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Queens Bar Bulletin

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

Vol. 71 / No. 5 / February 2008

Criminal Law: Cases

By ILENE J. REICHMAN

Ilene J. Reichman

This past year, the New York Court of Appeals rendered a number of decisions of interest to the criminal law practitioner. Some of the more significant opinions are highlighted in this article.

In *People v. Chiddick*, 8 N.Y.3d 445 (decided May 1, 2007), the Court of Appeals revisited the issue of what constitutes "physical injury" as set forth in Penal Law § 10.00 (9). Chiddick was burglarizing a building where Adrian Gentles was working. When Gentles confronted him, Chiddick scuffled with him and bit his finger in order to escape from his grasp. As a result of the bite, Gentles' fingernail cracked and his finger bled. He later was treated at a hospital where he received a tetanus shot and a bandage. At trial, Gentles testified that he experienced "moderate" pain as a result of the bite.

In upholding Chiddick's conviction of burglary in the second degree (Penal Law § 140.25) and assault in the second degree (Penal Law § 120.05 [6]), the Court of Appeals acknowledged that the element of "substantial pain" could not be defined precisely. The Court found it significant that Gentles had testified that his pain was not trivial and that he sought medical treatment for the wound inflicted. However, the Court attached even more significance to Chiddick's motive in biting Gentles, noting that, "the whole point of the bite was to inflict as much pain as he could," and that it seemed, "unlikely that anything less than substantial pain would have caused Gentles, evidently a tenacious man, to release his hold," on Chiddick.

In *People v. Kisoon* and its companion case, *People v. Martin*, 8 N.Y.3d 129 (decided February 13, 2007), the Court of Appeals reviewed the propriety of actions taken by trial judges when confronted with jury notes during deliberations. In *Kisoon*, the trial judge received a note advising that the jurors were divided "10 guilty to 2 not guilty on all three counts" with the belief that "further deliberations will not change our decision". The trial judge advised counsel that the jurors were hopelessly deadlocked, but did not further consult with counsel or announce his intended response to the note. He then returned the jury to the courtroom and admonished them to "take their responsibility seriously and to continue deliberations".

In *Martin*, the defendant was charged with intentional murder, depraved indifference murder and criminal possession of a weapon. During deliberations, the trial judge failed to read or respond to the jury's first note which requested "definitions of 3 counts". Shortly thereafter, the jury sent a second note to the court requesting a

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Estates Update

By DAVID N. ADLER

The year in trusts and estates was highlighted by requirements of greater disclosure in the areas of fiduciary behavior and proof of heirship, and continued instability in the area of federal estate taxation.

ATTORNEY - FIDUCIARY

SCPA 2307 (a) mandates disclosure whenever an attorney or an affiliated attorney prepares a will designating that attorney as executor. This disclosure component consists of an acknowledgement by the testator exhibited by a separate writing apart from the will, in which the testator acknowledges that an attorney may serve as an executor, that an executor is entitled to statutory commissions, and that an attorney - fiduciary who renders legal services to the estate is entitled to legal fees in addition to commissions.

David Adler

This disclosure requirement has been recently extended as to include employees of the attorney draftsman. Thus, in the event that a testator designates an employee of the attorney - draftsman to serve as executor, a

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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, 90-35 148 Street, 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 County Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2008 Spring CLE Seminar & Event Listing

February 2008
Monday, February 25 — Stated Meeting
Thursday, February 28 — CPLR Evidence Update

March 2008
Wednesday, March 5 — Family Law Seminar
Wednesday, March 26 — Basic Criminal Law Part 1
Monday, March 31 — Past Presidents and Golden Jubilarians Night

April 2008
Wednesday, April 2 — Basic Criminal Law Part 2
Wednesday, April 9 — Civil Court Seminar
Monday, April 14 — Judiciary Night
Wednesday, April 16 — Equitable Distribution Update

May 2008
Thursday, May 1 — Annual Dinner and Installation of Officers

NEW MEMBERS

Seyun Bach
John E. Boneta
Wendell E.S.T. El-Shabazz
Joseph A. Ledwidge
Patrick Michael Megaro
Celeste Caire Pacifico
Anurag Parkash
Alexander Somphone Phengsiaroun
Artur Pogorzelski
Tahmina Choudhury Rajib
Nils C. Shillito

NECROLOGY

Eugene P. Bambrick — Robert Cohen — Frederick T. Haller

Prof. Bernard G. Helldorfer
Director
Legal Studies Program

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January 3, 2008

Dear Mock Trial Judge:

I am pleased to announce that for the sixth consecutive year, St. John's University will host the **Atlantic Coast Regional component of the National Intercollegiate Mock Trial Tournament, February 22-24, 2008**. This undergraduate trial tournament, organized by the American Mock Trial Association (AMTA), involves over 500 colleges and universities throughout the United States and is a wonderful demonstration of the academic talent of our young men and women in college. I invite you to visit the AMTA website and learn about the tournament. www.collegemocktrial.org

As you know, the Atlantic Coast Regional held at St. John's has been highly successful and has been praised for its outstanding quality. This is due almost entirely to the efforts and dedication of the many attorneys and judges who have generously volunteered their time to judge the trials. I write to you now to invite you to once again participate in this endeavor by serving as a judge in one or more of the four rounds of competition.

The Atlantic Coast Regional Mock Trial Tournament will be held here at St. John's Queens Campus as follows:

Round 1	**Friday afternoon/evening, February 22, 2008 (3:15 PM – 7:00 PM)**
Round 2	**Saturday morning, February 23, 2008 (9:15 AM – 1:00 PM)**
Round 3	**Saturday afternoon, February 23, 2008 (2:15 PM – 6:00 PM)**
Round 4	**Sunday morning, February 24, 2008 (9:15 AM – 1:00 PM)**

If you can join us and serve as a judge in one or more of these rounds, please contact my secretary, Mrs. Donna Buchbauer at 718-990-7511 or e-mail at buchbaud@stjohns.edu **BEFORE JANUARY 18, 2008** and she will send the material and other information to you. **PLEASE NOTE: Through St. John's University School of Law, one (1) credit of New York CLE will be given for each one (1) hour of judging. Each trial lasts three (3) hours.**

I thank you in advance for helping to make this tournament an outstanding academic experience for our students.

Regards,

Prof. Bernie Helldorfer, Coach

Les Nizin

EDITOR'S NOTE...

The QCBA offers a varied and extensive CLE program for its members that are set forth on this page and can be viewed on the Bar Association web page at www.qbca.org. The CLE courses are an opportunity to update your skills at a reasonable cost in a friendly setting with your fellow bar members.We welcome your participation.

The bar association congratulates Stephanie Zaro Co Chair of the Criminal Courts committee on her appointment to the Criminal Court.

LAWYERS ASSISTANCE COMMITTEE

The Queens County Bar Association (QCBA) provides free confidential assistance to attorneys, judges, law students and their families struggling with alcohol and substance abuse, depression, stress, burnout, career concerns and other issues that affect quality of life, personally and/or professionally.

QCBA Lawyers Assistance Committee (LAC) offers consultation, assessment, counseling, intervention, education, referral and peer support.

All communication with QCBA LAC staff and volunteers are completely confidential. Confidentiality is privileged and assured under Section 499 of the Judiciary laws as amended by the Chapter 327 of the laws of 1993.

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

Lawyers Assistance Committee
Confidential Helpline
718-307-7828

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PRESIDENT'S MESSAGE

David Cohen

I am writing this the day after President Bush delivered his State of the Union Address to Congress. With that in mind I wish to report to the membership that the state of the QCBA is strong. The strength of any association is its membership. I am pleased to report that our membership has increased by approximately ten percent. This, in spite of reports by many organizations of apathy and membership decline. We should be proud of our growth which signals that we are serving the needs of the lawyers who live and practice in Queens County. Even with this good news we are working diligently to attract new members and better serve current members. Under the leadership of President-Elect Steven Orlow we have formed a Membership Task Force to look into ways that we can attract new members. One area we will focus on is increasing membership from all of the diverse communities of Queens County. Anyone wishing to serve on this Task Force or anyone with new and innovative ideas is welcome to contact me at the Bar Association or at my email, dlccrimlaw@aol.com.

I am also pleased to report that our books are balanced and with the hard work of our Board and Staff we have significantly reduced expenses without a decrease in member services. CLE revenue, as in most associations, fluctuates with the odd/even year OCA registration cycle. Lawyer Referral fees are on the rise as is the number of participating lawyers. Our Academy of Law chaired by Judge Ritholtz, has put together a full schedule of interesting and informative programs. We urge you to take advantage of this low cost method to complete your MCLE requirements.

Were this to be a true State of the Union, I would be looking up towards balcony and recognizing individuals worthy of note. I extend our heartfelt congratulations to the Hon. Randall T. Eng on his recent appointment to the Appellate Division, Second Department. Our loss is the Second Department's gain. The Hon. Cheryl Chambers, the wife of our Past President, Seymour James, was also appointed to the Second Department. The QCBA can be proud that two members of our "family" have been recognized for their professional ability.

On a sad note, I wish to extend both my personal and the QCBA's condolences to our Administrative Judge, the Hon. Jeremy Weinstein on the loss of his father, former Associate Justice of the Appellate Division, Second Department and Administrative Judge of the 11th Judicial District, Moses M. Weinstein. Judge Weinstein was a giant figure in both the political and legal communities of Queens County and he will be sorely missed.

Please make every effort to attend our Stated Meeting on February 25, 2008. We are having a panel discussion on Judicial Selection, post Lopez-Torres. Hon. Seymour Boyers has graciously agreed to serve as moderator. We plan to have representatives from all sides of the issue, including Michael Reich, Esq., Secretary of the Queens County Democratic Organization, representatives from the NYS Bar Association, the Brennan Center for Justice at New York University Law School and a speaker from the New York State Legislature. It should be a most interesting and spirited discussion.

The QCBA has not taken a formal position on what manner of judicial selection we favor, elected or appointed. This forum will be the first step in an ongoing process to formulate the QCBA's position on this most important issue. Please join with us on the 25th and thereafter as we work together to have the voice of the QCBA heard on this topic.

Queens County Bar Association
90-35 148th Street, Jamaica, New York 11435 ● Tel 718-291-4500 ● Fax 718-657-1789

QUEENS COUNTY BAR ASSOCIATION SCHOLARSHIP FUND

Dear Members:

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

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

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

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

Sincerely,

David L. Cohen
President

Please make checks payable to:

QUEENS COUNTY BAR ASSOCIATION FUND, INC.

(all donations are tax deductible)

Hon. Moses M. Weinstein

By SEYMOUR BOYERS*

Our distinguished member and dear friend, Judge Moses Weinstein throughout his lifetime truly epitomized that the American dream is still viable. One need only examine his unusually long and varied career, full of accomplishment to recognize his fulfillment of the American dream.

Moses M. Weinstein was born in New York on July 8, 1912. The son of a tailor, he grew up on the lower east side in a walk-up building where four families shared a bathroom. He graduated from Thomas Jefferson High School at 15, but it took him seven years and several jobs to work his way through college and Brooklyn Law School. In World War II, Moe served in the infantry and fought with our troops in the Battle of the Bulge.

In 1941, Judge Weinstein married his first love, and his wife Muriel gave birth to three wonderful sons who followed their father as members of the bar. Presently, son Jeremy, a former State Senator, serves as our outstanding Administrative Judge of the Supreme Court, Civil Term in the County of Queens; son Peter, a former Assistant District Attorney in Queens, now serves as a Superior Court Judge in Broward County, Florida; and Jonathan, the eldest son, was a successful commercial lawyer in Queens County and, presently, has a thriving business in Boca Raton, Florida.

Judge Weinstein practiced law in Kew Gardens, Queens County, and was very active with civic groups in his community. In 1958, at the age of 46, Moe's friends urged him to run for public office. In that year, he was elected as a member of the New York State Assembly. Over the next 11 years he was re-elected five times compiling a most impressive legislative record.

In addition to serving as an Assemblyman, Moe was elected as a District leader of the Democratic Party in Queens County, and was successful in forging alliances with party leaders throughout Queens County.

One evening in 1962, Moe received a telephone call at his home from the office of Robert Wagner, the then Mayor of the City of New York, urging him to come to Gracie Mansion that evening. After that meeting, the following morning, Moe was elected as County Chairman of the Democratic Party of Queens County.

In Albany, Judge Weinstein became a most powerful figure when he was designated as the Assembly Majority Leader. He was also the Majority Leader of the 1967 New York State Constitutional Convention that redrafted the State Constitution.

In 1968, Judge Weinstein was acting Speaker of the Assembly. In August 1968, Judge Weinstein as Speaker was fourth in line for the governorship and became acting head of the State for 10 days when the then Governor, Nelson A. Rockefeller, Lt. Governor, Malcolm Wilson, and the Senate Majority Leader, Earl W. Brydges, were all out of the state attending the Republican National Convention in Miami. A humorous caption at that time was published in the New York Times stating "GOP Giving up State/But Wants It Returned."

In 1969, Judge Weinstein was elected to a 14 year term as a Justice of the Supreme Court in the then Tenth Judicial District that included Queens County, Nassau County and Suffolk County.

In the 1970's, Moe was designated by the then Chief Judge of the State of New York as the Administrative Judge of the Civil and Criminal Terms of the Supreme Court in the County of Queens. As Administrative Judge, he earned the respect and admiration from both the members of the Bench and the Bar.

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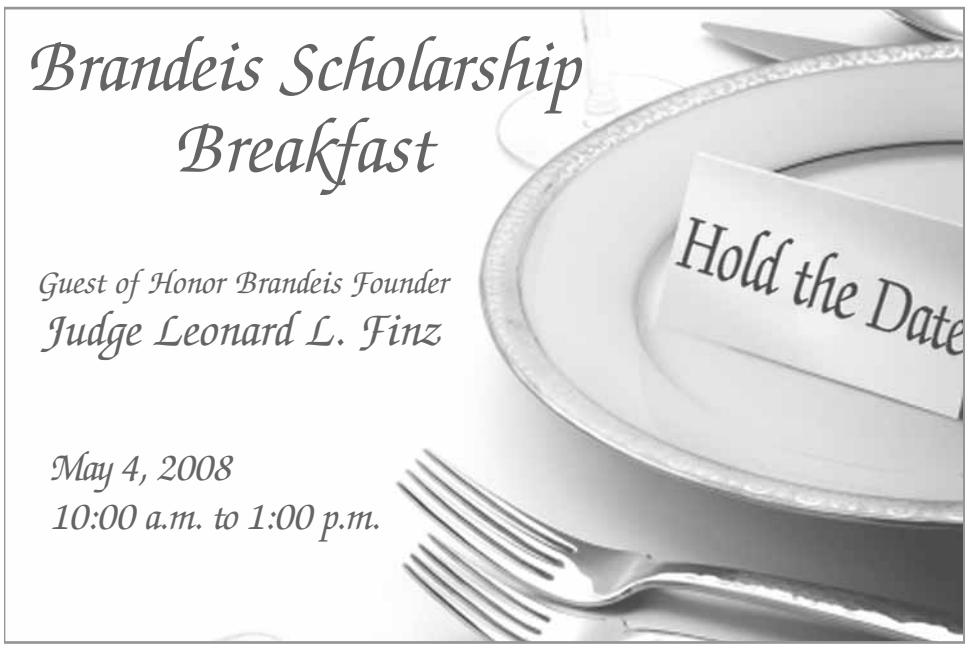

Fetal Alcohol Syndrome Disorders (FASD) & the Law

By SUSAN ROSE

Adaptations by DAVID M. BOULDING,Criminal Defense Lawyer

After thirty years of working with individuals who have diagnosed or undiagnosed FASD, five years of running FASSN, and several years of operating a New York City/Long Island FAS Hotline, I have found that the most common cry for help from a parent is "My son has just been arrested. What should I do?"

Data are limited because so many people have undiagnosed FASD. But it is estimated that the majority of individuals who have FASD have at some point in their lives needed a lawyer. 40,000 babies are born every year with FASD. Most of the 1/100 people who have an alcohol-related disorder are undiagnosed.

The news for lawyers is that some of your clients, who look and act perfectly normal, have a 'hidden disability' that could be caused by even moderate in-utero exposure to alcohol. The damage to the brain--especially the frontal lobe and central nervous system-- severely impacts your client's ability to make good judgments. Shockingly, alcohol is such a dangerous teratogen that it is a more serious threat to the unborn child than heroin or crack. The molecules in alcohol are smaller than those in crack or heroin, so they are able to pass through the placenta and cause cellular brain death. The result is that individuals with an FASD are typically impulsive and do not foresee the consequences of their actions. Most are quite naïve and can be easily led by their peers to illegal activities. Sometimes people with an FASD are not even aware that what they are doing is illegal.

Recent case in Queens: A nineteen year old young man was arrested for selling marijuana. His so-called friends suspected his naiveté and gave George money to buy marijuana. George just wanted to be a good friend, so he agreed to purchase the marijuana. But since he has a poor memory and limited math skills, he bought the wrong amount, leaving him with extra money. While driving by, the police saw George standing under a bright street light holding a plastic bag and cash. When they approached 'the suspect', George immediately told the police officers that he bought the marijuana so that he could sell it back to his friends. Of course George was arrested. After six hours of retention, the police allowed this young man to call his panicked parents at about 3 AM. The police officer told his parents that their son insisted that he had done nothing wrong because he did not smoke the marijuana. Understandably, the officer said to the parents, "Does this kid think we're stupid?"

His mother instantly understood what had happened. Individuals with FASD are very concrete thinkers. She had told her son to never smoke marijuana because he would get into trouble. It never occurred to her to tell him that it was illegal to sell it. His mother also knew that her son had just been exploited by more sophisticated teenagers. So, now this young man needed a lawyer. Unfortunately, the closest criminal defense lawyer who has expertise in FASD lives in New Jersey.

But there is good news for lawyers in New York City and Long Island. Any lawyer who has conducted enough interviews to know how to ask curious questions can learn how to do an FASD assessment that can ferret out the possibility that his or her client has FASD. All you are doing is exploring. Experts give a complete diagnosis. (www.FASSN.org lists several physicians in NYC who have the experience to diagnose FASD).

Dr. Julianne Conroy, a neuro/psychologist, has a helpful screening tool called ALARM: Adaptive behaviors, Language, Attention, Reasoning. The 'ALARM' is a form of specific checklist that may have you thinking that the person in front of you has fetal alcohol issues. For example, does your client use landmarks rather than street numbers to explain where he has been? Do you see problems with memory, language, reasoning, attention, and those behaviors we use to get through the day? Does the person appear "Not to get it"? No one expects you to be the next Dr. Conroy, but you have the skills. Use your ability to ask questions and make observations. Give yourself some credit for common sense.

Take notes. Look for unusual behaviors and manner of dress. If it is a freezing December day and your client does not have a coat with him, write that down! (Sensory Threshold). Be aware of cleanliness and type of clothing. This may be a sign of tactile defensiveness. Observe posture, gait and fidgeting- postural defensiveness. For a few minutes, speak in a louder voice than usual and watch for signs of auditory defensiveness. Has he or she participated in stupid crimes that involve high risk of apprehension because of lack of judgment? Can he handle criticism? People with an FASD frequently will 'shut down', come up with absurd answers, go into a rage, or go into a flight/flee mode when they feel threatened. These individuals lack coping skills.

Then, ask about birth date information. Parents or relatives may be helpful or reluctant to answer the following question: Did the mother drink alcohol when she was pregnant? Other questions may be less threatening. Ask about adoption, foster placements, visits to various professionals. Ask about developmental milestone, ie. tying shoes, riding a bike. After a brief mental health quiz ask: "Has he ever taken Ritalin, Zoloft, or any other common anti-depressant? Inquire about problematic behaviors in school or any expulsions or multiple school placements. Was he ever told that he was lazy, disruptive, or explosive? Has a 'special' person' at school ever tested him? What were his marks in school? Does he have any learning disabilities? Ask caregivers about what kind of friends he has. Note scattered abilities with chronological age vs. adapative age.

Next, look for certain traits and patterns. Is there a 'victim' quality present? Is there difficulty generalizing from experience? Could this person be easily taken advantage of? Does he not 'get' the notion of consequences? Does he seem eager to please? Does he not 'get' sarcasm or idiomatic expressions? Has this person ever had a driver's license? Use your well-honed skills to see through answers that do not pass the straight-face test.

If you do these interviews over and over and constantly tell judges- the judges will eventually ask for an expert report! If you do not keep asking for expert assessments, these individuals will continue to be undiagnosed and fill up our jails. In addition, lawyers can put on the stand experts who can testify about FASD. Call (718) 279-1173 for the name of a NYC/L.I. expert). Lawyers have successfully presented FASD as an exculpatory or mitigating factor.

For further information about legal issues, contact Kay Kelly at (206) 543-7144 or e-mail her at faslaw@hotmail.com. Ms. Kelly is regarded in the FASD community as one of the foremost FASD legal experts in the United States. She will eagerly get back to you.

PROFILE OF. . .

Hon. Randall T. Eng Appointed to Second Department

By NELSON E. TIMKEN*

On January 15, 2008, Governor Spitzer announced that he had appointed Justice Randall T. Eng, who has been Administrative Judge in charge of criminal cases in Queens Supreme Court, to the Appellate Division, Second Department. The Second Department covers Brooklyn, Queens, Staten Island, Nassau and Suffolk counties, as well as Putnam, Westchester, Dutchess, Orange and Rockland counties. Justice Eng, a Queens native, is the second Asian American to have been appointed to the Appellate Division; Justice Peter Tom of the First Department, was the first. Governor Spitzer has thus far demonstrated that he is taking a vastly divergent path from that of his predecessor in actively appointing minorities and women to appellate judgeships.

Justice Randall T. Eng

Justice Eng, 60, is a graduate of St. John's University School of Law, in Jamaica, Queens. He began his legal career as a prosecutor with the Queens District Attorney's Office and subsequently held the position of New York City Department of Correction's Inspector General. He was appointed to the Criminal Court bench in 1983 and elected to Supreme Court in 1990. In 2007, Justice Eng was appointed Administrative Judge of Supreme Court, Criminal Term, Queens County. The Queens County Bar Association is proud to have one of the finest jurists in Queens County ascending the appellate bench. We wish you all the best, Justice Eng!

***Editor's Note: Nelson E. Timken is Associate Court Attorney to Judge Thomas D. Raffaele in the Civil Court, Queens County**

Article 730/Mental Disease or Defect Excluding Fitness to Proceed

By ANDREW J. SCHATKIN

Article 730 of the New York State Criminal Procedure Law, entitled "Mental Disease or Defect Excluding Fitness to Proceed" is a comprehensive statement of the parameters of what constitutes incompetency to proceed in a Criminal matter under the New York State Criminal Procedure Law and how such incompetency is handled and determined in the context of a Criminal trial. Article 730 is divided into seven sections. Section 730.10 entitled, "Fitness to Proceed; Definitions" is the particular subject of this article. The other sections are Section 730.20, "Fitness to Proceed; Generally"; Section 730.30, "Fitness to Proceed; Order of Examination"; Section 730.40, "Fitness to Proceed; Local Criminal Court Accusatory Instrument"; Section 730.50, "Fitness to Proceed; Indictment"; Section 730.60, "Fitness to Proceed; Procedure Following Custody by Commissioner"; and Section 730.70, "Fitness to Proceed; Procedure following Termination of Custody by Commissioner."

This is the first in a series of articles, which will examine and analyze each of these statutory sections. There will be seven articles, this is the first, which, as I said, will consider the ramifications, issues, and import of the first section in article 730, Section 730.10, "Fitness to Proceed; Definitions".[1]

More specifically, this article will consider what constitutes an "incapacitated person" in terms of the prohibition of a criminal prosecution of a defendant who has been determined to be not mentally competent to stand trial, that is to say, has been adjudged an incapacitated person. Incapacity to stand trial must be distinguished from the issues and procedures relating to the defendants mental capacity at the time of the commission of the crime. The latter involves the affirmative defense of mental disease or defect, or a plea of not responsible by reason of a mental disease or defect. (Penal Law, Section 40.15 and Criminal Procedure Law, Section 220.15) In People v. Francabandera[2], the New York State Court of Appeals defined the purpose of this particular section of this statutory schema. In that case, the Court of Appeals held that, in enacting this Section, defining an incapacitated person as one, who as a result of mental disease or defect lacks capacity to understand the proceedings against him, or to assist in his own defense, the legislature had in mind the situation where the defendant, because of a current inability to comprehend, or at least a severe impairment to the existing mental state, could not, with a modicum of intelligence, assist counsel.

The cases interpreting this section focus mainly on what constitutes an incapacitated person, and the parameters and criteria with respect to that particular status or state. For example, in People v. Reason[3], the Court of Appeals held, in general, that the standard of competency to stand trial is the same as the standard of competency to waive the right to be represented by counsel and to act as one's own attorney.

Subsequent cases have considered the issue as to what may be said to constitute incapacity and incapacity to stand trial. For example, in People v. Visnett,[4] the Appellate Division held that a defendant who suffered from obstructive sleep apnea, a condition that made him fall asleep involuntarily was not unfit to stand trial, in view of the remedies provided by the court, including granting defendant frequent adjournments, allowing testimony to be read back to the defendant, and allowing witnesses to be called.

On the other hand, in People v. Picozzi[5], the Appellate Division held that the defendant's apparent disagreement with defense counsel's theory of the case, as well as the defendant's somewhat abrupt decision to change defense tactics in the middle of the trial, and his decision not to follow the advice of defense counsel did not, in and of itself, establish incompetency to stand trial.

In People v. Pugach[6], the trial court held that to be excused from being a party in criminal proceedings as a result of a mental condition, there must be a showing that the condition from which the defendant suffers is of such a nature that his reasoning power is impaired to the extent that he cannot understand the nature of the charges against him, and make defense therein, but that a mental disturbance, which does not effect one's reasoning powers, cannot act as a shield to the defendant.[7]

The next topic to be considered in this analysis of CPL Sec. 730.10, is whether amnesia can constitute a mental disease or defect, excluding fitness to proceed. In general, amnesia is not considered a mental disease or defect. Thus, in People v. Goodell[8], the Appellate Division held that the fact that the defendant suffered from retrograde amnesia and could not recall the events surrounding an automobile accident, did not deprive the defendant of a fair trial on Manslaughter charges arising out of the accident, where the court-appointed psychologist and psychiatrist, both concluded, after examination, that the defendant understood the nature of the charges against him, and could assist in his own defense. Similarly, in People v. Pisco[9], the trial court held that the evidence established that the defendant was not an incapacitated person and was fit to proceed to trial, even though he suffered from encapsulated amnesia, which might have prevented him from recalling facts immediately surrounding the alleged criminal act with which he was charged.[10] It should be noted that in People v. Francabandera,[11] the New York State Court of Appeals held that it may be a denial of due process under certain circumstances to prosecute a person who presently has the ability to consult with his lawyer and fully comprehends the proceedings against him, but suffers from amnesia and is completely unable to recall facts relevant to the time, place, and circumstances of the crime. Thus, in that sense, under the Francabandera definition, amnesia may be considered a mental disease or defect.

The next topic to be considered, in this article, as to what constitutes the requisite mental disease or defect, excluding fitness to proceed, is medication. In general, medication does not constitute a mental disease or defect excluding fitness to proceed. For example, in People v. Grant[12], the Appellate Division Fourth Department held that the fact that the defendant was taking Dilantan and Phenobarbital to control Epilepsy did not provide a basis to conclude that the defendant was incompetent to stand trial. Similarly, in People v. Lopez[13], the Appellate Division held that the evidence established that the defendant was competent to stand trial even though he contended that the medication he was on slowed his reaction to questions. The court noted, that the psychiatrist who examined the defendant, unequivocally testified that his medication would have no effect on his fitness to stand trial, and one psychiatrist stated that, during the hour-long interview, the defendant was attentive and cooperative, despite being on medication.[14]

Finally, this article will conclude with an analysis of what the relevant case law considers a capacity to understand the proceedings. Thus, in Mead v. Walker[15], the Federal District Court held that the test for competency to stand trial is whether the defendant has sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual understanding of the pending proceedings.

On the other hand, in U.S. Exrel. Farnum v. McNeill[16], the New York Federal District Court held that the evidence supported the finding that the accused was in such a state of insanity as to be incapable of understanding the charge against her or of making her defense, and supported her commitment to a State hospital for the criminally insane.

For the most part, the cases support the view that defendants are generally competent to stand trial. For example in People v. Polimeda[17], the Appellate Division Second Department held that the failure to sua sponte order a competency hearing was not an error, although the presentence report indicated that the defendant had been physically and sexually abused as a child, and had been hospitalized for suicidal and homicidal ideations. There was no basis to support the conclusion that, at the time of the plea proceedings, defendant lacked capacity to understand the proceedings, or that he was unable to assist in defense, and his responses at the plea allocutions, taken as a whole, did not indicate he was incapacitated.[18]

Two final point should be noted. Although in general, the trial and appellate courts of this state have found the defendant competent, and having the capacity to stand trial, there is some case law to the contrary. For example in People v. Vallen[19], the trial court held first that the accused lacked the capacity to stand trial, including effectively assisting counsel at the pre-trial hearing. Both the psychiatrist for the People, and the psychiatrist for the defense, admitted that the accused was not fit to assist counsel in his own defense in a jury trial, did not have sufficient intelligence to listen to counsel's advice, and, based upon such advice, appreciate that one course of conduct may be more beneficial than another, and so, the court held the defendant was not sufficiently stable, so as to enable him to withstand the stresses of a jury trial.

It should be noted that the Vallen court also held that the statute governing whether the defendant is fit to proceed to trial does not distinguish between competency to proceed for the purpose of pretrial hearings and competency to proceed for the purpose of a jury or non-jury trial.

CONCLUSION

This examination, the first in a series of articles on Article 730 of the Criminal Procedure Law, analyzing Section 730.10 "Fitness to Proceed; Definitions", reveals a general definition as to what constitutes an incapacitated person, in terms of the prohibition of a criminal prosecution of a defendant who has been determined to be not mentally competent to stand trial. The definition, in general, of an incapacitated person, is a person who as a result of mental disease or defect lacks the capacity to understand the proceedings against him, or to assist in his own defense. The cases are varied as to what actually constitutes incapacity to stand trial. For example, sleep apnea has been held an insufficient basis for that purpose. A disagreement between defense counsel as to his theory of the case; the defendant's abrupt decision to change defense tactics in the middle of a trial, and his decision not to follow the advice of defense counsel, do not in and of themselves establish incompetence to stand trial.

There is a general rule that there must be a showing that the condition from which the defendant suffers is of such a nature that his reasoning power is impaired, so that he cannot understand that nature of the charges against him, and make defense therein.

In general, it has been held that amnesia or medication does not constitute a mental disease or defect excluding a defendant's ability to proceed to trial.

This article also considered what constitutes a capacity to understand the proceedings. The definition of capacity is the ability to understand the proceedings and assist in his or her defense.

This article is a beginning of a complete analysis of this statute, which has seven sections. The next section, and the article to follow, will be an analysis of CPL Sec. 730.20, entitled, "Fitness to Proceed: Generally". It is hoped that this series of articles will be an aid to defense counsel in understanding and applying this statutory schema.

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Article 730/Mental Disease or Defect Excluding Fitness to Proceed

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END NOTES

[1] As used in this article, the following terms have the following meanings:

1. "Incapacitated person" means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.

2. "Order of examination" means an order issued to an appropriate director by a criminal court wherein a criminal action is pending against a defendant, or by a family court pursuant to section 322.1 of the family court act wherein a juvenile delinquency proceeding is pending against a juvenile, directing that such person be examined for the purpose of determining if he is an incapacitated person.

3. "Commissioner" means the state commissioner of mental health or the state commissioner of mental retardation and developmental disabilities.

4. "Director" means (a) the director of a state hospital operated by the office of mental health or the director of a developmental center operated by the office of mental retardation and developmental disabilities, or (b) the director of a hospital operated by any local government of the state that has been certified by the commissioner as having adequate facilities to examine a defendant to determine if he is an incapacitated person, or (c) the director of community mental health services.

5. "Qualified psychiatrist" mean a physician who:

A. Is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or,

B. Is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

6. "Certified psychologist" means a person who is registered as a certified psychologist who has been designated by a director to examine a defendant pursuant to an order of examination.

7. "Psychiatric examiner" means a qualified psychiatrist or a certified psychologist who has been designated by a director to examine a defendant pursuant to an order of examination.

8. "Examination report" means a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense. The state administrator and the commissioner must jointly adopt the form of the examination report; and the state administrator shall prescribe the number of copies thereof that must be submitted to the court by the director.

[2] 33 NY2d 429, 354 NYS2d 609 (1974)

[3] 37 NY2d 351, 372 NYS2d 614 (1975)

[4] 144 AD2d 567, 534 NYS2d 424 (2nd Dept. 1988)

[5] 106 AD2d 413, 482 NYS2d 335 (2nd Dept. 1987)

[6] 33 Misc.2d 938, 225 NYS2d 822 (Co. Ct. Bronx Co. 1962)

[7] See also on what constitutes an incapacitated person, People v. Parsons, 82 Misc.2d 1090, 371 NYS2d 840 (Nassau Co. Ct. 1975); People v. Valentino, 78 Misc.2d 678, 356 NYS2d 962 (Nassau Co. Ct. 1974); People v. McCloud, 62 Misc.2d 1086, 310 NYS2d 772 (Monroe Co. Ct. 1970).

[8] 164 AD2d 321, 565 NYS2d 929 (4th Dept. 1990)

[9] 69 Misc.2d 675, 330 NYS2d 542 (Dutchess Co. Ct. 1972)

[10] See also on this People v. Soto, 68 Misc.2d 629, 327 NYS2d 669 (Nassau Co. Ct. 1972); where the trial court held that where the defendant accused of a crime is accurately orientated in all respects except that he suffers from amnesia, may not be committed to a mental institution, absent of finding a mental disease or defect. See also People v. Francabandera, 33 NY2d 429, 354 NYS2d 609 (1974).

[11] Id.

[12] 188 AD2d 1052, 592 NYS2d 206 (4th Dept. 1992)

[13] 160 AD2d 335, 554 NYS2d 98 (1st Dept. 1990)

[14] See also on this People v. Williams, 533 NYS2d 963 (2nd Dept. 1988), where the Appellate Division held that the evidence established that the defendant was diagnosed as suffering from chronic paranoid schizophrenia was competent to stand trial. The court noted that the evidence indicated that the defendant was receiving an anti-psychotic drug on a daily basis, and that he was capable of understanding the nature of the proceeding against him, and could assist in a defense, and even the defense psychiatrist testified that the drug had the apparent effect of suppressing the defendant's psychosis and permitting the defendant to discuss on some level, in a rational manner, the charges against him. See also, People v. Parsons, 82 Misc.2d 1090, 371 NYS2d 840 (Nassau Co. Ct. 1975).

[15] 839 F.Supp. 1030 (S.D.N.Y. 1993)

[16] 157 F.Supp. 882 (D.C.N.Y. 1958)

[17] 198 AD2d 242, 603 NYS2d 513 (2nd Dept. 1993)

[18] See also that the weight of the case law generally finds people competent, People v. Greco, 177 AD2d 648, 576 NYS2d 349 (2nd Dept. 1991); People v. Manzi, 162 AD2d 955, 558 NYS2d 337 (4th Dept. 1990), in Manzi the Appellate Division held that the finding that the defendant was competent to stand trial was supported by the testimony of two psychiatrists that the defendant was competent, that he understood the charges against him, and that he was able to assist in his own defense. See also on this, that in general the courts find defendants competent under this statute, People v. Owens, 111 AD2d 274, 489 NYS2d 110 (2nd Dept. 1985), where the Appellate Division held that where four out of five doctors who examined the defendant in order to determine his fitness to stand trial, agreed that he understood the charges and was able to assist his lawyer, the defendant was competent to enter a plea of guilty. See also on this People v. Verrone, 96 AD2d 955, 466 NYS2d 411 (2nd Dept. 1983); Fazio v. McNeill, 4 AD2d 686, 164 NYS2d 156 (2nd Dept. 1957); People v. Lopez, 126 Misc.2d 1072, 484 NYS2d 974 (S. Ct. Kings Co. 1985); People ex rel. Fusco on Behalf of Wells v. Sera, 123 Misc.2d 19, 472 NYS2d 564 (S. Ct. Bronx Co. 1984).

[19] 128 Misc.2d 397, 488 NYS2d 994 (Orange Co. Ct. 1985)

Criminal Law: Cases

Continued From Page 1

readback of "First Count 3 points". Without first consulting with counsel, the trial judge returned the jury to the courtroom and reread the intentional murder instruction. In open court, a juror then requested a rereading of the depraved indifference murder instruction and the trial judge complied without consulting with counsel. A third note from the jury, which requested a rereading of the elements of the weapon count, was subsequently received. Once again, the trial judge failed to notify counsel of the contents of the note before responding to the jury.

In affirming the reversals of the convictions in *Kisoon and Martin*, the Court of Appeals reminded trial judges of their responsibilities under Criminal Procedure Law § 310.30 to provide adequate notice to counsel of the contents of a deliberating jury's request for further instruction, and to afford counsel a full opportunity to suggest appropriate responses. Specifically, in *Kisoon*, the Court faulted the trial judge for not reading the jury's note to counsel *verbatim*. While in *Martin*, the trial judge was faulted for failing to notify counsel of, and responding to the jury's first note. Since the Court could not conclude with "requisite certainty" that the trial judge's handling of the second and third jury requests for instruction cured that failure, *Martin* was likewise entitled to a new trial.

In *People v. Sedlock*, 8 N.Y.3d 535 (decided June 5, 2007), the Court of Appeals considered the sufficiency of an accusatory instrument alleging that the defendant had committed the crime of forcible touching under Penal Law § 130.52. The information charged that the defendant, a Boy Scout scoutmaster, had pinched the penis of the complainant, a 16 year old member of his troop "on one occasion between December of 2002 and June 2003". The trial judge denied defendant's pre-trial motion to dismiss the information on the ground that the time frame alleged was unduly expansive and denied his motion to set aside the verdict on that same ground.

In its decision reversing *Sedlock's* conviction and dismissing the information, the Court of Appeals reiterated the paramount purpose of an accusatory instrument: to provide the accused with sufficient notice of the accusation to enable him to prepare and conduct a defense. While noting that there is no requirement that an accusatory instrument give an exact date and time of the alleged offense, the Court nevertheless held that since the complainant was at least 16 years old during the time period in question, and was by all accounts, intelligent, reasonableness and fairness required the prosecution to delineate a narrower time frame for the alleged act, and that the failure to provide such specification rendered the accusatory instrument defective.

In *People v. Greene*, 9 N.Y.3d 277 (decided November 20, 2007), a detective investigating a homicide learned that the deceased had slashed his assailant in the face during the fatal encounter. The detective proceeded to a nearby hospital and asked the administrator if anyone had been treated for such an injury on the day in question. The administrator gave the detective the defendant's name and address. The detective then obtained a photograph of the defendant and he was subsequently identified by an eyewitness to the shooting. After trial, the defendant was convicted of manslaughter in the second degree.

On appeal, *Greene* argued that suppression of all evidence obtained as a result of the hospital's disclosure to the detective should have been ordered because it was obtained in violation of the physician-patient privilege. The Court of Appeals disagreed, holding that the privilege derived from a statute, not the Constitution, and that its purpose was not to protect individuals against government conduct. Since the privilege bore no relation to any constitutionally protected right, suppression of evidence obtained in violation of that privilege was therefore not an appropriate remedy.

In *People v. Louree*, 8 N.Y.3d 541 (decided June 5, 2007), the defendant pled guilty to attempted criminal possession of a weapon in the third degree and was promised a one-year jail sentence, or two years if it was determined that he was a prior felony offender. Because he requested a lengthy adjournment for sentencing, the trial judge also required the defendant to plead guilty to criminal possession of a weapon in the third degree, with the promise that this count would be dismissed provided he appeared for sentencing, cooperated with the Probation Department and was not rearrested. However, the judge did not inform the defendant that a period of postrelease supervision would follow his sentence of incarceration. The defendant failed to comply with any of the conditions of his guilty plea and was found to be a second felony offender. Upon his return, he was sentenced to a seven-year prison term to be followed by five years postrelease supervision.

On appeal, *Louree* argued that his guilty plea should be vacated because the trial judge's failure to advise him of the postrelease supervision requirement rendered his plea unknowing, unintelligent and involuntary. The Appellate Division rejected this challenge on the ground that the defendant had not preserved the issue due to his failure to move to withdraw his plea or vacate his conviction in the trial court. The Court of Appeals reversed that decision, holding that a defendant could challenge his plea on direct appeal based on the trial judge's failure to advise him of postrelease super

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Estates Update

Continued From Page 1

written acknowledgement of disclosure, as outlined above, shall now be required. The model form for this acknowledgement of disclosure appears in the statute itself. In the event that this acknowledgement is not produced, absent good cause for non-production, the commissions of the designated executor shall be reduced by one half.

PROOF OF HEIRSHIP

As discussed in this column last year, DNA testing, has been confirmed as an element of proof of paternity by which non-marital children may inherit. The statute, EPTL-4-1.2 (C) (D), and subsequent case law have confirmed the validity of both pre-death testing and post death testing as one component of proof of paternity. Yet, said testing has not yet been held to stand by itself. The requirement of open and notorious acknowledgement of the child by the parent remains a necessary factor in this type of proof.

This acknowledgement generally incorporates some form of public, repetitive pattern of behavior by which the parent represents the child to be his own. In the recent case of In Re Marks (837 NYS 2d 531), the Court relied exclusively on open and notorious acknowledgement as sufficient proof of paternity in a Kinship matter, It is clear that both DNA testing, and open and notorious acknowledgement, working together, shall provide the ideal manner of proof of paternity.

TAXATION

The present federal estate tax threshold is 2,000,000. It shall remain there for the next 2 years. In the year 2009, it is scheduled to be increased to 3,500,000. In 2010 the estate tax is scheduled to be abolished. Yet, that abolition only exists for one year, as in the year 2011, the estate tax threshold is rolled back to the 2001 level. It is anticipated that the new administration in Washington shall address this very confusing and volatile issue prior to the abolition date. Until then, estate taxation planning remains a very tricky terrain. We are presently anticipating a three-year window with varying taxable thresholds each year, and no realistic level set for the future.

QUEENS COUNTY

Our county continues to be a leader in the field of legal education. Surrogate Robert L. Nahman again served as moderator of our Annual Seminar, and opened up his courtroom and his excellent staff to the Bar. This year's seminar focused on the Role of the Guardian - Ad Litem in Surrogate's Court Proceedings. The protection of those unable to represent themselves is of paramount importance to our Surrogate. Our outstanding faculty included Daphne Loukides, member of the Law Dept., Gerard J. Sweeney, Counsel to the Public Administrator, Louis M. Laurino Jr., Vice Chairman of our committee and Scott G. Kaufman, Vice Chairman of our committee. Many thanks to all involved.

In October, a special joint meeting of the Trusts and Estates Committee and the Elder Law committee was held, at which Lee Coulman, the Chief of the Law Dept. spoke about special areas of concern to the Court and practitioner alike. His presentation was both highly informative and well attended. Happy New Year to all.

Hon. Moses M. Weinstein

Continued From Page 3

In 1980, Judge Weinstein's talent as a Jurist was again acknowledged by the Governor of the State of New York, when Governor Hugh Carey appointed Judge Weinstein as an Associate Justice of the Appellate Division, Second Judicial Department.

Moe served with distinction and honor as an Associate Justice of the Appellate Division until 1989 after reaching a mandatory retirement age.

Judge Weinstein was most articulate and quick witted - capable of adapting himself to each particular audience. In his customary relaxed manner he could be informational but informal, helpful but authoritative.

One of his early famous witty responses occurred when a Republican called him a political boss, Moe retorted: "I've never been called boss, not by anybody. I'm not even boss in my own house. My wife makes me take out the garbage."

Judge Weinstein's presence will certainly be missed.

***Editor's Note: Seymour Boyers, Retired Associate Justice, Appellate Division, Second Dept., is a partner in Gair, Gair, Conason, Steigman & Mackauf.**

PHOTO CORNER

2007 Holiday Party

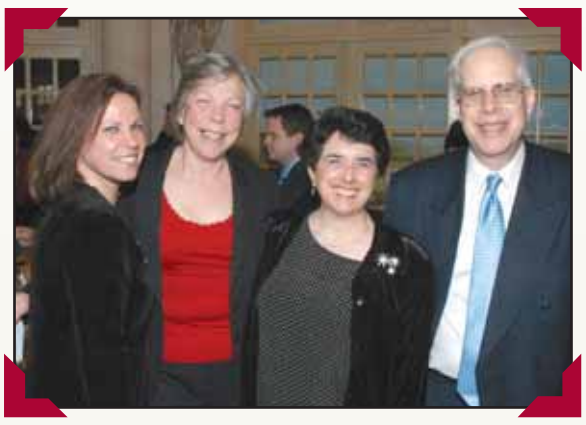
Wednesday, December 19, 2007

Angelo Caldi, Guy Vitacco and Joe Risi

April Newbauer, Seymour James, Hon. Cheryl Chambers and Richard Gutierrez

Arthur Terranova, Hon. Cheryl Chambers, Seymour James and David Adler

David Adler, Jennifer Ajah and Arthur Terranova



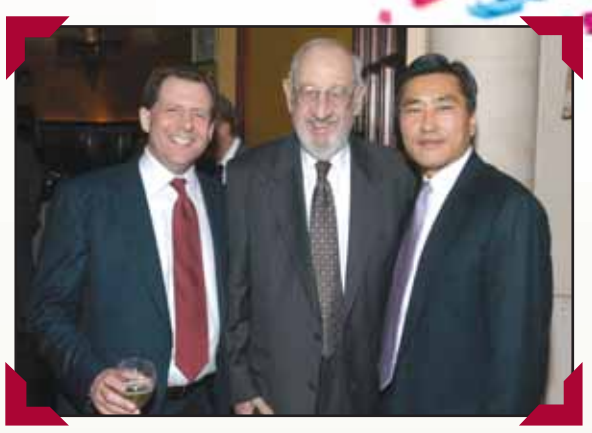
Bruna DiBiase, Mona Haas, Susan Beberfall and Jay Abrahams

Hon. Jeffrey Lebowitz, Hon. Jeremy Weinstein, Hon. Bernice Siegal, Hon. Robert Kalish, Susan Beberfall, Hon. Lee Mayersohn and Richard Lazarus

Elly Vreeburg, June Briese, Catherine Glover, Hon. Margaret Parisi-McGowan and Susan Borko

Greg Newman, Ed Rosenthal, Jim Patterson and Guy Vitacco

Photos by Walter Karling



James Patterson, Joseph Baum and Jeffrey Kim

Jeffrey Kim, Martha Taylor, Hon. George Heymann and Jodi Orlow

Kenneth Brown, Jim Patterson, Hon. Jeremy Weinstein, Susan Beberfall and Joseph Baum

Paul Pavlides, George Campos, Guy Vitacco and Steve Singer

QCBA Staff-Sasha Khan, Janine Coakley, Shakema Oakley and Janice Ruiz

Ron Ramirez, Audrey Sager, Larry Litwack and Richard Ortiz

Harold Sokoloff, Joe Risi, George Campos, Joe Baum, Ed Rosenthal, Paul Pavlides, George Nashak and JoeDe Felice

Members of the Latino Lawyers Association of Queens County and friends

Joseph Cristiano, Alexander Rosado, Hon. Bernice Siegal, Steven Orlow, Bruna DiBiase, Josephine Benton, Jeffrey Kim, and Hon. Maureen Healy

Martha Taylor, Hon. Robert Nahman, Ed Rosenthal, Hon. Peter Vallone and James Wrynn

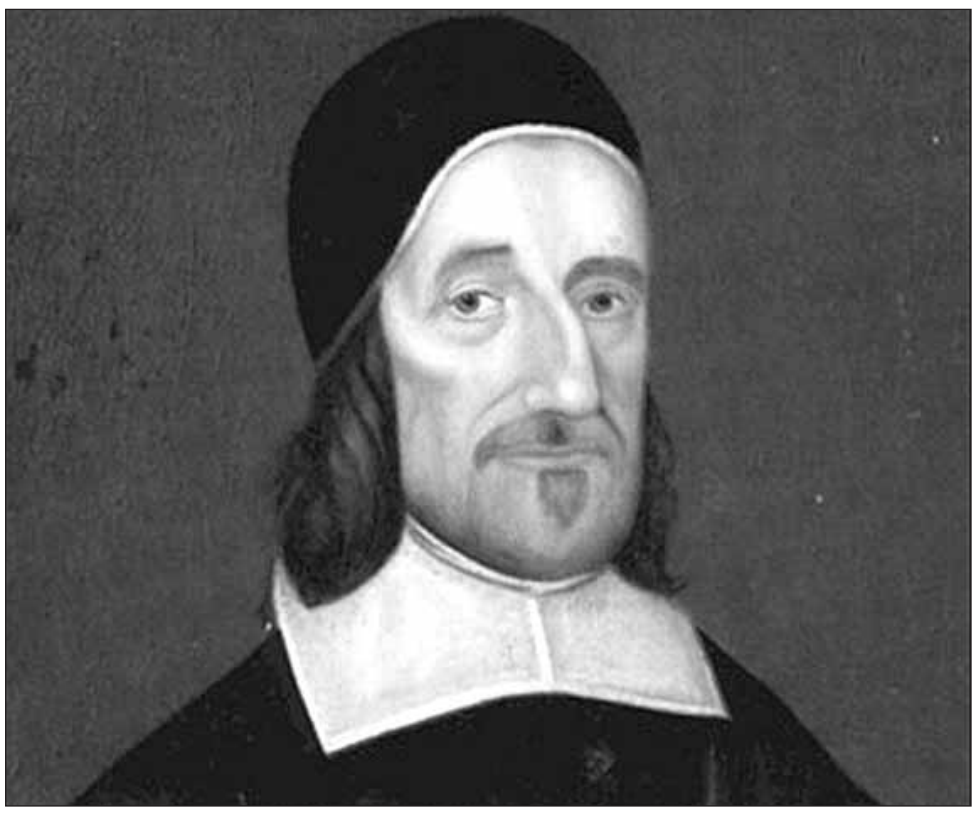
Miriam and Steve Singer, Nicole Corrado and Audrey Sager

BOOKS AT THE BAR

Protestant minister Nathaniel Howe [1764-1837] posited: "The way of the world is to praise dead saints and to persecute living ones." [Sermon, 1810]. Too often society cuts down creative persons in their lifetime only to build monuments in their honor **after** their death. The lives of Jeremiah, Isaiah, Jesus, William Tyndale [1494-1536, Protestant minister and scholar who was rewarded for his English translation of the Bible by execution], and Emile Zola [French novelist who was wrongfully convicted of seditious libel and hated for coming to the defense of Captain Alfred Dreyfus (see "Culture Corner" column, **Queens Bar Bulletin**, Oct. 2007, pp. 10-11)] are all sad examples of this repeated historical fact of truthful, courageous men being not only punished, but persecuted.

Howard L. Wieder

Richard Baxter [1615-1691], an English Puritan church leader on the Parliamentary side of the English Civil War, stated both of the Anglicans and the Papists: "So much do they agree in destroying men for their opinions' and ceremonies' sake, and in building the tombs of the prophets and over-honoring the dead saints, while they go on to hate and destroy the living." **[The Autobiography of Richard Baxter**, by Richard Baxter and Rev. J.M. Lloyd Thomas, p. 166 (Everyman ed.)]. For his recompense, Baxter, like many other persons of truth, was constantly and unjustly persecuted in legal cases.



On a lesser scale, in some way, we can make small, but important, corrections to this fact, before life's fast pace prevents us from doing so, by thanking significant persons, relatives, and mentors - - while they are still alive - - for their contributions to us. Gratitude is a virtue that does not need to be accompanied by an expensive gift; it is the heartfelt "thank you" that counts.

Toward this objective, the principal portion of this column is to review the recent published books of two authors, both of whom were outstanding and extraordinary mentors of mine, Professors **MANFRED WEIDHORN** of Yeshiva University and **EDWARD J. BANDER**, formerly of N.Y.U. School of Law and now with Suffolk University School of Law.

I do not use the words "mentor" lightly. Let me explain. In 1971-1972, I was a student in the freshman class of Yeshiva College, where I took [and was REQUIRED to take] a year long course in ENGLISH COMPOSITION. **MANFRED WEIDHORN** was my Professor. He constantly bombarded us with assignments, coupled with the feature that, with each assignment, the best AND the worst essay would be read by him aloud to the entire class. Talk about incentives, fears, and motivations!! Even before I came to recognize my own ability, **PROF. WEIDHORN**, a widely published biographer and essayist, informed me of my potential. Since I was the son of two immigrant parents and, as a result, never took the English language for granted, such praise truly meant a great deal.

I had the same experience several years later. Every first year law student at New York University ("N.Y.U.") School of Law was required to take a year long legal research and writing course, culminating, at the end of the academic year, in a professionally judged full-blown Moot Court brief and oral argument. Commendably, to allow instructors to give more attention to each student, each legal writing section was composed of only 16-20 students. I consider myself very fortunate because my instructor was **EDWARD J. BANDER**, N.Y.U. Law's Assistant Head of the Library.

Like **PROF. WEIDHORN** at college, **PROF. BANDER** gave us, weekly, intriguing, and fascinating legal research and writing assignments. I was thrilled by his feedback to my papers and his belief in my ability! Even more, when I told him of my fondness for legal research, **PROF. BANDER** took me under his wing and spent countless hours sharing with me great details about a wide array of legal research books, resources, and digests that proved very valuable in my professional experience and made me a skilled advocate.

EDWARD J. BANDER'S instruction was given at a time when conventional research not only governed, but was the **ONLY** means to function! There was NO Westlaw or Lexis computerized legal research then; legal research consisted of laboriously going through Key-Word indices and descriptions, going through several editions of digests and decennial digests and pocket parts - - all published in fine print, and "shepardizing" each case by checking every burgundy hard cover book and red and gold covered supplements of Shepard's [for those of us old enough to remember!].

Consumed by life's demands and attempted professional attainment, I had little time, until recently, to stay in touch with these two extraordinary and learned gentlemen. Now, since both **MANFRED WEIDHORN** and **EDWARD J. BANDER** are published authors, let me use this column to say, to each of them, "**THANK YOU!**"

EDWARD J. BANDER: A MASTER OF LEGAL HUMOR!

EDWARD J. BANDER is the author, editor, or compiler of sixteen books that cover legal research, Shakespeare and the Law, Justice Holmes, the most famous fictional case in law - - *Bardell v. Pickwick*, and his favorite, two books on Finley Peter Dunne, a humorist who wrote at the turn of the 20th century. Prof. Bander's first article, "The Novel Approach to Juvenile Delinquency" appeared in 1954 and his repertoire includes "Woe Unto You Novelists" (A.B.A. Journal 1959), "Mr. Dooley on Judges," "How to Protect Yourself from Legal Experts," "Speakin' iv Pollytics" (**New York Times**, Sept. 17, 1972), "Under 5'6": They Get the Short End" (N.Y.U. Alumni News, Dec. 1970), "A Day in the Life of a Suffolk Alumnus: Class of 2001" (*see*, Juris Jocular edited by Ronald Brown 1988), and "The Lawyer as Devil's Advocate" (*see*, The Lawyer and Popular Culture, ed. by David L. Gunn, 1993).

Prof. Bander is a graduate of Boston University Law School (1951), and has worked in a library capacity at Harvard Law School, N.Y.U. School of Law, and Suffolk University Law School where he was Law Librarian. He has also taught courses in introductory law and law and literature. He retired in 1990 and now lives in a retirement community in Brookline, Massachusetts, with his companion Ms. Tema Nason. He has three children and two grandchildren. At age 84, Prof. Bander still rides a bike, and, while he has given up on being a snowbird, he still spends his summers in Mt. Desert Island, ME. His present project is writing a novel about a law school.

Prof. Bander's specialty has always been humor. In a recent collection of legal humor, he was dubbed "the grandfather of law review humor." His humor material can be found in the New Jersey Bar Journal, Law Library Journal, Library Journal, Case and Comment, Obiter Dictum and other publications. His hobby has been preparing anecdotes about the law, and his work has appeared in the Law Library Journal, Villanova Law Review, and, in his latest book, **LEGAL ANECDOTES, WIT, AND REJOINDER** (discussed below).

EDWARD J. BANDER has also written poetry and has had two one act plays produced in the Boston area. One of his poems, "The Lambert Talk," appeared in the Suffolk University Law Review (1994). Bander wrote the published poem, whose title played on that of the showstopper number "The Lambert Walk" from the 1937 musical "Me and My Girl," in honor of the [now late,] renowned torts scholar Thomas Francis Lambert, Jr. [1915-2000], of Suffolk University Law School. Dean Lambert, a gifted orator, served as a trial lawyer for the International Military Tribunal at Nuremberg after the defeat of Nazi Germany and taught at Suffolk University Law School in Boston for 27 years, where he held an endowed chair. **EDWARD J. BANDER'S** two one-act plays, "The Test" and "The Lottery," were written with his daughter, Lida McGirr.

On two occasions, **EDWARD J. BANDER** had a role in writing, acting, and producing plays that were performed at the Association of American Law Libraries meetings. **EDWARD J. BANDER** was President of both the Law Librarians of Greater New York and the New England Law Librarian (at different times, of course). He was also the editor of the Law Library Journal and, for a while, also edited the N.Y.U. School of Law alumni publication.

MS. TEMA NASON, Edward Bander's companion, is a Professor and Scholar at the Brandeis Women's Study Research Center of Brandeis University and is a published novelist and short story writer. Her novel, **ETHEL: THE FICTIONAL AUTOBIOGRAPHY OF ETHEL ROSENBERG** [New York: Delacorte Press, 1990], regarding the controversial execution on June 19, 1953 of convicted spies Julius and Ethel Rosenberg, was widely and critically acclaimed. It has been re-published by Syracuse University Press [www.SyracuseUniversityPress.syr.edu]. **EDWARD BANDER** and **TEMA NASON** are both widowed and met on a blind date in or about 1992. They went out on a date one night. It snowed so bad that Edward Bander couldn't get home and that one night has lasted 16 years.

As can be expected with older persons of powerful, creative minds, **EDWARD J. BANDER** is not experiencing much luck in trying to find a niche in his retirement community. He exercises regularly and has a great view of the Boston skyline from the window of his 14th floor window, where he avoids watching the 8:30 A.M. rush hour scramble to work. You can help **EDWARD J. BANDER** in a meaningful way. He is collecting materials for another book on legal humor and has specifically requested that QCBA members send to him your stories and anecdotes about lawyers, clients, and courtroom observations by writing to him at either Bander5812@aol.com or 1550 Beacon St., Brookline, MA 02446.

Bander's published books are available at amazon.com. I own five of his books and have come to realize his many, wonderful gems of truth in the guise of humor. In a recent televised interview, the producer of HBO's hit show "The Wire" **incorrectly** attributed to H.L. Mencken [journalist, 1880-1956] the saying that a newspaper "comforts th' afflicted [and] afflicts th' comfortable." The sentence is not by Mencken, but from Edward J. Bander's opus **Mr. Dooley & Mr. Dunne: The Literary Life of a Chicago Catholic** p. 219 (quotation 296) [Michie Co. 1981], quoting **Finley Peter Dunne** [humorist and essayist, 1867-1936] and his character Mr. Dooley, a Chicago bartender with a thick Irish accent] in **The Boston Globe**, October 5, 1902.

Even improving upon Cushman K. Davis's classic opus **The Law in**

BOOKS AT THE BAR

Shakespeare (1883), I strongly recommend that you purchase **Edward J. Bander's THE BREATH OF AN UNFEE'D LAWYER: SHAKESPEARE ON LAWYERS AND THE LAW** (Catbird Press 1996) (editor Edward J. Bander) (softbound, $13.95). Even more useful than Davis's classic work, collecting Shakespeare's words about judges, lawyers, and the courts, Bander wonderfully organizes the Bard's words under topic headings and adds an index. Bander's organization of topics, headings, and index are priceless for the lawyer who wants to impress the court with an apt quotation! The book at only $13.95 is a steal!

But please don't overly quote from Shakespeare! In his book, **JUSTICE HOLMES - - EX CATHEDRA: a collection of the wisdom and humor of and about Justice Oliver Wendell Holmes** p. 207 (anecdote 425) [The Michie Co. 1966], **EDWARD BANDER** describes the irritation of Holmes with a learned Philadelphia lawyer named Beck, who loved to impress the judges with his literary knowledge. Unable to contain himself any longer, Holmes leaned over to the Chief Justice and whispered **not** inaudibly, "I hope to God Mrs. Beck likes Shakespeare!" Beck spent his oral argument showing the Justices how smart he was; maybe he didn't bore his wife, but he certainly turned off the justices.

LEGAL ANECDOTES, WIT, AND REJOINDER (Vandeplas Publishing 2007) (263 pages, softbound, ISBN 978-1-60042-017-7), is also available at www.amazon.com or www.vandeplaspublishing.com. The book is a vibrant collection of anecdotes and quotations regarding the law and lawyers and has over 200 topics. **This book and** Bander's collection of Shakespeare quotations, **THE BREATH OF AN UNFEE'D LAWYER: SHAKESPEARE ON LAWYERS AND THE LAW, are essential for your collection and practice**.

Prof. EDWARD J. BANDER is justly proud of his acclaimed work of ***BARDELL v. PICKWICK:*** **THE MOST FAMOUS FICTIONAL TRIAL IN THE ENGLISH LANGUAGE BY CHARLES DICKENS;** (Transnational Publications, 2005) (edited and compiled by Edward J. Bander) (175 pages, ISBN 1-57105-325-5), a wonderful abstraction of ***The Pickwick Papers*** by Dickens. Bander's prose is absorbing, showing us how a misunderstanding mushroomed into a full blown litigation. Another recent work by **EDWARD J. BANDER is SEARCHING THE LAW** (Trans. Pub., 3d ed., 2005) (with Frank S. Bae).

DR. MANFRED WEIDHORN'S 2008 REVISION OF LANDMINES OF THE MIND

My **first** writing mentor was **DR. MANFRED WEIDHORN**. Dr. Weidhorn is the Guterman Professor of English at Yeshiva University, where he still keeps an active schedule at both Yeshiva College and Stern College for Women, 36 years after teaching me.

He is the author of numerous books, biographies, and essays. My first "Books at the Bar" column was devoted entirely to the first edition of his work ***Landmines of the Mind: One Thousand Asseverations, Surmises, and Questions about the Design of the Universe and the Meaning of Life*** [the first edition published in 2005]. Despite my review in November 2006, applauding that work, **DO NOT BUY IT! WHY? Dr. Weidhorn has masterfully revised it in a re-titled LANDMINES OF THE MIND: 1500 Original and Impolite Assertions, Surmises, and Questions about Almost Everything [$17.95, 201 pages, iUniverse, 2008; note the new title and new ISBN number: 978-0-595-46734-1]. Go buy and read the 2008 revised edition of LANDMINES OF THE MIND**, containing new aphorisms and an index!

I quote **DR. WEIDHORN'S** biography, with his permission, as available at Yeshiva University's web site, because of his smart, pithy writing style. **DR. WEIDHORN** states:

"I am a lucky man. When I was young, Hitler generously offered to spare me many of life's ills and vexations, but I (or rather my parents, with me in tow) turned him down and preferred rather to entertain those ills and vexations peacefully on the other side of the pond. A matter of taste, no doubt. At any rate, I was twice under the thumb of Hitler—both in Vienna, during the first week of the annexation of Austria, and in Paris, living almost a year under the German occupation, before the round-up of Jews."

"My family settled in Brooklyn, where I attended the Hebrew Institute (Yeshiva) of Borough Park. Then came education at Stuyvesant High School and Columbia College. A two year stint in the U. S. Army (artillery) was followed by work in graduate schools (U. of Wisconsin [M.A. 1957] and Columbia University [Ph. D. 1963]). An academic year (1956-57) spent in Alabama as English Instructor at the University brought me to two discoveries: that I love teaching and that the South is different from Brooklyn. After three years as Instructor at Brooklyn College, I came in 1963 to Yeshiva University for the long haul - - till today."

"In 1988 I became the inaugural occupant of the Abraham and Irene Guterman Chair of English Literature at Yeshiva. In the late 1990s, I received the Farrow Award for Excellence in Churchill Studies and the Emmett Award for Best Essay. Various other books of mine have received special commendations. Although writing more than a dozen books, I did not turn away from activism. I was, during the 1970s, the co-founder and co-leader of a faculty union at Yeshiva. The administration reacted by vowing to fight us "all the way to the Supreme Court." They kept their word, and in that hallowed chamber, in the 1980 ruling on *N.L.R.B. v. Yeshiva University*, [444 U.S. 672, 100 S. Ct. 856 (5-4; private university's full-time faculty with absolute authority on academic matters was not entitled to protection under collective bargaining agreement)] (a phrase of infamy in the world of higher education), we lost by one vote." [bracketed material added by this columnist for clarity].

"Not least, I was happily married for 35 years; till death did us part; my dear Phyllis and I raised two wonderful sons."

As you may surmise from his biography, especially in his involvement in organizing a teachers union, Manfred Weidhorn is a man of truth, courage, and eloquence. He means to provoke and shock, in aid of getting at the truth. In my November 2006 column, I described how he strode into the classroom at Yeshiva College for our first lecture of English composition, placed his portable lectern on the table, turned to us yarmulke-wearing, sheltered freshmen, and exclaimed , "F#*K!" After seconds of absolute silence, he continued, "It's only a word." He made his point effectively on the use of words, when warranted, to capture attention.

DR. WEIDHORN'S revisions in **2008** to **LANDMINES OF THE MIND** make it an outstanding book of original, provocative, and brilliant aphorisms that will stimulate your thought! You may even find some occasion to quote them in your briefs or arguments, especially since the 2008 revision, unlike the earlier one in 2005, contains an index. Here are some of the entries in this newly revised work:

"Yes, God did become man, but then we took Him hostage and made him do our bidding." [aphorism 19; numbers within brackets refer to the numbered aphorism in the revised 2008 edition of **LANDMINES OF THE MIND**];

"Humankind does not deserve itself." [26];

"'Buy low, sell high!' As an analysis of someone's success, this slogan is unexceptionable. As a formula to be put into practice, it is utterly useless." [55];

"Jews invented ethical monotheism and the idea of one Truth--and then fell victim to it when Christians adopted the idea." [62];

"All explanations are partial and tentative." [87];

"Barbarians at least are not hypocrites." [108];

"Orthodox Judaism tries to trap the divine in the trivial." [141];

"Damn you relativists! There most certainly are eternal verities: Selfishness, greed, lechery, gluttony, hypocrisy, war." [147];

"Conservatives advocate for the rich, and liberals advocate for the non-rich. Since the non-rich outnumber the rich by at least nine to one, liberals would easily win every election. Hence, to right the balance, conservatives resort to lying. When liberals, for example, say that social security has diminished poverty among the elderly, they are demonstrably telling the truth; when conservatives say that privatizing social security or replacing the progressive income tax with a flat tax would benefit everyone, they are demonstrably lying. To seduce people into voting against their own economic interests for the sake of subjective moral issues which do not even belong in politics is another form of conservative duplicity. Liberals, of course, also lie, but not as much as do conservatives. That is not because liberals are nobler than conservatives but because, with the majority of the voters potentially on their side, they have fewer occasions for lying. Were the roles reversed, liberals would lie as much as do conservatives." [emphasis in the original]. [152];

"'Hope' is usually just another word for 'illusion.'" [159];

"Religions splinter." [169];

"History definitely repeats itself but never in the same way." [174];

"Conservatives point to the Russian Revolution as an example of the futility of trying to improve things through violence. Liberals point to the American Revolution." [182];

"The desk is to many modern people what a herd of animals or a plot of land was to primitive people." [191];

"If Jesus had lived in Europe during the Holocaust, he would have been

Continued On Page 14

COURT NOTES

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

N. Stephen Sukhdeo, admitted as Naresh Stephen Sukhdeo, a suspended attorney (November 7, 2007)

The respondent was found guilty, after a disciplinary hearing, of misappropriating funds entrusted to him as a fiduciary, incident to his practice of law, and/or failing to safeguard funds entrusted to him as a fiduciary; commingling funds entrusted to him as a fiduciary, incident to his practice of law, with his own funds; breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to safeguard funds entrusted to him and/or failing to maintain adequate client funds in his escrow account; breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to promptly pay or deliver to clients or third persons all the funds in his possession that the clients or third persons were entitled to receive; failing to maintain required bookkeeping records for an attorney escrow account; and engaging in conduct prejudicial to the administration of justice and/or adversely reflecting on his fitness as a lawyer by premising payment to a client upon the withdrawal of her complaint to the Grievance Committee.

Gay Lynn Tonelli (November 7, 2007)

In an order of the Virginia State Bar Disciplinary Board dated November 24, 2003, the respondent's resignation was accepted; her license to practice law in the Commonwealth of Virginia was revoked; and her name was stricken from the roll of attorneys 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.

Gerald Phillip Garson (November 20, 2007)

On April 19, 2007, the respondent was convicted, after a trial in the Supreme Court, Kings County (Berry, J), of receiving a bribe in the third degree, a class D felony, and receiving a reward for official misconduct in the second degree, a class E felony (two counts). As a result of his conviction of a felony, the respondent automatically ceased to be an attorney pursuant to Judiciary Law §90(4)(a).

Shelley A. Rivera, admitted as Shelley Ann Rivera, a suspended attorney (November 20, 2007)

On May 30, 2007, the respondent pleaded guilty in Supreme Court, Westchester County (Cacace, J.) to the charge of grand larceny in the second degree, a class C felony. As a result of her conviction of a felony, the respondent automatically ceased to be an attorney pursuant to Judiciary Law §90(4)(a).

Sigmund V. Mazur (November 27, 2007)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges that he, *inter alia*, owes a former client the sum of $1,525.74 in unreimbursed proceeds from the sale of his property.

Michael Paul Henry (December 4, 2007)

In an order of the Supreme Judicial Court of the Commonwealth of Massachusetts entered November 2, 2005, the respondent was suspended from the practice of law in Massachusetts for an indefinite period, as a result of his commingling of personal funds and trust funds, and his intentional misuse of trust funds, with resulting deprivation to a client. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

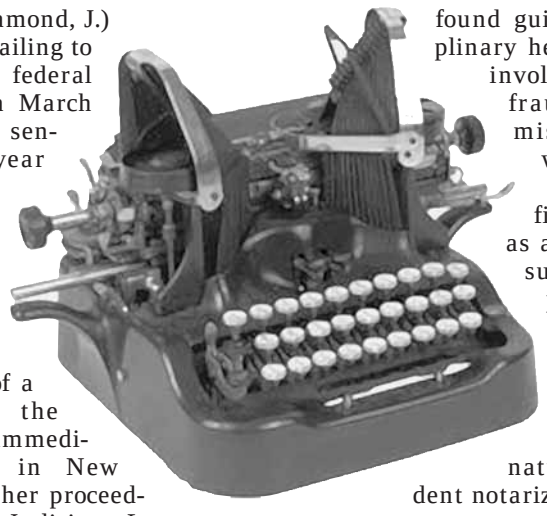
Moses Eda Osayame, admitted as Moses Edamwen Osayamwen (December 11, 2007)

The respondent tendered a resignation upon allegations that he failed to promptly pay or deliver funds to a client and failed to properly safeguard the funds in his attorney trust account.

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

Blonde Grayson Hall (October 29, 2007)

In March 2006, the respondent pleaded guilty in the United States District Court for the Eastern District of Pennsylvania ((Diamond, J.) to three counts of failing to file tax returns, a federal misdemeanor. On March 21, 2007, she was sentenced to one-year imprisonment to be followed by one-year supervised release; a $20,000 fine; and a $75 assessment. As a result of her conviction of a serious crime, the respondent was immediately suspended in New York, pending further proceedings, pursuant to Judiciary Law §90(4)(f).



Mayank V. Munsiff (November 7, 2007)

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

John P. Oliver, admitted as John Patrick Oliver (November 7, 2007)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a *prima facie* finding that he was guilty of professional misconduct immediately threatening the public interest based upon uncontroverted evidence.

Marise Robergeau (November 7, 2007)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a *prima facie* finding that she was guilty of professional misconduct immediately threatening the public interest based upon her failure to cooperate with the Grievance Committee.

David B. Rosen (November 7, 2007)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a *prima facie* finding that he was guilty of professional misconduct immediately threatening the public interest based upon his failure to cooperate with the Grievance Committee.

Thomas A. Bruno, admitted as Thomas Arthur Bruno (December 4, 2007)

The respondent was found guilty, after a disciplinary hearing, of engaging in conduct prejudicial to the administration of justice by providing inaccurate and evasive responses to discovery requests and/or failing to disclose information, and engaging in conduct that adversely reflects 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 January 4, 2008, and continuing until further order of the Court.

The Following Attorneys Were Publicly Censured By Order Of The Appellate Division, Second Jud-icial Department:

Steven L. Raskind, admitted as Steven Lawrence Raskind (October 30, 2007)

The respondent was found guilty, after a disciplinary hearing, of conduct involving dishonesty, fraud, deceit or misrepresentation, which reflects adversely on his fitness as a lawyer, as a result of filing a summons and complaint with an individual verification containing a client's forged signature and a forged signature of the respondent notarizing same.

Albert J. Rodrigues (November 7, 2007)

The respondent was found guilty, after a disciplinary hearing, of engaging in illegal conduct that adversely reflects on his honesty, trustworthiness, and/or fitness as a lawyer, as result of his conviction, on or about September 6, 2005, of criminal possession of a controlled substance in the seventh degree, a serious crime within the meaning of Judiciary Law §90(2).

Jill R. Epstein (December 11, 2007)

By order of the Supreme Court of New Jersey dated September 19, 2006, the respondent was censured for violating New Jersey Rule of Professional Conduct (RPC) 1.3 (lacking diligence); RPC 1.4(a) (failing to communicate with a client); RPC 1.15(b) (failing to promptly deliver funds to a client); RPC 1.15(d) (failing to comply with New Jersey Rule of Court 1:21-6 pertaining to record keeping); and RPC 8.1(b) (failing to cooperate with disciplinary authorities). Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was publicly censured in New York.

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

Margaret A. Hurst (October 29, 2007)

At The Last Two Meetings Of The Grievance Committee For The Second And Eleventh Judicial Districts, The Committee Voted to Sanction Attorneys For The Following Conduct:

- Failing to timely re-register as an attorney with the New York State Office of Court Administration (19)
- Improperly withdrawing from a legal matter
- Improperly withdrawing from a legal matter and engaging in a conflict of interest by representing another person in a transaction involving a former client
- Discontinuing a client's legal action without notifying the client
- Improperly soliciting legal business
- Aiding the unauthorized practice of law
- Entering into a partnership with a non-lawyer
- Failing to maintain adequate communication with a client
- Neglecting a legal matter (5)
- Neglecting a legal matter and failing to maintain adequate communication with a client (2)
- Neglecting a legal matter and failing to adequately supervise law firm employees
- Neglecting a legal matter and ignoring court directives
- Neglecting multiple legal matters; failing to maintain adequate communication with clients; and failing to adequately supervise lawyers in the attorney's employ
- Failing to use proper care to safeguard the interests of a client
- Failing to use proper care to safeguard the interests of a client and failing to reduce agreements with opposing counsel to writing
- Failing to use proper care to safeguard the interests of a client and failing to reduce agreements and/or communications with the client to writing
- Failing to document a client's instructions and/or obtain written authorization from the client to disburse funds in the attorney's possession
- Failing to acknowledge/honor other attorneys' liens
- Exercising a lien over client funds totaling more than the amount in dispute

COURT NOTES

- Communicating on the subject matter of litigation with a party the lawyer knew to be represented by counsel

- Failing to promptly pay or deliver to a client, as requested, funds in the attorney's possession that the client was entitled to receive

- Failing to maintain separate accounts for fiduciary and operating funds; failing to properly safeguard fiduciary funds; and failing to maintain a contemporaneous ledger or similar record of deposits into, and withdrawals from, escrow, as required by Disciplinary Rule (DR) 9-102 (D) of the Lawyer's Code of Professional Responsibility (22 NYCRR §1200.46)

- Failing to maintain adequate books and records of escrow transactions; commingling personal and fiduciary funds; and issuing escrow checks prior to depositing the corresponding client funds

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

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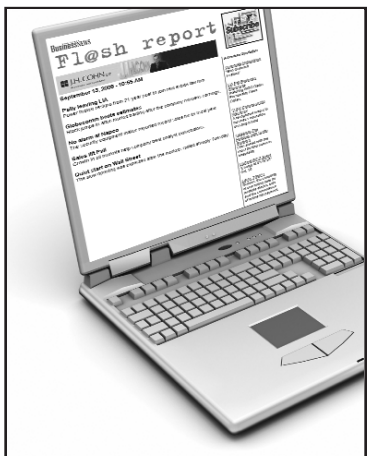

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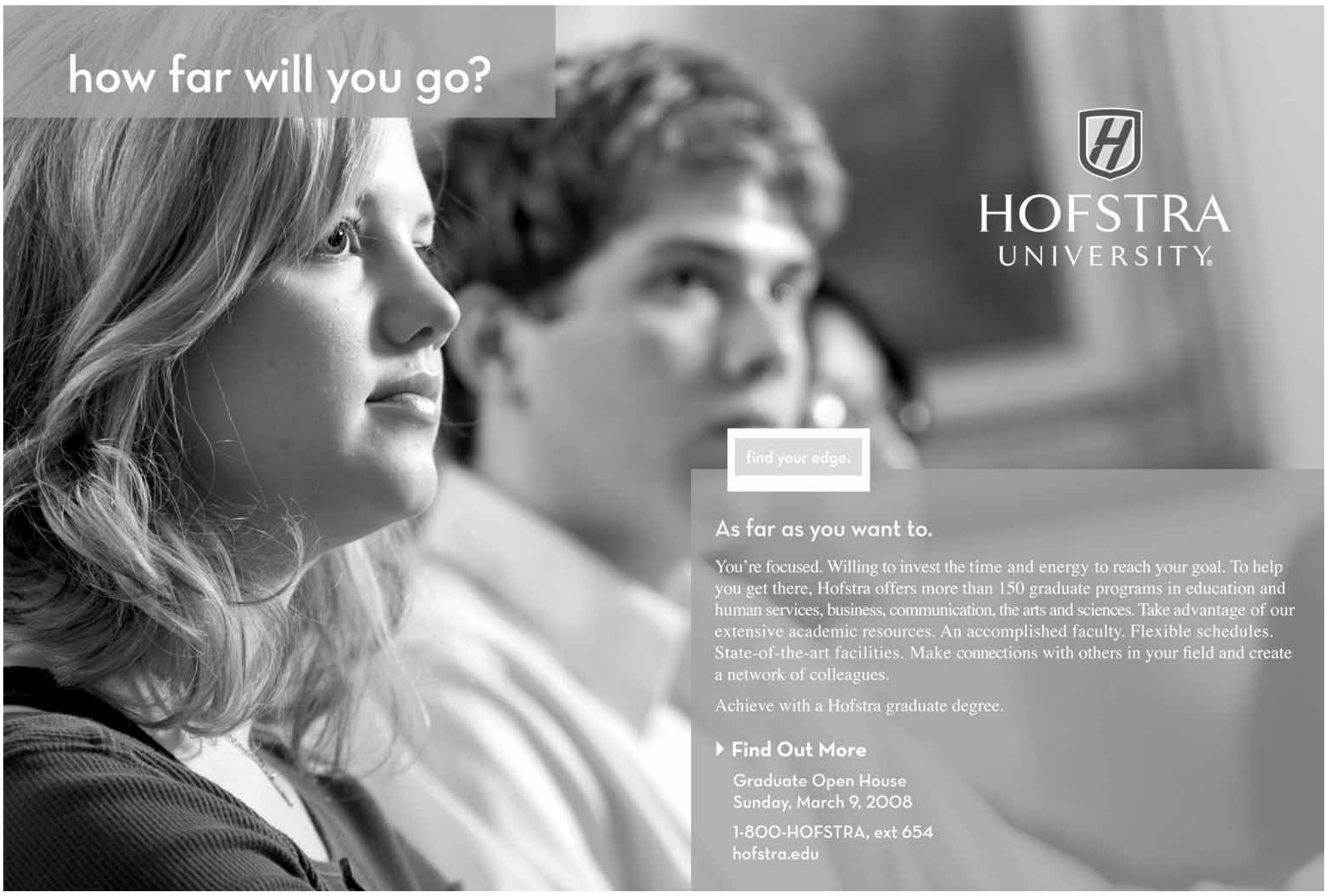

BOOKS AT THE BAR

Continued From Page 11

exterminated. By Christians, of course. No doubt by some in the name of Christianity." [217];

"An octogenarian once advised young men to bed as many women as they could in order to feel contentment in old age. That assertion caps the argument that sex is not mainly about sensual pleasure—for what is left of such long-ago physical experience to an old man reminiscing? (In the words of John Donne [in another connection], 'We see by this it was not sex.') No, many forms of copulation have to do rather with vanity. After all, physical gratification can easily be had through masturbation or a prostitute, but thoughtful men find such avenues unfulfilling (though the argument, in the latter case, that it is shabby to pay for sex is negated by the fact that we pay for all other pleasures). It is rather 'scoring' that matters; that is, a man treasures the knowledge that a woman, especially many women—attractive and classy ones, to boot—willingly surrendered herself to his charms, that in the wake of self-protective reluctance, she decided that he was notably worthy to be allowed entry. Going to a prostitute or the village nymphomaniac is playing tennis without a net."

"Women are, moreover, unready to yield, or yield too soon, for fear that the man will then leave for good. If sexual pleasure were central, would not the man rather stay with a reliably giving woman than pursue other women who may not be so open to him? What matters, then, is not the amount and intensity of sex but the number of women one has had it with, even only once. Men, in short, really seek the pride expressed in the consoling last words of a dying Shakespeare character who is the object of the amatory rivalry of two women: 'Yet Edmund was beloved!' Since the rise of feminism, moreover, it has been established that women—some? many?—also have (and secretly always had) an interest in variety and experimentation, in scoring. But because of the plumbing, as well as the possibility of unintended pregnancy and the certainty of the double standard in society, that all-important sense of serial conquests is necessarily greater in the man." [220];

"When you invoke the future, you must specify 'short term' or 'long term.' They are never the same." [239];

"When Galileo made a literally earth-shaking discovery, he was lionized by the scientific community but fed to the lions by the religious community." [244];

"Aphorisms are overrated: They only remind us of what we already know." [248];

"Perfectionism is what drives some people into a seminary or monastery and then drives them out of it." [270];

"A Protestant minister a few years ago said, 'God Almighty does not listen to the prayers of Jews.' Though labeled by some as anti-Semitic, the statement, insofar as it is based on the Gospel dictum that there is no salvation except through Jesus Christ, is eminently fair and accurate. But—beware!—that sort of logic can be turned on its head. Christians, for whatever reason, have swallowed the Ten Commandments, hook, line, and sinker. The first few commandments assert the singularity of God. Belief in the divinity of Jesus is therefore blatantly heretical, blasphemous, and idolatrous. (We will not even discuss the scandal of 'graven images' which afflicts Roman Catholicism in the form of crucifixes, icons, paintings, statues.) Christians are nice people and some of my best friends are Christians, but a strict constructionist and original-intent reading of 'thou shalt have no other gods before me' forces one to reluctantly conclude that God Almighty does not listen to the prayers of Christians." [271];

"The Pill made prudence prudery." [283];

"Religion prizes, science surprises." [284];

"God spoke to you? He spoke to me too and told me to ignore you." [299]; and

"Either a few people are cynics, or all the rest are naive." [308].

DR. MANFRED WEIDHORN continues:

"After a half century of teaching and writing and after publishing ten books on specialized subjects—17th century literature, dreams, psychological self help, Winston Churchill, major themes in literary works, biographies for Young Adults—I entered the stage of life in which such matters dwindle in significance and one looks back rather on the road taken. Drawing on all my experiences and gathering the courage—or, if you will, lapsing into the folly—of hazarding conclusions about the larger picture, I have therefore in the past two years published three books on the meaning of it all, each book doing so in a different way:"

"***LANDMINES OF THE MIND [new ISBN number: 978-0-595-46734-1 for the 2008 REVISED edition**, $17.95, 201 pages, available at bn.com or amazon.com] is a collection of a thousand aphorisms about virtually all aspects of life. These are selections consisting of a sentence or two or three—some even consist of as little as two or three words—which sum up matters in compact form from vastly divergent perspectives. The aim is to shock and amuse."

"***THE PERSON OF THE MILLENNIUM: The Person of the Millennium: The Unique Impact of Galileo on World History** [ISBN 0-595-36877-8, $15.95, bn.com or amazon.com] is my contribution to an intellectual parlor game—among the outstanding historical figures, who is the most outstanding? In giving my answer, I present a vision of history, a theory of how we came to where we are."

"***AN ANATOMY OF SKEPTICISM** [ISBN 0-595-40950-4, $27.95, bn.com or amazon.com] shifts attention from history to epistemology and traces the long-term consequences of the achievements of the Person of the Millennium. This is a non-technical survey, written in layman's English, of the difficulty of finding the truth about anything. Only someone who has spent a lifetime of trying to do so has the right or the motive to draw conclusions about the quest. In modern times, the world of intellect is, of course, so pervaded by subjectivity, skepticism, deconstructionism, and relativism, that such an approach would seem redundant. But in everyday life, people are either oblivious of cultural currents or unwilling to apply them to practical matters, with the result that certitude, fanaticism, and self righteousness, especially in religion and politics, dominate as much as ever. So this book sprays the cold shower of skepticism on those everyday issues that make for endless, noisy, and ultimately futile squabbles in the agora (the marketplace or shopping mall) of today - - talk radio, cable TV punditry, the blogosphere."

The above three books, **AN ANATOMY OF SKEPTICISM** [2008 revised version], **THE PERSON OF THE MILLENNIUM**, and **AN ANATOMY OF SKEPTICISM**, will cost you a few dollars, but will also enrich your mind! If you want to think "outside the box" and "can handle the truth," then you will be fascinated, captivated, and absorbed by these three recent books of **Dr. MANFRED WEIDHORN**.

HOWARD L. WIEDER is the sole editor/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 IAS Part 32 of Supreme Court, Civil Term, in Long Island City, New York.

Essay Contest Winners

By SUSAN L. BEBERFALL*

On May 30, 2007, in recognition of Women's History Month, the New York State Supreme Court, Queens County Gender Fairness Committee sponsored a lunch hour discussion, led by Professor Margaret V. Turano, of St. John's University, School of Law, at which time it announced the winners of its 2007 High School Writing Competition. This year's topic was "An Important Woman's Rights Issue That Changed the Law and Improved the Lives of Women." The four first place winners were: Maria Arguello, a senior at John Bowne High School; Rupinder Garcha, a sophomore at Townsend Harris High School; Margaret Morgan, a junior at Flushing High School; and Sanjeevni Wanchoo, a senior at John Bowne High School. Each student received an award certificate, read from a portion of their essays, and thanks to the generous support of the Court Attorney's Association of the City of New York, received a cash prize. Each student also had the opportunity to spend a day in court, "shadowing" a Justice of the Supreme Court.

***Editor's Note: Susan L. Beberfall, is a Principal Court Attorney, Supreme Court, Queens County, and Chairs the Writing Competition Subcommittee of the NYS Supreme Court, Queens County Gender Fairness Committee, of which Hon. Sheri S. Roman is Chairperson.**

Rupinder Garcha, Margaret Morgan, Sanjeevni Wanchoo and Maria Arguello.

Criminal Law: Cases

Continued From Page 6

vision without first moving for vacatur in the trial court. As the Court reasoned, "[i]f the trial judge does not mention postrelease supervision at the allocution ... a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge".

In *People v. Gajadhar*, __ N.Y.3d __, 2007 WL 4380529 (decided December 18, 2007), the Court of Appeals held, for the first time, that a defendant could be convicted by a jury composed of fewer than 12 jurors. In *Gajadhar*, defense counsel advised the trial judge that he would not consent to substituting an alternate juror once deliberations commenced. The alternate jurors were discharged and deliberations continued for two days. On the third day of deliberations, a juror fell ill and had to be hospitalized for a week. Defense counsel then advised the trial judge that the defendant would consent to having the deliberations continue with the remaining 11 jurors. The trial judge granted this request and the remaining 11 jurors then resumed their deliberations. At the conclusion of the trial, the defendant was convicted of attempted robbery in the first degree and was sentenced to a prison term of 20 years.

Gajadhar argued on appeal that a verdict by an 11-member jury violated the State Constitutional guarantee of the right to trial by jury, and relied on a case decided almost 150 years earlier, Cancemi v. People, 18 N.Y.128 (1858) which held that a guilty verdict rendered by 11 jurors was a nullity. In rejecting this argument, the Court of Appeals noted that while Cancemi was correctly decided when it was, later legislative enactments which permitted a defendant to waive his right to a jury trial and to consent to substituting an alternate juror after deliberations commenced, supported the proposition that the State Constitution did not bar a verdict by an 11-member jury so long as the defendant consented in writing to such a procedure and the trial judge approved it. The Gajadhar court did not express any opinion as to whether a verdict by fewer than 11 jurors would comport with the New York State Constitution.