



## You Have Come A Long Way

*But You Still Have A Thing Or Two To Learn About Venue*

BY PAUL S. GOLDSTEIN\*

There are some little known and little used procedures which are available to defense counsel, but are rarely used. I propose, with this article, to bring one of these procedures to your attention.

Imagine a situation where an out-of-state plaintiff commences an action against your client, a New York resident. From the facts furnished by the defendant, it sounds like the plaintiff's case is frivolous, but the complaint is sufficient to withstand defendant's motion for summary judgment. What could the defendant do to delay and legitimately harass the plaintiff (assuming we do not have a question of improper service of process on the defendant or that the plaintiff is not suing a poor person)?

The answer lies in CPLR 8501 which provides: "Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or resident of the state when the motion is made."

It should be kept in mind that this section of the law provides that defendant's application to compel the plaintiff



Paul S. Goldstein

to pay into court the sum of \$500.00 dollars or post an undertaking for \$500.00 as security for costs may be made ex parte. Note that the \$500.00 figure is set where the action is brought in any county within the City of New York CPLR 8503. Yes, there is no notice to the plaintiff's attorney when this application is submitted to the court, and when the order is served on the plaintiff's counsel, it usually falls like a ton of bricks on such counsel and the client, unless plaintiff's counsel is familiar with Article 85 or has read this article in the Bar Bulletin. Beside requiring the plaintiff pay into court the sum of \$500.00 or post an undertaking in the sum of \$500.00, all proceeding on the part of the plaintiff are stayed until the plaintiff has complied with the order.

The supporting affidavit which certainly can be submitted by defendant's counsel is short, to the point, and furnishes the court with facts sufficient for the granting of the order. The affidavit is not argumentative and one needs to briefly spell out the facts which established the defendant's right to the granting of this order.

The order is signed. What then? A copy of same is served on the plaintiff's attorney within the time specified in the order. What then? The plaintiff now has thirty days within which to comply with the order or move to attempt to vacate the order. Vacating the order is not easily

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## The Following Summary of Second Department and Court of Appeals Decisions in Medical Malpractice Cases

*Decided Between February 15 and April 1, 2009*

PREPARED BY BROOKLYN BAR ASSOCIATION MEDICAL MALPRACTICE COMMITTEE CHAIRMAN JOHN BONINA

**Statute of Limitations - Continuous Treatment Doctrine:** Mule v. Peloro, \_\_ A.D.3d \_\_, 2009 NY Slip Op. 01626 (2<sup>nd</sup> Dept. 2009).

Plaintiff was treated by various doctors at defendant University Physicians Group between August 28, 2000 and September 14, 2004.<sup>1</sup> However, her last appointment with defendant Langan was December 4, 2001.<sup>2</sup> During this time, she was treated for pulmonary and respiratory complaints.<sup>3</sup>

She was ultimately diagnosed with lung cancer on October 22, 2004 at a different medical facility and died November 11, 2004.<sup>4</sup>

The action for medical malpractice and wrongful death was commenced on May 12, 2006.<sup>5</sup> Defendant Langan thereafter moved for Summary Judgment dismissing the Complaint on statute of limitations grounds, since he last treated plaintiff on December 4, 2001, and left defendant University Physicians Group on December 31, 2001.<sup>6</sup>

Supreme Court denied the motion, and the Second Department affirmed, stating:

"(U)nder the continuous treatment doctrine, the time in which to 'bring a malpractice action is stayed when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' (McDermott v. Tory, 56 NY2d 399, 405 quoting Borgia v. City of New York, 12 NY2d 151, 155;

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## QUESTIONS AND ANSWERS

### USCIS Provides Interim Deferred Action Relief For Surviving Spouses

*Relief for Spouses of Deceased U.S. Citizens Married Less Than Two Years*

BY ALLEN KAYE

#### Introduction

U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano, on June 9, 2009, announced that DHS would grant deferred action relief to surviving spouses of U.S. citizens who died before the second anniversary of their marriage. Based on the Secretary's decision, U.S. Citizenship and Immigration Services (USCIS) will temporarily suspend adjudication of visa petitions and adjustment applications filed for widow(er)s where the sole reason for an adverse decision from USCIS would be the death of a U.S. citizen spouse prior to the second anniversary of their marriage.

#### Background

Until there is a legislative solution to remedy the situation commonly referred to as the "widow penalty," USCIS is providing interim administrative relief in the form of deferred action to surviving spouses whose U.S. citizen spouses died before the second anniversary of their marriage. The "widow penalty" prevents widow(er)s of deceased U.S. citizens, who were married less than two years at the time of the U.S. citizen's death, from becoming permanent residents based on the marriage. Under this action USCIS also will consider favorably requests for humanitarian reinstatement where previously approved petitions for widow(er)s had been revoked because of the law.

#### Q. What is deferred action?

A. Deferred action is an exercise of prosecutorial discretion not to pursue removal from the United States of a particular foreigner for a specific period. Deferred action is not intended to be a perma-

*Continued On Page 4*

### Jamaica Service Program for Older Adults honors Volunteer Program of QCBA



Mark Weliky with William Collins, Ann Wilkinson and Carol Hunt.

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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.

2009 FALL CLE Seminar & Event Listing

December 2009

Tuesday, December 1 Family Law Seminar 6:00 - 8:00 p.m.  
Monday, December 7 Article MHL 81/Guardianship Training Seminar 2:30 - 5:00 p.m.  
Thursday, December 10 Holiday Party at Floral Terrace 6:30 - 10:30 p.m.  
Friday, December 25 Christmas Day, Office Closed

January 2010

Friday, January 1 New Year's Day, Office Closed  
Monday, January 18 Martin Luther King, Jr. Day, Office Closed

February 2010

Wednesday, February 3 Ethics & Real Estate Practice 1:00 - 2:00 p.m.  
Wednesday, February 10 Evidence Seminar 6:00 - 8:00 p.m.  
Friday, February 12 Lincoln's Birthday, Office Closed  
Monday, February 15 President's Day, Office Closed  
Tuesday, February 23 Small Claims Arbitrator Training (Tentative)  
Thursday, February 25 Labor Seminar (Tentative)

March 2010

Wednesday, March 10 NYSBA Volunteer Training 10:00 - 4:00 p.m.  
Monday, March 22 Past Presidents & Golden Jubilarians Night 5:30 - 8:30 p.m.

April 2010

Friday, April 2 Good Friday, Office Closed  
Wednesday, April 21 Equitable Distribution Update 6:00 - 8:00 p.m.

May 2010

Thursday, May 6 Annual Dinner & Installation of Officers Terrace on the Park 6:00 - 10 p.m.  
Monday, May 31 Memorial Day, Office Closed

CLE Dates to be Announced

Civil Court Seminar  
Elder Law

Insurance Law  
Taxation Law



Leslie S. Nizin

EDITOR'S MESSAGE

As we come to the end of 2009, on behalf of the President, the Board of Managers and the entire Bar Association, I wish each of you and your families a very happy holiday season , a healthy and happy new year, and may the new year bring health and peace.

-- Les Nizin

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2009-2010

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QUEENS BAR BULLETIN

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## PRESIDENT'S MESSAGE

I would like to wish all members of the Queens County Bar Association a happy and healthy holiday season and a prosperous New Year. This time of year is always so joyful and festive. The Queens County Bar Association is hosting its Holiday party on December 10, 2009 at the Floral Terrace in Floral Park, New York. Our Chairperson, George Nicholas, has been working very hard to get a good turnout, which I know he will do. George has arranged for a live band to entertain us and we thank all of our co-sponsors and sponsors for their support.

On behalf of the Queens County Bar Association I would like to congratulate our newly elected Supreme Court Justices, Dicia T. Pineda-Kirwan and Thomas D. Raffaele, as well as, our newly elected Civil Court Judges Richard Latin and Jodi Orlow Mackoff.

Our Stated Meeting on November 30, 2009 will be attended by our Administrative Justices Jeremy S. Weinstein and Fernando Camacho as we have a seminar on the "Screening Process For The Appointment To The Criminal And Matrimonial Bench" and we have Zachary Carter

from the Mayor's Advisory Committee coming down to address the members of the Queens County Bar Association. A special thanks to our Program Chair, Joe Carola, III, for his hard work. I hope to see everyone there.

I hope to see you all at the various functions of the Queens County Bar Association. Again, if you have any questions or concerns please be in touch.

Guy R. Vitacco, Jr.  
President



## COURT NOTES

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

#### Sandra Fernandez (August 25, 2009)

On October 23, 2008, the respondent was convicted in the Supreme Court, Kings County (Mangano, J.) of eight counts of offering a false instrument for filing, a class E felony. By virtue of her New York felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4) and was automatically disbarred.

#### Robert A. Macedonio, admitted as Robert Anthony Macedonio (August 25, 2009)

On December 9, 2008, the respondent pleaded guilty in County Court, Suffolk County (Hudson, J.) to one count of criminal possession of a controlled substance in the fifth degree, a class D felony. By virtue of his New York felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4) and was automatically disbarred.

#### Hector A. Martinez, Jr. (August 25, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges predicated upon a dishonored check drawn on his attorney trust account.

#### John H. Schunke, Jr., admitted as John Henry Schunke, Jr. (August 25, 2009)

By order of the Supreme Court of New Jersey dated December 9, 2008, the respondent was disbarred on consent, his name was stricken from the roll of attorneys, and he was permanently enjoined from practicing law in that State. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

#### Claude R. Simpson, admitted as Claude Richard Simpson (August 25, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of professional misconduct concerning his attorney escrow account and documents he submitted to the Grievance Committee in the course of its investigation.

#### Andrew Petrone (September 8, 2009)

On January 5, 2006, the respondent

pleaded guilty in County Court, Suffolk County (Doyle, J.) to criminal possession of a controlled substance in the fourth degree, a class C felony. By virtue of his New York felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4) and was automatically disbarred.

#### Steven T. Rondos (September 8, 2009)

By order of the Supreme Court of New Jersey dated January 5, 2009, the respondent was disbarred on consent, his name was stricken from the roll of attorneys, and he was permanently enjoined from practicing law in that State. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

### The Following Attorneys Were Suspended By Order of The Appellate Division, Second Judicial Department:

#### William J. Salica (August 18, 2009)

By order of the Supreme Court of California filed July 3, 2003, the respondent was suspended from the practice of law in that State for a period of two years and until he had shown "satisfactory proof...of his rehabilitation, fitness to practice, and learning and ability in the general law." That order further stated that, until the respondent made restitution as specified therein, execution of the suspension would be stayed and he would be placed on probation for a period of three years, on condition that he be actually suspended for a period of six months. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was suspended from the practice of law in New York for a period of two years, commencing September 18, 2009, and continuing until further order of the Court.

#### Fredrick Klarer (August 25, 2009)

Following a disciplinary hearing, the respondent was found guilty of knowingly making false statements of fact by (a) failing to advise the Family Court, New York County, that the relief he was seeking had previously been denied by both the Supreme Court, New York County, and the Appellate Division, First Department, and (b) falsely asserting before the Supreme Court, New York County, in an affirmation in opposition to a motion for



Diana J. Szochet

the imposition of sanctions, that he had verbally informed the Family Court, New York County, of the prior applications and determinations; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation as a result of the foregoing; engaging in frivolous conduct in that he filed a deficient record on an appeal before the Appellate Division, First Department; and engaging in conduct prejudicial to the administration of justice, which reflects adversely on his fitness as a lawyer, based upon the foregoing. He was suspended from the practice of law for a period of three years, commencing September 25, 2009, and continuing until further order of the Court.

#### Philip S. LaPenta (August 25, 2009)

Following a disciplinary hearing, the respondent was found guilty of engaging in illegal conduct, which reflects adversely on his honesty, trustworthiness or fitness as a lawyer, as a result of his conviction, on November 2, 2005, of operating a motor vehicle while under the influence of alcohol or drugs, an unclassified misdemeanor; his admitted violation of the terms of his probation as a result of his further arrest, on February 16, 2006, for operating a motor vehicle while under the influence of drugs or alcohol; and his conviction on May 11, 2007, of operating a motor vehicle under the influence of alcohol or drugs, as well as engaging in conduct that adversely reflects on his fitness as a lawyer based upon the foregoing. He was suspended from the practice of law for a period of six months, commencing September 25, 2009, and continuing until further order of the Court.

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**Queens County Bar Association**  
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## Notice Of Nominating Committee Meetings:

*Please take notice that those members who wish to be considered for nomination as Officers or Members of the Board of Managers of the Queens County Bar Association should submit written requests and resumes highlighting your activities in the Association prior to January 20, 2010.*

*Tentative meetings pursuant to the by-laws have been scheduled by the Nominating Committee on January 27, 2010 and finally on February 3, 2010. Said meetings are scheduled for 5:00 P.M. in the Board of Managers Room - in the Headquarters Building, 90-35 148th Street, Jamaica, N.Y.*

*At those meetings you may present the names of the persons whom you desire to have considered by the Nominating Committee for nomination to offices to be filled at the Annual Meeting. Hearings will be held at those times for that purpose pursuant to the by-laws.*

**Joseph F. DeFelice**  
Secretary

*Please submit your requests in writing to the attention of the:*

**Nominating Committee**  
**Queens County Bar Association**  
**90-35 148 Street**  
**Jamaica, N.Y. 11435**

*The Annual Election of Officers and Managers will be held on March 5, 2010. The newly elected Officers and Managers will assume their duties on June 1, 2010.*

**Dated: December 3, 2009**  
**Jamaica, NY**

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## Relief For Surviving Spouses

*Continued From Page 1*—  
nient remedy for this situation; rather it is a temporary discretionary solution. The grant of deferred action by USCIS does not confer or alter any immigration status. It does not affect any period of prior unlawful presence. The grant of deferred action does not convey or imply any waivers of inadmissibility that may exist, regardless of whether or not that inadmissibility is known to DHS at the time of the request for deferred action. Likewise, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. Periods of time in deferred action do, however, qualify as periods of stay authorized by the Secretary for purposes of sections 212(a)(9)(B) and (C) of the Immigration and Nationality Act [INA]. Aliens with deferred action may apply for an Employment Authorization Document (EAD) if they can establish an economic necessity for employment.

#### Q. Who is covered under this program?

A. Surviving spouses (and their qualifying children), whose U.S. citizen spouses died before the second anniversary of marriage, who have not remarried since the death of the spouse, and are currently residing in the United States. Such surviving spouses are covered without restrictions on how long the U.S. citizen spouse has been deceased as long as the surviving spouse has not remarried.

#### Q. Who is a qualifying child?

A. A qualifying child is the unmarried son or daughter of the surviving spouse, who is currently residing in the United States. Generally, a qualifying child must be younger than age 21 at the time the request for deferred action is made. However, in some cases a qualifying child may be older than age 21 based upon having had a Form I-130 previously filed on his or her behalf as an immediate relative when younger than age 21, as provided by the "age-out" provisions in section 201(f) of the INA.

#### Q. Can my children be considered eligible for deferred action on my Form I-360 or must I file separate Forms I-360 on their behalf?

A. Yes, qualifying children can be listed on your Form I-360 request for deferred action. You are not required to file an individual Form I-360 for each child. If you are eligible for deferred action and have filed a Form I-360 naming your children as part of your request for deferred action, your children may also be eligible for deferred action. , Deferred action under this program is also available to the qualifying children of the surviving spouse who are younger than age 21 (at the time the request for deferred action is submitted or a Form I-130 was filed on their behalf as an immediate relative); currently residing in the United States; and unmarried. Your qualifying children are also eligible for consideration for a grant of deferred action relief based on your Form I-360.

#### Q. Are the children of my deceased U.S. citizen spouse covered under this program?

A. That depends on whether they are your children as well. Generally, your stepchildren through marriage to the U.S. citizen would be considered your children, and thus covered under this program, as long as your marriage took place when the child was younger than age 18. If those

children did not already derive U.S. citizenship through your deceased spouse at birth or on entry into the United States under the Child Citizenship Act of 2000, they may be covered under this program.

#### Q. Are my children, who are not the children of my deceased U.S. citizen spouse, covered under this program?

A. Yes. The program covers your children in the United States, as long as they meet the definition of your "child" in section 101(b) of the INA, regardless whether or not they are also the children of your deceased U.S. citizen spouse.

#### Q. Are any children who were born in the United States covered under this program?

A. No. Children born in the United States are U.S. citizens by birth, and are not subject to the immigration process involved in this program.

#### Q. What if I am a widow(er) of a deceased U.S. citizen, and I live outside the United States?

A. You must be living in the United States to be eligible to request deferred action under this program.

#### Q. Who is not covered under this program?

A. This program does not cover surviving spouses or qualifying children of deceased U.S. citizens who are residing outside the United States or surviving spouses and children of a lawful permanent resident or other non-U.S. citizen. This program also does not cover surviving spouses or qualifying children of deceased U.S. citizens if the surviving spouse remarried at any time after the U.S. citizen's death (regardless of whether or not the subsequent marriage has been terminated). The program does not cover any beneficiary who was legally separated from his or her U.S. citizen spouse at the time of the citizen's death, or such beneficiary's children.

#### Q. My spouse and I were married for more than two years at the time of the U.S. citizen's death, am I covered under this program?

A. If you meet the requirements of section 201(b)(2)(A)(i) of the INA, as the widow/widower of a U.S. citizen, and had been married more than two years at the time of the U.S. citizen's death, you are not covered by this program. You may file a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, in accordance with the instructions on the Form as an immediate relative based upon a self-petition, as long as the Form I-360 is filed within two years after the date of death.

#### Q. What if my U.S. citizen spouse died and I remarried, but my marriage to the new spouse has been terminated by divorce or death?

A. If you are claiming to be a surviving spouse, based on a prior spousal relationship to a now deceased U.S. citizen and have remarried after the death of your previous U.S. citizen spouse, you are not eligible for deferred action under this program, regardless of whether your subsequent marriage ended due to a divorce from or the death of your subsequent spouse.

#### Q. What if a stand-alone Form I-130 was filed and not approved before the

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# Marital Quiz

BY GEORGE J. NASHAK JR.\*

**Question #1** - Does the Appellate Division, in custody cases, have as broad authority as the hearing court?

**Your answer -**

**Question #2** - Can an order denying reargument or resettlement be appealed?

**Your answer -**

**Question #3** - In a divorce proceeding is a spouse entitled to a credit for marital funds used by the other spouse to pay court ordered child support for a child of a prior marriage?

**Your answer -**

**Question #4** - In a divorce proceeding is a spouse entitled to a credit for marital funds used by the other spouse to pay maintenance to a former spouse?

**Your answer -**

**Question #5** - Does a party in a matrimonial action have the right to access and utilize the email account of the estranged spouse with whom he or she no longer resides?



George Nashak

**Your answer -**

**Question #6** - Can a party to litigation take a position contrary to a position taken in an income tax return?

**Your Answer -**

**Question #7** - Does appreciation in a separate property business attributable to the employees who were hired by the owner-spouse to run the company count as spousal active appreciation subject to equitable distribution?

**Your answer -**

**Questions #8** - Is denial of three requests to have sex, in one year, sufficient to establish constructive abandonment?

**Your answer -**

**Question #9a** - With respect to disability pensions, is there a formula for determining which portion of the pension is disability and which portion of the pension in non-disability?

**Your answer -**

**Question #9b** - Who has the burden of establishing the marital portion of a disability pension?

**Your Answer -**

**Question #9c** - If the party with the burden of proof to establish the marital portion of a disability pension fails to provide the necessary proof, can the court still distribute the marital portion of the disability or must it treat the entire disability pension as marital?

**Your Answer -**

**Question #10a** - Is the portion of an award received from the September 11<sup>th</sup> Victim Compensation Fund, designated as compensation for personal injuries, marital or separate property?

**Your answer -**

**Question #10b** - Is the portion of an award received from the September 11<sup>th</sup> Victim Compensation Fund, designated as compensation for economic loss, marital or separate property?

**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 TO MARITAL QUIZ ON PAGE 15

## You Have Come A Long Way

*Continued From Page 1* —  
achieved nor is it likely to be attempted. What then? After thirty days the defendant may then move to strike the complaint pursuant to CPLR 8502 if the plaintiff has not complied with the order of the court! Unopposed, the motion will be granted, and if opposed, the court will, for cause shown, give the plaintiff time to comply. In any event, the defendant is on the offensive and the plaintiff may now have second thoughts about the action which was commenced.

For those not familiar with the form of the ex parte application, the following is an example of the body of such order which I have successfully employed:

Defendant has moved for an Order directing the plaintiff to furnish security for costs pursuant to CPLR Article 85 on the ground that the plaintiff is a non-resident of the State of New York. In support of the motion, the defendant has submitted this ex parte order and the affirmation of Paul S. Goldstein dated October 29, 2009, with attached exhibits, from which it appears that the plaintiff was a non-resident of this state when the motion was made and not a poor person.

Upon the foregoing, and upon the motion of PAUL S. GOLDSTEIN, attorney for defendant, it is ordered that:

The motion in all respects granted.

Within thirty (30) days from the date of this order, plaintiff either pay into this

Court the sum of \$500.00 to be applied to the payment of the costs in this action, if any, be awarded against plaintiff, or at her election, that plaintiff file with the clerk of this Court and undertaking, with sufficient surety to the effect that she will pay on demand to defendant all costs which may be awarded to defendant in this action, not exceeding the sum of \$500.00, and that she serve written notice of such payment or filing of the undertaking on defendant's attorney.

Until such payment or filing and notice thereof, all other proceedings on the part of the plaintiff, except to review or vacate this order, are stayed.

Defendant to serve a copy of this order upon plaintiff's attorney on or before \_\_\_\_\_, 2009.

Although, the supporting affidavit or affirmation is not being discussed, remember to include in your affirmation the statement that no prior application or motion has been made for the relief requested herein. With that you are ready to move forward.

In the next issue of the Bar Bulletin we will look at the solution to the problem of venue where venue is a consideration for the plaintiff.

\*Editor's Note: Paul S. Goldstein is a Past President (94-95) of the Queens County Bar Association and in private practice.

### EMPLOYMENT & LABOR LAW

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# Decisions in Medical Malpractice Cases

Continued From Page 1—  
see *Labshere v. Petroski*, 32 AD3d 645, 646). Further, “the continuous treatment doctrine may be applied to a physician who has left a medical group, by imputing to him or her the continued treatment provided by subsequently treating physicians in that group.” (*Solomonik v. Elahi*, 282 AD2d 734, 735; see *Watkins v. Fromm*, 108 AD2d 233).<sup>7</sup>

**Statute of Limitations - Relation Back:** *Bryant v. South Nassau Communities Hospital*, 59 A.D.3d 655 (2nd Dept. 2009).

Before the expiration of the statute of limitations, plaintiff moved for leave to amend her Summons & Complaint to add appellants as defendants in her action.<sup>8</sup> The motion was granted by Order dated October 7, 2005.<sup>9</sup> Plaintiff then served the Order with Notice of Entry upon the appellants, but failed to serve the amended Summons and Complaint for over two years, despite the fact that appellants neither answered or appeared for approximately 20 Court appearances during that time period.<sup>10</sup>

Thereafter plaintiff moved for leave to serve a “supplemental” Summons and Amended Complaint nunc pro tunc pursuant to the relation back doctrine of CPLR §203(c).<sup>11</sup> The Second Department denied this motion, and dismissed the case as to appellants, noting that the failure to serve appellants was not a “mistake” concerning the defendants’ identity, and thus plaintiff had failed to meet the third prong of the relation back doctrine (i.e. that there was an excusable mistake in originally failing to identify all of the proper parties).<sup>12</sup>

**Negligent Infliction of the Emotional Distress - Case Dismissed:** *Jason v. Krey*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 01779 (2nd Dept. 2009).

“The circumstances under which recovery may be have for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff’s physical safety or caused the plaintiff fear for his or her own physical safety” (*Creed v. United Hospital*, 198 AD2d 489, 491 quoting *Lancellotti v. Howard*, 155 AD2d 588, 589-590). Here the complaint alleges in conclusory fashion that Jason suffered physical injury. Furthermore, the plaintiff’s allegation in opposition to the motion that Jason suffered physical trauma due to

the side effects of the medications taken in preparation for the IVF procedure is insufficient to sustain the complaint because the alleged physical discomfort or harm was a necessary component of the IVF procedure which Jason would have suffered even in the absence of any alleged negligence (see *id.*).<sup>13</sup>

**Discovery - Plaintiff’s Prior Mental Health and Alcohol Abuse Records Discoverable:** *Rothstein v. Huh*, \_\_ A.D.3d \_\_, N.Y. Slip Op. 01972 (2nd Dept. 2009).

“It is well settled that a plaintiff who commences a medical malpractice action waives the physician-patient privilege with respect to those physical or mental conditions which he or she affirmatively places in issue in the lawsuit (see *Dillenbeck v. Hess*, 73 NY2d 278, 287; *Koump v. Smith*, 25 NY2d 287, 294). Since the plaintiff affirmatively placed the mental condition of her ward in controversy, the appellants were entitled to full disclosure of records regarding her ward’s mental health and alcohol abuse treatment, if any, prior to the date of the alleged negligence....The nature and severity of the previous mental condition of her ward is material and necessary to the issue of damages recoverable for a claimed loss of enjoyment of life due to his current brain injury....”<sup>14</sup>

**Discovery - Education Law 6527(3) - Protective Order Granted:**

*Teta v. Mercy Medical Center*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 016609 (2nd Dept. 2009).

Education Law 6527(3) shields from disclosure the proceedings and records relating to the performance of a medical or quality assurance review function.<sup>15</sup> The party seeking to invoke the privilege has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes, a burden which defendant satisfied here, and accordingly a protective order was granted.<sup>16</sup>

**Discovery - Incident Reports Privileged:** *Bennett v. Stybel*, 59 A.D.3d 652 (2nd Dept. 2009).

Plaintiff’s request for disclosure of all incident reports with respect to the incident in question was denied as privileged pursuant to Public Health Law 2805-J and 2805-M.<sup>17</sup>

**Discovery - Substantial Compliance:** *Helm v. Lentine*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 01615 (2nd Dept. 2009). Supreme Court properly granted defen-

dant’s motion for a protective order quashing plaintiff’s subpoenas to take the depositions of two non-party witnesses, as plaintiff provided insufficient notice of the depositions.<sup>18</sup> With respect to the remainder of plaintiff’s discovery requests, Supreme Court properly exercised its discretion in determining that defendants had substantially complied with plaintiff’s discovery requests, and that their conduct was not in any way willful or contumacious.<sup>19</sup>

**Summary Judgment Granted - No Cause of Action for “Wrongful Living”:**

*Cronin v. Jamaica Hospital Medical Center*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 01941 (2nd Dept. 2009).

During his hospitalization, decedent was resuscitated on two occasions allegedly in violation of two “do not resuscitate” orders issued by the hospital and executed by members of decedent’s family.<sup>20</sup> Plaintiff subsequently commenced this action alleging that defendant wrongfully prolonged decedent’s life by resuscitating him against the express instructions of decedent and his family.<sup>21</sup> Supreme Court granted defendant’s motion for Summary Judgment, indicating that no cause of action for “wrongful living” could be maintained.<sup>22</sup> The Second Department affirmed, holding that defendant demonstrated that decedent did not sustain any legally cognizable injury as a result of defendant’s conduct.<sup>23</sup>

**Summary Judgment Denied - 3101(d) Issues:** *Howard v. Kennedy*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 02326 (2nd Dept. 2009).

In opposition to defendant’s Summary Judgment motion, plaintiff submitted an affidavit of a medical expert which raised a triable issue of fact.<sup>24</sup> The Second Department held that “the Supreme Court did not err in considering the affidavit of the plaintiff’s expert, despite the plaintiff’s alleged failure to comply with CPLR §3101(d)(1).<sup>25</sup> The Supreme Court noted that there was a “factual dispute” as to whether the plaintiffs had in fact complied, and its decision to consider the affidavit solely for the purposes of Summary Judgment was a provident exercise of discretion.” (Citations omitted).<sup>26</sup>

**Summary Judgment Denied - Insufficient Prima Facie Showing on Causation:**

*Francis v. Mishra*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 01943 (2nd Dept. 2009).

This case involved allegations of a five-

month delay in diagnosing squamous cell carcinoma of the mouth, leading to its diagnosis at Stage 4 necessitating major surgery on plaintiff’s tongue, the floor of his mouth, mandible and lymph nodes, and reconstruction of the mandible, as well as chemotherapy and radiation.<sup>27</sup>

Defendant moved for Summary Judgment.<sup>28</sup> On the issue of causation, he submitted an expert affidavit to the effect that plaintiff’s oral cancer was already Stage 4 at the time of the initial visit with defendant, and even if it had been diagnosed at that time “the plaintiff’s ultimate course of treatment would not have been altered in any way.”<sup>29</sup> The plaintiff would still have undergone a surgical removal of the growth, chemotherapy and radiation.<sup>30</sup>

Defendant’s expert failed to address whether the delay in diagnosing the cancer impacted upon the extent of the surgery and treatment required, or affected plaintiff’s prognosis,<sup>31</sup> and accordingly the motion was denied as defendant failed to demonstrate prima facie that his alleged malpractice was not a proximate cause of any of plaintiff’s alleged damages.<sup>32</sup>

**CPLR §4401 - Dismissal at the Close of Plaintiff’s Case Affirmed:**

*Perricone-Bernovich v. Gentle Dental*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 01785 (2nd Dept. 2009).

“At trial, the injured plaintiff’s primary dentist testified as the plaintiff’s expert witness. He testified he was “not quite sure” what the standard of care was and that he was not testifying to give his opinion as to whether the defendant dentist deviated from any standard of care but only to “tell what had happened” to the injured plaintiff. According to the plaintiff’s expert, if the defendant had performed the root canal before the crown preparation work, the injured plaintiff “probably wouldn’t have” suffered from pain.

...Because the plaintiff’s expert specifically stated that he did not form an opinion as to whether the defendant departed from any standard of care and, in fact, was “not quite sure” what the standard of care was, the plaintiffs failed to introduce sufficient evidence of the relevant accepted standard of care owed to the injured plaintiff or whether the defendant had departed from any standard of care. Accordingly, the Supreme Court properly granted the defendant’s motion pursuant to CPLR §4401 made at the close of the plaintiff’s case.”<sup>33</sup>

Continued On Page 7

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# Decisions in Medical Malpractice Cases

Continued From Page 6

## Jury Charge - Error Not to Charge Comparative Negligence: *DiCicco v. Cattani*, 59 A.D.3d 660 (2<sup>nd</sup> Dept. 2009).

Plaintiff's verdict and judgment for \$737,000.00 reversed, and remitted for a new trial, as defendant's request to charge the jury on comparative negligence was erroneously denied by the trial court.<sup>34</sup>

"Instruction on the question of comparative negligence should be given to the jury where there is any valid line of reasoning or permissible inferences which could possibly lead rational individuals to the conclusion of negligence on the basis of the evidence presented at trial. Furthermore, whether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases." (Citations omitted).<sup>35</sup>

## Judgment for Defendant Reversed - Failure to Poll the Jury: *Duffy v. Vogel*, \_\_\_ A.D.3d \_\_\_, 2009 N.Y. Slip Op. 02448 (2<sup>nd</sup> Dept. 2009).

This malpractice case dealt with a failure to diagnose and properly treat a granular cell tumor in plaintiff's pelvic area.<sup>36</sup> In the first ten questions submitted to the jury, the jury found that neither defendant was negligent.<sup>37</sup> Although instructed not to proceed any further in its deliberations if it made such a finding, the jury answered the remaining questions of the verdict sheet, finding that two non-party physicians who had been added to the verdict sheet at the request of the defendants were negligent and responsible for plaintiff's injuries, finding that plaintiff was negligent but that this was not a cause of

her injury, and setting damages at \$1,500,000.00.<sup>38</sup> The jury's verdict was unanimous in all respects.<sup>39</sup>

Plaintiff initially claimed the verdict was inherently inconsistent, and asked the trial court to have the jury reconvene to continue with its deliberations.<sup>40</sup> When this request was refused, plaintiff asked that the jury be polled.<sup>41</sup> The court indicated it saw no need given the manner in which the verdict was delivered, denied plaintiff's request and entered a judgment for defendants.<sup>42</sup>

The First Department affirmed the Trial Court's ruling, holding that any error in failing to poll the jury constituted "harm-

less error."<sup>43</sup> The Court of Appeals disagreed, reversed, and remanded for a new trial, holding that **the right to poll the jury is an indispensable right.**<sup>44</sup>

## Damages - Right of Sepulcher - \$400,000.00 Judgment:

## *Emegwali v. Brooklyn Hospital Center*, \_\_\_ A.D.3d \_\_\_, 2009 N.Y. Slip Op. 02318 (2<sup>nd</sup> Dept. 2009).

Defendant moved to set aside plaintiff's verdict and judgment, on the grounds that it was contrary to the weight of the credible evidence.<sup>45</sup> The Second Department disagreed, noting that it was for the jury to make determinations as to the credibility

of witnesses.<sup>46</sup> Further, with respect to defendant's contention that it did not violate any applicable regulations, the Court noted that defendant's liability was predicated upon the common law right of sepulcher, which applied to stillborn infants.<sup>47</sup>

With respect to damages, the jury returned a verdict of \$1,800,000.00 for past pain and suffering for plaintiff mother, and \$100,000.00 for past pain and suffering and \$100,000.00 for loss of services to plaintiff husband.<sup>48</sup> The Second Department reduced the award to plaintiff mother from \$1.8M to \$250,000.00, and reduced the loss of services award from

Continued On Page 14

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Guest Speaker Zachary Carter, Chair of the Mayor's Advisory Committee on the Judiciary



Hon. Allen Beldock, Greg Newman and Guy Vitacco, Jr.



Hon. Fernando Camacho, Administrative Judge, Criminal Term, Queens County



Hon. Jeremy Weinstein, Administrative Judge, Civil Term, Queens County



Hon. Jeremy Weinstein, Zachary Carter, Hon. Fernando Camacho and Guy Vitacco, Jr.



Jim Pieret, George Nicholas, Guy Vitacco, Jr. and Joe Carola



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## So You Want To Be A Judge



Joe Carola, Moderator



John Zoll, Stephan Siegel and David Cohen



Joseph Carola, Hon. Fernando Camacho, Guy Vitacco, Jr., Zachary Carter and Hon. Jeremy Weinstein



Mona Haas, Gary Muraca and William Sena



Robert Litwack, Terrence Kossegi, Emilio Gonzalez and Matt Hunter



Tracy Catapano-Fox, Hon. Deborah Stevens Modica and John Zoll

Judge Weinstein graciously afforded me an opportunity not to have to worry about my civilian job and, instead, focus on the needs of my family during the upcoming one year's military absence. He said, 'you

do us proud by your service to our country and you have absolutely nothing to worry about here.' He was true to his word - I had nothing to worry about. He richly deserves to be recognized with this award from

the Employer Support of the Guard and Reserve as a Patriotic Employer who makes it easy for his employees who are military members to serve in the defense of our country.





## BOOKS AT THE BAR

BY HOWARD L. WIEDER

This month's column features three books, great as holiday or birthday gifts, on three controversial topics: Famous Probate Trials involving celebrities called *TRIALS AND HEIRS*, *THE SUPREME COURT AND ELECTIONS*, and *THE SUPREME COURT AND CAPITAL PUNISHMENT*.

**TRIALS AND HEIRS: Famous Fortune Fights! . . . and What You Can Learn from Celebrity Errors**

by ANDREW W. MAYORAS and DANIELLE B. MAYORAS, ESQS., Legacy Expert Attorneys

ISBN 978-0615328867

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Book is available on [www.amazon.com](http://www.amazon.com), the web site of [www.TrialsandHeirs.com](http://www.TrialsandHeirs.com), and will soon be available everywhere online and in all bookstores. Go to [www.TrialsandHeirs.com](http://www.TrialsandHeirs.com), and share your story at <http://TrialAndHeirs.com/YourStory>

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Go to [www.TrialsandHeirs.com](http://www.TrialsandHeirs.com)

This new book can be read and enjoyed by both lawyers and non-lawyers and makes for an eminently readable and inviting book. It is educational and entertaining at the same time. By telling stories, often at the expense and blunders of celebrities, *TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS!* is meant to help you avoid major blunders. One of the great messages of the book is, to the extent possible, try to avoid family fights.

The highly publicized estate battles of several deceased celebrities have cast a bright spotlight on the importance of having the proper estate planning. Although mega-rich celebrities seem to be affected overwhelmingly by these brutal family squabbles, the new book *TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS!* is designed to help every family, regardless of income level, avoid the financial pitfalls that drained bank accounts and created huge family rifts for the dozens of superstars profiled in the book.

*TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS!* uses real stories to help readers steer clear of the same celebrity "estate errors" as they plan for their own "heirs." The stories cover well known legal fights over famous fortunes, including the

recent battles over Michael Jackson's estate, along with other celebrities like Ted Kennedy, Anna Nicole Smith, Whitney Houston, Brooke Astor, Heath Ledger, Ray Charles, Princess Diana, INXS singer Michael Hutchence, Jimi Hendrix, Frank Sinatra, Dr. Martin Luther King, Jr., and Rosa Parks, as well as many other celebrities. The book gives readers a front row seat in the courtroom, while the authors replay the "tabloid drama," point out what went wrong in these riveting cases, and teach readers how to avoid similar errors.

*TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS!* was written by co-authors ANDREW MAYORAS and DANIELLE MAYORAS, ESQS., legacy expert attorneys with strong reputations and extensive experience in estate planning, probate, elder law, and litigation. The husband and wife team are two of the co-founders of The Center for Elder Law, The Center for Special Needs Planning, and The Center for Probate Litigation. "Here we have common problems that could easily be avoided," says co-author ANDREW MAYORAS, a probate litigator who writes the popular Probate Lawyer Blog featured at [www.probatelawyerblog.com](http://www.probatelawyerblog.com). "We want to teach people about the importance of proper legacy planning, because these fights don't just happen to the rich and famous," he says. ANDREW MAYORAS says, from his perspective battling in the trenches of probate courts, he sees firsthand the devastation caused by poor planning. "If by writing this book we help keep families from feuding in court, then we've accomplished our mission."

Co-author DANIELLE MAYORAS, ESQ., agrees. "As an estate planner and educator, the most frequent question I'm asked is: 'How do I get my parents to talk about these issues?'" This book is the answer," says co-author DANIELLE MAYORAS, a professional speaker, attorney, and credentialed professional gerontologist. "Our goal was to take a difficult topic that no one wants to talk about and make it fun and entertaining with the use of famous stories." DANIELLE MAYORAS, ESQ., says she and her husband would like to ignite people into action to protect their families and legacies through proper estate planning.

*TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS!* is a wonderful, informative, educational, easy to read, enjoyable and entertaining book, even if you have never been involved in a messy probate contest. The book has a good table of contents. I would have liked to see an index, but, after all, it's not a textbook and part of the delightful nature of this entertaining book is that it's not a boring hornbook. Again, you do not have to practice in the field or work in Surrogate's Court to enjoy this engaging, well-written book.

**THE SUPREME COURT AND ELECTIONS: Into the Political Thicket**

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CQ Press has just published *THE SUPREME COURT AND ELECTIONS*. This thought-provoking new installment in the CQ Press series *The Supreme Court's Power in American Politics* draws attention to the complex nature of voting and



Howard L. Wieder

election law.

The act of voting sounds simple enough for those who live in a popular democracy such as the United States. The process of voting in America is, in fact, a highly contested act whose forms, meanings, and practical boundaries are open to widely differing interpretations. From the question of who can vote to the tricky problem of accurately organizing, running, and tabulating the results of a popular election, voting remains a work in progress in the United States.

In an easy-to-follow format, *THE SUPREME COURT AND ELECTIONS* presents excerpts from the U.S. Constitution, legislation, federal statutes, Supreme Court cases, editorial commentary, and court briefs. With the help of these primary documents, legal historian CHARLES L. ZELDEN explores the ways in which the High Court has struggled with these issues throughout American history, even after an initial refusal to consider the topic. Over time, the Court overcame its reluctance and addressed the Fourteenth Amendment's impact on the question of who could vote, the rise and fall of race-based disenfranchisement, and more recently, on issues of redistricting, campaign finance reform, and the validity of new voting technologies. The essays and documents illuminate the multifaceted nature of voting and election law and paint a clear picture of the Supreme Court's role in crafting the current U.S. election system.

Topics addressed in *The Supreme Court and Elections* include:

Reapportionment and redistricting

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Voting in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries

Vote denial and vote dilution

The Voting Rights Act

*THE SUPREME COURT AND ELECTIONS* masterfully discusses, without editorializing, the circumstances of *Bush v. Gore* and includes the major opinions, in that infamous case. I will comment: in that case, five Justices, with little to no legal foundation, in a per curiam opinion, entered dangerous ground in stopping the Florida recount.

PROF. CHARLES ZELDEN's writing style is enjoyable to read. He has great felicity of expression. He gets to the point nicely. Less is more. PROF. CHARLES ZELDEN does not bore the reader with tangential detail. PROF. CHARLES L. ZELDEN is Professor of History at Nova Southeastern University in Ft. Lauderdale, Florida where he teaches courses on legal/constitutional history, twentieth century American history, and the judicial process.

MELVIN UROFSKY, series editor, is professor of public policy and law at Virginia Commonwealth University and the author of several books on the Supreme Court and constitutional history. He is one of the great biographers of Justice Louis D. Brandeis, appointed by President Woodrow Wilson to be the first Jewish Justice to serve on the Supreme Court and whose confirmation was marred

by bitterness and anti-Semitism.

I heartily recommend *THE SUPREME COURT AND ELECTIONS* - - and it makes a great gift for lawyers and non-lawyers. The book has a very good table of contents and helpful index.

**THE SUPREME COURT AND CAPITAL PUNISHMENT: Judging Death**

by MICHAEL E. PARRISH

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CQ Press's *THE SUPREME COURT AND CAPITAL PUNISHMENT* is the second installment in *It's the Supreme Court's Power in American Politics* series. This well-organized book explores the controversial topic of capital punishment by discussing the High Court's past and current involvement in all aspects of the death penalty.

In *THE SUPREME COURT AND CAPITAL PUNISHMENT*, legal historian MICHAEL E. PARRISH examines how the Supreme Court's rulings throughout the county's history have shaped the guidelines under which Americans have been tried, convicted, sentenced, and put to death for capital offenses. Through primary source documents and expert analysis, PROFESSOR MICHAEL E. PARRISH chronicles the major cases that have come to define U.S. capital punishment jurisprudence. Placing considerable emphasis on twentieth-century developments, *THE SUPREME COURT AND CAPITAL PUNISHMENT* examines the impact of these rulings on the behavior of legislators, judges, prosecutors, defense attorneys, and defendants.

*THE SUPREME COURT AND CAPITAL PUNISHMENT* also details the impact of race on the death penalty. As defendants and victims, African-Americans, on trial for their lives in Southern courts, became the central figures in the design and redesign of capital punishment in the twentieth century. *THE SUPREME COURT AND CAPITAL PUNISHMENT* illustrates how the Court's "effective counsel" decisions have played a major role in how states shape their public defender systems and how they respond to the claims of impoverished defendants charged with capital crimes. Other important topics include the Court's rulings on the constitutionality of execution methods, public opinion, the execution of minors and the mentally ill, and recent state death penalty repeals.

MICHAEL E. PARRISH is Distinguished Professor of History at the University of California in San Diego. His books include *Securities Regulation and the New Deal*; *Felix Frankfurter and His Times*; *Anxious Decades: America in Prosperity and Depression*; and *The Hughes Court*.

MELVIN UROFSKY, series editor, is professor of public policy and law at Virginia Commonwealth University and the author of numerous books on the Supreme Court and constitutional history and, as stated, a leading biographer of Justice Brandeis.

I am familiar with the subject matter. I formerly believed in the death penalty. As a young lawyer, I helped represent a prisoner on death row, in *Hance v. Zant*, 696 F.2d 940 (11<sup>th</sup> Cir. 1983), on an emergency, expedited basis, in a successful appeal - - although the petitioner was ultimately

Continued On Page 14



# Court Notes

Continued From Page 3

**Ethan E. Ellner (September 11, 2009)**

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest as a result of his substantial admissions under oath and other uncontroverted evidence.

**John J. Budnick, admitted as John Joseph Budnick (September 15, 2009)**

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct involving dishonesty, fraud and deceit by knowingly filing a false instrument with a governmental agency and engaging in conduct prejudicial to the administration of justice, which reflects adversely on his fitness as a lawyer, by reason the foregoing. He was suspended from the practice of law for a period of two years, commencing October 15, 2009, and continuing until further order of the Court.

**Jonathan Mason-Kinsey, admitted as Jonathan G. Mason-Kinsey (September 15, 2009)**

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct involving dishonesty, deceit, fraud or misrepresentation by drawing IOLA checks to which he signed the name of his law partner without his law partner's knowledge or consent; engaging in a pattern and practice of drawing IOLA checks against insufficient funds; converting funds entrusted to him as fiduciary, incident to his practice of law; drawing IOLA checks to cash; failing to produce financial records he was required to maintain; failing to maintain required bookkeeping records, to wit, a contemporaneous ledger or similar record of deposits into and withdrawals from his IOLA account(s); failing to cooperate with the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts; and engaging in conduct involving dishonesty, deceit,

fraud or misrepresentation by knowingly forwarding fraudulent occupancy affidavits to lenders in real estate transactions where the subject purchasers did not, in fact, intend to reside at the premises. He was suspended from the practice of law for a period of three years, commencing October 15, 2009, and continuing until further order of the Court.

**The Following Attorneys Were Publicly Censured By Order Of The Appellate Division, Second Judicial Department:**

**Lawrence Ira Wechsler (August 25, 2009)**

Following a disciplinary hearing, the respondent was found guilty of having been convicted of a serious crime, to wit, two counts of failing to file a New York State tax return, and engaging in conduct that adversely reflects on his fitness as a lawyer based upon the foregoing.

**Yvette A. Bentham, admitted as Yvette Allison Bentham (September 15, 2009)**

On or about November 5, 2008, the respondent was suspended from the practice of law in Connecticut for a period of two months, as a result of professional misconduct emanating from a real estate transaction. She was reinstated to the practice of law in Connecticut as of January 4, 2009. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was publicly censured in New York.

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

Failing to re-register as an attorney with the New York State Office of Court Administration (OCA) [9]

Neglecting a legal matter; failing to re-register as an attorney with OCA; and fail-

ing to cooperate with the Grievance Committee

Neglecting a legal matter and failing to respond to client inquiries about the matter

Neglecting one or more legal matters; failing to communicate with a client or clients; failing to reduce important decisions affecting clients to writing; and failing to return unearned fees

Neglecting a legal matter; failing to communicate with a client; failing to file a Retainer Statement with OCA; and handling a matter the attorney knew or should have known he/she was not competent to handle without associating with a lawyer who was competent to handle it

Handling a matter the lawyer knew or should have known he/she was not competent to handle without associating with counsel who was competent to handle it, and failing to notify OCA of a change of address

Handling a legal matter without adequate preparation under the circumstances

Failing to communicate with a client; failing to adequately supervise law office staff; and failing to timely respond to Grievance Committee inquiries

Failing to pay a court-imposed sanction

Engaging in multiple conflicts of interest (2)

Entering into a business transaction with a client without securing the client's written consent after full disclosure of the inherent conflict of interest

Having been convicted of Driving While Under the Influence, a misdemeanor

Having been convicted of Driving

While Intoxicated, a misdemeanor

Failing to timely correct the mislabeling of a business/operating account as an IOLA account

Commingling personal funds with clients' funds

Improperly permitting his/her spouse, a non-attorney, to be a signatory on an IOLA account; improperly maintaining fees on deposit in said IOLA account and improperly paying personal and/or business expenses against those fees; drawing an IOLA check to "cash" and making "cash" withdrawals and/or "online" transfers from the account; and failing to maintain a ledger book or similar record of IOLA deposits and withdrawals

Failing to maintain a contemporaneous ledger or similar record for his/her IOLA account; making "cash" withdrawals and drawing checks to "cash" from said account; and failing to consistently identify the account as an attorney escrow account

Handing to a client, who owed fees to the attorney, a "Summons" directing the client to appear in Civil Court or risk a \$1,400 judgment, when no action had, in fact, been commenced, as well as withdrawing from the client's matter without taking steps to avoid foreseeable prejudice

Failing to comply with a Bankruptcy Court order to disgorge legal fees paid by a client

*This edition of COURT NOTES has been compiled by Diana J. Szochet, Assistant Counsel to the State of New York Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts, and Immediate Past President of the Brooklyn Bar Association. The information herein is reprinted with permission of the Brooklyn Bar Association.*

# Relief For Surviving Spouses

Continued From Page 4

**death of my U.S. citizen spouse?**

A. If you did not file your Form I-130 with the Form I-485, you will need to submit to the Vermont Service Center a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the appropriate filing fee, with a copy of the Form I-130 receipt notice and the documents requested in the Form I-360 filing instructions. On the Form I-360, you must check box "m. Other, explain:" in Part 2 of the petition and mark the basis for eligibility as "Deferred Action -- Surviving spouse of a deceased U.S. citizen, married less than two years."

**Q. What if my deceased U.S. citizen spouse never filed a Form I-130 on my behalf?**

A. If you were legally married for less than two years to a now deceased U.S. citizen, at the time of the U.S. citizen's death, you may submit a completed Form I-360, with the appropriate filing fee to the Vermont Service Center, if a Form I-130 was not filed on your behalf. You must check box "m. Other, explain:" in Part 2 of the petition and cite the basis for eligibility as "Deferred Action -- Surviving spouse of a deceased U.S. citizen, married less than two years."

**Q. What if my Form I-130 was denied due to the death of my U.S. citizen spouse?**

A. If you are the surviving spouse of a U.S. citizen petitioner whose petition was denied by USCIS due to the death of the U.S. citizen petitioner, and prior to the issuance of this guidance, you may submit a completed Form I-360, with the appropriate filing fee to the Vermont Service Center. The beneficiary must check box "m. Other, explain:" in Part 2 of the petition and cite the basis for eligibility as "Deferred Action -- Surviving spouse of a deceased U.S. citizen, married less than 2 years."

**Q. What if my U.S. citizen spouse filed a Form I-130 on my behalf concurrently with my Form I-485 before his or her death?**

A. You will remain eligible to receive interim benefits, such as employment authorization and advance parole, based on the pending adjustment of status application.

**Q. What if I was legally separated or divorced from my U.S. citizen spouse at the time of his or her death?**

A. If you were legally separated from your

U.S. citizen spouse at the time of his or her death, you are not eligible for deferred action under this program. If you were not legally married to the deceased U.S. citizen at the time of his or her death, then a qualifying relationship does not exist and you are not eligible for deferred action under this program.

**Q. What if my deceased U.S. citizen spouse filed a Form I-130 on my behalf, which was approved prior to his or her death?**

A. Once USCIS has received notice of the death of the U.S. citizen petitioner, the approved I-130 petition is automatically revoked pursuant to 8 CFR 205.1(a)(3)(i)(C). However, you, as the beneficiary of that petition, may request humanitarian reinstatement of the revoked petition. USCIS may then exercise discretion and grant the reinstatement after reviewing the facts and humanitarian considerations of your particular case. To request humanitarian reinstatement, pursuant to 8 CFR 205.1(a)(3)(i)(C)(2), you must submit your request in writing, along with any supporting documents, to the USCIS office with jurisdiction over your petition. **Q. Is there a form to complete to request humanitarian reinstatement of an automatically revoked Form I-130?**

A. No, to request humanitarian reinstatement, under 8 CFR 205.1(a)(3)(i)(2), you must submit your request in writing, along with any supporting documents, to the USCIS office with jurisdiction over the petition. Be sure to provide all relevant receipt numbers and carefully follow any directions or requests for evidence issued by that office.

**Q. What happen if my request for humanitarian reinstatement is approved?**

A. If your request for humanitarian reinstatement is approved, you may proceed to the adjustment of status or consular processing stage of the immigration process.

**Q. What if my request for humanitarian reinstatement is denied?**

A. If your request for humanitarian reinstatement is denied and you were legally married to the deceased U.S. citizen petitioner for two years prior to his or her death, you may be eligible to file a self-petition Form I-360 pursuant to INA 201(b)(2)(A)(i) as an immediate relative widow/widower with the Vermont Service Center. If your request for humanitarian reinstatement is denied and you were not married to the deceased U.S. citizen petitioner for two years at the time of his or

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# Relief For Surviving Spouses

*Continued From Page 11—*  
her death, you may be eligible to request deferred action by submitting Form I-360 based on the program described herein. (Please refer to the information pertaining to a denied Form I-130 due to the death of the U.S. citizen petitioner.)

## Q. What if my case is covered by Court of Appeals case law regarding surviving spouses?

A. There is continuing litigation on the subject of appropriate immigration classification of surviving spouses of U.S. citizens whose marriages were of less than two years' duration at the time of death. U.S. courts of appeal for the First, Sixth, and Ninth Circuits have issued decisions holding that such spouses should be considered as immediate relatives notwithstanding the death of the U.S. citizen spouse. In cases subject to the law of these three circuits, these surviving spouses will be entitled to continuing immediate relative consideration and an application for deferred action is not necessary.

## Q. I entered the United States on a K-1, Fiancé(e) nonimmigrant visa and married my U.S. citizen spouse within the required 90-day period, but my spouse died before the 2-year anniversary of our marriage. Can I request deferred action under this program?

A. Yes, you can request deferred action under this program.

## Q. I entered the United States on a K-1, Fiancé(e) nonimmigrant visa, but married a U.S. citizen other than the U.S. citizen who sponsored me for the K-1 visa. My spouse died before the two-year anniversary of our marriage. Can I request deferred action under this program?

A. Yes, you can request deferred action under this program.

## Q. I entered the United States on a K-1, Fiancé(e) nonimmigrant visa, but mar-

ried my U.S. citizen spouse after the 90-day period, and my spouse died before the two-year anniversary of our marriage. Can I request deferred action under this program?

A. Yes, you can request deferred action under this program.

## Q. I entered the United States on a K-3, spousal nonimmigrant visa (while my I-130 was pending) and my U.S. citizen spouse died before the two-year anniversary of our marriage and before the adjudication of my I-130. Can I request deferred action under this program?

A. Yes, you can request deferred action under this program.

## Q. I am a surviving alien spouse of a U.S. citizen, and I am in detention pending removal. Can I apply for deferred action?

A. Yes, however, you cannot apply for this program with USCIS. You must seek deferred action from Immigration and Customs Enforcement (ICE).

## Q. What forms and fees must be submitted in order to request deferred action with USCIS?

A. You must submit a completed Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the \$375 filing fee, which may not be waived. You must check box "m. Other, explain:" in Part 2 of the petition and cite the basis for eligibility as "Deferred Action -- Surviving spouse of a deceased U.S. citizen, married less than two years." In addition to the Part 2 information described above, you must complete Parts 1, 3, 4, 7, 9, 10, and 11 of the Form I-360. **NOTE:** While USCIS is using Form I-360 for these deferred action requests, such filings are **not** immigrant self-petitions under current law. They will be adjudicated as requests for deferred action only.

## Q. Which USCIS office processes Form

## I-360 requests for deferred action?

A. The Form I-360 petition request for deferred action is adjudicated at the Vermont Service Center.

## Q. Will I be eligible for a Form I-360 fee waiver when I submit my request for consideration under this program?

A. No, the \$375 application fee cannot be waived.

## Q. What is the time limitation when filing for deferred action?

A. The time limitation for requesting deferred action as the surviving spouse of a U.S. citizen married less than two years is two years from the issuance of the Secretary's directive to DHS on May 27, 2009. This program may be revised as needed.

## Q. What documentation will I need to provide with the Form I-360?

A. You must provide the documentation requested from widows/widowers of U.S. citizens on page two of the Form I-360 instructions, including marriage certificate, proof of termination of prior marriages, evidence of your late spouse's U.S. citizenship, and your late spouse's death certificate.

## Q. When I submit the Form I-360 to request deferred action under this program, am I considered a self-petitioning widow or special immigrant?

A. No. Since your U.S. citizen spouse died before the second anniversary of your marriage, you are not eligible to be considered as a self-petitioning widow(er), pursuant to INA 201(b)(2)(A)(i). Also, when you submit your Form I-360, you will be checking the box marked "m. Other, explain:" and writing in the following: "Deferred Action -- Surviving spouse of a deceased U.S. citizen, married less than two years." which shows that you are applying under the temporary USCIS program which is meant to address the "widow penalty" as an interim measure. Therefore, for USCIS purposes, you will not be considered a self-petitioning special immigrant. Instead, you will be considered an applicant for deferred action only.

## Q. What factors will USCIS consider in deciding my deferred action request?

A. A grant of deferred action is a discretionary action on the part of USCIS. In addition to basic eligibility criteria as described elsewhere in these *Questions and Answers*, USCIS will consider whether any serious adverse factors exist, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons, that counsel against granting deferred action. In addition, applicants whose visa petition was denied or revoked for any reason other than or in addition to the death of the petitioning U.S. citizen spouse are not eligible for deferred action under this program.

## Q. What if my deferred action request is approved?

A. You will be issued a decision letter that will inform you that you have been granted deferred action for a validity period of two years and that you may request employment authorization using existing procedures.

## Q. If I am granted deferred action, does that mean I'm on a path to lawful permanent residence?

A. No. This is a program for those who are

not eligible for lawful permanent residence under current law. While it is possible that Congress may enact legislation in the future providing you with the opportunity

to become a lawful permanent resident, that is entirely up to Congress and cannot be guaranteed. In addition, a grant of deferred action does not mean that you have been determined to be eligible for adjustment of status or other grant of lawful permanent resident status, except for the fact that your spouse died before two years of marriage. There may be other disqualifying criteria under the INA that apply to you. Deferred action means only that DHS, as a matter of discretion, has temporarily authorized you to remain in the United States, and to apply for a grant of work authorization if you have economic necessity for employment.

## Q. Can I appeal the denial of a deferred action request?

A. No. The decision by USCIS to deny a deferred action request cannot be appealed.

## Q. Can I work while in deferred action status?

A. Yes, in many cases. Applicants and their qualifying children who are granted deferred action relief under this program are eligible to apply for an Employment Authorization Document (EAD) by filing Form I-765, *Application for Employment Authorization*, with the appropriate fee and a copy of your deferred action grant letter, in accordance with the Form I-765 instructions. The Form I-765 should be submitted to the Vermont Service Center. You will be required to list your assets, income, and expenses to demonstrate economic necessity, in accordance with 8 CFR 274a.12(c)(14).

## Q. How long will the EAD permit me to work in the United States?


A. The particular EAD that you may be eligible for under this program will be granted for a maximum period of two years, not to exceed the expiration date of the grant of deferred action relief. All applicants requesting an EAD, based on a grant of deferred action, must demonstrate an economic necessity, pursuant to 8 CFR 274a.12(c)(14).

## Q. Am I eligible for advance parole to travel abroad and return to the United States while in deferred action status?

A. Yes, as a surviving spouse, who has been granted deferred action relief under this program, you and your qualifying children are eligible to apply for advance parole by filing Form I-131, *Application for Travel Document*, with the appropriate fee and a copy of your deferred action grant letter, in accordance with the Form I-131 instructions. The Form I-131 may be filed with the Form I-765 to the Vermont Service Center. If your application for advance parole is granted, you will be issued a document that will be valid for a period not to exceed the expiration date of your granted deferred action relief. However, departure from the United States and return, even under a grant of advance parole, may adversely affect eligibility for adjustment of status of aliens with past periods of unlawful presence.

**NOTE:** If you are granted deferred action relief and you travel outside of the United States without first being approved for advance parole, you may not be permitted to travel to or re-enter the United States.

—USCIS—



STATE OF NEW YORK  
UNIFIED COURT SYSTEM  
ELEVENTH JUDICIAL DISTRICT, SUPREME COURT  
(OFFICE OF COURT ADMINISTRATION)  
125-01 QUEENS BOULEVARD  
KEW GARDENS, NEW YORK 11415  
(718) 298-1540

**FERNANDO M. CAMACHO**  
Administrative Judge  
Criminal Term  
Eleventh Judicial District  
Supreme Court

**JENEEN M. WUNDER**  
Principal Law Clerk  
To Administrative Judge

**MEMORANDUM**

To: All Criminal Term Justices  
All Criminal Term Law Secretaries  
Anthony D'Angelis, Chief Clerk

From: Hon. Fernando M. Camacho, Administrative Judge

Re: Special Victim Indictments

Date: November 4<sup>th</sup>, 2009

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Effective November 9<sup>th</sup>, 2009, Special Victim Indictments, (cases coming from felony waiver part AP-4-S), shall be handled according to the following guidelines:

All filed indictments shall be made returnable to Part K-10. (J. Buchter), for arraignment.

If a case is sent out for hearing from Part K-10, that case shall be adjourned back to K-10 upon completion of the hearing.

Indictments currently pending in TAP-A shall be adjourned to K-10 when trial ready. From there, the trial will be handled in Part K-10 or sent out.

Indictments that are currently pending in parts other than TAP-A and K-12 shall remain in those respective parts for the entirety of the case.

Indictments currently pending in K-12, (the hearing part), shall be sent to K-10 for hearing and remain in Part K-10 thereafter. If Part K-10 is unavailable to conduct a hearing, the case shall be sent to an available part, and thereafter adjourned to Part K-10 upon completion of the hearing.

jw/FC



## THE CULTURE CORNER

BY HOWARD L. WIEDER

Even if you cannot get away from the cold onset of New York's winter, the City's cultural feast for December through February is ripe. For rollicking fun, go see the Off-Broadway musical **THE TOXIC AVENGER** before it closes on January 3, 2010, at the **NEW WORLD STAGES** theater on West 50<sup>th</sup> Street in Manhattan. I had not laughed so continuously at a show in years! For the kids, the Met Opera's production of **HANSEL AND GRETEL** returns on December 14, and is a delight that I have seen previously and enjoy always. Several important classical music events, discussed below, occur at the **92<sup>ND</sup> STREET Y** on Lexington Avenue in Manhattan's Upper East Side, including a performance by internationally renowned, Canadian pianist **MARC ANDRE HAMELIN**, **AVERY FISHER HALL** of Lincoln Center, and **ZANKEL HALL** of Carnegie Hall.

Chief Cantor **YITZCHAK MEIR HELFGOT** and Cantor **SOL ZIM** performed an **EVENING of CELEBRATION** at the **PARK EAST SYNAGOGUE**, 163 East 67<sup>th</sup> Street, on December 5, 2009. They were conducted by **DR. MORDECHAI SOBOLO**.

Canadian conductor **YANNICK NÉZET-SÉGUIN** (*pronounced nay-ZAY say-GHEN*) is only 34 years old, but I predict he will be known as one of the greatest conductors of the 21<sup>st</sup> century. He makes his **MET OPERA** debut in January 2010 conducting the **new production of CARMEN** and then follows with a series of concerts at Lincoln Center in February 2010. **MAESTRO NÉZET-SÉGUIN** does not often get to New York City, so buy tickets now to see and hear this remarkable talent.

## THE TOXIC AVENGER

**THE TOXIC AVENGER** is one of the funniest musicals I have seen in a long time. I loved it so much that I saw it twice, and, not easily moved to laugh, I have long yearned to find a show that I judge funny!! The Drama Desk-nominated musical is about to close on January 3, 2010, so it is imperative that you buy seats now. The show runs for two hours without an intermission and is good fun for everyone from age 4 and up! The show is especially lovably raucous on a Thursday through Saturday night, where capacity audiences are riveted to the action on the stage.

Do any of you remember the cult, classic, horror film **THE TOXIC AVENGER**, by **LLOYD KAUFMAN**, released in 1984? Released by Troma Entertainment, the low budget, grade B movie was ignored until it caught on with fans at the Bleeker Street Cinemas of Greenwich Village. A la **Hairspray**, **Beauty and the Beast**, and other Broadway successes, the movie has become a musical, with Book and Lyrics by **JOE DIPIETRO** and Music and Lyrics by **DAVID BRYAN**, skilled direction by **JOHN RANDO**, and great, awesome, and energetic ensemble acting of **DIANA DeGARMO** [*American Idol* finalist, as Sarah], **NICK CORDERO** [as Melvin/Toxie], **NANCY OPEL** [as corrupt Mayor Babs Belgoody and Ma Ferd], **DEMOND GREEN** [as Black Dude/various characters], and **JONATHAN ROOT** [as White Dude/various characters], you will not want to leave the theater at the show's conclusion. Their mad cap hilarity, stamina and physical agility, acting range, and

vocal talents are brilliant and impressive.

The action takes place in the present, in Tromaville, Exit 13B, on the New Jersey Turnpike. The show revolves around two thugs, paid off by a corrupt mayor, to stop Melvin Ferd the Third's efforts to clean the environment. Exit 13B of the New Jersey Turnpike proves to be unlucky for Melvin as the bullies dunk him into a vat of toxic materials. Melvin is transformed instantly into a super-human monster, on the side of good, known as **THE TOXIC AVENGER** or simply "TOXIE" for short. So angered at evil and injustice, TOXIE rips off limbs and vital organs from criminals who are unlucky enough to be caught by him. Will TOXIE ever find self-respect and love despite his new, hideous appearance? "With a face so decayed, it's not easy to get laid," Toxie croons.

The show features a wonderful band of **DOUG KATSAROS**, **ALAN CHILDS**, **CHRIS CICCHINO**, and **DAN GRENNES**. The remarkable set design, deceptively simple looking, is by a genius, Obie-award winning designer **BEOWULF BORITT** [No, I'm not making that name up!]. The sound design by **KURT FISCHER**, requiring hair trigger precision, is executed flawlessly! **KENNETH POSNER** does a great job with the lighting design, and the numerous costume designs by **DAVID C. WOOLARD'S** for the shows gifted and remarkable five actors are brilliantly conceived. Finally, how can you not love a show that includes lyrics sung by Toxie: "I want to give my love a geranium and pray that she does not touch my cranium."? This musical is fun, fun, fun, including the rocking finale by the Company of "A Brand New Day in New Jersey"????!!

The **NEW WORLD STAGES**, on West 50<sup>th</sup> Street, is between Eighth and Ninth Avenues. The theater invites you to bring drinks to your seat during **THE TOXIC AVENGER's** 2 hour performance time that is quick moving and thoroughly entertaining.

## YANNICK NÉZET-SÉGUIN

The television, international hit, quiz show **Who Wants to Be a Millionaire** played the central, focus part in director Danny Boyle's Oscar-winning film **Slumdog Millionaire**. So let's do one of the preliminary rounds entitling its winner to hop on stage and play the game. To test your knowledge of classical music, place the following internationally renowned, contemporary, classical music conductors in age, from youngest to oldest:

- [a.] **ALAN GILBERT** [U.S.A.],
- [b.] **JONATHAN NOTT** [England],
- [c.] **GUSTAVO DUDAMEL** [Venezuela],
- [d.] **CHRISTIAN THIELEMANN** [Germany], and
- [e.] **YANNICK NÉZET-SÉGUIN** [Canada].

*The answer follows at the end of the column!*

At age 10, **YANNICK NÉZET-SÉGUIN** already knew that he wanted to be an internationally known conductor. At that tender age, he innocently called a leading conservatory to announce his



Howard L. Wieder

ambitious calling. By determination and talent, he is now enjoying a meteoric rise in professional attainment. Despite having a boyish face and sporting modern touches of spiked hair and jewelry, Maestro **NÉZET-SÉGUIN** has earned the respect of tough, discerning musicians and is in high demand by leading orchestras and opera houses. **NÉZET-SÉGUIN** is about to make his

Met Opera debut, conducting the new production of Bizet's **CARMEN** in January 2010. Met Opera General Manager **PETER GELB** has astutely signed up **NÉZET-SÉGUIN** for performances of various operas through the 2013-2014 season, before **NÉZET-SÉGUIN** gets scooped up by rival opera houses.



Yannick Nézet-Séguin

For the past two years, I recognized **NÉZET-SÉGUIN's** gifts as I listened with rapture to his recordings of **Ludwig van Beethoven's Eroica** symphony [number 3 in E flat major] with Strauss's *Death and Transfiguration*, conducting the **ROTTERDAM PHILHARMONIC ORCHESTRA** on the **Rotterdam Philharmonic Orchestra Live** label [2008], and **Anton Bruckner's** majestic symphonies 7, 8, and 9 [3 separate CDs], conducting the **ORCHESTRE MÉTROPOLITAIN DU GRAND MONTRÉAL** on the **ATMA Classique** label, from years 2006-2009]. (Incidentally, the Bruckner Expressway in New York is named in honor of Congressman Henry Bruckner [1871-1942], and not after famed musical genius and composer **ANTON BRUCKNER** [1824-1896]). **NÉZET-SÉGUIN's** discography also includes other works by Ravel, Beethoven, Korngold, Saint Saens, and other works [see [www.yannick-nezetseguin.com](http://www.yannick-nezetseguin.com)].

**YANNICK NÉZET-SÉGUIN** is the Principal Conductor of both **ORCHESTRE MÉTROPOLITAIN DU GRAND MONTRÉAL** and the **ROTTERDAM PHILHARMONIC ORCHESTRA**. He is also the Principal Guest Conductor of the **LONDON PHILHARMONIC ORCHESTRA**. Such is the loyalty and integrity of **YANNICK NÉZET-SÉGUIN** that when offered, on short notice, to conduct the Berlin Philharmonic, an honor bestowed on the very best conductors for this prestigious, premium-shelf orchestra, that he turned it down to keep a commitment to play for the

holidays for his own **ORCHESTRE MÉTROPOLITAIN DU GRAND MONTRÉAL**.

Following his conducting of the Met Opera orchestra in **CARMEN from December 31, 2009 through January 21, 2010**, Maestro **NÉZET-SÉGUIN** heads to Europe and then returns to New York City to perform at **AVERY FISHER HALL** to conduct the **ROTTERDAM PHILHARMONIC ORCHESTRA** on Wednesday, February 17, 2010 with piano virtuoso **JEAN-YVES THIBAUDET** and, again, on Friday, February 19, with an entirely different program, with violin superstar **VICTORIA MULLOVA**. I urge you to buy tickets for **CARMEN** and both Avery Fisher Hall concerts conducted by Maestro **NÉZET-SÉGUIN**. Please check [www.yannicknezetseguin.com](http://www.yannicknezetseguin.com), [www.metopera.com](http://www.metopera.com), and [www.lincoln-center.org](http://www.lincoln-center.org). The Production of **CARMEN**, with Maestro **NÉZET-SÉGUIN** at the helm, will be televised live in High Definition in many Cineplex movie theaters on January 16, 2009.

Permit me a moment of immodesty: In this towering metropolis, with great classical music critics, I was the only one who predicted that Alan Gilbert would be named the new Music Director of the New York Philharmonic, many months before it actually happened. *Now mark my words: NÉZET-SÉGUIN will become legendary.* He has the fresh music interpretation that was offered by **FERENC FRICSAY**, whose rising, meteoric career on the podium was cut short mercilessly by terminal illness. May Maestro **NÉZET-SÉGUIN** be blessed, in the Polish blessing of "Sto lat!" [100 years] and the French toast of *Santé* [good health], and may the Almighty grant us all long life and good health so that we can determine whether my prediction will become reality.

## THE MET OPERA OFFERS HANSEL UND GRETEL

The **Met Opera** presents its annual holiday presentation this season beginning **Monday, December 14, 2009**: an English-language production of Humperdinck's **HANSEL AND GRETEL**. The Brothers Grimm fairy tale, a timeless children's favorite, features a sophisticated score in this staging by **RICHARD JONES**, with costumes and set designs by **JOHN MACFARLANE**, which will appeal to audiences of all ages. **HANSEL AND GRETEL**, which is part of the Met's annual series of holiday presentations designed to appeal to family audiences, follows last year's immensely popular production of Mozart's *The Magic Flute*, an abridged, English-language version directed by Julie Taymor. The presentation of **HANSEL AND GRETEL**, includes four matinee performances and four evening performances: Monday, December 14, 2009; Thursday, December 17; Saturday, December 19; Monday, December 21 matinee; Thursday, December 24; Monday, December 28 matinee; Wednesday, December 30 matinee; and Saturday, January 2, 2010 matinee.

**ANGELIKA KIRCHSCHLAGER** and **MAIA PERSSON** sing the title roles of the lost siblings for the first time at the Met. Tenor **PHILIP LANGRIDGE** reprises his acclaimed, mesmerizing portrayal of the Witch, and **ROSALIND PLOWRIGHT** and **DWAYNE CROFT**

—Continued On Page 14

Photo by Marco Borggreve



# The Culture Corner



Met Opera Production of Hansel und Gretel

Continued From Page 13 —  
sing the roles of the parents. **Maestro FABIO LUISI** conducts all eight performances. *Set the oven to SIZZLING for this delightful operatic classic!*

For tickets to **HANSEL AND GRETEL**, a great holiday gift for the kids, contact the Metropolitan Opera box office at 212-362-6000 or [www.metopera.org](http://www.metopera.org). The production, which premiered in 2007, was transmitted to movie theaters worldwide as part of *The Met: Live in HD* series and is now available as a DVD on the EMI label.

## OTHER CLASSICAL MUSIC OFFERINGS IN DECEMBER

**1. MARC-ANDRÉ HAMELIN, PIANO**  
**Saturday, December 12, 2009 at 8:00 P.M.**  
**at the 92 Street Y on Lexington Avenue, in Manhattan's Upper East Side**  
**Masters of the Keyboard series**

The second concert of the Y's *Masters of the Keyboard* series features Canadian pianist **MARC-ANDRÉ HAMELIN**. This solo recital features works by Haydn, Liszt, Faure and Schumann. **MARC-ANDRÉ HAMELIN** has recorded more than 35 CDs for Hyperion Records [in my collection, I have 33 of the 35], has received 7 Grammy nominations, and was recently presented with a rarely bestowed lifetime achievement prize by the German Record Critic's Award (*Preis der deutschen Schallplattenkritik*).

*Imitation is the highest form of flattery.* A few years ago, as I covered in a previous column, pianist Joyce Hatto, as mainly perpetrated and enabled by her husband, Mr. Barrington-Coupe, participated in the greatest fraud in classical music history, by passing off as hers the works of great pianists. Hatto's entire recorded oeuvre from 1989 was stolen from the recordings of other gifted pianists. Hatto usually stole from younger artists who were not household names, although on the basis of the reviews she received, they richly deserved to be. Scientific and engineering testing have confirmed that her acclaimed CD of

the Leopold Godowsky transcriptions of Chopin's études, its difficulty demanding demonically-driven dexterity, was actually that performed by **CARLO GRANTE** and **MARC-ANDRÉ HAMELIN**.

At the December 12 concert, **MARC-ANDRÉ HAMELIN** will be performing:

**FRANZ JOSEF HAYDN**: Andante and Variations in F minor, H.XVII:6, "Un piccolo divertimento" **FRANZ LISZT**: Sonata in B minor - a great piece of at least 30 minutes, nonstop, in duration, that is a test of an artist's endurance and interpretive skills. **GABRIEL FAURÉ**: Nocturne No. 6 in D-flat Major, Op. 63 **ROBERT SCHUMANN**: Fantasie in C Major, Op. 17

**Single tickets: \$48/\$38 (ages 35 & younger, \$25) | Series Subscription: \$125/\$95 (ages 35 & younger, \$60). See [www.92y.org](http://www.92y.org).**

**2 MARTINA FILJAK, PIANO**  
**Monday, December 14, 2009 at 7:30 PM**  
**Cleveland International Piano Competition First Prize Winner, New York Recital Debut Zankel Hall of CARNEGIE HALL, on West 57th Street, near Seventh Avenue**

Selected from 32 contestants around the globe, Croatian Pianist **MARTINA FILJAK** was named winner of the Mixon First Prize at the **2009 Cleveland International Piano Competition**. As first-prize winner, she received a cash award of \$50,000, which is the largest cash prize of any piano contest of its kind worldwide, an international compact disc recording on Naxos, and more than 50 worldwide engagements.

**MARTINA FILJAK** tours regularly in her home country and abroad, performing at prestigious venues such as the *Concertgebouw* of Amsterdam, *Salle Cortot* in Paris and *Hotel de Ville* in Bruxelles. **MARTINA FILJAK** has performed as soloist with the Torino Philharmonic Orchestra, the Chamber Orchestra of South Africa, the Barcelona Symphony Orchestra, the Moscow State Symphony Orchestra and the Cleveland Orchestra in the Competition final round. During the 2009-2010 season, she will tour Spain, Argentina, China, and the United States. **MARTINA FILJAK** was

born in Zagreb and raised in a family of pianists. **MARTINA FILJAK** completed her musical education in the Music Academy of Zagreb and the Vienna Conservatory and continues to pursue studies in the Soloist Class of the Hochschule für Musik und Theater in Hannover, Germany, with Professor Mi Kyung Kim.

**MARTINA FILJAK** will perform:

**MAURICE RAVEL**: *Une barque sur l'océan*

**LUCIANO BERIO**: Wassenklavier, Feuerklavier, Luftklavier **BÉLA BARTÓK**: *Out of Doors*

**LUDWIG VAN BEETHOVEN**: *Sonata in B flat Major, Op. 106 (Hammerklavier)*

**Admission: \$15** (\$10 for Students and Seniors) Tickets on sale at [www.carnegiehall.org](http://www.carnegiehall.org), CarnegieCharge at 212-247-7800, and at the Carnegie Hall Box Office.

**3. THE ISRAEL PHILHARMONIC ORCHESTRA (IPO)**

**Monday, December 14, 2009, at 8:00 P.M.**

**at Lincoln Center's Alice Tully Hall, at West 65th Street & Broadway in Manhattan**

This year's concerts feature guest conductor and solo violinist **PINCHAS ZUKERMAN**, who will lead the IPO in a program of Haydn, Bruch [who was not Jewish], and Tchaikovsky. Maestro Zukerman shares the stage with cellist **AMANDA FORSYTH, who makes her New York Orchestral Debut**. The New York concert is preceded by an **American Friends of the Israel Philharmonic Orchestra** Gala dinner at Alice Tully Hall, and a dessert reception following the performance. All proceeds from the American Friends of the Israel Philharmonic Orchestra Benefit concert help ensure the financial security of the IPO.

The program by the IPO is:

**HAYDN**: Symphony No. 83 in G minor "La Poule" **HAYDN**: Violin Concerto in C major **BRUCH**: Canzone for Cello in B-flat major, Op. 55 **BRUCH**: Adagio on Celtic Melodies for Cello, Op. 56 **TCHAIKOVSKY**: Romeo & Juliet

"Fantasy Overture"

**Tickets for the general public are \$90/60/45.** The event is probably sold out. If any tickets become available, they may be purchased by calling (212) 721-6500, through Lincoln Center's website at [www.lincolncenter.org](http://www.lincolncenter.org) and at the Alice Tully Hall box office.

**4. CHAMBER MUSIC AT THE Y**  
**Tuesday, December 15, 2009 at 2:00 P.M.**  
**Wednesday, December 16, 2009 at 8:00 P.M.**  
**at the 92 Street Y on Lexington Avenue, in Manhattan's Upper East Side**

**Jaime Laredo, artistic director** Maurice Bourgue, oboe | Jaime Laredo, violin | Josef Paek, violin | Daniel Phillips, viola | Sharon Robinson, cello | Tara Helen O'Connor, flute | Alexander Fiterstein, clarinet | Reiko Uchida, piano & harpsichord | Bridget Kibbey, harp. They will perform:

**FRANÇOIS COUPERIN**: "La Francaise" from *Les Nations* for Oboe, Violin and Continuo **HENRI DUTILLEUX**: Sonata for Oboe and Piano **CLAUDE DEBUSSY**: Sonata for Flute, Viola and Harp **MAURICE RAVEL**: Sonata for Violin and Cello

**Single tickets: \$48/\$38 (ages 35 & younger, \$25) | Series Subscription: \$125/\$95 (ages 35 & younger, \$60). See [www.92y.org](http://www.92y.org).**

All Tickets may be purchased by calling 212.415.5500, visiting [www.92Y.org](http://www.92Y.org) / *Concerts*, or at the Box Office. THE 92ND STREET Y is located at 1395 Lexington Avenue at 92nd Street.

## YITZCHAK MEIR HELFGOT

Chief Cantor YITZCHAK MEIR HELFGOT and Cantor SOL ZIM performed an EVENING of CELEBRATION at the PARK EAST SYNAGOGUE, 163 East 67th Street, on December 5, 2009. They were conducted by DR. MORDECHAI SOBOL. Cantor DANIEL GILDA accompanied at the piano. I have attended previous concerts by Chief Cantor HELFGOT [whose name literally means "with God's help"]. His talent is awesome, and he deserves to be heard by a wide audience. His vocal range and interpretative skills of the Jewish liturgy, the Jewish and Hebrew songbooks, and opera standards are breathtaking. For future concerts, check [www.parkeastconcert.com](http://www.parkeastconcert.com) or call 212-737-6900.

## ANSWER TO QUIZ:

- [c.] GUSTAVO DUDAMEL [age 28, born 1981];
- [e.] YANNICK NÉZET-SÉGUIN [age 34, born 1975];
- [a.] ALAN GILBERT [age 42, born 1967];
- [b.] JONATHAN NOTT [age 47, born 1962];
- [d.] CHRISTIAN THIELEMANN [age 50, born 1959].

**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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## Marital Quiz

(Continued from page 8)

**Question #1** - Does the Appellate Division, in custody cases, have as broad authority as the hearing court?

**Answer:** Yes, *Matter of Volpe v. Volpe* 2009 NY Slip Op 02795 (2<sup>nd</sup> Dept. 2009)

**Question #2** - Can an order denying rear-

gument or resettlement be appealed?

**Answer:** No, *Matter of Kosowski v. Kosowski* 2009 NY Slip Op 02790 (2<sup>nd</sup> Dept. 2009)

**Question #3** - In a divorce proceeding is a spouse entitled to a credit for marital funds used by the other spouse to pay court ordered child support for a child of a prior marriage?

**Answer:** No, *Mahoney-Buntzman v. Buntzman* 2009 NY Slip Op 03629 (Court of Appeals 2009)

**Question #4** - In a divorce proceeding is a spouse entitled to a credit for marital funds used by the other spouse to pay maintenance to a former spouse?

**Answer:** No, *Mahoney-Buntzman v. Buntzman* 2009 NY Slip Op 03629 (Court of Appeals 2009)

**Question #5** - Does a party in a matrimonial action have the right to access and utilize the email account of the estranged spouse with whom he or she no longer resides?

**Answer:** Yes, *Gurevich v. Gurevich*, NYLJ, 5/12/09, pg 35, column 1. (Justice Jeffrey S. Sunshine, Supreme Kings).

**PRACTICE NOTE** - Advise clients, at the first meeting, to change their password.

**Question #6** - Can a party to litigation take a position contrary to a position taken in an income tax return?

**Answer:** No, *Mahoney-Buntzman v. Buntzman* 2009 NY Slip Op 03629 (Court of Appeals).

**Question #7** - Does appreciation in a separate property business attributable to the employees who were hired by the owner-spouse to run the company count as spousal active appreciation, subject to equitable distribution?

**Answer:** No, *Smith v. Winter* 64 A.D.3d 1218 (4<sup>th</sup> Dept. 2009) In this case the owner spouse's contribution to the appreciation, as compared to the contributions of the employees he hired to run the business, was minimal. The court awarded the non-owner spouse 10% of the appreciation.

**Questions #8** - Is denial of three requests to have sex, in one year, sufficient to establish constructive abandonment?

**Answer:** Yes, *BM v. MM*, New York Law

Journal, June 16, 2009, page 36 column 5 (Supreme Court, Nassau County, Justice Diamond).

**Question #9a** - With respect to disability pensions, is there a formula for determining which portion of the pension is disability and which portion of the pension is non-disability?

**Answer:** Yes, *Palazzolo v. Palazzolo* 242 A.D.2d 688; 663 N.Y.S.2d 58 (2<sup>nd</sup> Dept. 1997)

**Question #9b** - Who has the burden of establishing the marital portion of a disability pension?

**Answer** - The recipient of the pension. *Howe v. Howe* 2009 NY Slip Op 6804 (2<sup>nd</sup> Dept.).

**Question #9c** - If the party with the burden of proof to establish the marital portion of a disability pension fails to provide the necessary proof, can the court still distribute the marital portion of the disability or must it treat the entire disability pension as marital?

**Answer** - No, if there exists some other method of determining the disability portion of the pension. In this case the Appellate Division, Second Department, held that the Plan Administrator had sufficient information to apply the Palazzolo formula. *Howe v. Howe* 2009 NY Slip Op 6804 (2<sup>nd</sup> Dept.).

**Question #10a** - Is the portion of an award received from the September 11<sup>th</sup> Victim Compensation Fund, designated as compensation for personal injuries, marital or separate property?

**Answer** - Separate property. *Howe v. Howe* 2009 NY Slip Op 6804 (2<sup>nd</sup> Dept.).

**Question #10b** - Is the portion of an award received from the September 11<sup>th</sup> Victim Compensation Fund, designated as compensation for economic loss, marital or separate property?

**Answer:** Separate property. *Howe v. Howe* 2009 NY Slip Op 6804 (2<sup>nd</sup> Dept.).

## Decisions in Medical Malpractice Cases

Continued From Page 7

\$100,000.00 to \$50,000.00, resulting in a total judgment of \$400,000.00.<sup>49</sup>

**Damages - Not De Minimis: *Perrin v. Syed*, \_\_ A.D.3d \_\_, 2009 N.Y. Slip Op. 02345 (2<sup>nd</sup> Dept. 2009).**

The jury found that an employee of appellant Richmond OB/GYN Associates, P.C., departed from good and accepted medical practice by discharging plaintiff without a prescription for a full course of Flagyl, an antibiotic.<sup>50</sup> The jury also found that this departure was a substantial factor in causing a recurrence of C. difficile colitis, an infection which had occurred during plaintiff's hospital stay.<sup>51</sup> As a result of the recurrence, for about two weeks after her discharge plaintiff sustained frequent and severe bouts of diarrhea, along with nausea and vomiting.<sup>52</sup> The jury, however, declined to award plaintiffs any damages upon its finding of liability.<sup>53</sup>

Plaintiffs moved pursuant to CPLR §4404(a) to set aside the verdict on the issue of damages, seeking either additur or a new trial on that issue.<sup>54</sup> The Court noted that the injured plaintiff's injuries were not "de minimis", and the jury's award of no damages deviated materially from what would be reasonable compensation, and granted a new trial unless defendant consented to increase the award to \$25,000.00.<sup>55</sup>

1. Mule v. Peloro, \_\_ N.Y.S.2d \_\_, \_\_, 2009 NY Slip Op. 01626, \*1 (2<sup>nd</sup> Dept. 2009).

2.*Id.* at \_\_, \*1.

3.*Id.* at \_\_, \*1.

4.*Id.* at \_\_, \*1.

5.*Id.* at \_\_, \*1.

6.*Id.* at \_\_, \*1.

7.*Id.* at \_\_, \*1.

8. Bryant v. South Nassau Communities Hospital, 59 A.D.3d 655, 656 (2<sup>nd</sup> Dept. 2009).

9.*Id.*

10.*Id.*

11.*Id.*

12.*Id.* at 656\_57.

13. Jason v. Krey, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 01779, \*1 (2<sup>nd</sup> Dept. 2009).

14. Rothstein v. Huh, \_\_ A.D.3d \_\_, \_\_, 2009 NY Slip Op. 01972, \*1 (2<sup>nd</sup> Dept. 2009).

15. Teta v. Mercy Medical Center, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 016609, \*1 (2<sup>nd</sup> Dept. 2009).

16.*Id.* at \_\_, \*1.

17. Bennett v. Stybel, 59 A.D.3d 652, 653 (2<sup>nd</sup> Dept. 2009).

18. Helm v. Lentine, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 01615, \*1 (2<sup>nd</sup> Dept. 2009).

19.*Id.* at \_\_, \*1.

20. Cronin v. Jamaica Hospital Medical Center, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 01941, \*1 (2<sup>nd</sup> Dept. 2009).

21.*Id.* at \_\_, \*1.

22.*Id.* at \_\_, \*1.

23.*Id.* at \_\_, \*2.

24. Howard v. Kennedy, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 02326, \*1 (2<sup>nd</sup> Dept. 2009).

25.*Id.* at \*1.

26.*Id.* at \*1.

27. Francis v. Mishra, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 01943, \*1 (2<sup>nd</sup> Dept. 2009).

28.*Id.* at \_\_, \*1.

29.*Id.* at \_\_, \*1.

30.*Id.* at \_\_, \*1.

31.*Id.* at \_\_, \*1.

32.*Id.* at \_\_, \*1.

33. Perricone-Bernovich v. Gentle Dental, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 01785, \*1 (2<sup>nd</sup> Dept. 2009).

34. DiCicco v. Cattani, 59 A.D.3d 660, 660\_61 (2<sup>nd</sup> Dept. 2009).

35.*Id.* at 661.

36. Duffy v. Vogel, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 02448, \* (2<sup>nd</sup> Dept. 2009).

37.*Id.* at \_\_, \*1.

38.*Id.* at \_\_, \*2.

39.*Id.* at \_\_, \*2.

40.*Id.* at \_\_, \*1.

41.*Id.* at \_\_, \*1.

42.*Id.* at \_\_, \*2.

43.*Id.* at \_\_, \*2.

44.*Id.* at \_\_, \*3.

45. Emeagwali v. Brooklyn Hospital Center, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 02318 (2<sup>nd</sup> Dept. 2009), \*1.

46.*Id.* at \_\_, \*1.

47.*Id.* at \_\_, \*2.

48.*Id.* at \_\_, \*1.

49.*Id.* at \_\_, \*1.

50. Perrin v. Syed, \_\_ A.D.3d \_\_, \_\_, 2009 N.Y. Slip Op. 02345, \*1 (2<sup>nd</sup> Dept. 2009).

51.*Id.* at \_\_, \*1.

52.*Id.* at \_\_, \*1.

53.*Id.* at \_\_, \*1.

54.*Id.* at \_\_, \*1.

55.*Id.* at \_\_, \*1.

## Books At The Bar

Continued From Page 10

mately executed by the State of Georgia ["the operation was a success, but the patient died"]. The State's decision to take a life is complicated. I am deeply troubled that justice, thoroughly inexact and ephemeral for starters, has a lot to do with the quality and gifts of a litigant's lawyer. Adding the mischief of police and prosecutorial misconduct, my thinking on capital punishment changed.

Whatever your own personal view of capital punishment, **PROF. MICHAEL PARRISH** does a superlative job in cov-

ering the myriad issues involving the Death Penalty in **CQ PRESS's THE SUPREME COURT AND CAPITAL PUNISHMENT**.

**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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