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Queens Bar Bulletin

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

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Criminal Law: Cases

BY: ILENE J. REICHMAN, ESQ.

During the past year, the New York Court of Appeals addressed a variety of issues in the area of criminal law and procedure. This article will review and highlight several cases that may be of interest to the criminal practitioner.

In *People v. Michael Rawlins*, 10 N.Y. 3d 136 and a companion case, *People v. Dwain Meekins*, 10 N.Y. 3d 136 (decided February 19, 2008), the Court decided to resolve an issue of first impression: whether DNA and latent fingerprint comparison reports are "testimonial" statements within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). In *Rawlins*, the defendant's latent fingerprints were lifted from six burglarized commercial establishments and compared by several different detectives, one of whom did not testify at trial. In *Meekins*, a DNA report was prepared by multiple technicians at a private laboratory that the NYPD had outsourced the task of testing crime scene samples. None of the technicians testified at trial. However, a supervisor at the laboratory testified that she had reviewed the technicians' results. In each case, the prosecution introduced the reports prepared by the non-testifying witnesses as business records prepared and kept in the regular course of business. On appeal, *Rawlins* and *Meekins* challenged the admission of those reports as a violation of their Sixth Amendment right of confrontation. The Court of Appeals held that the DNA report in *Meekins* was not "testimonial" within the definition of *Crawford* because it shed no light on the guilt of the accused. By contrast, The Court held that the fingerprint report in *Rawlins* was "testimonial" since it was inherently accusatory and offered to prove an essential element of the crimes charged. The error in *Rawlins* was nevertheless found to be harmless beyond a reasonable doubt.

In *People v. Donnie Simmons*, 10 N.Y. 3d 946 (decided July 1, 2008), the defendant sought dismissal of an indictment on the grounds that his right to testify before the grand jury had been violated. *Simmons* was held on bail following his arraignment in the criminal court on a misdemeanor charge where he was represented by an attorney from the misdemeanor panel of the Assigned Counsel Plan. At his next court appearance, the prosecutor notified him and his attorney of his intent to present the case to a grand jury. However, his attorney failed to appear for the scheduled grand jury appearance and *Simmons* was not produced for that proceeding. In support of the motion to dismiss filed by his new attorney, *Simmons* argued that his first attorney had constructively abandoned him at a critical stage of the prosecution. The Court of Appeals disagreed, holding that the failure of defense counsel to facilitate defendant's testimony before the grand jury did not amount to a denial of his right to effective assistance of counsel since there was no showing that the outcome of the grand jury proceeding would have been different if he had testified.

In *People v. Jason Naradzay*, N.Y.3d (decided

Continued On Page 12

New Amendments to Section 3420 of the Insurance Law Relating to Late Notice to Insurers and Disclaimers of Coverage

BY MARTIN SCHULMAN, ESQ.*

Martin Schulman, Esq.

On January 17, 2009 a change in the Insurance Law took effect that substantially benefits both insured and injured parties. As of that date amendments to Section 3420 of the Law mandate that an insurer may not disclaim coverage based on "late notice" unless it suffers material prejudice as a result of the delay. In conjunction with the change, Sec. 3001 of the CPLR was also amended to allow injured parties to maintain Declaratory Judgment actions against an insurer on the issue of late notice.

Background

Prior to the change, signed into law by Governor Patterson in July, 2008, if an insured failed to notify its insurer of an accident in a timely manner, the insurer was able to disclaim coverage whether or not it was prejudiced by the delay.

New York was one of only a few states that adhered to the "no prejudice" rule and it was rigidly enforced by the Court of Appeals. Delays in giving notice of an accident or an injury to an insurer, even where such delays were innocent or the result of honest misunderstandings on the part of the insured often resulted in a disclaimer by the insurer and its refusal to either defend or indemnify under an insurance policy.

A concise statement of the Court's position was given in 2005 by Judge Smith in Argo Corp. v. Greater N.Y. Mutual Insurance Co., 4 NY3d 332. He wrote:

"A liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule. Argo's delay was unreasonable as a matter of law and thus, its failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of lawsuit."

Continued On Page 18

CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

David H. Rosen, Esq.

Arbitration

It is basic to the determination of arbitration issues that whether a contract to arbitrate has in fact been made is a matter to be determined by the court. Where the parties have agreed to arbitration, and one party demands arbitration of a dispute, the service of the demand triggers a short limitations period of twenty days, during which the responding party must make application to the court for a stay of arbitration or be held to have waived any objection to the arbitration based upon the demanding party's lack of compliance, or time limitations or even that the dispute is within the arbitration agreement. An exception to this strict rule applies where the parties [2] never in fact agreed to arbitrate. In such a case, the Court of Appeals has previously held in *Matter of Matarasso* that the twenty-day limitations period does not apply.[3]

In *Matter of Fiveco, Inc. v Haber*, the Court of Appeals considered whether the [4] *Matarasso* rule applies so as to allow a late petition to stay arbitration, where the contract has expired. The Court found the *Matarasso* rule to be inapplicable, thus disallowing the late petition to stay arbitration and directing the parties to arbitrate.

The contract involved the installation and maintenance of music and game machines in petitioner's bar. The contract contained a broad arbitration clause, and was to last for five years, with a five-year extension if certain payments were made by the respondent vendor to petitioner. A payment was made, but petitioner claimed that it was not one which would trigger the five year extension. Claiming that the contract had expired, petitioner demanded that respondent remove the machines from its premises, which the respondent did. Respondent then served a demand for arbitration, alleging that the payment did extend the contract for the additional five years, and that petitioner had breached the contract by demanding removal of the machines.

More that three months later, petitioner commenced the proceeding pursuant to CPLR Article

Continued On Page 14

photo by Robert Nieter

INSIDE THIS ISSUE

THE DOCKET . . .

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

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

2009 SPRING CLE Seminar & Event Listing

February 2009

Monday, February 23	Stated Meeting - Small Firm & Solo Practitioners
Thursday, February 26	Psychological Issues Underlying Lawsuits (rescheduled from Nov 08)

March 2009

Wednesday, March 4	Court Evaluator Training
Thursday, March 12	How to Obtain Court Appointments
Wednesday, March 18	CPLR & Evidence Update
Monday, March 23	Past Presidents & Golden Jubilarians Night

April 2009

Wednesday, April 1	Equitable Distribution Update
Thursday, April 2	Ethics Seminar
Tuesday, April 7	Bankruptcy Seminar - **TENTATIVE**
Monday, April 20	Judiciary Night
Tuesday, April 21	Guardianship Annual Accounting - **TENTATIVE**
Wednesday, April 22	Selection of a Jury
Thursday, April 23	Basic Criminal Law Seminar – Part 1
Thursday, April 30	Basic Criminal Law Seminar – Part 2

May 2009

Thursday, May 7	Annual Dinner & Installation of Officers

CLE Dates to be Announced

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

NEW MEMBERS

Rory Alarcon	Damien Bosco	John Paul Mixon
Musa Ali	Wynter Vincent Galindez	Abel Luc Pierre
Christopher Michael Arzberger	Alexander Hakopian	Mark I. Schreck
Cindy Helene Barrios	Brendan Hennessey	Tiberiu Weisz
	Kimberley Anne Lazar	Jean C. Wesh

NECROLOGY

Vincent P. DiStephan

Directory Correction

Due to a technical glitch in the production of the 2009 Annual Directory to the Queens County Bar Association, some addresses in the letters "D", "E" and "O" were misaligned from their corresponding names. Despite the efforts on part of the publisher and the Bar Association, the error was not caught until after the book was printed and distributed.

An insert will appear in the March edition that can be slipped into the existing directory, replacing the pages in question. We apologize for the error.

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

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

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

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

Queens County Bar Association

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,

STEVEN S. ORLOW
President

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President's Message

Changes Are Coming

Word is getting around that changes are coming. Changes that will effect the way each of us practices in our courts. These changes will affect our use of technology and our appearances in court. It will undoubtedly impact the allocation of our law office resources including personnel, finances and, perhaps most significantly, use of our time.

Becoming president, I committed doing what I could to alleviate the burdens on the small firm and solo practitioner which represents the vast majority of our Association's members. This approach anticipated changes in our court procedures, many of which are now being contemplated.

Steven Orlow

The truly crucial issue with which we are now faced is whether the changes we as practitioners contemplate will be either imposed upon us, perhaps in a form not of our choosing, or will we have the opportunity to influence the nature and extent of changes we believe would be most beneficial.

Numerous recommendations, already extant by virtue of the Castellano Commission Report solicited by Chief Judge Kay, include significant changes to preliminary conferences, (such as eliminating many appearances), greater institutionalization of summary jury trials, greater unification of court rules, increased access to court files on the internet, greater use of faxing (such as courts providing copies of signed orders) and the increased use of filing by electronic means.

It is not only whether or not suggestions such as these should be implemented but, if implemented, what form should such implementation take place.

So this is an invitation to all our Queens County Bar Association members. If ever you wanted to express yourself regarding some court practice or procedure you found annoying or unnecessary, or have a suggestion which you think would make your life as a litigator easier, this is your opportunity to speak up.

It is our profession, it is our lives, so let's not yield the shape it will take to others.

Stated Meeting
Monday, February 23, 2009
Queens County Bar Association

A Tribute to Hon. Thomas V. Polizzi

BY: PETER LANE, ESQ.*

The loss of Hon. Thomas V. Polizzi on December 20, 2008 after a battle with esophageal cancer is something no one could have imagined a short time ago. He was a significant part of many people's lives in many varied ways. Since his passing people have talked about their thoughts and memories of him. I'm told stories that convey the central theme that he was a well-trusted, charitable and kindly inspiring man, intellectually, emotionally and otherwise; and a very good and loyal friend. He was all those things to me. His passing leaves an unsettled feeling, as if suddenly there were several missing planks underfoot on a pier way out on the water.

However, unsettled feelings give way to joyous thoughts when one turns the mind to memories of this good man. We all have our own moments and memories of Hon. Thomas V. Polizzi, and from endlessly varied vantage points. But like spectators in the same theater, we all saw essentially the same fantastic show. Let me share some memories of Hon. Thomas V. Polizzi with you and give you a sense of his character.

Personal Life

Hon. Thomas V. Polizzi, known as Judge Polizzi to the legal community, or "Tom" to his many friends, was born to hard-working Sicilian immigrants here in New York City and lived in an old-fashioned railroad tenement housing most of his youth. He played stick-ball in the streets, rode the subways, and obtained a college education at City University of New York. After graduating St. John's Law School, he left New York City to serve in the United States Army during the Korean War, being stationed in Arkansas. Upon his return he married his wife, Palma, with whom he spent his 50th wedding anniversary this past November. Tom and Palma moved from Jackson Heights to Flushing where they raised two children, Thomas and Carol; they have two surviving grandchildren.

He matured into a man with an outsized character, a large and generous heart and an active, vigorous mind that he put to use with a wit and warmth that naturally attracted people toward him. He employed his caring heart and working mind to faithfully care for other people around him throughout his life. He always put his family first, and if you knew him you knew he cherished his family more than anything on this Earth. He cared similarly for his friends, and he had a special place in his heart for children. He kept a fresh jar of lollipops for children; he loved them very much. He was a passionate man too, who loved his Faith, his Sicilian heritage, his friends and yes, the Law.

Peter Lane Esq.

The Law and Respect for Lawyers

Judge Polizzi had a tremendous and abiding respect for lawyers, and he encouraged trial lawyers to be their best. He felt badly whenever he heard that a judge had yelled at or demeaned a lawyer. He would talk about how those situations could have been handled more tactfully. In the afternoon, he would talk with his staff about his handling of the lawyers and the issues, and question whether he handled them carefully, thoughtfully and respectfully enough. He was a Judge who cared about his cases, and the lawyers who appeared before him. This is how he earned respect.

His respect for lawyers was firmly grounded in his experience as a practicing lawyer for over 20 years here in Queens, before becoming law secretary to Hon. Lester Holtzman, Hon. Frank O'Connor, and Hon. Joan-Marie Durante, and before becoming a Supreme Court Justice. He knew how hard it was for neighborhood lawyers to earn a living, particularly if they had a family to sustain. He was conscientious about forging opportunity and experience for the greater community of Queens lawyers, and his enduring relationship with Queens lawyers is evidenced by his membership of over 50 years with the Queens County Bar Association and his roles as President of the Columbian Lawyers Association and President and Judicial Moderator of the Catholic Lawyers Guild.

On the subject of lawyers, he always liked them to be well-organized and prepared. He had high standards for that, as he himself was a well-organized and prepared man. He was not rigid or castigatory with lawyers when they were unprepared, and was always patient while guiding them through the trial process. His patience bore him a unique quality at being serendipitous. Such a quality favors a prepared mind that has the faculty to find facts and issues that are not looked for, and then to discover something new in the process. He would discuss the facts and the issues with the lawyers, always trying to learn something and find a solution. I have a note he wrote me saying: "The most frustrating part of being a good lawyer is putting up with those lawyers and judges who think they alone know the Law and there is nothing to discuss, not realizing that the Law is flexible and not sacrosanct."

His organized and flexible mind, together with his experience as a practicing attorney, was enhanced by a considerable knowledge of the Law. He could quickly synthesize facts and issues and analyze their relationship to the Law, and then convey his analysis clearly to trial attorneys, often with a disarming sense of humor. This accounted for his exceptional ability to settle complex civil actions, for which the trial attorneys always seemed appreciative.

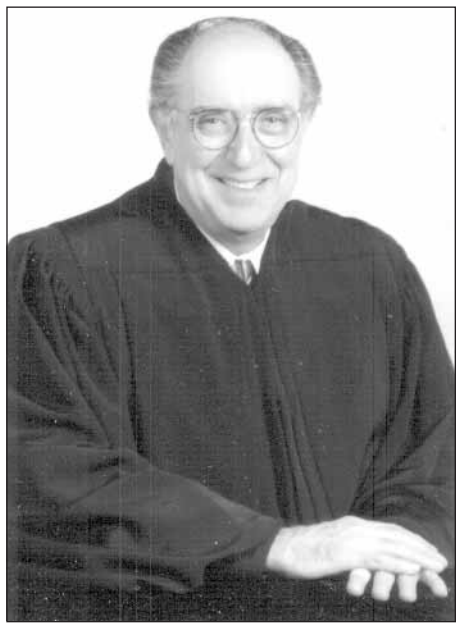
Sense of Honor, Sense of Humor

Judge Polizzi was also the sort of man who valued his independence and naturally maintained his integrity in his dealings with people. He never forgot a debt, and would not let others take advantage of him, unless it was at the expense of humor. In this way, he was very modest.

He loved to tell jokes, and then blush. Corny jokes, religious jokes, risky jokes, jokes that would appear immoral at first, but with the wit and sarcasm he employed so effortlessly, so brilliantly, they were nothing short of phenomenal.

His delivery was interesting: I would describe it as laxly emotive, starting with mirth or a chuckle, building with mimic and gestures, and ending with a poignant guffaw as he, rosy-faced, gleaned a smile in the warmth of his absurd or shameful subject. Speech for Judge Polizzi was gracefully punctuated by gestures, pauses, and casual runs of his one hand to his tie or his wrist, or both hands over the heart. He had the vocal style of a guy who had a lot to say, and his words kept coming and coming.

On the subject of talking, he was an excellent conversationalist. But did you know he could carry on multiple conversations at once? He'd have people in front of him, a staff member to the side of him, someone on the telephone, someone waiting on the telephone…he loved that telephone. Sometimes while he was in the midst of multiple conversations, I would be six paces away from him trying unsuccessfully to get his attention on something important. Since he appeared overwhelmed, I would walk into the next room and call him on the telephone. He was sure to pick up that telephone…and I could get his attention that way. We always had a laugh about that.



Hon. Thomas V. Polizzi

Charitable Heart

Judge Polizzi had a kind, generous and charitable heart. His benevolent munificence was apparent when he gave you his time, advice, knowledge and support. He listened to you, and it did not matter who you were: a judge, an attorney, an intern, or an old friend come to visit. I can't tell you how many times friends would call and say "Peter, can I talk to Tom about something personal?" Do you remember 'Tom' saying to you: "Here's what you should do…", or "I've got an idea…."

Once he received a call from a dying man whose wedding plans were to be ruined by his imminent death. The groom had been unsuccessful in finding someone to perform the marriage on an emergency basis. Judge Polizzi made the necessary arrangements and was at the groom's bedside with the bride that evening to perform the marriage. The man died the next day. Judge Polizzi told me with tears in his eyes that "the groom and his bride were so happy together."

A very obvious extension of his generosity was his and Palma's hospitality

———————Continued On Page 7

Judge Lippman Begins Service as New Chief Judge of the New York Court of Appeals

BY SPIROS TSIMBINOS

On January 14, 2009, Governor Paterson announced that he had selected Jonathan Lippman as his nominee to be Chief Judge of the New York Court of Appeals. In late January, the State Senate confirmed Judge Lippman's nomination, and he assumed his seat on the Court of Appeals during the month of February. Judge Lippman has a long and distinguished career of service within the judicial system. He served as Chief Administrative Judge of the New York Unified Court System for over 11 years, and most recently was the Presiding Justice of the Appellate Division, First Department. Prior to his selection to serve on the Appellate Division, he was a Supreme Court Justice serving in Westchester County.

Judge Lippman is a graduate of New York University School of Law, and has been a long time resident of New York City. He is married with two children. He was selected from a list of seven nominees presented to the Governor to fill the position recently vacated by Chief Judge Judith Kaye, who retired on December 31, 2008. Judge Lippman has reached 64 years of age and will be able to serve as Chief Judge of the New York Court of Appeals for a little more than six and a half years, to wit, December 31, 2015, when he reaches the mandatory retirement age. Judge Lippman is the first Chief Judge not selected from the New York Court of Appeals itself in more than 100 years.

Judge Lippman is well known for his administrative skills, and it was recently reported, as he was concluding his two-year tenure on the Appellate Division, that the backlog of that Court had been dramatically decreased, and that cases were being heard and decided in a more expeditious manner. Governor Paterson, in making his selection of Judge Lippman, praised the Judge's qualifications and character, and stated that he would make an outstanding Chief Judge of the Court.

It had been widely reported that Judge Lippman and Judge Jones, who was already sitting on the New York Court of Appeals, were the leading candidates for selection of Chief Judge. Evidently, because of the high quality of the candidates who were presented to him, and the difficult decision which he had to make, Governor Paterson waited almost to the last day of the required time period to announce his selection. The choice of Judge Lippman was well received within the legal community and we are certain that he will make an outstanding contribution to the Court of Appeals and to the New York State Court System. Judge Lippman is well known to our Bar Association having appeared at many of our programs and functions. We congratulate Judge Lippman on his appointment and wish him all the very best.

Pretrial Advocacy: An Ethical Checklist — Part I

BY GERALD LEBOVITS AND JOSEPH CAPASSO

Professionals use checklists to ensure consistency and completeness in carrying out tasks. Checklists are useful memory aides when multi-tasking under stress to finish a project. Commercial airline pilots use checklists during each phase of flight to ensure that they configure the aircraft for engine start, taxi, and take-off. Pilots also rely on checklists so that they do not forget routine tasks like deploying the landing gear during an in-flight emergency.

Checklists are equally useful in the legal profession. The phases of pretrial litigation include chaotic procedures that require expert multi-tasking. Using an ethical checklist will save the attorney from a "gear-up" landing.

This article sets forth an ethical checklist that highlights important provisions of the Federal Rules of Civil Procedure (F.R.C.P.), the New York Civil Practice Law and Rules (C.P.L.R.), the American Bar Association (ABA) Model Rules of Professional Conduct, the 2009 New York Rules of Professional Conduct,[1] and the New York State Standards of Civility.[2] Attorneys must consider these provisions from the initial prospective-client interview through the pleading, discovery, and motion stages of pretrial negotiation and litigation. All references in this article to the New York Rules of Professional Conduct are to the new Rules, which the four judicial departments of the Appellate Division approved on December 16, 2008, and which will take effect on April 1, 2009.[3]

A. Ethical Considerations During the Initial Client Interview.

Client interviews are an important first step in pretrial litigation. During the interview, information flows rapidly between attorney and client. The attorney must make quick decisions, ask follow-up questions to elicit more facts, and be mindful of numerous ethical situations that might arise. With a checklist in hand, the prudent attorney will avoid many hazardous ethical dilemmas. Initially, the attorney must decide whether representing the client is morally correct. The attorney must then guard against shaping the client's factual narrative to fit a legal theory and helping the client commit illegal conduct. During the initial interview or soon thereafter, the attorney should define the scope of the representation and fee arrangement.

Does the client have a legal and moral right to the relief requested?

The first item on every ethical checklist involves a threshold moral determination. Abraham Lincoln once told a prospective client: "Yes, . . . we can doubtless gain your case for you; . . . we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you."[4] Lincoln continued: "You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you try your hand at making six hundred dollars in some other way."[5]

An attorney needs facts to make this initial moral decision. The attorney must determine the best way to secure these facts from the client. Attorneys should learn the entire story, from the client and other sources, while allowing the client to present the facts undisturbed. Attorneys who do not actively listen or who fail to facilitate full client communication risk embarking on litigation without all the relevant facts. Attorneys who knowingly ignore, or decide they do not want to know, the facts place themselves in dangerous ethical situations. The next item on our ethical checklist, therefore, is to use care developing the facts underlying a case.

Do not mold the client's factual narrative to fit a legal theory.

An attorney's efforts to structure a client's version of the facts can cross the line from poor interviewing to violating ethical norms. Robert Traver illustrated this principle in *Anatomy of a Murder*.[6] The defense attorney lectured his prospective client, Lieutenant Manion, on the legal defenses to first-degree murder, trying to obtain facts to support Manion's only plausible defense. The attorney reflected: "It had been obvious to me . . . that insanity was the best, if not the only, legal defense the man had. And here I had just slammed shut every other escape hatch . . . ."[7]

The attorney told Manion that persons acquitted of murder due to insanity must spend time in a mental hospital. The law required this to discourage phony pleas. In explaining the law in a precise sequence, the attorney led his client to the insanity defense but stopped just short of asking him whether he was insane when he committed the murder. Instead, "[t]he lecture was about over. The rest was up to the stu-

Continued On Page 13

Gerald Lebovits

Joseph Capasso

Profile Of Judge Carmen R. Velasquez

Judge Velasquez is quite disarming. Nothing about her is exactly what it appears at first blush. When you sit down with the Judge she is so relaxed, so charming and so unpretentious that you feel as though you are interviewing your next door neighbor, a nice lady with children who is a stay at home Mom who bakes cookies. Nothing could be further from the fact.

The Judge is an immigrant from Ecuador and, accordingly, speaks with a light Spanish accent. She looks you in the eye and responds fully and quite candidly to every question posited … but she is so down to earth that you are immediately placed in a relaxed mode yourself and what began as a ritualized journalistic interview process evolved into a wonderful conversation with a friend.

Her real story is the female equivalent of Horatio Alger (for you old timers who even know who Horatio Alger was). Coming from a home with very modest income, she had to fight prejudice at every level to achieve even a college education, let alone a legal one. Within her culture, women of her era were encouraged to become secretaries or nurses, but certainly not to expend the years and money required to achieve a professional degree. However, her dreams of becoming a lawyer were strong enough to survive all attempts to deprecate that ambition. She graduated from Long Island City H.S., John Jay College of Criminal Justice and eventually attended and completed her legal education at Temple Law School.

And the Judge did it the "old fashioned" way, working her way through college and then obtaining a full scholarship for her legal degree as the result of high scholastic achievement and personal dedication to her professional goals. Of course, she did receive her Juris Doctor degree. Following graduation she gained employment as an Assistant District Attorney in the Bronx. After earning her foundation legal experience there she became a Deputy Advocate, as it is called, with the Legal Affairs Division of the N.Y.C. Sanitation Department. In 1991 she left government service and entered private practice, taking on the heavy weight of a solo practice, which, as a single Mom, was no mean feat. She concentrated her practice in the fields of criminal defense, family law and immigration, doing what she knew best and helping her "constituents" at the same time.

Worthy of note, this single parent with a developing solo law practice found the time to participate in meaningful professional endeavors that most of us don't seem to manage to participate in. She was one of the founding members of the Latino Lawyers Association … the first bar association for attorneys of Hispanic descent in our county … and rose to the presidency of that organization. Recognized both for her legal accomplishments and her efforts to assist the local Spanish community, she became the President of the Hispanic National Bar Association – New York Region, is the Chair of the Alumni Association of the Puerto Rican Legal Defense Fund, the Treasurer of the Queens Legal Services Corporation, a board member of the Latin American Cultural Center, the La Guardia Community College Foundation and served as a board member of our own Queens County Bar Association. Whew! And those are only a small portion of the associations she has participated in over the years.

This legal dynamo has been the recipient of numerous awards for her contributions to her community and the legal profession, too numerous to mention. She was personally recognized by El Diario, the Latin American Cultural Center, the Corona-Elmhurst Center for Development to name just a few. She was perhaps the president of Latino Lawyers who did the most to launch that organization and to gain national recognition for it. Latino Lawyers now has hundreds of members and hosts an annual dinner at Terrace at the Park to rival our own.

Hon. Carmen Velasquez

On a more personal note, I am aware of the many pro-bono representations which she has taken on for members of her local community who were simply deserving folks with a legal problem but without the money to pay for a lawyer. Carmen Velasquez always seemed to find time for them. She has tried murder cases and D.W.I.s, and everything in between. From our own perspective, it is such a positive thing for a judge to have had significant experience as a practicing attorney. She knows our problems; she was a single practitioner who was obligated to appear in more than one courthouse on the same day, understands about difficult clients and scheduling conflicts which occur merely because you forgot to bring your diary with you to court. Her election to the Civil Court of Queens County is something to be celebrated … a Judge who was a real lawyer. Personally, I can't wait for her to come over to Criminal Court…

— STEPHEN J. SINGER

THE CULTURE CORNER

BY HOWARD L. WIEDER

BLACK HISTORY MONTH is celebrated in the United States in February. There could not be a better time for the world premiere of veteran African-American playwright **LESLIE LEE's** new masterpiece drama ***"THE BOOK OF LAMBERT,"*** to be presented at the prestigious and esteemed **LA MAMA, EXPERIMENTAL THEATRE CLUB** ("**LA MAMA**" or "**LA MAMA, E.T.C.**") at 74A, East 4th Street, in Manhattan's East Village. **LESLIE LEE'S** engaging and absorbing psychological drama, directed by **CYNDY A. MARION**, occurs on Friday, February 13, 2009 and runs for twelve performances through March 1, 2009.

The Spring 2009 program of the **92ND STREET Y** is phenomenal. The **MET OPERA** has tickets left for Cycle 1 of Wagner's *RING*, so please do not wait for the last minute to order your tickets, since Cycles 2 and 3 are already sold out.

"THE BOOK OF LAMBERT"

The world premiere of *"THE BOOK OF LAMBERT"* will have begun its momentous run by the time you read this paper. Performed on the stage of the prestigious La Mama Experimental Theatre Club in Manhattan's East Village, ***"THE BOOK OF LAMBERT"*** is by Obie-winner and Tony-nominee playwright **LESLIE LEE** and is directed by **CYNDY A. MARION. *"THE BOOK OF LAMBERT"*** features: **CLINTON FAULKNER, JORESA BLOUNT, SADRINA JOHNSON, HEATHER MASSIE, GLORIA SAUVÉ, ARTHUR FRENCH, OMRAE D. SMITH,** and **HOWARD L. WIEDER.**

Performances run from February 13-March 1, 2009, at LA MAMA, EXPERIMENTAL THEATER CLUB, First Floor Theater, 74A East 4th St. (between 2nd Ave. & Bowery), AS FOLLOWS: Thurs.-Sat. at 7:30 P.M./Sun. at 2:00 P.M., with an additional performance: Wed. Feb 18th at 7:30 P.M. There are 12 performances for ***"THE BOOK OF LAMBERT"*****: Friday, Feb. 13, at 7:30 P.M.; Saturday, Feb. 14, at 7:30 PM; Sunday, Feb. 15, at 2:00 P.M.; Wednesday, Feb. 18, at 7:30 P.M.; Thursday, Feb. 19, at 7:30 P.M.; Friday, Feb. 20, at 7:30 P.M.; Saturday, Feb. 21, at 7:30 P.M.; Sunday, Feb. 22, at 2:00 P.M.; Thursday, Feb. 26, at 7:30 P.M.; Friday, Feb. 27, at 7:30 P.M.; Saturday, Feb. 28, at 7:30 P.M.; and the closing matinee performance on Sunday, March 1, at 2:00 P.M.**

CYNDY A. MARION is the Director of *THE BOOK OF LAMBERT*. CYNDY A. MARION directed the world premiere of **LESLIE LEE's** *MINA* at **LA MAMA, E.T.C.**, in November, 2007. **CYNDY A. MARION** is the Producing Artistic Director of The White Horse Theater Company, [web site is www.whitehorsetheater.com], for which she has directed: *Small Craft Warnings, In the Bar of a Tokyo Hotel*, *Buried Child*, *The Late Henry Moss*, *States of Shock*, *a Lie of the Mind*, *True West*, and a Workshop production of *Half*.

Howard L. Wieder

CYNDY A. MARION's direction has received great press acclaim, and her direction of "***THE BOOK OF LAMBERT***" is gripping as she contends with a setting of an abandoned subway platform and several "fight" sequences with stage guns that require ammunition. Her other directing credits include: *PB&J* (NYC International Fringe Festival), *La Turista* and *Red Cross* (Michael Chekhov Theatre Co.), *Twister with an Octopus* and *Arthur Murray Taught Me Dancing in a Hurry* (The Puerto Rican Traveling Theatre), *Fool for Love* and *Mud* (Brooklyn College), *Last Train To Nibroc* (American Theatre of Actors), *12 Angry Men* and *Fighting The Gorilla* (Riant Theatre), *The Mandala* (The White Heron Inc.), and many readings of new plays for The White Horse Theater Company, La MaMa E.T.C., New Dramatists, The Players, and PRTT.

CYNDY A. MARION holds an M.F.A. in Directing from Brooklyn College and has trained with The SITI Co., La MaMa Umbria, Fordham, T. Schreiber Studio, The Acting Studio Inc., and NYU. **MS. MARION** is the 2001 recipient of the Brooklyn College Joel Zwick Scholarship in directing and one of nytheatre.com's "People of The Year for 2007." **CYNDY A. MARION** is a member of The Players and The Society of Stage Directors & Choreographers.

Having been given the privilege of working under the direction of **CYNDY A. MARION,** I now understand why so many producers entrust their productions and investments and playwrights their new works to her professional directorial talents. A good director has the challenging role of: examining carefully the text of a play and working with a playwright, in the case of a world premiere of a play, as in **"THE BOOK OF LAMBERT,"** to work out kinks in the text as the characters start to take life from the printed page; co-coordinating and organizing a top-notch technical crew; planning the blocking or staging of every scene of the play; entrusting and delegating to a carefully chosen and auditioned cast and crew to come up with interpretations and solutions without micro-managing; and rehearsing, motivating, and challenging a group of creative actors to give their finest performances without being brutal -- and to do all these tasks within the framework of a rigorously enforced Actor's Equity union schedule, applicable also to Actor's Equity showcase productions, that permits rehearsals only for set times and hours. **CYNDY A. MARION** adroitly handles each of the foregoing challenges.

A recent rehearsal with **CYNDY A. MARION** reminded me of the great craft of stage direction. Since my first scene in the play should tell the audience a lot about my character's delusional mental state, at the rehearsal of that scene, **MS. MARION** politely and patiently asked to repeat my first opening scene a dozen times until I delivered the proper pacing of my conversation, tempo, and rhythm of the lines, and careful, meticulous stage blocking. Without any frustration, quite the contrary -- a ready willingness to submit to the process -- I repeated the scene, knowing that, by doing so, I was becoming a genuine actor, trying to capture reality. I am lucky to have a director of such talent, skill, and nurturing.

GLORIA SAUVÉ, a member of Actors' Equity Association, started her Theater, Film and TV career in Toronto Canada, and toured most of Canada. She has performed nationally and internationally. On Broadway, she appeared in "*Comin Uptown*." Off Broadway and Regional Theater credits for the accomplished and talented **GLORIA SAUVÉ** include: "*Having Our Says*" (as Bessie), "*Ma Rainey's Black Bottom*," "*Big River*," "*Not with A Bang,*" "*Stuck*," "*As The Crow Flies*," "*We Are Your Sisters,*" "*Starmites,*" "*Savage Wilds*," "*Changes*," "*Julius Caesar Set In Africa,*" "*The Medea,*" "*Jacques Brell Is Alive and Well Living in Paris*," "*Hair,*" "*Godspell,*" and "*Jesus Christ Superstar*." **GLORIA SAUVÉ** has appeared in principal roles in numerous feature films, including "*August The First*," "*Lean On Me*," *"Turk 182,"* "*The First Deadly Sin,*" "*The Guce Family,*" "*Middle Age Crazy,*" and "*Find The Lady*." **GLORIA SAUVÉ's** television credits include: "*Lipstick Jungle*", and several episodes of "*Law and Order*," "*Now and Again*,", the Emmy-winning HBO Mini Series "*The Corner*" [directed by Charles Dutton], "*Boycott*," "*The David Letterman Special*," "*The Ellen Burstyn Show*," "*Police Story*," "*Another World,*" and "*Texas*." **GLORIA SAUVÉ** can also be seen in numerous commercials and Advertising Prints and heard in many radio & TV voice-overs.

HEATHER MASSIE plays the recurring ghost of Virginia, whose memory haunts the title character Lambert. You will leave the theater remembering her stunning performance in **THE BOOK OF LAMBERT**. **HEATHER MASSIE** portrayed Mina Loy in **LESLIE LEE'S** Mina at La MaMa in 2007. **HEATHER MASSIE's** immense talent and awesome beauty has graced many stages in NYC, including The Lamb's Theatre, Theatre Row, Metropolitan Playhouse, and The New Acting Company. She also won the Jean Dalrymple Best Supporting Actress Award for *The Queen's Knight*. The beautiful **HEATHER MASSIE** is an actress of great accomplishment. An entire column could be devoted to her works to date. Her regional theater work includes performances at: Mill Mountain Theatre, Allenberry Playhouse, Flat Rock Playhouse, Phoenix Theatre, Arizona Jewish Theatre Company, Nearly Naked Theatre, Oklahoma Shakespearean Festival, Southwest Shakespeare, Southern Appalachian Repertory Theatre, California Theatre Center, and many others. Among **HEATHER MASSIE's** favorite roles are: Rosalind (*As You Like It*), Jill (*Equus*), Sorel Bliss (*Hay Fever*), Rachel (*Shmulnik's Waltz*), Toby (*Greyhounds*), Johnny (*Deadheading Roses*), Carrie (*Carousel*), Cinderella (*Into the Woods*), and Eliza (*My Fair Lady*). **HEATHER MASSIE**, a member of Actors' Equity Association, is also the Cultural Envoy to Zimbabwe for the 2008 Intwasa Arts Festival. Her recent films are: *Low Battery* and *Playing Doctor*.

SADRINA JOHNSON, also a member of Actors' Equity Association, is tickled pink to have moved from the mountains of Virginia (Big Stone Gap) to New York. In **"THE BOOK OF LAMBERT," SADRINA JOHNSON** plays the character of Priscilla, an oversexed exotic dancer, who lives under the subways. After only two weeks, **SADRINA JOHNSON** feels honored to be a part of this experience with such amazing talent, both on the stage and behind the scenes. Although the character of Priscilla in **"THE BOOK OF LAMBERT"** is a challenging character for **Sadrina,** she has come to love living under the A train 4+ days a week as you will see when you attend performances of **LESLIE LEE's** play**.** The talented, beautiful, and graceful **SADRINA JOHNSON's** most recent credits include being featured in the New Yorker magazine for her performance in Southern Promises at Performance Space 122, making meringue cookies on the HERE Arts Center stage in *Life After Bush* as our new First Lady, and as Polly Peachum (among other characters) in *The Beggar's Opera* with Peculiar Works.

JORESA BLOUNT, in **"THE BOOK OF LAMBERT,"** plays the pregnant Bonnie, who was disgraced at home and in her hometown of Galveston, Texas as a prostitute and thief. Bonnie, facing her pregnancy, of a baby she yearns having, realizes that she can make some important life choices. It is her struggle, and also reflected in the emotional climax between Lambert and Clancy that we ponder whether we can ever be let go freely of past crippling psychological shackles, and allowed a chance at psychological rebirth, just as Bonnie literally gives birth. Born and raised in North Carolina, **JORESA BLOUNT** enjoyed acting in both high school and college. After graduating from the University of North Carolina at Chapel Hill with a B.A. in Performance Studies, Joresa studied at William Esper and Ward Studio. **JORESA BLOUNT** has been seen in *Five Women Wearing the Same Dress* (Meredith), *The Woolgatherer* and the NY premiere of *And My Name Ain't Peaches*.

OMRAE SMITH is a versatile, beautiful, and talented actress who, in ***"THE BOOK OF LAMBERT"*** brings to the memories of character Irish cop Michael Clancy's repeated flashback memories of Miss Wambaugh, his African-American first grade teacher. The beautiful and talented **OMRAE SMITH** graduated from The School of Creative and Performing Arts in Kentucky, where she majored in Theatre and minored in Ballet/Tap. She has performed in several plays, including "*Noises Off*," "*Flyin' West*" and the Trinidadian play, "*The Ritual*" to name a few. **OMRAE SMITH** has also been in several independent films. This is her first experience with the prestigious **LA MAMA, E.T.C.**

ARTHUR FRENCH, who plays the 60+-year-old, blind Otto in ***"THE BOOK OF LAMBERT,"*** **is well known to Broadway theatergoers.** In fact, while rehearsing for ***"THE BOOK OF LAMBERT,"*** **ARTHUR FRENCH** was performing in "Medea." **MR. FRENCH** is a giant on Broadway**,** respected by actors, directors, and critics for the depth of his interpretations and the versatility of his roles. **ARTHUR FRENCH** recently appeared on Broadway in *Dividing The Estate*. His other Broadway credits include *Ain't Supposed to Die a Natural Death*. His acting roles and performances are numerous. Among his many Off-Broadway credits are *Two Trains Running,* where **ARTHUR FRENCH** *won the* Lucille Lortel Award for Outstanding Featured Actor. Significantly, **ARTHUR FRENCH** is a founding member of Negro Ensemble Company and received the highly regarded Obie Award for Sustained Excellence of Performance.

Continued On Page 8

A Tribute to Hon. Thomas V. Polizzi

Continued From Page 3

during the holidays. There was always an oversized fruit basket arriving, a luncheon with friends, personalized Christmas cards, and an impeccably wrapped present . . . invariably something thoughtful. His generosity always seemed an expression of genuine respect and affection, a desire to make sure everyone was comfortable and properly taken care of.

Care for the Sick

Judge Polizzi was perhaps at his best when he had someone to care for. If a family member or friend was sick he suffered with that person, and was there with all his heart, his mind and his soul. He cared for people in their dying days, such as his mother and his mother-in-law. He did everything possible for one grandchild whom was terribly sick, and he suffered with his family through the prolonged tribulation and death of this beloved grandson. He grieved with others when they suffered losses, and was there with advice and direction.

On a lighter note, his staff would joke with him that he was overly concerned about our own health. If one was home sick he would call every day with a sincere, if not earnest interest. But to all of us it felt great to get those calls.

A Self-Effacing and Modest Man

To some extent, Judge Polizzi could be self-effacing, and invite your laughter at him by presenting himself as something of an anachronism or a contradiction.

Although he was confident, talented and decisive as a Supreme Court Justice, he seemed without airs, flexible and well-nourished with humility. He had a strong personality which accompanied his mild and forgiving nature. Although he had a progressive outlook on modern-life issues, it seemed he would have preferred the good old days when life was hard in the tenement, and where the family rallied around each hard-earned meal.

There were interesting differences at work within the man that made you think. He was a cross between the Sicilian street-boy from New York and the Army man from Arkansas: enterprising but disciplined, vulnerable yet inventive and self-empowered, respectful of authority but always willing to question it.

Although a solid hard-working man who admired achievement in an old-fashioned sense, if he could bring Italian cooking along I could easily see him in the wild, open, old American West forging law and order out of the chaos that happens when Law becomes a matter of personal assertion that shifts with the winds.

Judge Polizzi would keep you thinking because of contrapositions he presented. One moment you saw this rugged, extraverted man with machismo, and the next moment he could display a humorous smile, modest, absolutely diffident and humble.

He may have appeared to you a contradiction with respect to his political ideas and affiliations. Once, as his law secretary, I remember getting a call from a reporter asking how he became a judge: "How could the Liberals and Conservatives endorse him, as well as the Democrats and Republicans?" Although as a rule I did not respond to such inquiries, this time I paused and said with a lilt of naiveté: "He was elected." He laughed about this for many years. I think he laughed at the folly wrought by his seemly contradictions. The truth about him, however, was simply that there was no contradiction: he valued meaningful and genuine relationships, he was reliable, trustworthy, loyal and honest to his friends, consistent and fair in the way he treated people, and his unique charisma attracted people toward him in a remarkable way.

Nonetheless, even his choice of sports teams would make you shake your head and say: "Tom, what the heck?" He attended Mets games but talked mainly about the Yankees with a fan's knowledge. But did you know he was a die-hard Red Sox fan? Yes! Not many knew this. Judge Polizzi was a Ted Williams and a Jimmy Stewart sort of guy crossed with George Carlin all wrapped up in the drama of a Marcello Mastroianni movie.

A Man of Faith

Judge Polizzi was a practicing Catholic who attended mass at St. Andrew Avellino parish in Flushing. He was a man of Faith, and he displayed great Faith in his last days. As a witness to his Faith, I suppose I might describe it as the courage to have hope: the courage to hope that through suffering he would receive God's mercy and grace, and the courage to hope for an abiding love and for an everlasting peace in his transition out of this world. He bore his suffering with great courage, and with a mind that was as sharp as ever.

With Faith, Judge Polizzi hoped for a better tomorrow for his family and his friends, and he eased the suffering in this world that he and others experienced. His Faith was an inspiration whenever the good Lord sent him another cross to bear, and he was particularly inspiring in his final days.

Let Us Honor His Memory

Perhaps the best way we can honor Hon. Thomas V. Polizzi's memory and regain some of what we have lost is to practice his virtues in our own lives—to emulate his charity, his love, his generosity, his hospitality, his respect for others, his endless good humor and his attitude to life—so as to create better and more interesting lives for ourselves and others. To do so would be a meaningful celebration and perpetuation of his life, and a way to pass on his spirit, his love of life.

There really is something to the saying that a man never dies until he is finally forgotten. And judging from the huge circle of friends he maintained, and from the endless stories and fond remembrances of him, it seems perhaps that we can derive some solace from the fact that Hon. Thomas V. Polizzi is extremely well-remembered—which is to say that he will live on in our minds and hearts —and, inevitably, our own lives—for a very long time. May the Good Lord have mercy on him now and forever.

*Peter Lane, Esq.
January 15, 2009
Requiescat in pace.

***About the Author:** Peter Lane, Esq. is a Court Attorney/Referee in Queens Surrogate Court. He was Hon. Thomas V. Polizzi's Law Secretary in Queens Supreme Court. Their affiliation dates back to the 1970's, when Peter attended St. Andrew Avellino School in Flushing, NY.*

Culture Corner

Continued From Page 6

CLINTON FAULKNER is the star of **"THE BOOK OF LAMBERT."** Clinton Faulkner attended Howard University and then later transferred to The American Academy of Dramatic Arts. Originally from Washington, D.C., **CLINTON FAULKNER** performed with various distinguished theaters in the Washington, D.C., area, including the Arena Stage, Studio Theater, and the Discovery Theater. Since being in New York City, **CLINTON FAULKNER** has been cast in two one-man shows, a sign of the immense talent and charisma of this dedicated actor. He performed Claude Brown's autobiographical "*Manchild in the Promised Land,*" regarding the author's tumultuous life, at the prestigious Abingdon Theater, directed by **WYN HANDMAN. CLINTON FAULKNER's** second one-man show was "*Ride 'em Cowboy*," describing the lives of black cowboys in the old west. His other stage credits include playing the role of Edmund in Shakespeare's "King Lear" -- good experience considering the amount of works of the Bard that **MR. FAULKNER's** character of Lambert quotes in "***THE BOOK OF LAMBERT***" -- and the character of Lebonne in the Drilling Company's production of "Honor." He has also performed in several independent films. There can be little doubt that **CLINTON FAULKNER** is Hollywood and Broadway-bound!

As Lambert, **CLINTON FAULKNER** plays an ex-college Professor of English. Lambert's recent experiences, especially a failed relationship has led him into this subterranean hole where he now lives and where he now emerges as the respected delusional leader of five other psychological misfits. Lambert, African-American, is stunned and fed up by the persistent delusional behavior of another inhabitant of the abandoned subway station, Michael Clancy, played by me. Lambert decides to embark upon curing the delusional Irish-American cop, despite differences in their race, age, and educational attainment. In the journey that ensues, Lambert and Clancy learn that they actually have a lot in common. As Lambert, **CLINTON FAULKNER** gives a memorable performance. His sweeping emotional power as the thoughtful, but distraught and delusional intellectual, immense vocal range, crisp articulation, and compelling portrayal will leave its marks on you.

I am delighted to be playing the character of delusional, Irish-American, former cop Michael Clancy. I made my professional acting debut last November as the diabolical *New York Times* award-winning journalist "Name Withheld on Advice of Counsel," actually based on Pulitzer Prize-winning journalist Jeff Gerth, in Tony-winning David Henry Hwang's *Yellow Face*. The critically and commercially successful revival of *"Yellow Face,"* at The Queens Theatre in the Park was directed by **DRAMA DESK NOMINEE SOFIA LANDON GEIER**.

LOVE, HALLIE FOUNDATION [www.lovehallie.org]

In the spirit of the life-affirming message of **LESLIE LEE's** beautiful play **"THE BOOK OF LAMBERT,"** I urge you to visit **www.lovehallie.org** to learn about the inspiring work that the **LOVE, HALLIE FOUNDATION** does to engage children in youth service. The charity is recognized by the IRS, and all contributions are tax-deductible. The great work of this charity that helps all people was featured by celebrity actress **OPRAH WINFREY** on TV's "***OPRAH!***"

The inspiration behind this website is **HALLIE KASSANDRA GEIER**, an energetic 11-year old who died in May 2004, after being accidentally struck by an SUV, while walking the family dog, near her home in Sunnyside, Queens, New York City. Characteristic of her beautiful soul, **HALLIE**, while lying in the street, before expiring, asked whether her dog Cherry survived [she did].

HALLIE KASSANDRA GEIER was such a force of life-brimming with optimism and love that her parents, **TED GEIER** and **SOFIA LANDON GEIER**, my director in "*Yellow Face,*" and her sisters, **MJ** and **NASI**, wanted her ideas, enthusiasm, and hope for peace to live on. They created the **LOVE, HALLIE FOUNDATION** so that others could continue to spread **HALLIE GEIER's** optimism through their good works. **HALLIE GEIER** loved expressing her thoughts and ideas in creative ways. She was passionate about everything she did and was dedicated to making the world a better place. She saved money from her allowance to help children with HIV/AIDS in Africa -- an issue she learned about in school. **HALLIE KASSANDRA GEIER** best demonstrates the spirit of **LESLIE LEE's** great new masterpiece, "***THE BOOK OF LAMBERT***," of persons reaching out to help other persons not of their race.

HALLIE KASSANDRA GEIER's many writings (she left behind more than 1,000 essays, poems, and stories) captured her positive spirit, her hopes, and her dreams. She wrote of her love and empathy for people, animals, and the natural world. Her notebooks overflow with drawings, poems, ideas, and dreams. Every page reveals a fertile mind and giving spirit that was eager to engage the world around her. A simple inscription in her kindergarten notebook became her call to action: "People, be nice to each other. Love, Hallie." ***Please visit and consider giving generously to www.lovehallie.org.***

THE 92ND STREET Y PRESENTS

The 92nd Street Y's **Distinguished Artists in Recital** series returns for another season on Thursday, February 26. The first concert welcomes violinist/violist **PINCHAS ZUKERMAN**, who is celebrating his 60th birthday with an exciting, globe-trotting 2008–09 season. Zukerman, who regularly appears at the Y with his ensemble of protégés, the Zukerman Chamber Players, will present an evening of Mozart, Shostakovich, Takemitsu, and Franck with his friend and musical colleague, pianist/composer **Marc Neikrug**. The duo has been performing together regularly since 1975, made numerous recordings, and has given performances in the world's great concert halls.

The program includes: **Mozart's Sonata for Violin and Piano in B-flat Major, K. 454**; **Shostakovich's** final work, the **Sonata for Viola and Piano, Op. 147; Takemitsu's poetic *From Far Beyond Chrysanthemums and November Fog* for Violin and Piano**; and **Franck's** enormously popular **Sonata for Violin and Piano in A Major**, composed as a wedding present for the famous Belgian violinist Eugène Ysaÿe in 1886.

PINCHAS ZUKERMAN has been a phenomenon for four decades. His musical genius, prodigious technique, exceptional artistic standards and devotion to younger generations of musicians who are inspired by his magnetism has been applauded worldwide. Equally respected as a violinist, violist, conductor, pedagogue and chamber musician, **PINCHAS ZUKERMAN** is a master of our time. **PINCHAS ZUKERMAN** turned 60 on July 16, 2008. He spends 10 weeks teaching in his role as Director of the Pinchas Zukerman Performance Program at the Manhattan School of Music, and as Artistic Director of the National Arts Centre Summer Music Institute in Ottawa, which includes the Young Artist Programme, Conductor's Programme and Composer's Programme. Currently in his 10th season as Music Director of the National Arts Centre Orchestra, **PINCHAS ZUKERMAN** is also Principal Guest Conductor of London's Royal Philharmonic Orchestra.

Acclaimed **FRENCH PIANIST HÉLÈNE GRIMAUD** brings her talents to the 92nd Street Y for the third concert of the Masters of the Keyboard series on **Saturday, February 28, 2009**. Known for her original, passionate, risk-taking performances, Grimaud will present a recital of her **riveting interpretations** of selections by **Johann Sebastian Bach, Ludwig von Beethoven's** Sonata No. 30 in E Major, Op. 109, and three transcriptions of **Bach** compositions by **Ferruccio Busoni, Franz Liszt,** and **Sergei Rachmaninoff**. The concert is inspired by her **LATEST CD, "*HÉLÈNE GRIMAUD | BACH*,"** released in October 2008, on the prestigious yellow Deutsche Grammaphon label.

Born in Aix en Provence, **HÉLÈNE GRIMAUD** was accepted into the Conservatoire National Supérieur de Musique in Paris at the age of thirteen. She began her international career in 1987 with performances at MIDEM in Cannes, La Roque d'Anthéron Piano Festival, and a concert with the Orchestre de Paris at the invitation of Daniel Barenboim. Since then, Grimaud has given numerous solo performances and made frequent appearances with many of the world's most important orchestras. At the French "Victoires de la Musique" she was nominated Soloist of the Year in 2000, and in January 2002 she was appointed an Officier dans l'ordre des Arts et des Lettres by the French Ministère de la Culture. She is one of the world's greatest pianists.

The Distinguished Artists in Recital series' second concert, Sunday, March 15, features the renowned **violinist NIKOLAJ ZNAIDER, pianist Saleem Abboud Ashkar,** and other musicians. Born in Denmark to Polish-Israeli parents, **NIKOLAJ ZNAIDER**, one of my favorite violinists, has worked with many of the world's top ensembles and soloists, drawing on an eclectic background and studies with Russian pedagogue Boris Kushnir. Saleem Abboud Ashkar, a young Palestinian-Israeli pianist who made his New York debut at Carnegie Hall at age 22, frequently performs with major Israeli orchestras and world-renown conductors.

The **series' final concert, Wednesday, April 22**, is one of two concerts dedicated to **Elliott Carter & Heinz Holliger: A Musical Friendship**. The **92ND STREET Y** is joining many institutions in celebrating Elliott Carter's 100th birthday, but it is taking **a unique approach by focusing on the long-time friendship and musical relationship between Carter and oboist/composer Heinz Holliger**. The program not only **celebrates Carter's 100th and Holliger's 70th birthdays**, but allows these two musicians to come together for a remarkable series highlighting their partnership. Holliger is considered one of the world's foremost oboists, but he rarely performs in the U.S., making this celebration all the more newsworthy. The April 22 schedule includes **five Carter chamber works along with Mozart's Adagio and Rondo for Harp, Flute, Oboe, Viola and Cello in C minor, K. 617 and Quartet for Oboe and Strings in F Major, K. 370**.

Acclaimed cellist Steven Isserlis wraps up his third season of family music concerts for ages 6 and older at the 92nd Street Y on **Sunday, March 1, 2009.** In the program **Musical Dreamer: The Life and Music of Schumann**, Isserlis's irresistible wit, contagious joy, and masterful artistry come together in an hour-long musical exploration.

Chamber Music at the Y's third program of the season (Tuesday, March 3 and Wednesday, March 4, 2009) brings together a group of celebrated musicians and personal friends: violinist **Jaime Laredo**, violist **Ida Kavafian**, cellist **Sharon Robinson**, double bassist **Kurt Muroki**, flutist **Tara Helen O'Connor**, oboist **Ariana Ghez**, clarinetist **Alexander Fiterstein**, horn player **David Jolley**, and bassoonist **Frank Morelli**. The ensemble will perform three serenades from central Europe, composed almost 50 years from each other: The earliest work, **Ludwig von Beethoven**'s sonorous **Serenade in D Major for Flute, Violin and Viola, Op. 25**; Hungarian composer **Ernö Dohnányi**'s **Serenade in C Major for Violin, Viola and Cello, Op. 10; and** Chris Nex's reconstruction of the original chamber version of **Johannes Brahms**'s rarely-performed **Serenade No. 1 in D Major for Winds and Strings, Op. 11**, composed in 1857–58.

Tickets may be purchased by calling 212.415.5500, visiting *www.92Y.org/concerts, or at the box office*. *The **92nd Street Y** is located at 1395 Lexington Avenue at 92nd Street*.

MET OPERA'S *RING* CYCLE

Don't miss your final opportunity to see Otto Schenk's landmark production of the world's greatest theatrical journey, Wagner's *Ring* cycle! Cycles 2 and 3 are sold out, but tickets are still available for Cycle 1; this Saturday matinee series, featuring James Morris, Johan Botha, Waltraud Meier, and Christine Brewer, is conducted by James Levine. See . **Performance dates for Cycle 1:** March 28 -- *DAS RHEINGOLD* (Saturday, 1:00 P.M.) April 11 -- *DIE WALKÜRE* (Saturday, 12:00 P.M.) April 18 -- *SIEGFRIED* (Saturday, 12:00 P.M.) April 25 -- *GÖTTERDÄMMERUNG* (Saturday, 12:00 P.M.)

***HOWARD L. WIEDER** is the writer of both **"THE CULTURE CORNER"** and the **"BOOKS AT THE BAR"** columns, appearing regularly in **THE QUEENS BAR BULLETIN,** and is **JUSTICE CHARLES J. MARKEY'S** Principal Law Clerk in IAS Part 32 of Supreme Court, Civil Term, in Long Island City, Queens County, New York.*

Queens Native Joins Armed Forces Inaugural Committee

WASHINGTON -- Colonel Leonard Livote recently joined the Armed Forces Inaugural Committee, which is preparing to support the 56th Presidential Inauguration on Jan. 20, 2009. AFIC is a joint service committee charged with coordinating all military ceremonial support for the inaugural period. As a joint committee, it includes members from all branches of the armed forces of the United States, including Reserve and National Guard components.

A 1971 graduate of Grover Cleveland High School in Ridgewood, New York, Colonel Livote is assigned to the special staff as the senior legal advisor. He is responsible for providing legal support to AFIC by coordinating all legal actions with Army General Counsel, the Office of the Judge Advocate General and the Office of the Staff Judge Advocate, Military District of Washington. Colonel Livote is a reserve member of the United States Army and has served for 24 years.

"I am honored to represent the deployed members of the military and participate in this historic Presidential Inauguration," said Colonel Livote.

Colonel Livote lives in Douglaston in the borough of Queens in New York City. In his civilian career, he is a court attorney/referee in New York State Supreme Court, Queens County. He earned his Bachelor's degree in 1975 at Queens College of the City University of New York, and his law degree at Western New England College in Springfield, Massachusetts.

The U.S. Armed Forces have participated in the inauguration of the President of the United States since April 30, 1789, when members of the U.S. Army, local militia units and Revolutionary War veterans escorted George Washington to his first inauguration ceremony at Federal Hall in New York City. Two hundred twenty years later, the participation of the armed forces continues to honor our commander in chief, recognize civilian control of the armed forces and celebrate democracy.

Participation by the armed forces traditionally includes musical units, marching bands, color guards, salute batteries and honor cordons. Soldiers, Marines, Sailors, Airmen and Coast Guardsmen assigned to AFIC also provide invaluable assistance to the Presidential Inaugural Committee, a not-for-profit, partisan organization representing the President-Elect, and the Joint Congressional Committee on Inauguration Ceremonies.

Colonel Leonard Livote greeting President Barack Obama

The Secretary of Defense has authorized nearly 750 service members to be assigned to AFIC by Inauguration Day to coordinate Department of Defense support in and around the District of Columbia. Historically, as many as 5,000 service members have participated in the celebration, both in view of the public and behind the scenes.

Colonel Livote's role in the 56th Presidential Inaugural is like that of any other essential military mission during peace or war. Just as our military men and women are showing their commitment to this country while deployed around the globe, participation of service members in this traditional event demonstrates our military's support to the nation's newly elected Commander-in-Chief.

Queens Bar Responds to Foreclosure Crisis

BY MARK WELIKY*

On December 15th over 250 attorneys attended a full day CLE seminar on foreclosure intervention at the Queens County Bar Association (QCBA). All of the attendees were volunteering to provide pro bono assistance to homeowners facing foreclosure. The seminar was co-sponsored by the New York State Bar Association (NYSBA), the Queens County Bar Association, the Brooklyn Bar Association and the Empire Justice Center. QCBA President Steven S. Orlow made welcoming remarks thanking the lawyers for attending the seminar and volunteering for this pro bono service. Gloria Herron-Arthur, Director of Pro Bono Affairs for the NYSBA also thanked those attending and promised that her organization would continue to give its full support in the continuing struggle to keep New York residents from losing their homes.

New York State legislation which became effective September 1, 2008 created a right to a court supervised foreclosure settlement conference for borrowers with subprime mortgages. However, most of these homeowners cannot afford to hire private counsel. Therefore, pro bono volunteers will represent many of these borrowers in the new foreclosure settlement conference process. It is hoped that with legal representation that there will be a greater chance at arriving at a loan modification with the lender thus keeping people in their homes.

Queens has been designated by the Office of Court Administration (OCA) as the pilot County for its foreclosure intervention initiative. QCBA's pro bono program, the Queens Volunteer Lawyers Project (QVLP) is partnering with other legal service providers and OCA in the pilot program. The Queens Foreclosure Pilot Screening Office, staffed by the Legal Aid Society and Legal Services for the Elderly, is consulting with Queens homeowners who are in foreclosure or who are afraid that they soon will be. The screening office is at Queens Civil Court, 89-17 Sutphin Boulevard, Jamaica, Room 160 and is open Wednesday evenings and Friday during the day. The result of this screening may be that the homeowner needs representation for a settlement conference. A QVLP volunteer lawyer will step in and provide free legal representation to the homeowner for the settlement conference. Volunteer lawyers will also assist in reviewing proposed loan modifications for these homeowners, assisting at the screening office and providing information to homeowners at Queens Supreme Court in Jamaica.

QVLP is funded in part by a grant from the IOLA Fund of the State of New York and is the recipient of a grant from the New York State Division of Housing and Community Renewal to help administer the foreclosure intervention program.

Pro bono volunteers are still needed for this foreclosure intervention initiative. Free training is available. Those interested in volunteering should contact QCBA/QVLP at (718) 291-4500, MWeliky@QCBA.org.

** Mark Weliky is QCBA Pro Bono Coordinator*

QUEENS FORECLOSURE CONFERENCE PROJECT

HALL OF FAME

Salvatore J. Acquista
Regina Alberty
M. Daniel Bach
Andrew J. Jaloza
Zhanna Kandel
Jeeyoung Kim
Marc C. Leavitt
Thomas McCloskey
Marc J. Monte
Irene Nwanyanwu
Dena Orenstein
Sukhbir Singh
Basilios Vassos

We applaud these attorneys who are providing pro bono representation for Queens homeowners facing foreclosure.*

*as of 1/26/09

Attendees to the Foreclosure Seminar.

PHOTO CORNER

Dealing With Residential Foreclosure Crisis Representing Homeowners In The Mandatory Settlement Conferences Monday, December 15, 2008.

More attendees to Foreclosure Seminar

April Newbauer-Moderator Attorney-in-Charge, Legal Aid Society, Queens Civil Division

Hon. Augustus Agate, Supreme Court Justice, Queens County

Jennifer Sinton, Staff Attorney - Foreclosure Prevention Project, South Brooklyn Legal Services

John G. Hall, Esq.-Law Firm of Hall & Hall, LLP, Staten Island

Kirsten Keefe - Senior Staff Attorney, Empire Justice Center

Photos by Walter Karling

COURT NOTES

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

Anthony G. Young (October 28, 2008)

The Grievance Committee for the 2nd and 11th Judicial Districts received a consent order of disbarment from the Superior Court of the State of North Carolina, Wake County, dated February 11, 2008, based upon the respondent's plea of guilty to conspiracy to commit mortgage fraud, in violation of 18 USC § 371, and mail fraud and aiding and abetting, in violation of 18 USC §1341. Upon the Grievance Committee's motion for reciprocal discipline, pursuant to 22 NYCRR § 691.3, the respondent was disbarred in New York.

Peter Scott Port (November 12, 2008)

On September 20, 2005, the respondent pleaded guilty in the United States District Court for the District of New Jersey (Greenaway, J.), to violating 18 USC §§ 1001 and 1002. During the plea allocution, the respondent admitted that between June 23, 2000, and October 19, 2000, he owned and operated Port Abstract Title Company in Garden City, and acted as closing agent for residential mortgages generated by the Neighborhood Mortgage Bank for New Jersey Properties. During that time, the respondent loaned money to Barry Fauntleroy, the owner and operator of EON Real Estate Investment Company, for the purchase of dilapidated homes to sell at a profit. At the respondent's direction, employees of Port Abstract prepared HUD-1 Real Estate Settlement forms that contained materially false information, which were submitted to HUD with the intent to defraud. Inasmuch as the Federal felony of making false statements to a Federal agency is essentially similar to the New York State felony of offering a false instrument for filing in the first degree, the respondent automatically ceased to be an attorney in New York upon his conviction.

Beth Mansfield Modica, admitted as Beth Mansfield Gardner (November 18, 2008)

On April 11, 2008, the respondent pleaded guilty in the County Court, Rockland County (Bartlett, J.) to rape in the third degree, a class E felony, and criminal sexual act in the third degree, a class E felony. As a result of her New York felony convictions, the respondent automatically ceased to be an attorney upon entry of a plea of guilty, pursuant to Judiciary Law § 90 (4) (a).

Diana J. Szochet

Leroy Evans, admitted as Leroy Winston Evans (November 25, 2008)

On November 26, 2003, the respondent, as Director of Foreign Students and the Designated School Official for Morris Brown College in Atlanta, Georgia, was convicted, in the United States District Court for the Northern District of Georgia, Atlanta Division, of conspiracy to obtain fraudulent student visas and induce aliens to unlawfully reside in the United States, in violation of 18 USC §§ 371 and 1546(a), and 8 USC § 1324(a)(1)(A)(iv) and (a)(1)(B)(i); obtaining fraudulent student visas, in violation of 18 USC § 1546(a); and inducing aliens to unlawfully reside in the United States, in violation of 8 USC §1324(a)(1)(A)(iv) and (a)(1)(B)(i). Inasmuch as the violation of 18 USC § 1546 is analogous to the New York felony of offering a false instrument for filing in the first degree, the respondent automatically ceased to be an attorney upon his conviction.

Floyd T. Ewing, admitted as Floyd Talmadge Ewing III (November 25, 2008)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges that he neglected legal matters entrusted to him; failed to communicate with clients; failed to abide by two orders issued by United States District Court Judge Dora Irizarry; and was found in civil contempt and sanctioned.

Michael George Feurtado (November 25, 2008)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges that he failed to adequately supervise a paralegal formerly in his employ; failed to tender escrow funds to a third party; and neglected an estate.

Scott S. Gale (November 25, 2008)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges that he failed to safeguard escrow funds that he was holding incident to a real estate transaction.

The Following Attorney Was Disbarred By Order of the Appellate Division, Third Judicial Department:

Michael H. Feinberg (December 4, 2008)

The respondent was charged with misconduct emanating from his service as Kings County Surrogate. Previously, the State Commission on Judicial Conduct issued a determination that the respondent should be removed from the bench, which determination was accepted by the Court of Appeals in 2005. Following issuance of an order declaring that no factual issues existed, and an opportunity for the respondent to be heard in mitigation, he was found guilty of conduct prejudicial to the administration of justice, which reflected adversely on his fitness as an attorney.

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

Michael J. Kaper, admitted as Michael Jonathan Kaper (November 14, 2008)

The respondent was suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest in that he, *inter alia*, failed to cooperate with the Grievance Committee for the Tenth Judicial District.

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

Louis B. Rosenthal (December 4, 2008)

The respondent was charged with misconduct emanating from his service as counsel to the public administrator of Kings County. Following issuance of an order declaring that no factual issues existed, and an opportunity for the respondent to be heard in mitigation, he was found guilty of charging and collecting excessive fees. He was suspended from the practice of law for a period of two years, effective December 24, 2008.

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

Eric B. Chalif (November 12, 2008)

The Grievance Committee for the Tenth Judicial District was notified that the Board of Bar Overseers of the Supreme Judicial Court of the Commonwealth of Massachusetts issued an order dated January 18, 2007, publicly reprimanding the respondent for failing to promptly deliver funds to a third party to which the third party was entitled; failing to adequately supervise his staff such that he was initially unaware of the receipt and deposit of an insurance check; and failing to maintain proper conciliation reports. 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 Attorney Was Publicly Censured By Order Of The Appellate Division, Third Judicial Department:

Steven H. Chepiga (December 4, 2008)

Continued On Page 13

Criminal Law: Cases

Continued From Page 1

November 24, 2008), the defendant challenged his conviction for attempted murder and attempted burglary, arguing that his intent to commit those crimes was equivocal and did not come dangerously near their commission in accordance with Penal Law § 110.00. In an angry response to the victim's refusal to continue their friendship, *Naradzay* put together a "to-do" list detailing a plan to break into her home and shoot her and her husband. Thereafter, he purchased a shotgun and borrowed a friend's vehicle to drive to the victim's home. On the night in question, armed with the shotgun, he drove to the community where the victim and her family resided. Unsure of the exact location of the victim's house, *Naradzay* walked around the vicinity but began thinking of killing himself instead. When a neighbor spotted him scurrying down a driveway, pulling the shotgun from beneath his coat, she called 911. As the police approached him, *Naradzay* pointed to where he had left the shotgun, a spot about 20 feet away from the driveway to the victim's home. The shotgun was then recovered along with the "to-do" note detailing his plan for the victim. The Court of Appeals rejected *Naradzay's* argument that his conduct did not come dangerously near burglary and murder, holding that a rational jury could have concluded that he crossed "the boundary where preparation ripens into punishable conduct" and that "there was no homicide here only because an observant motorist made a 911 call and law enforcement authorities responded promptly, cornering defendant before he could ... [perform] the next step on his 'to-do' list".

In *People v. Burton Jeffrey Hunter*, 11 N.Y. 3d 1 (decided June 12, 2008), the defendant was charged with rape and other related sex offenses. The victim claimed that after she accepted *Hunter's* invitation to watch a movie at his house, he forcibly raped and sodomized her. At trial, the prosecution presented evidence that the victim had made a prompt outcry to her friend and friend's mother. However, the prosecution did not reveal that the victim had recently accused another man of raping her in that man's home. Following his conviction, *Hunter* learned of the victim's other accusation and moved to vacate his conviction, arguing that the prosecution had violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court granted *Hunter's* motion but the Appellate Division reversed. In reversing the Appellate Division's decision and ordering a new trial, the Court of Appeals held that while the trial court could have excluded evidence about the victim's accusation against the other man, it also had discretion to allow it. Under those circumstances, there was a reasonable probability that the withheld evidence would have added doubt to the jury's view of the victim's allegations and that *Hunter* could therefore have been acquitted.

In *People v. Ruben Luciano*, 10 N.Y. 3d 499 (decided June 3, 2008), the trial judge rejected two of the peremptory challenges to prospective jurors by defense counsel on the grounds that they were exercised in a discriminatory manner pursuant to the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). After the two jurors were ordered to be seated, defense counsel argued that he should be allowed two additional peremptory challenges since Criminal Procedure Law § 270.25 provides that each party "must be allowed" an equal number of peremptory challenges. The trial judge responded that counsel had forfeited those two peremptory challenges because "the law is that if you exercise the strikes [on a discriminatory basis] you forfeit those rights". The Appellate Division reversed *Luciano's* conviction and ordered a new trial on the grounds that he had been denied his statutorily prescribed number of challenges. The Court of Appeals affirmed the Appellate Division's decision but for a different reason. Holding that § 270.25 predated *Batson* and therefore codified an outdated theory of peremptory challenges, the Court of Appeals held that a trial judge does possess the discretion to order the forfeiture of peremptory challenges for a *Batson* violation. However, because the trial judge in *Luciano* was under the misapprehension that the law required forfeiture, and failed to exercise the requisite discretion, reversible error had occurred.

Pretrial Advocacy: An Ethical Checklist — Part I

Continued From Page 4

dent. The Lieutenant looked out the window . . . . I sat very still. Then he looked at me. 'Maybe,' he said, 'maybe I was insane . . . [w]hen I shot Barney Quill.'"[8]

This story highlights how poor interviewing techniques place attorneys in ethical quandaries. To avoid molding client narratives to fit legal theories, attorneys should focus on active listening as an alternative to soliciting facts. Then the attorney may mold an available legal theory to fit the facts honestly relayed and earnestly uncovered.

Through active listening the attorney hears the client's message and sends it back in a reflective statement that mirrors what the attorney has heard. Active listening provides nonjudgmental understanding and stimulates client participation in the interview. Instead of simply repeating what the client just said, the attorney's response should be an affirmative effort to convey the essence of what the attorney just heard. The attorney's response communicates the following to the client: "This is what I have heard you say." This technique helps the client feel comfortable and develops rapport. In building rapport, the attorney encourages the client to relate the facts openly and fully and shelters the attorney from ethical improprieties during the interview process.[9]

Be wary of client questions designed covertly to seek the attorney's assistance in contemplated crime or fraud.

The attorney should pursue a client's objectives with vigor, zeal, and undivided loyalty. The attorney must not, however, advise or help a client commit a wrong. Sometimes questions during client interviews are not about past conduct but instead about contemplated future actions. The attorney should be cognizant of both the N.Y. Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. According to N.Y. Rule of Professional Conduct 1.16(c)(2), a lawyer may withdraw from representing a client who "has used the lawyer's services to perpetrate a crime or fraud." Comment 2 to ABA Model Rule 1.16 adds that an attorney must decline or withdraw from representation if the client demands that the attorney engage in conduct that is illegal or violates the Rules or other law. Attorneys must be vigilant to detect questions from clients covertly trying to gain assistance in illegal conduct.

Define the scope of the representation.

Taking time to define the representation is an important part of the initial client interview. The attorney should define the scope and objectives of the representation and, if necessary, limit the representation by agreement with the client. In New York, 22 N.Y.C.R.R. Part 1215 defines the requirements for the written letter of engagement. Attorneys "who undertake[] to represent a client . . . shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter: (1) if otherwise impractical; or (2) if the scope of services to be provided cannot be determined at the time of commencement of representation."[10] The letter of engagement should include an (1) explanation of the scope of the legal services to be provided; (2) explanation of the attorney's fees to be charged, expenses and billing practices; and (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under 22 N.Y.C.R.R. Part 137.[11]

There are four exceptions to these letter-of-engagement requirements: (1) representation when the fee is expected to be less than $3000; (2) representation when the attorney's services are similar to those previously rendered to and paid for by the client; (3) representation in domestic-relations matters subject to 22 N.Y.C.R.R. Part 1400; or (4) representation when the attorney is admitted to practice in another jurisdiction and does not maintain an office in New York state or when no material part of the services will be rendered in New York.[12]

Communicate fee arrangements to the client.

The final item on our initial client interview checklist reminds attorneys to structure fee arrangements to avoid later ethical questions. The nature and amount of an attorney fee are subject to contractual agreement between the attorney and the client except when a statute or court order sets the fee. The attorney must bargain at arm's length with the client. The attorney must also protect against later claims of unethical conduct in establishing the fee. A court that determines the reasonableness of a fee will give the benefit of the doubt to the client because the attorney has the burden to prove the reasonableness of the fee.

N.Y. Rule of Professional Conduct 1.5(a) forbids attorneys from charging an illegal or excessive fee. The Rule outlines eight factors to determine whether a fee is excessive.

Under 22 N.Y.C.R.R. Part 137, New York attorneys must offer arbitration to clients in most civil matters and submit to fee arbitration or mediation if a client in a civil matter requests it. Under Section 137.1(a) and (b), the fee-arbitration program does not apply to representations begun before January 1, 2002, or to (1) criminal matters; (2) fee disputes involving less than $1000 or more than $50,000, unless the arbitral body and the parties consent; (3) claims involving substantial legal issues, including malpractice or misconduct; (4) claims for damages or relief other than adjusting a fee; (5) disputes over a fee allowed by a statute, or rule, or set by a court; (6) disputes in which no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who have no office in New York or who did not render any material portion of the services in New York; and (8) disputes in which the person requesting arbitration is neither the client nor the client's legal representative.[13]

B. Ethical Considerations During the

Continued On Page 17

Court Notes

Continued From Page 12

The respondent was charged with misconduct emanating from his service as supervisor and then Chief Clerk of the King's County Surrogate's Court. Following issuance of an order declaring that no factual issues existed, and an opportunity for the respondent to be heard in mitigation, he was found guilty of engaging in conduct prejudicial to the administration of justice.

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 register as an attorney with the New York State Office of Court Administration (OCA) (22)

Representing the lender and purchaser in a real estate transaction without informing them of the conflict; assisting the purchaser in conduct the attorney knew to be illegal and fraudulent (*i.e.*, facilitating the breach of a mortgage contract); failing to advocate for either the lender or the purchaser, resulting in damage to both; depositing fiduciary funds into a business account; and failing to indicate on law firm letterhead required information relative to deceased members of the firm

Handling a matter for which the attorney lacked the requisite degree of competence; counseling or assisting a client in conduct that the attorney knew to be illegal or fraudulent (i.e. helping a client to conceal information from a lender); permitting a person who recommended the attorney's employment to influence his or her professional judgment; and failing to cooperate with the Grievance Committee

Counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent (*i.e.,* engaging in a real estate transaction with a "straw buyer") and engaging in conduct that had the appearance of impropriety

Failing to maintain appropriate bookkeeping records; writing bulk checks for fees without noting which client matters the fees originated from; failing to adhere to Court Rules regarding the filing of Retainer and Closing statements with OCA; improperly depositing funds belonging to *another* attorney; and failing to adequately supervise staff

Drawing IOLA checks to pay client expenses and /or disburse fees before commensurate deposits cleared; failing to adequately supervise the work of associates and non-lawyers; engaging in an impermissible conflict of interest by acting as an attorney and real estate broker in the same transaction; and making a cash withdrawal from an escrow account

Maintaining personal funds in an escrow account; commingling personal funds with funds held as a fiduciary, incident to the practice of law; failing to maintain a contemporaneous ledger of deposits into, and withdrawals from, escrow; making improper ATM withdrawals from an escrow account; and failing to file a Retainer and Closing Statement with OCA relative to a personal injury matter

Technically converting client funds as the result of an inadvertent overpayment to *another* client and failing to maintain adequate bookkeeping records in accordance with Disciplinary Rule 9-102(D) of the Lawyer's Code of Professional Responsibility [22 NYCRR § 1200.46(d)]

Failing to withdraw fees from escrow when earned; improper commingling; and failing to maintain proper bookkeeping records

Failing to withdraw fees from escrow when earned; improper commingling; failing to maintain proper bookkeeping records; and failing to ensure that sufficient funds were available before issuing escrow checks

Failing to maintain accurate and contemporaneous bookkeeping records; improperly depositing a settlement check into a business account (rather than an escrow account); failing to properly safeguard clients' funds; and failing to adequately supervise staff

Commingling fiduciary funds with personal funds; causing a technical conversion of fiduciary funds as a result of failing to maintain adequate bookkeeping records; and improperly making ATM and cash withdrawals against personal funds on deposit in an escrow account

Drawing an escrow check without ascertaining that sufficient funds were on deposit, causing the check to be dishonored, and failing to maintain proper escrow records

Inadvertently drawing checks against the attorney's IOLA account, rather than his business account, and inadvertently depositing business funds into his IOLA account

Failing to promptly pay funds to a third party to whom the funds were owed

Taking an excessive fee in connection with the representation of a client before the September 11th Victim Compensation Fund

Neglecting an estate matter

Neglecting a legal matter and failing to maintain contact with clients

Neglecting a legal matter and improperly withdrawing from representation

Engaging in conduct that adversely reflects on fitness to practice by communicating with a represented party on the subject of the representation

Engaging in an improper conflict of interest and lacking candor before the Grievance Committee

Conducting improper advertising while under suspension from the practice of law

Falsely acknowledging, and then filing, a deed when the person executing the document was not, in fact, before the attorney

Having been convicted of Driving While Intoxicated, a misdemeanor

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

CPLR Update 2009

Continued From Page 1

75, to stay the arbitration. Petitioner's claim was that the payment had not triggered the five-month extension of the contract, that the contract had therefore expired, and that there was therefore no existing contract to arbitrate. In response, respondent argued that the twenty-day limitations period barred petitioner's objections. The question of whether the contract had been extended was one for the arbitrator. Supreme Court granted the stay of arbitration, finding the payment clearly was not one which extended the contract. The Appellate Division modified and denied the petition, finding the *Matarasso* exception to be inapplicable since the parties clearly had agreed to arbitrate.

The Court of Appeals affirmed the Appellate Division. The *Matarasso* exception to the twenty-day limitations period is intended to protect the party who never agreed to arbitrate from being bound to arbitration by a failure to object to a demand within the short period. Here, it could not be said that the parties never agreed to arbitrate, since they clearly had so agreed. Since petitioner's argument was limited to the claim that the contract containing the arbitration agreement was no longer viable, it was subject to the twenty-day limitations period and was precluded from arguing the point in court. The issue was one for the arbitrator.

In *Matter of Henneberry v ING Capital Advisers, LLC*, the Court of Appeals considered [5] the relationship between an arbitrator's mere errors in the conduct of the arbitration, on the one hand, and misconduct on the other. The issue before the arbitrator in this case was whether or not the petitioner employee had been terminated for cause. There was apparently some doubt as to whether the petitioner or [6] respondents employers bore the burden of proof on the issue. Prior to the hearing, the arbitrator indicated that the respondents had the burden, by a fair preponderance of the evidence. After respondents indicated their disagreement, the arbitrator decided to hold the issue in abeyance until the actual arbitration. All during the proceedings, the respondents reiterated their position that the burden was on the petitioner. After taking 13 days of testimony, and after submission of briefs, the arbitrator finally determined that the burden was on the petitioner after all, and by a fair preponderance standard.

The arbitrator ruled that the petitioner had not carried this burden, and that the termination had been for cause. The arbitrator also noted that if the burden had been on the respondents, they would have carried it.

Petitioner commence the proceeding to vacate the award, claiming that the arbitrator was guilty of misconduct. Both Supreme Court and the Appellate Division disagreed, holding that the petitioner was on notice throughout the proceeding that the issue of the burden of proof was unresolved. Petitioner was unable to point to evidence she would have presented had she known the arbitrator was going to reverse his initial view.

The Court of Appeals affirmed. At most, the arbitrator committed a procedural error in initially allocating the burden of proof to the respondents, and eventually corrected that error. That does not deny the petitioner a fair arbitration, and did not "infect the underlying proceeding with the taint of fraud."

Article 78

Matter of Ellis v Mahon, *Matter of Torrance v Stout*, and *Matter of Rutkunas v Stout*[7] were all Article 78 proceedings to review penalties imposed on employees for poor performance or misconduct. In each, the Appellate Division found substantial evidence to support the charges against the employee, but found the penalty imposed to be "so disproportionate to the offense committed as to be shocking to one's sense of fairness," remitting for imposition of lesser[8] penalties. In each, the Court of Appeals reversed on review of submissions, stressing that the Appellate Divisions have no discretionary authority or interest of justice jurisdiction to review the penalties.

What is to be done when an Article 78 petitioner fails to join a necessary party? If there is no jurisdictional impediment, the missing party can simply be joined in the proceeding. Most of the time, however, due to the four month limitations period applicable to Article 78 proceedings, the missing party has an unassailable defense. Does that mean it is beyond the court's jurisdiction?

Prior cases, simply assuming that the missing party was not subject to the court's jurisdiction, dismissed for want of an indispensable party. In *Matter of Red Hook/Gowanus*[9] *Chamber of Commerce*, the Court of Appeals made the same assumption for the purposes of the[10] appeal, since the parties had not raised the issue themselves. It explicitly left open the question of whether or not the defense left the missing party beyond the court's jurisdiction. It went on to find that dismissal was not necessarily the only possible result, noting that CPLR 1001(b) may allow an action to proceed, even in the absence of a necessary party, if the statutory discretionary factors are present.

Last year, in *Romeo v. New York State Dept. of Educ.*, the Third Department explicitly[11] considered whether the lapse of the limitations period against the absent party precludes the court's exercise of jurisdiction over it. The court found that jurisdiction over the missing party could indeed be obtained despite the limitations defense, even though the defense might eventually defeat the claim.

The Appellate Division held that the concept of "jurisdiction" should not be loosely understood, and that the practical difficulty of the expiration of the limitations period, relied on by the prior cases, did not deprive the court of jurisdiction, and should not stand in the way of the joinder of the missing party. It reversed the judgment, joined the missing School District as a party, directed the service of the petition on it, and remitted for further proceedings.

This year, in *Windy Ridge Farm v Assessor of the Town of Shandaken*,[12] the Court of Appeals endorsed the holding in *Romeo*. The Court was "unwilling to consider an expired statute 'the equivalent' of a jurisdictional defect ." Moreover, the Court held that where the missing necessary party is subject to the court's jurisdiction – notwithstanding the expired statute of limitations – CPLR 1001(b) requires simply that the court should order him summoned. The discretionary factors considered in *Matter of Red Hook* would not then be relevant, and the court would simply direct the joinder of the missing parties.

As it turned out, that was unnecessary in this case, where the petitioner filed an amended petition naming the missing parties as additional respondents. They of course moved to dismiss on limitations grounds, and the proceeding was properly dismissed as against the original respondent for failure to join necessary parties.

Whether the court did, or should have assessed the discretionary factors set forth in *Matter of Red Hook* was not discussed here.

Attorney and Client - Disqualification

Disqualification of opposing counsel on grounds of conflict of interest requires consideration of three factors pursuant to the Disciplinary Rules: that there was a prior attorneyclient relationship; that the matters in both representations are substantially related; and the the present interests of both the past and present clients are materially adverse. Where all three[13] factors are shown, disqualification is mandatory.

Falk v Chittenden, was a rather unusual declaratory judgment action to disqualify[14] counsel in a disciplinary hearing against Chittenden, a Police Officer of the City of Rye. It arose after the hearing officer declared that he did not have authority to determine the disqualification issue and recommended that it be determined by the Supreme Court.

The charges in the disciplinary proceeding (alleging several acts of insubordination) had been preferred against Chittenden by the plaintiff Robert Falk. Prior to making the charges, Falk consulted with an attorney, Jonathan Lovett. After the charges had been made, Chittenden hired Lovett to represent him. This action was then instituted by Falk and the City of Rye for a declaratory judgment that Lovett had a conflict of interest, which prevented him from representing Chittenden, and directing Chittenden to discontinue the representation by Lovett and his firm.

Plaintiffs claimed that after Chittenden had made false complaints about Falk to the City Manager, Falk had consulted with Lovett in person five times and by telephone and in writing numerous times, discussing such matters as how Falk could keep his job in the face of Falk's complaints and Chittenden's insubordination. Falk allegedly had shared official documents with Lovett, including e-mails showing Chittenden's insubordination, and private records kept by Falk concerning Chittenden, other police officers and unnamed City officials. Lovett had advised Falk concerning the possibility of disciplinary charges against Chittenden, and they had even discussed using Lovett as a prosecutor in the disciplinary proceedings. Lovett had not taken a fee for these consultations.

Apparently, Lovett himself was not a party to the declaratory judgment action.

Chittenden moved for summary judgment dismissing the declaratory judgment action, claiming a lack of capacity and standing. Supreme Court granted the motion, on grounds of lack of ripeness and that it would result in an impermissible advisory opinion. The Appellate Division affirmed the result, but on the different ground that Falk and the City lacked standing to seek disqualification. The City had no standing, since there was no allegation that Lovett had ever represented it. Falk lacked standing, since his consultations with Lovett had only been in a private capacity, and his appearance in the declaratory judgment action was only in his official capacity.

The Court of Appeals reversed. It noted the factors stated above and stressed that where all three are present the presumption of disqualification is irrebuttable. They were all present here. There was clearly an attorney-client relationship between Falk and Lovett, during which they discussed disciplinary proceedings against Chittenden. Lovett conceded that he offered legal advice as to such proceedings, warning Falk to respect Chittenden's rights under the First Amendment. The request for advice as to discipline against Chittenden was clearly within Falk's official duties, however much he may also have desired it personally. Thus, the first factor was present, that of an attorney-client relationship between Falk and Lovett, and Falk has standing to bring the action as a former client.

The other factors were also present. The advice given in the consultations between Falk and Lovett was substantially related to actually bringing the charges, and Falk and Chittenden are clearly adverse in the disciplinary proceeding.

Calendar Practice

Striking another blow against dilatory litigation practices, in *Okun v Tanners*[15] the Court of Appeals refused to accept the plaintiff's excuse of law office failure for missing four pretrial conferences, including one at which it was struck from the calendar, and for failing to moving to restore the case to the calendar for a year and a half. As if to underscore that the point is no longer worthy of extended discussion, the Court acted on review of submissions.

The Appellate Division had affirmed the order of Supreme Court, denying defendant's motion to dismiss, accepting the excuses of law office failure, and restoring the case to the calendar on condition that plaintiff pay the defense attorney $250 for each missed conference, $1,000 in all. There was a dissent, in which the point was made that the excuse of law office failure – plaintiff's counsel stated "It just fell through the cracks" – is not really an excuse at all. Rather, it is an admission of fault. Law office failure is in general not an acceptable excuse for a failure to restore an action to the calendar within the year allowed under CPLR 3404. Here, the dissent viewed it as particularly vacuous, since plaintiff did nothing to advance the action after filing the note of issue, and only made the cross-motion to restore the case to the calendar after defendant moved to dismiss for failure to restore it.

The dissent also made the point that dismissal under CPLR 3404 is automatic after a year, and thus the defendant's motion was unnecessary and should have been denied as moot.

Collateral Estoppel/Res Judicata

The Court of Appeals held in *Landau, P.C. v LaRossa, Mitchell & Ross*,[16] that a determination that a corporate party lacks capacity to sue, leading to a dismissal without prejudice, does not bar a subsequent suit by the corporation's successor under the doctrine of re judicata. This legal malpractice claim was an outgrowth of an action against Morris J. Eisen, an attorney, and his firm, Eisen P,C., by the City of New York, for fraud in the conduct of certain personal injury actions. While the action was pending, Eisen was convicted on federal bribery, mail fraud and racketeering charges in connection with his representation of personal injury plaintiffs,

Continued On Page15

CPLR Update 2009

Continued From Page 14

and was disbarred on January 23, 1992.

The City obtained partial summary judgment in its actions on February 24, 1995. After seeking and failing to obtain renewal and reargument of the City's motion, Eisen and Eisen, P.C. commenced this action against its attorneys, claiming malpractice in the opposition to the City's motion. By pre-answer motion, defendants moved to dismiss the malpractice action on the grounds of lack of capacity, since Eisen as a disbarred attorney could not sue on behalf of the P.C., on collateral estoppel grounds since the alleged damages were due to the federal convictions, and lack of capacity in the P.C., since it had been dissolved for failure to pay franchise taxes. Supreme Court granted the motion, finding lack of capacity both as to Eisen and Eisen, P.C. An attempt to add the Landau, P.C., as the successor firm to Eisen, P.C., was unsuccessful.

The dismissal of the complaint had originally been "with prejudice," but on the defendants' motion this was changed to "without prejudice."

This action was then commenced by Landau, P.C., as successor to Eisen, P.C., and Eisen, asserting essentially identical causes of action as the original complaint. Defendants moved to dismiss, and the motion was granted on res judicata grounds. A motion for reargument was granted, but the court adhered to its original determination and dismissed. The Appellate Division affirmed.

The Court of Appeals reversed. The doctrine of res judicata requires a valid final judgment. Here, there was never a final adjudication of the merits of the original legal malpractice action. That action was dismissed "without prejudice," which by its terms is not a final determination. The only matters litigated in the original action was the capacity of Eisen, P.C., Landau, P.C., and Eisen to assert their malpractice claims. The merits of the claims were not litigated.

The Court concluded: "We remain mindful that if applied too rigidly, res judicata has the potential to work considerable injustice. "In properly seeking to deny a litigant 'two days in court', courts must be careful not to deprive him of one" (Matter of Reilly v Reid, 45 NY2d 24, 28 [1978]). Landau, P.C. has yet to have its day in court to litigate the merits of its legal malpractice claim against defendants and therefore we find that res judicata is not applicable to plaintiff in this case."

When a determination rests on two independent grounds, either of which would have been sufficient, and an appellate court bases its affirmance on one but makes no ruling as to the other, is the unaddressed ground entitled to collateral estoppel effect? The Court of Appeals said in *Tydings v Greenfield, Stein & Senior*, LLP,[17] that it is not. It also considered the question of when the limitations period on a compulsory accounting begins to run.

This was a legal malpractice case, in which the defendant firm had represented the plaintiff in an accounting proceeding in Surrogate's Court. Plaintiff had been a trustee of a grantor trust, and had resigned on January 1, 1997. She had been succeeded by a new trustee on the same day. As of August 20, 2003, she had still not rendered any accounting. On that day, a proceeding was commenced by the beneficiary of the trust to compel her to make an accounting. The defendants failed to assert a limitations defense, even though the applicable limitations period is six years. The Surrogate directed an accounting, which the plaintiff provided. The beneficiary objected to the accounting. Plaintiff retained new counsel, which moved to dismiss the objections, raising the limitations issue for the first time. The Surrogate denied the motion on two grounds. The first was that the six-year limitations period did not begin to run until a reasonable time had passed after plaintiff's resignation in which the plaintiff might have rendered a voluntary accounting. The Surrogate reasoned that a proceeding to compel an accounting could not have been brought during that reasonable period. The accounting proceeding was in fact commenced six years, seven months and nineteen days after the resignation, so that plaintiff would have had to have shown that seven months and nineteen days was a reasonable period before the proceeding could be dismissed as untimely, and had not done so. The second ground for denial of the motion was that it had been asserted too late and had therefore been waived.

On appeal, the Appellate Division affirmed the Surrogate on the waiver ground only,

finding it unnecessary to discuss whether the limitations period had in fact expired. Plaintiff then commenced this action against her former counsel, asserting that the defendant's negligence had led to the failure to assert the limitations defense timely. Defendant moved to dismiss, on the grounds that the Surrogate had ruled that the limitations period in the accounting proceeding had not expired, and that she was bound by that holding. Supreme Court agreed with the defendant and dismissed, but the Appellate Division reversed, on the grounds that the alternative grounds stated by the Surrogate, not having been ruled on by the Appellate Division, should not be given collateral estoppel effect. The Appellate Division also held that the limitations argument would have had merit, since it held that the period began to run on upon plaintiff's resignation as trustee and the appointment of the successor.

As to the collateral estoppel issue, the Court of Appeals began with the familiar statement that the determination of an issue in a prior action is given preclusive effect in the present action if it was necessarily determined in the prior action and if the party precluded had a full and fair opportunity to contest it. The Court noted the position of the Restatement that when a decision rests on two grounds, either of which could support it independently, neither is entitled to preclusive effect.[18] This case, however, presents the added circumstance that the plaintiff challenged the Surrogate's ruling as to the limitations issue on appeal, but that the Appellate Division declined to address it, finding the waiver issue determinative.

Federal courts have held that where an appellate court affirms on one ground and does not address the other, there is no collateral estoppel as to the ground that was not addressed. The Court adopted that rule as New York's.

The Court then was required to address the limitations issue, since plaintiff would still have no case against the former attorneys if the limitations issue would have been unavailing anyway. The parties agreed that the applicable period is six years, under CPLR 213(1), since no other limitations period is provided by law. The question was when the period began to run. Existing law, dating back more than 90 years, was that the limitations period begins to run upon the ending of the trust relationship.[19] The Surrogate, as noted, held that the period could not begin until a reasonable time had passed after the plaintiff's resignation as trustee, in which the beneficiary could have commenced the accounting proceeding. The Court viewed this as creating an unnecessary problem of deciding what a reasonable period was. The Court noted that the beneficiary did not, in fact, have to wait to see if the plaintiff was going to render a voluntary accounting, but could have sought the compulsory accounting the day after plaintiff's resignation. [20]

Defendant argued that the statute of limitations should not have begun to run until the trustee is asked to account and fails to do so. This would have rendered the accounting proceeding clearly timely, since no demand had been made for the accounting for years after plaintiff's resignation. The Court here rejected that view, since it would leave the limitations period open without end if the former trustee was never asked to give an accounting.

Seeing no reason to depart from the existing rule, and finding that it has the virtues of simplicity in concept and application, and that it gives interested parties six full years in which to proceed, the Court held that the limitations period in the underlying accounting proceeding was six years from the plaintiff's resignation and the appointment of a successor. Had it been asserted in the accounting proceeding, plaintiff would have been entitled to a dismissal. This legal malpractice action was therefore allowed to proceed. On July 17, 2003, the petitioner in *Josey v. Goord*, an inmate, stabbed another inmate in [21] the chest with a metal shank, killing him. The fight was witnessed by over 300 other prisoners. The Department of Correctional Services commenced a disciplinary hearing against petitioner three days later, at which a hearing officer found him guilty of various violations and imposed a penalty of 24 months in the Special Housing Unit. A second misbehavior report, based on the same incident, was made in September, 2003. After this hearing, petitioner was assessed a penalty of 120 months in the Special Housing Unit,[22] but the penalty was reduced to 60 months on administrative review.[23] Petitioner commenced an Article 78 proceeding, claiming that the second hearing was barred by res judicata. While the Article 78 was pending, DOCS reversed the determination, on the grounds that the incident had been considered in the first hearing. Petitioner then withdrew the Article 78 petition.

In August of 2004, petitioner pled guilty in Dutchess County Court to second-degree manslaughter arising out of the same incident, and was sentenced as a second felony offender. DOCS thereupon commenced a third disciplinary proceeding, this time based on a rule which allows it to discipline an inmate convicted of a Penal Law violation. After this hearing, petitioner was again found guilty, and a penalty of an additional 72 months in SHU was imposed. That determination was affirmed on administrative appeal. Petitioner then commenced this second Article 78 proceeding, again asserting that it is barred by the doctrine of res judicata arising from the initial hearing. Both Supreme Court and the Appellate Division found res judicata inapplicable to these facts. The Court of Appeals agreed, and affirmed the dismissal of the petition. Res judicata is generally applicable to administrative determinations rendered in administrative tribunals employing procedures substantially similar to those in a court of law. Petitioner was correct in his assertion that both determinations arose out of the same incident, but that does not necessarily mean that further disciplinary proceedings are foreclosed. The doctrine of res judicata should be applied to administrative determinations in a manner consistent with the functions of the agency, the necessities of the particular case, and the nature of the power being exercised.

The Court recognized that DOCS has legitimate interests, both security and rehabilitative, in seeing that disciplinary determinations are made promptly. It therefore had to act swiftly to discipline the petitioner and separate him from the general population. When, after a criminal investigation, an inmate such as petitioner is found guilty, DOCS should have the discretion to seek to modify that penalty based on the conviction, as is expressly contemplated by the rule under the rule relating to Penal Law violations. "To conclude otherwise would impede DOCS's ability to promote prison safety and have the perverse effect of encouraging DOCS hearing officers to impose more stringent disciplinary penalties initially, before any criminal investigation and proceedings are concluded."

Commencement of Action

In *Jones v Bill*,[24] the Court of Appeals settled a transitional issue under the federal Graves amendment, which abrogated New York's vicarious liability statute in automobile cases, insofar as it pertains to commercial vehicle lessors. The question was: If the date of original commencement of the action pre-dates the effective date of the Graves amendment, but the lessor is not added to the action until after the effective date, is the action barred against the lessor or not? The Court concluded that the action was not barred, reversing Supreme Court and the Appellate Division.

The procedural situation was simple. There was a two-car automobile accident on July 7, 2005, between Jones and Bill. Jones commenced this action against Bill on August 8, 2005, alleging that Bill was the owner and operator of his vehicle. Bill's answer denied ownership, naming DCFS Trust as the owner. On November 1, 2005, Jones filed an amended summons and complaint naming DCFS as a defendant. The Graves Amendment became effective on August 10, 2005. By its terms, the Amendment prohibits imposition of vicarious liability on commercial vehicle lessors, applying "to any action commenced on or after the date of enactment of this section."

Both Supreme Court and the Second Department viewed the interposition of the claim against DCFS as the functional equivalent of the commencement of the action as against it, and therefore barred by the Graves Amendment.

The Court of Appeals first noted that as a straightforward exercise in statutory interpretation, the standard of review was consideration de novo. The action was "commenced" when the plaintiff filed the original summons and complaint. That is the date referenced by the Amendment, and in the Court's view was the only relevant date. The concept of "interposition" of a claim refers to the statute of limitations, which is not relevant to the Graves

Continued On Page 16

CPLR Update 2009

Continued From Page 15

Amendment. Even where it is relevant, as in CPLR 203, the CPLR differentiates between "interposition of a claim" and "commencement of an action." Elsewhere in the CPLR, as in CPLR 305(a) [supplemental summons] and 1003 [addition of parties], the language of the statute clearly indicates that interposition of the claim and joinder of the new parties occurs within the context of an already existing action.

The language of the Graves Amendment does not lead to a different result, since New York's commencement-by-filing regime is based on the Federal model, with which Congress was certainly familiar.

It bears noting that the Court here came to the same conclusion as the Fourth Department in *Williams v White* and *Leuchner v. Cavanaugh*[25], thus resolving a split between the Second and Fourth Departments, albeit without mentioning the Fourth Department cases.

Declaratory Judgments

CPLR 3001 has been amended to allow for a direct declaratory judgment action by a claimant in a personal injury or wrongful death action against an insurer of a defendant, to determine the issue of coverage where the insurer has disclaimed due to lack of timely notice.[26] Previously, the claimant could not bring such an action until he had first obtained a judgment against the insured, which had then gone unsatisfied for at least 30 days.

The amendment was prompted by the 2004 decision of the Court of Appeals in *Lang v Hanover Ins. Co.*,[27] which held that an injured plaintiff has no right to bring a declaratory judgment action against the tortfeasor's insurer prior to obtaining a judgment against the tortfeasor. The judgment was held to be a statutory condition precedent to such an action, pursuant to Insurance Law § 3420. At common law, there was no right of action by the injured person against the tortfeasor's insurer. The statutory right codified in Ins. Law § 3420 is intended to remedy that inequity, but has as a condition precedent the requirements that the injured person obtain a judgment, serve the insurer with a copy of the judgment, and give the insurer 30 days in which to pay. The intent of this condition is to place the injured person in the same position as a solvent insured who has paid the judgment and seeks indemnification under the insurance contract.

The prior CPLR 3001, which authorizes declaratory judgment actions, does not create standing where none otherwise exists, and so the injured plaintiff could not utilize it to circumvent the condition precedent of the Insurance Law. The amendment specifically grants standing where the disclaimer is due to lack of timely notice.

Several points need to be made. First, the new right to institute the declaratory judgment action is limited to disclaimers for lack of timely notice. As to any other grounds for disclaimer, the claimant still must first obtain a judgment. The limitation is not explicitly stated in the amended language of CPLR 3001, but that language references Insurance Law § 3420(b)(6), which is explicitly limited that way. That provision requires personal and property insurance policies to contain a provision allowing the insured to bring a direct declaratory judgment action against the insurer, if the denial of coverage is due to a claimed failure to give timely notice to the insurer.

Also, the declaratory judgment action must be brought as a separate action, not as an additional claim within the personal injury action. Since the only issue is timely notice to the insured, there are really no common issues of law or fact between the two actions. Another proviso is that the action is proper only where neither the insured nor the insurer have themselves instituted declaratory judgment actions within 30 days of the disclaimer.

Differentiated Case Management

As part of an act addressing the mortgage foreclosure crisis on a number of fronts,[28] a new CPLR Rule 3408 has been added. As the legislative memorandum states, it "require[s] a court, in a residential foreclosure action involving a subprime or a non-traditional home loan made between January 1, 2003 and September 1, 2008, to schedule a settlement conference within 60 days of when the proof of service of the complaint is filed with the county clerk's office. The plaintiff, or a representative with authority to settle the matter, must appear at the conference. The court may allow the plaintiff's representative to appear via phone or video-conference. If the homeowner appears and is not represented by counsel, he or she would be deemed to have made a motion to proceed as a "poor person" under CPLR § 1101, and the judge may relieve the defendant of certain procedural court requirements and appoint counsel under CPLR § 1102(a). Section 3-a of the bill allows those homeowners against whom a foreclosure action has already been commenced to also participate in a settlement conference.

Disclosure

Where the parties have attempted mediation of their dispute, unsuccessfully, does any privilege attach to their communications and transactions with the mediator? The issue was raised here by the mediator, in *Hauzinger v Hauzinger*,[29] but not resolved since the parties had waived any confidentiality attaching to them by a signed waiver. Any privilege which might otherwise exist had therefore been waived and it was therefore proper to order disclosure of the details of the mediation. The Court did not reach the issue of whether a "mediation confidentiality privilege" in fact exists under CPLR 3101(b). *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, ___ NY3d ___, ___ NYS2d ___, 2008 NY Slip Op 09248 [2008] This case clarifies certain procedural issues concerning the supervision of disclosure by referees. Pursuant to CPLR 3104, a court has discretion to appoint a referee to supervise disclosure, on motion of any party or witness, or on its own initiative without notice. The statute specifies that the referee may be a judicial hearing officer or any named attorney to whom the parties may stipulate, but it is common for the court to appoint a referee on its own staff. That[30] is apparently what happened here. Plaintiffs moved for an order of preclusion, which was referred to the Special Referee. The referee, rather than make an order determining the motion, the Referee issued a report, with recommendations. (The recommendation was that the defendant was required to produce a Belgian resident for deposition in New York, and to produce certain documents.) She directed that the report was to be approved and confirmed, by application to the court pursuant to CPLR 4403. Plaintiff moved to confirm the report, and the defendant cross-moved to vacate it. Supreme Court decided that the evidence did not support the Referee's recommendations, and granted the cross-motion to vacate the report. The Appellate Division found that the evidence was in accord with Supreme Court's determination, and affirmed. There was a twojudge dissent, which agreed with the Referee's factual findings.

In the Court of Appeals, the plaintiff argued that Supreme Court could not disaffirm the Referee's factual findings, so long as there was support for them in the record, and that by appointing a Referee to supervise disclosure the court necessarily waived its discretion and limited its review of the Referee's determinations. The Court of Appeals rejected those arguments.

The trial court has broad discretion to supervise disclosure, which extends to the decision to confirm a Referee's report, so long as the report has support in the record. Supreme Court's decision to substitute its own findings for those of the Referee had support in the record, and was within its discretion.

In a footnote, the Court noted that there had not really been a need for the Referee to render a report subject to confirmation. Where the reference is pursuant to CPLR 3104 ("Supervision of Disclosure"), the Referee renders an order, not a report. Any party or witness can apply for review of the Referee's order, by motion to the court in which the action is pending, within five days after the order is made. As the Court noted in the footnote, "Bottom line, where the reference is made under CPLR 3104, there is no requirement that the referee's order be confirmed by the court in the absence of a request for review by a party."

Judgments and Orders

Last year's Appellate Division opinion in *Farkas v Farkas*[31] could be regarded as a leading invitation to a legal malpractice lawsuit. Even though the Court of Appeals has reversed,[32] it has done so in a manner which leaves the Appellate Division's rationale at least arguably intact, and so great care should be taken in the timely submission of orders and judgments.

The issues before the court were: what happens when a party delays in submitting a judgment, without good cause? What constitutes "good cause?" The Appellate Division, First Department, held that the time frames for submission of judgments, set forth in the Uniform Rules for the Trial Courts, are to be enforced, that the late submission of a judgment requires a showing of more than mere law office failure, and that in the absence of good cause the relief to which the dilatory party was otherwise entitled is to be regarded as abandoned. The defendant husband in this case, whom the Appellate Division opinion describes as "indisputably" a "bad guy," thereby avoided a judgment against him and in favor of his wife of $750,000

This was a bitterly contested divorce action, which was sixteen years old when it reached the Appellate Division. The central fact involved here was that the husband had taken out a home equity line of credit on the marital residence, and a decision after trial in 1996 directed him to repay the balance. If he did not do so, the judgment directed the entry of a further money judgment for the amount due, without further order. This was followed by a divorce judgment entered in 1996 and a 1999 amended divorce judgment. When the husband failed to satisfy the home equity loan, the wife moved for the entry of that further money judgment, and the motion was granted by order entered October 17, 2000, directing the settlement of a judgment in the amount of $984,401.17. The order also provided that execution of the judgment could be stayed pending resolution of a foreclosure action on the mortgage. Pursuant to 22 NYCRR § 202.48, orders or judgments directed to be submitted or settled must be submitted within 60 days of the decision. The rule further provides that failure to submit the order or judgment constitutes an abandonment of the motion or action except upon "good cause shown."

Plaintiff delayed for four and half years, until May 2, 2005, to submit the judgment for settlement. The foreclosure action had been resolved in August, 2003, and the amount due was only $750,000. Defendant opposed, on the grounds of untimeliness, and that the plaintiff had not shown good cause for the delay. The trial court signed the judgment, and the defendant appealed. The majority held that the directive of the Uniform Rule must be complied with, and a failure to timely submit a judgment could not be justified either by the merit of the motion or the lack of prejudice to the defendant. That the parties were engaged in a considerable amount of other litigation was something the dissent was willing to consider, but did not constitute good cause to the majority. The actual foreclosure litigation was the only part of the parties' legal battles the majority was willing to consider, and that had ended a year and nine months before plaintiff got around to submitting the judgment. The majority held that in enforcing the rule strictly in this manner, it was implementing the new attitude towards time limits announced by the Court of Appeals in *Brill v City of New York*, *Miceli v State Farm*, and *Andrea v Arnone, Hedin, Casker, Kennedy & Drake*.[33] The failure here was essentially a law office failure, and in the majority's view, the Court of Appeals cases have removed law office failures as "good cause." In the majority's view, the provisions of CPLR 2005, which hold that the courts are not precluded from recognizing law office failure as an excuse, is restricted to the specific applications listed therein, namely extensions of time to appear or plead under CPLR 3012, and to motions for relief from a judgment or order under CPLR 5015.

The two-judge dissent, while agreeing that "good cause" is not shown here merely by the merit of the underlying application and lack of prejudice to the adversary, was unwilling to adopt the strict attitude of the majority. In particular, the dissent pointed out that the *Brill* and *Miceli* decisions simply ruled out late summary judgment motions: the would-be movant was not ultimately deprived of his day in court. Here, the effect of a strict construction was to deprive the plaintiff wife of an "enormous money judgment granted. . .against an opponent who had thrown every possible obstacle in her path".

In reversing, the Court of Appeals did not address the Appellate Division's application of *Brill* and its progeny to Rule 202.48. Rather, it held the rule inapplicable under the facts. The plaintiff wife was entitled to the money judgment as a result of the original 1966 decision, which specifically directed the entry of a money judgment "without further order." Thus, no settlement was required and Rule 202.48 was inapplicable[34]. The point was reiterated in the 1996 judgment and again

Continued On Page 19

Pretrial Advocacy: An Ethical Checklist — Part I

Continued From Page 13

Pleading Stage of Litigation.

The Preamble to the ABA Model Rules of Professional Conduct recognizes the attorney's obligation to protect and pursue a client's legitimate interests within the bounds of the law while maintaining a civil, courteous, and professional attitude toward all. Attorneys must ensure that their devotion to the client does not conflict with duties to other parties, other counsel, the courts, and the administration of justice.

Attorneys must sign all papers filed with the court.

C.P.L.R. 2101(d) requires that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper . . . ." Similarly, F.R.C.P. Rule 11(a) and 22 N.Y.C.R.R. Part 130-1.1a require that at least one attorney of record or, if unrepresented by counsel, the party sign every pleading, motion, and other paper.

By presenting a signed paper to the court, an attorney or unrepresented party "certifies that to the best of the person's knowledge . . . formed after an inquiry reasonable under the circumstances"[14] the document "is not being presented for any improper purpose, such as to harass." [15] Additionally, "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . ."[16] The certification also attests that allegations and other factual contentions have evidentiary support or, if specifically identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.[17] The certification, moreover, means that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information or belief."[18]

Attorneys must conduct a factual investigation and legal research before taking positions in court documents.

F.R.C.P Rule 11 and C.P.L.R. 3013 require attorneys to perform a factual investigation and legal research before filing court documents and forbid filing documents for improper purposes. Sanctions under Federal Rule 11(c) and 22 N.Y.C.R.R. Part 130-1.1(a) add teeth to this mandate.[19]

Presenting a paper in federal court triggers F.R.C.P. Rule 11(b). Presenting includes signing, filing, submitting, or later advocating a particular court paper. The Judicial Conference of the United States Advisory Committee on Civil Rules explained in its note to the 1993 amendment to Rule 11 that "a litigant's obligations with respect to the contents of [court] papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have merit."[20] The attorney's duty of candor to the tribunal is a continuing duty. The attorney must ensure that all papers filed with the court comply with Rule 11(b) throughout the litigation.

F.R.C.P. Rule 11 recognizes that there might be uncertainty at the outset of the action about the particular facts. Rule 11(b)(3) provides that if a party or attorney is not, when a paper is filed or submitted, certain about the evidentiary basis underlying an allegation or factual contention, the matter may be pleaded anyway if it is "specifically so identified" and is "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[21]

Rule 11(b)(4) is the counterpart provision that gives an answering party initial freedom in constructing the answer. The Rule 11 duty continues, however, because "[t]olerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve the litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances . . . ."[22] If, after a reasonable opportunity for further investigation or discovery, the party does not find evidentiary support, the party has a duty not to persist with the contention. Even if the offending document need not be amended or withdrawn, it violates Rule 11 to premise advocacy on a court document that, despite a reasonable opportunity for investigation or discovery, has no evidentiary support.

C.P.L.R. 3013 mandates that "[s]tatements in a pleading . . . be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." To be sufficiently particular, statements in pleadings must be factual. To meet this requirement, attorneys must perform research before filing any paper with a court. Title 22 N.Y.C.R.R. Part 130-1.1a(b) also imposes the requirement that the attorney or party certify having performed "an inquiry reasonable under the circumstances."

C.P.L.R 3025(a) allows a party to amend a pleading one time "without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." C.P.L.R. 3020(a)-(c) describe scenarios when the attorney must verify the pleading.[23]

C.P.L.R. 3101(h) describes the attorney's continuing duty to amend papers after their initial submission to the court.[24]

Attorneys must anticipate Rule 11 challenges.

Prudent attorneys should take precautions to prevent Rule 11 litigation. For example, attorneys should memorialize pre-filing inquiries to anticipate a Rule 11 motion. This paperwork will support a defense during Rule 11 litigation and offer additional documentation for client billing. Attorneys should always examine relevant documentary evidence and talk to potential witnesses rather than rely on their clients' representations concerning important matters. If any question arises about the propriety of a filing, the attorney should mentally compose a Rule 11 affidavit outlining the support for the action. An attorney's inability to explain conduct suggests that the contemplated action is questionable under Rule 11.[25] Attorneys, moreover, should counsel clients about the attorney's ethical duty under Rule 11.

Attorneys must offer only meritorious claims and contentions.

N.Y. Rule of Professional Conduct 3.1 buttresses Federal Rule 11's ethical duty. This New York Rule subjects attorneys to discipline for bringing a frivolous action or proceeding or for asserting a frivolous position while defending an action or proceeding. An attorney is subject to discipline for taking a frivolous position on an issue. The Rule provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[28] The Rule excludes from the definition of frivolous arguments a "good faith argument for an extension, modification, or reversal of existing law."[27]

Similar to Rule 11, Comment 2 to ABA Model Rule 3.1 notes that filing an action or defense is not frivolous merely if the facts have not first been fully substantiated or if the attorney will develop evidence through discovery. Attorneys are required, however, to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."[28] Conduct is not frivolous just because the attorney believes that the client's position will fail. Conduct is frivolous, rather, "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."[29]

Attorneys should be cognizant of 22 N.Y.C.R.R. Part 130-1.1. Conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."[30] Conduct is also frivolous when "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" or if the attorney or client asserts "material factual statements that are false."[31]

This article continues with Part II in the March 2009 issue of the Queens Bar Bulletin.

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1 The New York Code of Professional Responsibility, which will remain in effect through March 31, 2009, consists of three separate but related parts: Cannons, Ethical Considerations, and Disciplinary Rules. The Rules of Professional Conduct, effective April 1, 2009, is a model rules-based code of conduct governing lawyers. For two discussions of the 2009 Rules written by the Second and Fourth Departments' presiding justices, see A. Gail Prudenti, *New Conduct Rules Set to Take Effect: Adoption Brings Many Benefits*, N.Y. L.J., Jan. 26, 2009, at 11, col. 1; Henry J. Scudder, *New Conduct Rules Set to Take Effect: State Bar Efforts Were Crucial*, N.Y. L.J., Jan. 26, 2009, at 11, col. 3.

2 The New York State Unified Court System adopted the Standards of Civility on January 1, 1998. The Standards apply to lawyers, judges, and court personnel. The Standards' goal is to orient the bar and bench to observe courtesies that enhance the quality of professionalism in the legal profession. The Standards are aspirational: They are not enforceable by sanction or disciplinary action, and they do not modify or supplement the N.Y. Rules of Professional Conduct. For a discussion of the Standards of Civility, see Gerald Lebovits, *Professionalism in the Legal Profession*, 5 Richmond County B. Ass'n J., Summer 2006, at 8, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299739. The New York State Unified Court System Standards of Civility are *available at* http://www.nycourts.gov/jipl/standardsofcivility.pdf.

3 The new N.Y. Rules of Professional Conduct are available at http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf.

4 Abraham Lincoln, *quoted in* 2 William H. Herndon & Jesse W. Weik, *Herndon's Lincoln* 345-46 n.* (1889).

5 *Id*.

6 Robert Traver, *Anatomy of a Murder* 46 (1958). Robert Traver was the pen name of John D. Voelker, a Michigan Supreme Court associate justice.

7 *Id*.

8 *Id*.

9 R. Lawrence Dessem, *Pretrial Litigation: Law, Policy and Practice* 26 (4th ed. 2007).

10 22 N.Y.C.R.R. 1215.1(a)(1)-(2).

11 22 N.Y.C.R.R. 1215.1(b)(1)-(3).

12 22 N.Y.C.R.R. 1215.2(a)-(d).

13 22 N.Y.C.R.R. 137.1(a)-(b).

14 Fed. R. Civ. P. 11(b).

15 Fed. R. Civ. P. 11(b)(1).

16 Fed. R. Civ. P. 11(b)(2).

17 Fed. R. Civ. P. 11(b)(3).

18 Fed. R. Civ. P. 11(b)(4).

19 22 N.Y.C.R.R. 130-1.1(a) provides that a court may award to any party or attorney in any civil action, except if prohibited by law, costs to reimburse expenses and reasonable attorney fees resulting from frivolous conduct. A court may also impose financial sanctions on any party or attorney in a civil action who engages in frivolous conduct in addition to or instead of awarding costs.

20 Advisory Committee Note to 1993 Amendment to Rule 11, 146 F.R.D. 401, 585 (1993).

21 Fed. R. Civ. P. 11(b)(3).

22 Advisory Committee Note, *supra* note 20, at 585-86.

23 *See, e.g.*, C.P.L.R. 3020(a) ("A verification is a statement under oath that the pleading is true to the knowledge of the deponent . . . .")

24 *See infra* Part C.2.

25 Dessem, *supra* note 9, at 171.

26 22 N.Y.C.R.R. 1200, R. 3.1(a).

27 22 N.Y.C.R.R. 1200, R. 3.1(b)(1).

28 Model Rules of Prof'l Conduct R. 3.1 cmt. 2.

29 *Id*.

30 22 N.Y.C.R.R. 130-1.1(c)(1).

31 22 N.Y.C.R.R. 130-1.1(c)(2).

New Amendments to Section 3420

Continued From Page 1

The Court had an opportunity to re-evaluate its position in Great Canal Realty v. Seneca Insurance Co., 5 NY 3d 742, later the same year. The case involved a delay of four months in the notification of the insurer where the insured believed that an injury would be covered by Worker's Compensation. The Appellate Division, First Department had affirmed the denial of the insurer's motion for summary judgment, finding that there was an issue of fact on the issue of promptness of notice. In a long and eloquent decision it recognized the "the inequities inherent in granting insurers the benefit of a conclusive presumption of prejudice" and concluded that there was "no reason to extend the "no-prejudice" exception to allow insurers to disclaim coverage on the basis of late notice of claim where "lateness" is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer."

The Court of Appeals curtly rejected the Appellate Division's point of view. In a terse three paragraph memorandum citing Argo, it stated that the "insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract".

Legislative Action

Subsequently, legislative efforts to eliminate harsh effects of the law grew and resulted in the passage of a bill in 2007 eliminating the "no prejudice" rule. The bill was promptly vetoed by then Governor Spitzer. He stated that it had been adopted too quickly and without sufficient input from those insurers and business groups that might be affected by it. The legislature, unhappy with the veto, quickly drafted new legislation. It amended Sec. 3420 and inserted the new provisions which prevent disclaimers by insurers unless they can show "material prejudice" from a delay. The amendments were signed into law in July, 2008.

Ironically, subsequently, after the Governor's signature, but before the changes went into effect, the issue again came before the Court of Appeals. In Briggs Avenue LLC v. Insurance Corporation of Hanover, 11 N.Y. 3d 377, decided in November, 2008, the Court reiterated its lame duck position that an insurer's disclaimer of coverage was reasonable even though the delayed notice was based on the insured's mistake or a misunderstanding of their obligations under an insurance policy.

The Amendments to Section 3420:

The new law affects all insurance policies "issued or delivered" after January 17, 2009. Its provisions do not apply to policies that are already in effect or are renewed before that date. Some of the important changes are:

- A claim by the insured, an injured party or any other claimant will not be invalidated by failure to give notice within a prescribed time unless the insurer has been prejudiced.
- If an insurer disclaims liability due to late notice in a claim arising out of death or personal injury the injured person or other claimant may maintain an action directly against the insurer on the issue of the insurer's refusal to provide coverage.
- If late notice is provided within two years of the time required under an insurance policy the burden of proof is on the insurer to show that it was prejudiced. If notice is provided after two years the burden is on the insured, injured party or claimant to show that the insurer was not prejudiced by the late notice.
- If prior to notice the insured's liability has been determined by a court or by binding arbitration, or if the insured has settled a claim, there is an irrefutable presumption of prejudice to the insurer.
- The insurer's rights shall only be deemed prejudiced where late notice materially impairs its ability to investigate or defend the claim.

In addition, the insurer must, upon request by an injured person who has filed a claim, confirm that the insured had a valid insurance policy in effect on the date of the occurrence as well as provide its limits of liability.

These changes do not apply to "claims made" policies where the insurance policy provides that the claim must be made during the policy period, a renewal period, or an extended reporting period. This exclusion is particularly important to lawyers and other professionals who traditionally purchase such "claims made" policies.

Effect of the New Law:

The amendments to Sec. 3420 make a sweeping change to New York's "no prejudice" rule. Nevertheless the practitioner should be aware of a number of ambiguities in the amendments.

The statute offers no definition of the word "material" and no hint of what would impair an insurer's ability to investigate or defend a claim. Presumably this difficulty will be dealt with on a case by case basis and resolution would be left for judicial determination.

There is also a potential difficulty concerning the burden of proof "if the notice was provided more than two years after the time required under the policy" (new section 3420(c) (2) (A). Most insurance policies provide that notice must be given "as soon as reasonably practicable", a phrase that is in itself ambiguous. Adding the elusive concept of giving notice "after the time required" merely adds uncertainty to ambiguity. Courts will now have to determine the time frame which would have been considered "reasonably practicable" then add two years to determine a transition point for the allocation of burden of proof. Finally they will have to determine whether the delay caused "material prejudice".

Who pays for the judicial determination of the rights of the parties?

Because of such ambiguities it is implicit that declaratory judgment actions will be required to resolve issues that arise subsequent to "late notice" disclaimers. While the amendments substantially curtail the insurer's ability to use technical notice irregularities to avoid their obligation to defend and indemnify, the insurer has no incentive to volunteer coverage where there is a question of whether or not the notice was given "as soon as is reasonably practicable". The insured, or interested third parties, will be forced to institute actions to compel coverage. While in some cases the cost of such an action might be insignificant to a litigant, in many cases it will amount to a substantial burden on an individual policy holder where coverage has been denied.

In Mighty Midgets Inc. v. Centennial Insurance Co. , 47 N.Y.3d 12 (1979), the Court of Appeals held that where an insured, rather than the insurer, instituted an action to clarify an insurer's obligations after a disclaimer, it was obligated to pay its own legal fees whether or not it was successful. Judge Fuchsberg stated that,

"It is the rule that such a recovery may not be had in an affirmative action brought by an insured to settle its rights but only when he has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy."

The clear implication is that an insurer will only be required to pay legal fees to an insured when it is the one who instituted the law suit and it is unsuccessful in an attempt to avoid the obligation to defend or indemnify a policyholder.

The Court of Appeals only seems willing to assess legal fees for actions required to determine the rights of the parties where there is a statutory basis to do so. (Cf. Fresh Meadows Medical Associates b. Liberty Mutual Insurance Co., 49 N.Y. 3d 93 (1979) where the Court allowed attorneys fees, as well as additional fees incurred to collect the initial fee, in a no fault action based on the provisions of section 675 of the Insurance Law).

There is no such statutory basis in Section 3420 and there is no reason to believe that the legislature is likely to make any amendments to allow legal fees to an insured or injured party. Where an insured or a third party is forced to institute an action to compel defense or indemnification they must be ready to bear the costs.

Conclusion

The amendments to Section 3420 are substantial and take the law of this State into the 21st Century, aligning it with the accepted position of the vast majority of jurisdictions. More importantly, it eliminates the situation where an insurer, after accepting policy premiums, avoids its obligations to defend and indemnify based on a relatively minor or innocent violation of the terms of coverage by the insured.

**Editor's Note: Martin Schulman is an attorney who has been engaged in the practice of law in Woodside for over twenty five years. In addition to a corporate and real estate practice he serves as a No Fault Arbitrator under the auspices of the American Arbitration Association.*

CPLR Update 2009

Continued From Page 16

in the decision on the 2000 motion. There was thus no time limit on the entry of the money judgment, and no need for the 2000 motion for leave to enter the money judgment. That Supreme Court had "unaccountably" added a direction to "settle judgment" as a money judgment the wife was entitled to without a further order did not change the result.

With the result reached by the Appellate Division having been reversed, but its rationale not having been addressed, it remains an open question whether or not Rule 202.48 will remain subject to the strict construction of time limits set forth in the original *Farkas* decision. The prudent approach is to assume that it will be, and to take great care to submit or settle orders and judgments in a timely fashion. It must not be assumed that the court will excuse late submissions merely because there has been no change in circumstances or prejudice to the adversary.

1. David H. Rosen is a Court Attorney/Referee in the Supreme Court, Queens County. The views and analyses presented here are his own and do not necessarily represent those of the Court or of any individual Justice.

2. CPLR 7503(c)3. *Matter of Matarasso (Continental Cas. Co.)*, 56 NY2d 264 (1982)

4. *Matter of Fiveco, Inc. v Haber*, 11 N.Y.3d 140, 863 N.Y.S.2d 391 [2008]

5. *Matter of Henneberry v ING Capital Advisers, LLC*, 10 N.Y.3d 278, 857 N.Y.S.2d 3 [2008] and proof of payment of engineering costs, ordered the Church to make pay for certain engineering analysis and other fees relating to the subdivision application, and ordered it to pay the 2005 and any future county, town and school taxes, and awarded money for missed payments and back property taxes.

The Appellate Division affirmed, describing the Levys' cross-motion as being, in effect,

one for summary judgment. It held that Supreme Court had jurisdiction to enforce the stipulation, which the Church had signed. The Levys were not, it held, required to enforce the settlement by separate plenary action.

The Court of Appeals reversed. It held, first, that the Appellate Division's description of the Levys' cross-motion had been erroneous. The Levys could not have been awarded summary judgment since no party had asked for that relief and, in any event, the Church had not joined issue in the case. CPLR 3212 specifies that any party may move for summary judgment, but only after joinder of issue.

Where, then, was Supreme Court's authority to award any relief? The Court noted, pointedly, that Supreme Court had never claimed to have granted summary judgment, but had simply awarded sweeping relief "without any citation to legal authority, statutory or otherwise". The Court held that Supreme Court did have inherent jurisdiction to enforce stipulations entered into in the course of litigation, citing *Teitelbaum Holdings v Gold*, 48 NY2d 51 [1979]. Even under *Teitelbaum*, however, Supreme Court had gone too far. Even though the original litigation between White House and the Levys concerned only the allocation of property taxes and not the contract between the Levys and the Church, the Church had expressly made itself a party to the litigation by the terms of the stipulation of settlement. It had appeared at all proceedings involving the stipulation. Pursuant to *Teitelbaum*, therefore, the Church could be considered as a party to the action for all matters directly involving the stipulation, and enforcement of the stipulation against it without a plenary action was not a violation of due process. To the extent that Supreme Court's order directly enforced the terms of the stipulation, therefore, it was correct. Supreme Court erred, however, when it went beyond the terms of the stipulation to find the Church in breach of the contract of sale. While it was proper to impose liability for taxes during the existence of the contract, the order imposed liability after termination of the contract. Any claim for breach of contract would have to be pursued by way of plenary action. The Court remitted the action to Supreme Court.

6. The difference in severance pay between a dismissal for cause or without was over $2 million.

7. *Matter of Ellis v Mahon*, 11 N.Y.3d 754, ___ NYS2d ___, 2008 NY Slip Op 06737 [2008]; *Matter of Torrance v Stout*, 9 N.Y.3d 1022, 852 N.Y.S.2d 8 [2008]; *Matter of Rutkunas v Stout*, 8 N.Y.3d 897, 834 N.Y.S.2d 73 [2007]

8. *Ellis v. Mahon*, 49 A.D.3d 538, 540 [2008]

9. See, e.g., *Matter of Freed v NYS Racing and Wagering Bd.*, 9 A.D.3d 808; 780 N.Y.S.2d 673 [3rd Dept., 2004] and *Matter of Haddad v City of Hudson*, 6 A.D.3d 1018; 775 N.Y.S.2d 613 [3rd Dept., 2004]; see also *Matter of Emmett v Town of Edmeston*, 2 N.Y.3d 817; 781 N.Y.S.2d 260 [2004]. The Court of Appeals in *Matter of Red Hook/Gowanus Chamber of Commerce* [see next note] listed many more such cases.

10. *Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals*, 5 N.Y.3d 452, 805 NYS2d 525 [2005]

11. *Romeo v. New York State Dept. of Educ.*, 41 A.D.3d 1102, 839 N.Y.S.2d 297 [3rd Dept., 2007]

12. *Windy Ridge Farm v Assessor of the Town of Shandaken*, 11 N.Y.3d 725, ___ NYS2d ___ [2008]

13. DR 5-108(A); *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631 [1998]

14. *Falk v Chittenden*, 11 N.Y.3d 73, 862 N.Y.S.2d 839 [2008]

15. *Okun v Tanners*, 11 N.Y.3d 762, 867 N.Y.S.2d 25 [2008]

16. *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 862 N.Y.S.2d 316 [2008]

17. *Tydings v Greenfield, Stein & Senior*, LLP, 11 N.Y.3d 195, ___ NYS2d ___ [2008]

18. Restatement [Second] of Judgments § 27, Comment i

19. *Spallholz v Sheldon*, 216 NY 205, 209 [1915] (Cardozo, J.)

20. SCPA§ 2205(1)(a)

21. *Josey v. Goord*, 9 N.Y.3d 386, 849 N.Y.S.2d 497 [2007]

22. Remarkably, there is no disciplinary rule which specifically prohibits homicide, and neither the misbehavior report nor the hearing officer's determination indicated that the other inmate had died.

23. The misbehavior report and determination this time did mention the death of the other inmate.

24. *Jones v Bill*, 10 N.Y.3d 550, 860 N.Y.S.2d 769 [2008]

25. *Williams v White*, 40 A.D.3d 110, 832 N.Y.S.2d 713 [4th Dept., 2007]; *Leuchner v. Cavanaugh*, 42 A.D.3d 893, 837 N.Y.S.2d 887 [2007]

26. L. 2008, ch. 388 § 1, effective January 17, 2009

27. *Lang v Hanover Ins. Co.*, 3 N.Y.3d 350, 787 N.Y.S.2d 211 [2004]

28. L. 2008, ch. 472

29. *Hauzinger v Hauzinger*, 10 N.Y.3d 923, 862 N.Y.S.2d 456 [2008]

30. The court may not appoint a private attorney to supervise disclosure and be compensated by the parties, absent their consent (*Surgical Design Corp. v. Correa*, 309 A.D.2d 800, 765 N.Y.S.2d 521 [2 Dept. 2003].

31. *Farkas v Farkas*, 40 AD3d 207, 835 NYS2d 118 [1st Dept., 2007]

32. *Farkas v Farkas*, 11 N.Y.3d 300, ___ NYS2d ___ [2008]

33. *Brill v City of New York,* 2 NY3d 648 [2004]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake*, 5 NY3d 514, 521 [2005]

34. The Court cited *Funk v. Barry*, 89 N.Y.2d 364, 653 N.Y.S.2d 247 [1996] as establishing that the rule is invoked only where there is an explicit direction to submit or settle an order or judgment.