losses even if they are recovered. But like Simon Wiesenthal who pursued Nazi war criminals during his lifetime, Mr. McShane has devoted much of his life to the search for art thieves who obviously care little about the damage which they have caused to history, beauty and all of us.

* Thomas F. Liotti is an attorney in Garden City, New York and a Village Justice in Westbury, Long Island. He is the author of *Judge Mojo: The True Story of One Attorney's Fight Against Judicial Terrorism* (iUniverse, 2007).



Golden Jubilarians-Hon. Arthur Cooperman, Robert Small, Lewis Stockman, Hon. Charles Thomas and Hon. Peter Vallone

Marital Quiz

BY GEORGE J. NASHAK JR.*

Question #1 - In applying for a downward modification of child support is it sufficient to show that the payer parent is on Social Security Disability?

Your answer -

Question #2 - Is a distributive award in a divorce judgment a "money judgment"?

Your answer -

Question #3 - What statute of limitations applies to a distributive award in a divorce judgment?

Your answer -

Question #4 - The marital home was owned by the husband prior to the marriage. After the parties were married for some time (the court does not tell us how long) the husband conveyed the property to himself and his wife as tenants by the entirety. Should the husband receive a credit for the value of the property as of the date he transferred the property to him and his wife or the date of the marriage?

Your answer -

Question #5 - The parties' stipulation of settlement was incorporated but did not merge the parties' judgment of divorce, may the court entertain a motion to modify the stipulation of settlement?

Your Answer -

Question #6 - When the parties separated, they executed a written separation agreement. No divorce action was commenced. Does the Family Court have



George J. Nashak Jr.

jurisdiction to modify maintenance provided for in the separation agreement, if the separation agreement provided that: "while this agreement will resolve these issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiations with the Husband, or failing such negotiations, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a 'de novo' application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife's needs or the Husband's income/earning capacity?"

Your answer -

Question #7 - Is the minimum award of \$25.00 per month child support as provided in Family Court Act §413 (1) (g) an irrevocable presumption?

Your answer -

Questions #8 - Is maintenance always deductible from gross income before cal-

culating child support in accordance with CSSA?

Your answer -

Question #9 - Are Family Court findings of fact and conclusions of law separately appealable?

Your answer -

Question #10 - Does the New York Supreme Court have the power to entertain an action for the dissolution of a civil union validly entered into in another jurisdiction?

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 12

What is Your Next Play...



COUNSELORS TO THE PROFESSION
Participation fees provided upon request, pursuant to DR-2-107.

Who Takes Care of Your Elder Law and Special Needs Clients?

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The following changes have been made by the Administrative Judge of the Criminal Court in the Arraignment Part effective March 21, 2010.

Sunday, Monday and Tuesday there will be no dinner break of any duration and the Court will close after completing all of the matters on the 9 o'clock "run" ... in other words, any matter not on the 9 o'clock run will not be handled in that evening session.

Wednesday through Saturday will continue on the present schedule and the dinner break, which will be a strict one hour, will likely occur at either 8:00, 8:30 or 9:00, at the Court's discretion.

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BOOKS AT THE BAR

BY HOWARD L. WIEDER

FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS

by Frederick Brown

Alfred A. Knopf publisher, 2010

\$28.95

304 pages, including an excellent index

Why should we bother, you might ask a busy Judge or lawyer, reading a finely-written account of history? First, it informs us of a particular episode. More important, knowing that history repeats itself in many ways, reading history permits us - - like a good GPS or navigation system in your car - - to avoid mistakes that were made in the past. **FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS** by Frederick Brown, succeeds on both of those levels. By reading his account of the tumultuous clash of several institutional and societal forces in France during 1830-1905, we can learn to apply history and realize that history does repeat itself.

My late mother, Etka, who lost all her family from Tarnow, Poland in the Holocaust - - four brothers [lawyers], two sisters and their children - - did not want to discuss her experiences in two concentration camps, Auschwitz and Bergen-Belsen, no matter how I tried to prod the information. I once wrote down the number that the Nazis engraved forcibly onto her left forearm, "A-26448." Reducing persons to wearing forced tattooed numbers is the ultimate in minimizing human

existence.

One time only she explained to me briefly the atrocities she suffered when the Nazi guards discovered that she had helped a fellow Jewish inmate at the concentration camp hide her baby, a ghastly and degrading torture [that I will spare you] that resulted in a collapsed lung. So later in her very short life, in 1975, when breast cancer had spread to her only working lung and brain, there was no way to save her.

I have read that in exceptional instances, when the conscious brain cannot deal with anger, it throws it off entirely. Instead of talking about the injustices and tortures she endured and the murder of her entire family, my late mother, repeatedly, ever since I was a boy, talked to me of Captain Alfred Dreyfus, a Jewish Captain in the French Army in the late nineteenth century, who was falsely arrested and imprisoned for five years, in shackles on hands and feet, on Devil's Island. A non-Jewish officer, Esterhazy, who was the real criminal, who had actually passed French information to Germany, then planted incriminating documents in Dreyfus's effects. Dreyfus was completely innocent. In fact, he was exceptionally loyal to France.

Within a year, the War Minister of France and the entire top level of the military knew the truth that Dreyfus was innocent and also knew that Esterhazy was guilty. Rather, than correct the record, the top French brass engaged in a massive



Howard L. Wieder

cover-up. Dreyfus was tried again and convicted. The real traitor was tried and found innocent. Why? A decision had been made by the top level of the military that France's honor could not afford such a scandal. The Dreyfus Affair AND THE FORCES THAT LED TO RABID ANTI-SEMITISM IN France, fueled by clerical forces is **MUST READING FOR ALL JUDGES AND LAWYERS**. That terrible chapter in the human saga - - is brilliantly recounted by eminent author **FREDERICK BROWN** in his new, universally acclaimed book, **FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS** [Alfred A. Knopf 2010]. Whether you are Protestant, Buddhist, Catholic, or Jewish, you should read this book, since history does repeat itself. Like Blacks who were lynched in a racist South, the Jew became the object of enmity in nineteenth century France. In fact, during the Holocaust, the French amazed the Nazis by expanding the qualification list of who should be considered Jewish.

FREDERICK BROWN, a great historian of all things French whose recent biographies of writers Flaubert and Zola has won deserved praise, has written a book, **FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS** [Alfred A. Knopf 2010]. **FOR THE SOUL OF FRANCE** has received universal praise, including from the top book reviewers of this country, explaining

the clerical forces of Catholic France that had a lot to gain by promoting rabid anti-Semitism. Brown traces the history, in highly absorbing content, and in a brisk pace, the anti-Semitism that preceded the "Dreyfus Affair."

I discussed the "Dreyfus Affair" or "L'Affaire Dreyfus" in a prior Culture Corner column I wrote, urging you to see an exhibit of artifacts of that gruesome chapter of man's inhumanity to man shown at the Yeshiva University Museum in Manhattan, not far from Cardozo Law School.

Even the courageous efforts of writer Emile Zola, who sacrificed everything he had, could not save Dreyfus. When Zola exposed the truth in a front page article called "J'Accuse," he was tried for sedition, AND CONVICTED by a panel of Judges that prevented him and his lawyers from introducing pertinent evidence!

Even when Dreyfus's innocence became manifest to the entire world - - since Zola escaped to England and wrote about the Dreyfus Affair to the entire world, France reacted slowly. Dreyfus was first "pardoned." Only toward the end of his life in the 1930s, was Dreyfus elevated to General.

No lie lives forever.

On March 26, 2010, **The New York Times** published an account of Mr. Toshikazu Sugaya, a soft-spoken, former kindergarten bus driver who had been con-

Continued On Page 12

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Monday, March 22, 2010



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Saturday Morning

BY STEPHEN J. SINGER

Arthur Feinstein rarely visited the neighborhood where his law office was located on a non-weekday, let alone venturing into the office. It was anathema to him to even consider working on a Saturday or Sunday. After some thirty-two years of practice he felt that he had paid his dues and refused to work on weekends, handle arraignments at night or even to leave his personal cell phone number on his office answering tape for emergency calls. His credo was "If they need me on Sunday, they will still need me on Monday." Frankly, he had made enough money over his many years in private practice that he could afford to skip the

occasional emergency call at night or over the weekend. He believed that if they were referred to him by other clients or lawyers, chances were that they would follow-up with him on Monday morning. Fortunately, that proved to be the rule, more than the exception.

Conscious stricken over his failure to have completed a memorandum of law on a particularly heavy narcotics search and seizure issue in a timely fashion, he had reluctantly taken the matter home to finish up over the weekend. It would probably be the first time he had ever used his three thousand dollar plus, super deluxe laptop with all the bells and whistles for anything other than making purchases on EBay. He finally conquered all of the alternate distractions he was able to create and settled down around eleven a.m. on Saturday to complete the brief. He had searched his Coach brief case thoroughly for the case file, only to come up empty handed. After checking both the interior and the trunk of his Mercedes sport coupe, he was still lacking vital information that he required to complete his legal obligations. Disgusted with himself, both for having forgotten to take home the file and because he now had to consider the ugly and most unpleasant alternative of actually driving to his office on a Saturday, he announced to his wife Sylvia that he would actually have to do that. The response was one of non-belief, followed by suppositions about which mistress/girlfriend he was going to have a tryst with so early in the day. Although said in jest, even his wife was set to wondering what was really going on that Arthur would violate one of his cardinal rules and actually visit his own law office on a weekend.

Arthur slipped on his Gucci loafers, his cashmere Polo V-neck and threw a lamb-skin leather jacket into the passenger seat of his convertible. That was casual, dress down attire for him. Because it was a Saturday, traffic was exceedingly light and he managed to pull into the lot behind his Little Neck office in a mere twenty minutes. "Some sort of a record," he said to himself as he unlocked the office door on the second floor and turned off the alarm code. Saturday mail was piled up behind the door, as was probably the normal thing, but Arthur was never there to receive it and it was always picked up, sorted, slit open and delivered to his desk-



top by the time he arrived on Monday. He picked up the assortment of mail, didn't bother to leaf through it, but merely dropped it on his secretary's desk. After a twenty minute search Arthur came up empty handed. He couldn't for the life of him figure out what he had done with the file. Frustrated and needing a break to clear his head and consider his options he decided to go down the block to the local deli for a coffee and a blueberry muffin ... his favorite.

Within five minutes he was in the process of paying for his muffin and coffee and looking forward to picking the muffin apart a little bit at a time while he sipped the too hot liquid. The coffee in the deli was surprisingly good, "not Starbucks quality", he thought, but nevertheless, pretty good. As he turned to leave the deli, he heard the counterwoman saying "That guy is a lawyer." Arthur immediately reacted in a negative way, assuming that the questioner would probably be someone he would not really care to speak with. He turned around, facing back towards the counter, merely to prevent being grabbed by the shoulder and risking dropping his precious muffin and coffee. The questioner or questioners, as it turned out, were an elderly Indian couple. Man and wife, it would appear, probably in their late seventies and very diminutive in size. They were relatively well dressed ... "not fashionably so", mind you ... but sufficiently so that Arthur was not completely turned off by their appearance.

"How can I help you?" Arthur heard himself saying, while actually thinking "Boy am I going to regret this!" The couple spoke in tandem, which, when combined with a classical Indian accent, rendered their English virtually unintelligible. Arthur was already frustrated and the conversation had not truly begun. The apparent husband took one step forward as if to establish his status and introduced himself as Mr. Chaudhury, which for Indians was the equivalent of Smith in Americanese. "I am in desperate need of a lawyer, Sir," the man stated, "Can we speak to you for a few minutes?" Arthur sized them up visually and immediately determined that it would undoubtedly be a waste of his time, but if for no other reason than to establish good will with the counterwoman at his local deli he found himself agreeing to a "brief interview" as a courtesy.

Arthur walked several steps ahead of the

Indian couple, perhaps so that people in the neighborhood would not think these folks his actual clientele. He waited, somewhat impatiently, while they ambled into the elevator and accompanied him to his office. For all of his fifty-eight years, Arthur was quite spry, thanks in part to the twice weekly visits from his personal trainer. It took what seemed to him to be an extraordinarily long time for the two would be clients to ultimately settle into the chairs in front of his handsome, antique partners' desk. "What can I do for you?" Arthur was hoping that he could complete this unpleasant task as quickly as possible and return to the search for his missing file folder.

The husband proceeded to expound upon his personal tale of woe in a plodding, but well articulated fashion that hinted at higher education. His wife had suffered an unpleasant episode which compelled him to suggest that they immediately visit their local drugstore to have a check on her blood pressure. While there, he had picked up a roll of Life Savers and then experienced an urgent need to use a restroom (unhappy prostate, he explained). He literally rushed into the employee's bathroom and in the process, placed the roll of candies in his pants pocket so as to free his hands. When he exited from the facility, the female manager of the store began yelling at him for using their employee restroom without permission and accused him of stealing the roll of Life Savers that he had in his pocket.

Of course, the gentleman explained his physical predicament and offered to pay for the allegedly purloined merchandise immediately. The manager refused to accept payment and called the police. When two young patrolmen arrived and heard the story from both sides, they implored the female complainant to accept his payment for the candy. She refused. In order that they not receive a complaint and have trouble with their commanding officer they took in the elderly couple and issued him a desk appearance ticket to appear in court about two months in the future. As a direct result of the arrest, the husband had immediately been suspended from his employment as a school security guard, the income from which made up the total portion of their financial support. Even Arthur was affected by the injustice of their story.

"Well," he remarked, "I normally only handle serious felony matters, but I don't believe that this will be overly complicat-

Continued On Page 16

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Marital Quiz Answers

ANSWERS TO MARITAL QUIZ ON PAGE 5

Question #1 - In applying for a downward modification of child support is it sufficient to show that the payer parent is on Social Security Disability?

Answer: No, the payer spouse must also show that he or she is no longer capable of working in any capacity. *Mandelowitz v. Bodden* 890 N.Y.S.2d 634 (2nd Dept. 2009)

Question #2 - Is a distributive award in a divorce judgment a “money judgment”?

Answer: No, *Woronoff v. Woronoff* 2010 NY Slip Op 01479 (2nd Dept.).

Question #3 - What statute of limitations applies to a distributive award in a divorce judgment?

Answer: Six years, not 20 years. *Woronoff v. Woronoff* 2010 NY Slip Op 01479 (2nd Dept.).

Question #4 - The marital home was owned by the husband prior to the marriage. After the parties were married for some time (the court does not tell us how long) the husband conveyed the property to himself and his wife as tenants by the entirety. Should the husband receive a

credit for the value of the property as of the date he transferred the property to him and his wife or the date of the marriage?

Answer: The date of marriage because the court found that the increase in value from the date of the marriage to the date of transfer from the husband to the husband and wife was attributable to the joint efforts of the parties. *Mongelli v. Mongelli* 2009 NY Slip Op 9627 (2nd Dept.). The Appellate Division, Second Department, once again does not address the issue of increase in value caused by market conditions.

Question #5 - The parties’ stipulation of settlement was incorporated but did not merge in the parties’ judgment of divorce, may the court entertain a motion to modify the stipulation of settlement?

Answer: No, must bring a plenary action. *Reiter v. Reiter* 39 A.D. 3d 616; 835 N.Y.S.2d 240 (2nd Dept. 2007)

Question #6 - When the parties separated, they executed a written separation agreement. No divorce action was commenced. Does the Family Court have jurisdiction to modify maintenance provided for in the separation agreement, if the separation agreement provided that: “while this agreement will resolve these

issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiations with the Husband, or failing such negotiations, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a ‘de novo’ application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife’s needs or the Husband’s income/earning capacity?”

Answer: No, the Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute. *Matter of Johna M.S. v. Russell E.S.* 10 N.Y.3d 364; 889 N.E.2d 471; 859 N.Y.S. 2d 594 (Ct. Of Appeals 2008)

Question #7 - Is the minimum award of \$25.00 per month child support as provided in Family Court Act §413 (1) (g) an irrevocable presumption?

Answer: No, 42 USC §667 (b) (2) prohibits a State from enacting child support guidelines which permit no rebuttal of the amount awarded. *Rose v. Moody* 83 N.Y.2d 65; 629 N.E. 2d 378; 607 N.Y.S.2d 906 (Ct. of Appeals 1993)

Questions #8 - Is maintenance always deductible from gross income before calculating child support in accordance with CSSA?

Answer: No. In order for maintenance to be deductible, a court order must include an adjustment to the child support obligation upon the termination of maintenance payments. *Kerigan v. Kerigan* 2010 NY Slip Op 1929 (2nd Dept.); DRL § 240[1-b][b][5][vii][C].

Question #9 - Are Family Court findings of fact and conclusions of law separately appealable?

Answer: No, *Matter of Kneip v. McWilliams*, 2010 NY Slip Op 2149 (2nd Dept.).

Question #10 - Does the New York Supreme Court have the power to entertain an action for the dissolution of a civil union validly entered into in another jurisdiction?

Answer: Yes, the Third Department held the New York Supreme Court has subject matter jurisdiction. The Third Department did not determine the ultimate question of what, if any, relief is available on the merits. *Dickerson v. Thompson* 2010 NY Slip Op 02052 (3rd Dept.).

Books At The Bar

Continued From Page 7 —
victed for the murder of a four year old child in 1991 and was, until recently, serving a sentence of life imprisonment. He was innocent. A faulty DNA specimen was introduced against him, including a forced confession after protracted questioning without the benefit of counsel. Japan’s neanderthal justice system does not easily permit rectifying a wrong, but, finally, in 2009, a new DNA showed the innocence of the man wrongfully convicted, and who spent **THE LAST 17 YEARS IN PRISON!!!**

The Presiding Justice apologized to the 63-year-old man, as did the prosecutors, for the numerous perversions of justice that permitted a fraudulent and false conviction. I don’t know about the man falsely accused, but someone should have told that Presiding Justice what he could do with his apologies How do you return 17 years of someone’s life? How do you compensate adequately for that? Destroy a person, rob him of his reputation, and then feebly say “We’re sorry” for the “irreversible damage” and bow your heads?

The annals of the miscarriages of justice are legion. In a prior book review, I urged you to buy and read “**I AM INNOCENT!**” by Jay Robert Nash [Da Capo 2008], discussing many horrific cases of injustice. “**I AM INNOCENT!**” is what Captain Dreyfus repeatedly shouted to the observing public when he was marched around and humiliated in grotesque fashion in a public court-martial before being sent to languish for five years in shackles on Devil’s Island.

Because of the injustices sustained by both my parents during the Holocaust, stories of injustice affect me greatly. I did not go into law for the money. I knew I wanted to be a lawyer from age four. I’m sure my mother’s repeated rendition of the sufferings sustained by an innocent Captain Dreyfus also affected me greatly.

Then, at an early age, in sixth grade, I sustained an injustice myself. Of course, nothing as major as that suffered by Captain Dreyfus or the innocent Japanese bus driver. As psychiatrists will confirm, spearheaded by German pioneer **ALICE MILLER**, the key to every biography, without exception, is the childhood and its experiences. Our regular teacher at Yeshiva of Central Queens, in Jamaica, was out, and we were given a substitute teacher. The teacher gave us homework and said we had to do it, lecturing us not to ignore it. I did my homework, as usual, including this assignment from the substitute teacher.

The substitute teacher returned the next day. She called on me, but I could not find my homework. She accused me falsely, before the entire class, of not having done it, further accusing me that I believed she would not return the next day so I could get away with not doing homework. She shouted at me, and I begin crying in front of all my classmates, protesting my innocence. As I was crying, who walks into that classroom?, my mother, with my homework, explaining that I had left it at home. The teacher was embarrassed, since my mother saw me in tears, but she quickly whisked my mother, a stoic sufferer, out

the door, politely. My mother did not stay - - but today any other mother would have had that substitute teacher up on charges!

More importantly, I learned not then, and not that year, but years later, that the substitute teacher inserted a bogus report into my folder that she wrote following my mother’s entry into the classroom with the homework that confirmed my innocence, explaining that I was crying because I had disrupted the class. This teacher, a poor excuse for a human being, was in for self-preservation. She knew what she did was wrong, so she immediately worked on a report that would exonerate her act of having a student crying for her indiscriminate hollering and false accusations, again slamming the victim!

So at an early age, I learned about injustice and what cover-ups can do. **COVERUPS** that protect and insulate the guilty, **AT THE COST OF AN INNOCENT VICTIM, ARE INTOLERABLE**. Reports are now surfacing of how the present Pope, Benedict XVI, when he was a high ranking cardinal from Munich assigned to investigate for the Vatican cases of sexual abuse by supposed “clergymen,” buried all and numerous accusations of child molestations by priests in order to spare the Vatican and the Catholic Church from embarrassment. So much for “Papal Infallibility” [a doctrine begun by Pope Pious IX]. Pope Benedict XVI is the same champion for the sainthood of Pious XI - - the Pope who kept his mouth shut during the Holocaust when 6 million Jews were being exterminated. Any wonder that someone who protects child molesters of hundreds of innocent victims, including 200 deaf boys, would want to elevate a predecessor who was quiet in the face of genocide to sainthood? Does Pope Benedict think he will honor the Vatican and the Catholic Church by that supposed legacy?

You will forgive my extended discussion. We who work as judges and lawyers

have a specialized responsibility - - and that is to make contributions, case by case, to minimize the amounts of injustice and to correct them. If you agree with me on that point, you will buy and read Frederick Brown’s book. Even when Dreyfus’s total innocence was clear, the French military worked to hide the information. An important officer who knew the truth and wanted to expose it was threatened and finally sent to some distant outpost in the world [in an era that preceded e-mail]. Now again, the revelations regarding the Vatican’s knowledge of sexual abuse and its efforts to suppress the truth shows that history does repeat itself.

Regardless of the race, nationality, and religion of the victim of injustice, we need to read about it and be sensitive to it. Cover-ups that protect institutions against innocent individuals cannot be condoned. Helping a cover-up, even by keeping quiet, is intolerable.

And just remember: No lie lives forever.

FREDERICK BROWN has a great gift for making history readable, in a fast-paced account. He takes a complicated subject matter and makes it understandable in a brisk paced account. **Frederick Brown’s FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS** is important reading, on many levels, AND DON’T JUST SAY “I’LL GET TO IT THIS SUMMER.” And only if you have no other choice, put it as your number one book for summer reading.

HOWARD L. WIEDER is the writer of both “**THE CULTURE CORNER**” and the “**BOOKS AT THE BAR**” columns, appearing regularly in **THE QUEENS BAR BULLETIN**, and is **JUSTICE CHARLES J. MARKEY’S PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

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When an Attorney Does Not Appear: The CPLR Solution

Continued From Page 1

Maida v. Riteaid, Corp.³ The rule stated in the latter cases is that the making of the Motion constitutes the key moment that satisfies the statute, and that the mere posting of the Motion papers, within the year, suffices to satisfy the statutory requirement.

There are a number of rules in connection with the methodology in connection with restoration of an action to the calendar under this statutory section. First, whether a case can be restored to the calendar, is totally a matter within the discretion of the Court. Thus, in Jankowicz v. New York City Health and Hospitals, Corp.⁴, the Appellate Division Second Department held that the Supreme Court should have granted the plaintiff's Motion to Restore a medical malpractice action to the trial calendar, where circumstances indicated that the litigation was not abandoned by the plaintiff.

Similarly, in Meade v. L.A. Lama Agency, Inc.⁵, the Appellate Division Third Department held that the court retains discretion to return an abandoned case to the calendar, after it was stricken, and not restored after one year, where the plaintiff demonstrates a sufficient excuse for the delay, lack of intent to abandon the case, a meritorious claim, and absence of prejudice to the defendant.⁶

There is a second rule which states that where there is pretrial activity, this is a significant factor arguing for restoration of an action to the calendar. For example, in Peterson v. City of New York⁷ The Appellate Division First Department held that a child did not abandon his personal injury action against the City, based on alleged lead poisoning, after his action was marked off the calendar more than one year earlier, where the matter was marked off the calendar for reasons unrelated to the child's default or neglect, and the child was able to show at least some activity during the year after the case was marked off.

In the same way, in O'Boye v. Consolidated Edison of New York⁸, the Appellate Division First Department held that the lower court acted within its discretion in vacating dismissal of the action, entered after the plaintiff's counsel failed to attend several conferences, and restoring the case to the trial calendar, inasmuch as the record demonstrated that the plaintiffs had a meritorious cause of action and never intended to abandon their case, additional discovery was undertaken after the case was marked off the calendar, personal problems suffered by plaintiff's counsel provided sufficient explanation for the default, and there was an inadequate showing of prejudice to the defendant.⁹

The next rule in connection with this section, is the rule concerning Settlement negotiations, as an aspect of pretrial activity, dictating restoration to the calendar. State v. Warren Bros. Co., Inc.¹⁰, the Appellate Division Second Department held that where the County and the landowner modified a Stipulation of Settlement in the County's action to abate a nuisance by agreeing to an extension of the deadline for obtaining approval of County Board of Supervisors, or for moving to restore the action to the trial calendar, and the parties validly agreed to extend the restoration deadline, the Appellate Division held that the Supreme Court erred in holding that the County's Motion to Restore was time barred.

Also, in Tactuk v. Freiberg¹¹, again, the Appellate Division Second Department held that where the parties were actively engaged in Settlement negotiations of a death action and at the time of dismissal for abandonment of the action, a Motion was pending before the Court, and attorneys' averments of merit were not refuted, denial of the Motion to Vacate Dismissal was an abuse of discretion.¹²

Law office failure is a frequent basis for restoration of a case to the calendar, where an attorney fails to appear. For example, in Evans v. New York City Housing Authority¹³, the Appellate Division First Department held that an oversight in seeking to have a case restored to the trial calendar, after appointment of the Administratrix, and her substitution, as plaintiff, for deceased personal injury victim, was excusable as law office failure, particularly where the twelve day delay, beyond the one year period for seeking restoration, was minimal, and there was no prejudice to the defendant.

In similar fashion, in Levine v. Agus¹⁴, the Appellate Division Second Department held that the plaintiff's excuse of law office failure for the delay in moving to restore a medical malpractice action to the trial calendar, which was occasioned by matrimonial difficulties experienced by a signed attorney, was reasonable, and action

should have been restored, particularly where the case was marked off the trial calendar on consent, and plaintiff had no intent to abandon the action.¹⁵

There are subtopics of this law office failure rule. For instance, in general, allegations that the calendar service, the attorney employed lacked awareness of the case on the calendar, or that the calendar answering service did not notify the attorney, does not constitute law office failure such as to justify restoration to the calendar. See Lupoli v. Venus Laboratories, Inc.¹⁶; and Filippi v. Grand Union Co.¹⁷. In the same way, an allegation that a file has been lost or misplaced is not a sufficient law office failure excuse.¹⁸

A third subtopic or sub-rule of law office failure is scheduling errors. For example, in Werner v. Tiffany & Co.¹⁹, the Appellate Division First Department held that law office failure occurred when counsel misplaced his calendar, and in the process of trying to reconstruct his commitments, forgot to include the deadline for restoration of an Employment Discrimination case to the calendar. The Appellate Court held that this was a reasonable excuse for the sixteen month delay in moving to restore the case to the trial calendar after it was dismissed as abandoned.

Douglass v. Brew's Restaurant²⁰ is instructive on this subtopic. In that case, the Appellate Division First Department held that evidence, including inadvertent failure of plaintiff's counsel to receive notice of calendar call in the law journal, resulting in the case being marked off and abandoned, provided reasonable excuse for the delay in prosecuting the case, such as to require restoration of the case to the trial calendar six years after the case was dismissed as abandoned.²¹

It should be noted that law office failure, at one point, was not an acceptable excuse per the Court of Appeals 1980 decision in Barrasch v. Micucci²². That case was finally overruled by the legislature in 1983 with the addition of Section 2005 to the CPLR and Subd(d) to CPLR 3012.

There is an important rule that should be analyzed and examined here with respect to the method, or rather, the requirements involved in moving to restore a case to the calendar within one year of unanswered calendar call, or after a year has passed. The seminal and important case concerning this is Basetti v. Nour²³. In Basetti, a patient brought a medical malpractice case against a physician and, after that case was taken off the trial calendar, the patient moved to restore the action to the calendar. The Nassau County Supreme Court granted the physician's Motion to Dismiss and denied the patient's Motion to Restore the action. The patient appealed. The Basetti court initially noted, in its analysis, that when a case is called for trial and one or more parties fails to appear, 1.) the court has the discretion to either adjourn the trial to another date; 2.) mark the case or strike the case from the calendar; 3.) vacate the note of issue; 4.) or dismiss the complaint or answer.

More to the point, Basetti stated a rule that the one who seeks this sort of relief, i.e., a patient seeking to restore a Medical Malpractice action that was marked off the trial calendar, rather than dismissed, was only required to request the restoration within one year of the trial court's decision to mark off the action, even though the action was almost ten years old and appeared on the trial calendar on eight prior occasions. Where more than one year has passed, more is required.

Thus, on the other hand, it has been held in Sheridan v. Mid-Island Hospital, Inc.²⁴ that in order to restore a matter, which has been stricken from the trial calendar, the plaintiff must demonstrate a meritorious claim, a reasonable excuse for the delay, the absence of intent to abandon the matter, and a lack of prejudice. Similarly, in Lupoli v. Venus Laboratories, Inc.²⁵, the Appellate Division 2nd Department again held that the standard for restoring a matter to the trial calendar is essentially the same as the standard for setting aside a default judgment. The Court held that the moving party must demonstrate a reasonable excuse for the default, a meritorious claim or defense, a lack of intent to deliberately default or abandon the action, and a lack of prejudice to the nonmoving party.²⁶

CONCLUSION

This article, it is hoped, has provided an overview as what I have termed the CPLR solution to address the situation when an attorney fails to make a court appearance. First, whether a matter can be restored to the calendar is a

matter totally within the discretion of the court. Second, the section basically states that a dismissal will take place when a case has been stricken from the calendar or unanswered on a calendar call after a year has passed on the striking. The dismissal is automatic at that point, without further action involving the court. This section states that counsel has the option to restore the case, by Motion, within one year of its being stricken to avoid it being deemed abandoned and dismissed. If the case is dismissed, the plaintiff is obliged to restore the case the year following.

The making of the Motion, it is the law, constitutes the key moment that satisfies the Statute.

There is further law to the effect that significant factors arguing for Restoration of an Action to the calendar is where there is pretrial activity or Settlement negotiations. Law office failure is a frequent basis for restoration of a case to the calendar. It is significant that where a case has been marked off the calendar, rather than dismissed, after the passing of a year, all that is required is a request that restoration occur within one year of the trial court's decision to mark off the action.

On the other hand, after a year has passed, the moving papers must include an excuse for the default, an Affidavit on the merits, and a showing that the defendant was not prejudiced, as well as a lack of intent to abandon the matter.

It is sincerely hoped that this brief survey and analysis of CPLR 3404 will provide the practitioner with a guide and the methodology of dealing with inadvertent or, rather accidental and certainly unintentional, failure to appear at a calendar call.

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ENDNOTES

1 140 AD2d 318, 527 NYS2d 552 (2nd Dept. 1988)

2 219 AD2d 281, 641 NYS2d 33 (1st Dept. 1996)

3 210 AD2d 589, 619 NYS2d 812 (3rd Dept. 1994)

4 284 AD2d 502, 726 NYS2d 713 (2nd Dept. 2001)

5 260 AD2d 979, 689 NYS2d 302 (3rd Dept. 1999)

6 See also Harrington v. Toback, 34 AD3d 640, 825 NYS2d 118 (2nd Dept. 2006); Michitsch v. Katz, 276 AD2d 605, 714 NYS2d 135 (2nd Dept. 2000); Markarian v. Hundert, 242 AD2d 263, 660 NYS2d 590 (2nd Dept. 1997); Bohlman v. Lorenzen, 208 AD2d 582, 617 NYS2d 193 (2nd Dept. 1994); Van Hoven v. Lenox Hill Hosp., 198 AD2d 97, 603 NYS2d 833 (1st Dept. 1993); Pierce v. Memorial Hosp., 190 AD2d 929, 593 NYS2d 612 (3rd Dept. 1993); Tucker v. Hotel Employees and Restaurant Employees Union, Local 100 of New York and Vicinity, AFL-CIO, 134 AD2d 494, 521 NYS2d 279 (2nd Dept. 1987); Izzi v. Arbucci, 90 AD2d 841, 456 NYS2d 85 (2nd Dept. 1982); Tender Care, Inc. v. Selin, 90 AD2d 547, 455 NYS2d 122 (2nd Dept. 1982); Omar v. David Fruit & Co., Inc., 59 AD2d 647, 398 NYS2d 300 (4th Dept. 1977); Casamassina v. Sutton Associates, Inc., 54 AD2d 682, 387 NYS2d 265 (2nd Dept. 1976); Breazeal v. Rent-A-Car Club of America, 32 AD2d 653, 300 NYS2d 812 (2nd Dept. 1969); Colombik v. Heinrich, 11 AD2d 1026, 205 NYS2d 921 (2nd Dept. 1960); Radar-Electronics, Inc. v. Oscar Leventhal, Inc., 8 AD2d 778, 186 NYS2d 107 (1st Dept. 1959); Emrick v. Paramount Restaurant, Inc., 6 AD2d 686, 174 NYS2d 327, (1st Dept. 1958); Schlesinger v. Spingler-Van Beuren Estates, 269 AD950, 57 NYS2d 912 (2nd Dept. 1945); Moskowitz v. Moskowitz, 269 AD747, 54 NYS2d 499 (2nd Dept. 1945); Manzi v. Central New York Wire Corp., 15 Misc.2d 248, 180 NYS2d 433 (S. Ct. Onondaga Co. 1958); Fontheim v. Fred E. French Investing Co., 13 Misc.2d 620, 177 NYS2d 77 (S. Ct. NY Co. 1958); Goldstein v. Block, 7 AD3d 699, 777 NYS2d 180 (2nd Dept. 2004); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Mirman, 269 AD2d 174, 702 NYS2d 295 (1st Dept. 2000)

7 286 AD2d 287, 730 NYS2d 58 (1st Dept. 2001)

8 168 AD2d 219, 562 NYS2d 106 (1st Dept. 1990)

9 See also, Nunez v. Resource Warehousing and Consolidation, 6 AD3d 325, 775 NYS2d 310 (1st Dept. 2004); Aguilar v. Djonovic, 282 AD2d 366, 723 NYS2d 474 (1st Dept. 2001); Schwartz v. Mandelbaum & Gluck, 266 AD2d 273, 698 NYS2d 252 (2nd Dept. 1999); Enrico & Sons Contracting, Inc. v. Bridgemarket Associates, 220 AD2d 368, 633 NYS2d 134 (1st Dept. 1995); Lear v. New York Helicopter Corp., 192 AD2d 646, 597 NYS2d 411 (2nd Dept. 1993); Stavrou v. Abravos-Vernadakis, P.C., 109 AD2d 676, 486 NYS2d 256 (1st Dept. 1985); Pirnack v. Savino, 96 AD2d 857, 465 NYS2d 773 (2nd Dept. 1983); Peterson v. Motor Sales Co. of Kingsprt, 35 AD2d 847, 317 NYS2d 155 (2nd Dept. 1970); H.R. Jacoby, Inc. v. Kushner, 3 AD2d 905, 162 NYS2d 657 (1st Dept. 1957); Young v. Witherspoon, 35 Misc.2d 737, 230 NYS2d 763 (S. Ct. NY Co. 1962); Murphy v. Solomon, 28 Misc.2d 157, 212 NYS2d 790 (S. Ct. Kings Co. 1961)

10 190 AD2d 728, 593 NYS2d 308 (2nd Dept. 1993)

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Availability of Immigrant Visa Numbers for March, 2010

Continued From Page 1 —
DETERMINATION OF THE NUMERICAL LIMITS ON IMMIGRANTS REQUIRED UNDER THE TERMS OF THE IMMIGRATION AND NATIONALITY ACT (INA)

1. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

2. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers."

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provided that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following chargeability areas: INDIA, MEXICO, PHILIPPINES and CHINA (mainland Born). This limits the number of visas available to immigrants chargeable to these countries in the various preference categories

EMPLOYMENT PREFERENCE VISA AVAILABILITY

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. This reduction has resulted in the DV-2010 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For March, immigrant numbers in the DV category are available to qualified DV-2010 applicants chargeable to all

regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

All DV Chargeability Areas Except Those Listed Separately

Region

AFRICA:29,600

Except:EGYPT:18,000;

ETHIOPIA:16,950;

NIGERIA:14,350;

ASIA:12,000;

EUROPE:24,700;

NORTH AMERICA:4;

(BAHAMAS)

OCEANIA:880;

SOUTH AMERICA

and the CARIBBEAN:985.

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2010 program ends as of September 30, 2010. DV visas may not be issued to DV-2010 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2010principals are only entitled to derivative DV status until September 30, 2010. DV visa availability through the very end of FY-2010 cannot be taken for granted. Numbers could be exhausted prior to September 30.

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When an Attorney Does Not Appear: The CPLR Solution

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11 24 AD2d 503, 261 NYS2d 438 (2nd Dept. 1965)

12 See also, Murphy v. Solomon, 28 Misc.2d 157, 212 NYS2d 790 (1961); Arvelo v. Multi Trucking, Inc., 194 AD2d 758, 599 NYS2d 301 (2nd Dept. 1993); Aleshin by Aleshin v. City of Long Beach, 147 AD2d 604, 538 NYS2d 13 (2nd Dept. 1989); Leone v. Bates Plan-A-Home of Sidney, Inc., 144 AD2d 759, 534 NYS2d 751 (3rd Dept. 1988); Goetzmann v. Continental Cas. Co., 70 AD2d 1046, 417 NYS2d 634 (4th Dept. 1979); McNamara v. Hutchinson, 33 AD2d 26, 304 NYS2d 790 (3rd Dept. 1969); People ex rel. Weiss v. Boyland (3 AD2d 738, 160 NYS2d 235 (1st Dept. 1957); Cosby v. R.G. Delivery Service, Inc. 302 AD2d 308, 756 NYS2d 31 (1st Dept. 2003); Koslov v. New York City Housing Authority, 186 AD2d 540, 588 NYS2d 363 (2nd Dept. 1992); Moacelli v. Board of Education of City School District of City of Mt. Vernon, 92 AD2d 930, 460 NYS2d 598 (2nd Dept. 1983).

13 262 AD2d 123, 692 NYS2d 54 (1st Dept. 1999)

14 28 AD3d 719, 814 NYS2d 215 (2nd Dept. 2006)

15 See also, Sheridan v. Mid-Island Hosp., Inc., 9 AD3d 490, 781 NYS2d 366 (2nd Dept. 2004); Groudine v. Delco Development Corp., 286 AD2d 416, 729 NYS2d 513 (2nd Dept. 2001); Collins v. New York City Health and Hosp. Corp., 266 AD2d 178, 697 NYS2d 341 (2nd Dept. 1999); O'Brien v. Groome, 87 AD2d 624, 448 NYS2d 242 (2nd Dept. 1982); Berger v. Colrick, 20 AD2d 639, 246 NYS2d 366 (2nd Dept. 1964); Dahl v. S. Klein Dept. Stores, Inc., 23 Misc.2d 997, 207 NYS2d 204 (S. Ct. Nassau Co. 1960)

16 264 AD2d 820, 695 NYS2d 598 (2nd Dept. 1999)

17 30 AD2d 532, 291 NYS2d 194 (2nd Dept. 1968)

18 See Salzano v. Mastrantonio, 267 AD2d 5, 699 NYS2d 45 (1st Dept. 1999); Diamond v. J.B.J. Management Co., 220 AD2d 378, 631 NYS2d 439 (2nd Dept. 1995); and Robinson v. New York City Transit Authority, 203 AD2d 351, 610 NYS2d 296 (2nd Dept. 1994)

19 291 AD2d 305, 738 NYS2d 326 (1st Dept. 2002)

20 280 AD2d 345, 720 NYS2d 478 (1st Dept. 2001)

21 See also, Stancati v. Weber, 17 AD3d 447, 792 NYS2d 612 (2nd Dept. 2005); Castillo v. City of New York, 6 AD3d 568, 775 NYS2d 82 (2nd Dept. 2004); Cruz v. Volkswagen of America, Inc., 277 AD2d 340, 716 NYS2d 104 (2nd Dept. 2000); Agarrat v. Metro-North Commuter R.R., 270 AD2d 154, 704 NYS2d 585 (1st Dept. 2000); Richel v. Brookdale Hospital Medical Center, 87 AD2d 815, 448 NYS2d 771 (2nd Dept. 1982); Tepperman v. Peri, 29 AD2d 893, 288 NYS2d 677 (2nd Dept. 1968); Berger East Corp. v. Grigg, 6 Misc.3d 76, 792 NYS2d 285 (2004); Jeganathan v. O'Reilly, 195 Misc.2d 197, 753 NYS2d 814 (City Ct. of White Plains 2003).

22 49 NY2d 594, 404 NE2d 1275, 427 NYS2d 732 (1980)

23 287 AD2d 126, 731 NYS2d 35 (2nd Dept. 2001)

24 9 AD3d 490, 781 NYS2d 366 (2nd Dept. 2004)

25 264 AD2d 820, 695 NYS2d 598 (2nd Dept. 1999)

26 See Yousan v. New York Medical Center Hospital of Queens, 277 AD2d 449, 716 NYS2d 695 (2nd Dept.); McCarthy v. Bagner, 271 AD2d 509, 710 NYS2d 249 (2nd Dept. 2000); Renne v. Roven, 29 AD2d 86, 288 NYS2d 415 (2nd Dept. 1968); Sal Masonry Contractors, Inc. v. Arkay Construction Corp., 49 AD2d 808, 373 NYS2d 424 (4th Dept. 1975)

Family-sponsored categories						
		All chargeability areas except the countries separately listed	China (mainland born)	India	Mexico	Philippines
F1	Unmarried Sons & Daughters of U.S. Citizens	22 JUN 04	22 JUN 04	22 JUN 04	01 OCT 92	01 MAR 94
F2A	Spouses & Unmarried Children of Permanent Residents - Subject to Per Country Limit	01 APR 06	01 APR 06	01 APR 06	01 JUL 04	01 APR 06
F2B	Unmarried Sons & Daughters (21 years of age or older) of Permanent Residents	01 FEB 02	01 FEB 02	01 FEB 02	15 JUN 92	22 AUG 98
F3	Married Sons & Daughters of U.S. Citizens	22 MAY 01	22 MAY 01	22 MAY 01	08 OCT 92	01 MAR 92
F4	Brothers & Sisters of Adult U.S. Citizens	15 JAN 00	15 JAN 00	15 JAN 00	08 DEC 95	01 SEP 87
Employment-based categories						
		All chargeability areas except the countries separately listed	China (mainland born)	India	Mexico	Philippines
E1	Priority workers	C	C	C	C	C
E2	Professionals Holding Advanced Degree or Persons of Exceptional Ability	C	08 JUL 05	01 FEB 05	C	C
E3	Skilled Workers & Professionals	15 DEC 02	15 DEC 02	01 JUL 01	01 JUL 02	15 DEC 02
EW	Other Workers (Unskilled Workers)	1 JUN 01	1 JUN 01	01 JUN 01	01 JUN 01	01 JUN 01
E4	Certain Special Immigrants	C	C	C	C	C
E4	Certain Religious Workers (SR)	C	C	C	C	C
E5	Employment Creation (Investors)	C	C	C	C	C
E5	Employment Creation (Investors in Targeted Employment Areas)	C	C	C	C	C
E5	Pilot Programs	C	C	C	C	C

C = Current
U = Unavailable
Cut-off date = The cut-off date is the priority date of the first applicant who could not be reached within the statutory limit for the month.
Only applicants who have priority dates earlier than the cut-off date may be allocated a number

The Culture Corner

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RICCARDO MUTI AND THE NEW YORK PHILHARMONIC

Expect the unexpected. That's what I learned from listening to internationally famous guest conductor **RICCARDO MUTI** lead the **NEW YORK PHILHARMONIC** in performances of four works this past March.



Riccardo Muti

Specifically, for months I was waiting for the performance of **Brahms's Piano Concerto No. 1 in D Minor - one of my three favorite pieces of music**. Brahms wrote this momentous and emotionally charged piece in 1858, that Brahms finally decided to put into concerto form, soon after the death in 1856 of his mentor and "discoverer" Schumann. It was Schumann who proclaimed publicly and importantly to the world that Brahms was the "next prophet" of classical music, or else Brahms might have continued to live the struggling life of several creative geniuses who were not appreciated in their lifetimes.

When the **Brahms Piano Concerto No. 1** is performed well, within moments of the entry of the piano, several minutes into the concerto, with its introspective and intensely felt passages, the listener, whether to a live or recorded performance, should be left at the brink of tears, if not feel the tears. That feeling totally eluded me when I listened and watched, in disbelief, a listless **RICCARDO MUTI** conduct the **NEW YORK PHILHARMONIC** that responded in loose and unstructured ways to Muti's seemingly lost and whimpering baton. The concerto was not helped by famed pianist Andras Schiff waving his hands in the air with every passage of piano, reminiscent of some pseudo-nostalgic yearning for Liberace [for readers of my generation].

I make those observations with great regret. I love the musicianship of pianist **ANDRAS SCHIFF**, who performs frequently at the 92nd Street Y on the Upper East Side. Two nights before the performance of the Brahms Piano Concerto No. 1, I heard Schiff on the same stage of Avery Fisher Hall playing glowing accounts of piano pieces by **MENDELSSOHN** and **SCHUMANN** in a brilliantly arranged program. Similarly, I have long admired **RICCARDO MUTI**. So I expected great things of their rendition of the Brahms Piano Concerto No. 1, but I was disappointed. Muti seemed overly tied to the score, as though he were reading the composition for the first time in his life. I did not see any connection between him and the New York Philharmonic musicians during that piece of music. Muti also seemed lethargic, as though he had stepped off a jet minutes ago from a 12 hour journey.

If you yearn to hear the Brahms Piano Concerto No. 1 played as it should be, I urge you to get Emil Gilels's brilliant recording with Eugen Jochum conducting the Berlin Philharmonic on the Deutsche Grammophon Label. Other excellent recordings of that piece are by pianists

Nelson Freire and Leon Fleischer.

What puzzled me more was the jubilant reception to the piece by the audience. Did the rest of the audience and I hear the same account or did they just zone out and then start to applaud the celebrity of the performers? **Could I have gotten it wrong? These questions haunted me.** I summoned my courage during the following intermission and turned to the elegantly dressed, very attractive, blonde woman sitting near me whom I heard was talking German to her friend. It turned out, she related in beautifully spoken, unaccented English, that she loves music, had been to New York before, attends religiously performances of the Berlin Philharmonic in Berlin where she lives, but this was her first time at a concert in New York City. I asked her for her opinion of the performance we had heard of the **Brahms's Piano Concerto No. 1**. She paused. I insisted on a truthful opinion. She then related that, like me, that piece was among her very favorite pieces of music, but she felt that Muti's interpretation was just flat, sterile, and devoid of emotion, and that the **NEW YORK PHILHARMONIC** responded in kind, with a loose, imprecise, and disconcerting rendition.

I immediately felt safe and secure that I was not crazy or going out of my mind. It is a relief when one realizes that, no matter how overwhelmingly the opinion against your trend or school of thought, that you are not crazy and that your belief *does* have substance!

So I said expect the unexpected. I had expected a great Brahms Piano Concerto no. 1, only to be disappointed. Now for more of the unexpected. I do not know what vitamins **MAESTRO RICCARDO MUTI** took in his dressing room during intermission or whether he downed a couple of Red Bulls, but **Maestro Muti conducted Hindemith's Symphony in E-flat right out of the ballpark!** It was fabulous. Muti was animated, related to the **NEW YORK PHILHARMONIC**, and the orchestra reciprocated by delivering a Hindemith sym-

phony that was muscular, robust, structured, and a statement of great musicianship. So impressive was the playing of the **Hindemith's Symphony in E-flat** that, after the first movement, the lady from Berlin and I instantly looked at each other and nodded our heads, trading satisfied smiles.

HINDEMITH was a great genius. He composed music in many styles and was constantly berated by the Nazis in 1930s Germany for his revolutionary musical concepts. The fact that Hindemith's wife was Jewish didn't endear him either to Nazi authorities. Luckily for him, **HINDEMITH** and his wife escaped Nazi Germany and found a welcome home in the United States where several colleges fought with each other for the privilege of having such a distinguished composer on their faculty.

HINDEMITH's music is eclectic. Hindemith's piano pieces remind me of Picasso's cubism. You have to think "outside of the box" to appreciate new forms. Yet, when writing his symphony, Hindemith returned to conventional symphonic writing and delivered a powerhouse symphony that grabs its listener by its larynx and just doesn't let go! I arrived to that concert expecting to love the Brahms Piano Concerto No. 1, but I left smitten by the wonderful account by **MAESTRO MUTI** and the **NEW YORK PHILHARMONIC** of the Hindemith symphony - something that I did not expect!

On her way out, the woman from Berlin added how much she enjoyed Muti's account of Hindemith's Symphony. **But she now had a question for me:** at the conclusion of the Hindemith Symphony, the audience was leaving, although many were applauding. In Berlin, she added, the audience stays in their seats until all of the performers leave the stage, and only then does the public leave. How else would a performer know whether to do an encore, she asked? Why would a performer do an encore when a lot of the audience is leaving? Looking at the departing crowd, running up the aisles in a rushed frenzy, although the conductor and the New York

Philharmonic were still standing on stage, **this knowing, cultured visitor asked: "Is this normal here in New York?"** With an embarrassed nod of the head, I answered "Yes." "They are all in a rush to grab a taxi, subway, and to get home." I was embarrassed by my fellow New Yorkers. It is painful when a visitor points out how rude and uncivilized audience etiquette can be in New York City. Thank God she did not know how Rangers fans behave during the playing of The Star Spangled Banner at Madison Square Garden.

A few nights later, I returned to **EVERY FISHER HALL** to hear **RICCARDO MUTI** conduct the **NEW YORK PHILHARMONIC** in Beethoven's violin concerto. The violin was played by gifted Russian violinist **VADIM REPIN**. Repin, in fact, recently recorded this concerto, adding to his impressive discography. **VADIM REPIN** is definitely in the top ten, if not top five, contemporary, leading violinists in the international classical music world. Muti, Repin, and the New York Philharmonic gave a very fine rendition of the Beethoven Violin Concerto. After the intermission, **Muti's interpretation of Franck's Symphony in D minor was electric!** It was a great account.

So the bottom line of the score card is that **MAESTRO RICCARDO MUTI** gave excellent performances with the **NEW YORK PHILHARMONIC**, as its guest conductor, in March, marred only by an unsatisfying account of the Brahms Piano Concerto No. 1. I hope that the New York Philharmonic will try that piece again.

You can learn more about **MAESTRO RICCARDO MUTI** by reading his web site at www.riccardomuti.com.

HOWARD L. WIEDER is the writer of both "THE CULTURE CORNER" and the "BOOKS AT THE BAR" columns, appearing regularly in **THE QUEENS BAR BULLETIN**, and is **JUSTICE CHARLES J. MARKEY'S PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

Beavers Spied on Ceiling of Queens Supreme!!!!

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error here (reversible?) since the NYC Seal we have today actually bears the year 1625 not 1664. However, at the time that the courthouse was constructed, the year on the seal was in fact 1664. The official seal has gone through many revisions over the years (the year on the seal was changed to 1664 by the Board of Aldermen in 1915). The date of 1664 remained until 1974,

when Paul O'Dwyer, the Irish-born and Anglophobic President of the City Council, figured that the 700th anniversary of the founding of Amsterdam in the Netherlands was as good a time as any to strip the British of the distinction of having founded the city and bestow it instead on the Dutch.

Now that this significant legal mystery was solved it was left only to write this

article to inform the Bar of Queens County of this most important information. I'll be back at the courthouse soon seeking to uncover other items of historical interest and reporting them for the Queens Bar Bulletin.

* Mark Weliky, is the Pro Bono Coordinator for the Queens County Bar Association

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ed so that I would consider taking on the case for a retainer of thirty-five hundred dollars." There was a dramatic silence in the room after that. The two elderly people looked a bit smaller in their seats. They were clearly shocked by what they had just heard and apparently had no concept of what it cost to employ counsel for legal matters such as theirs. "My take home pay is \$327.00 per week," the man said. "We have no other income and I have been suspended now for two weeks."

"Perhaps I could deal with the matter for twenty-five hundred dollars if it does not take a great deal of time," Arthur countered. "Please Sir, we have no savings and we are already one month behind in our rent." They truly did look pathetic at that moment. Whether it was a rehearsed por-

trayal or the real thing, Arthur was affected by the attitude of depression which had settled over the two of them. "We have nowhere else to turn, Sir, can't you do a little better on the fee?"

Even hard-bitten Arthur felt badly for these two sad souls. "Well", he said, "Maybe, if I can complete the case in one or two appearances I could do it for fifteen hundred dollars." The elderly gentleman appeared even more crestfallen at that point. "Could you possibly see your way clear to representing me for one thousand dollars, Sir? I can promise you that we would pay that off no matter how long it takes."

"How are you planning on doing that," Arthur asked? "We will try to save a little bit here and there, now that I am going to be allowed to return to work in a few

weeks. "How can you possibly save any money when your take home is only a few hundred dollars a week?" Arthur said. He often spent that much on a dinner evening in Manhattan, so the thought of saving any money at that level of income was completely incredulous to him.

"We will do the best we can, but I promise we will pay you." His wife permitted a small tear to roll down her face. Arthur watched the tear as if in slow motion as it dropped off her jaw bone. He reached behind his desk and proffered a tissue from a Kleenex box he kept there for just such occasions. Arthur glanced down at his gold Presidential Rolex as inconspicuously as possible, a move he had perfected over the years so that clients would not catch him watching the clock. He had to admit to himself that he was touched.

"How long are you two married, may I ask?" "Forty-seven years," they proudly responded. They reminded him of his own parents, both now deceased.

"We can bring in \$50.00 per week until the whole thing is paid," Mr. Chaudhury volunteered. Arthur was silent for a time and then he said "Let's just say I'm doing this for neighborhood good will and you don't have to bring in anything." The elderly couple sat in stunned silence for a moment and then launched into a series of blessings and vows of eternal appreciation that made Arthur blush. He shook their hands multiple times as he gently ushered them out of his office door. He checked his gold Presidential Rolex again, rolled up the sleeves on his Turnbull & Asher shirt and resumed his search. He never did find his file.

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