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Queens Bar Bulletin

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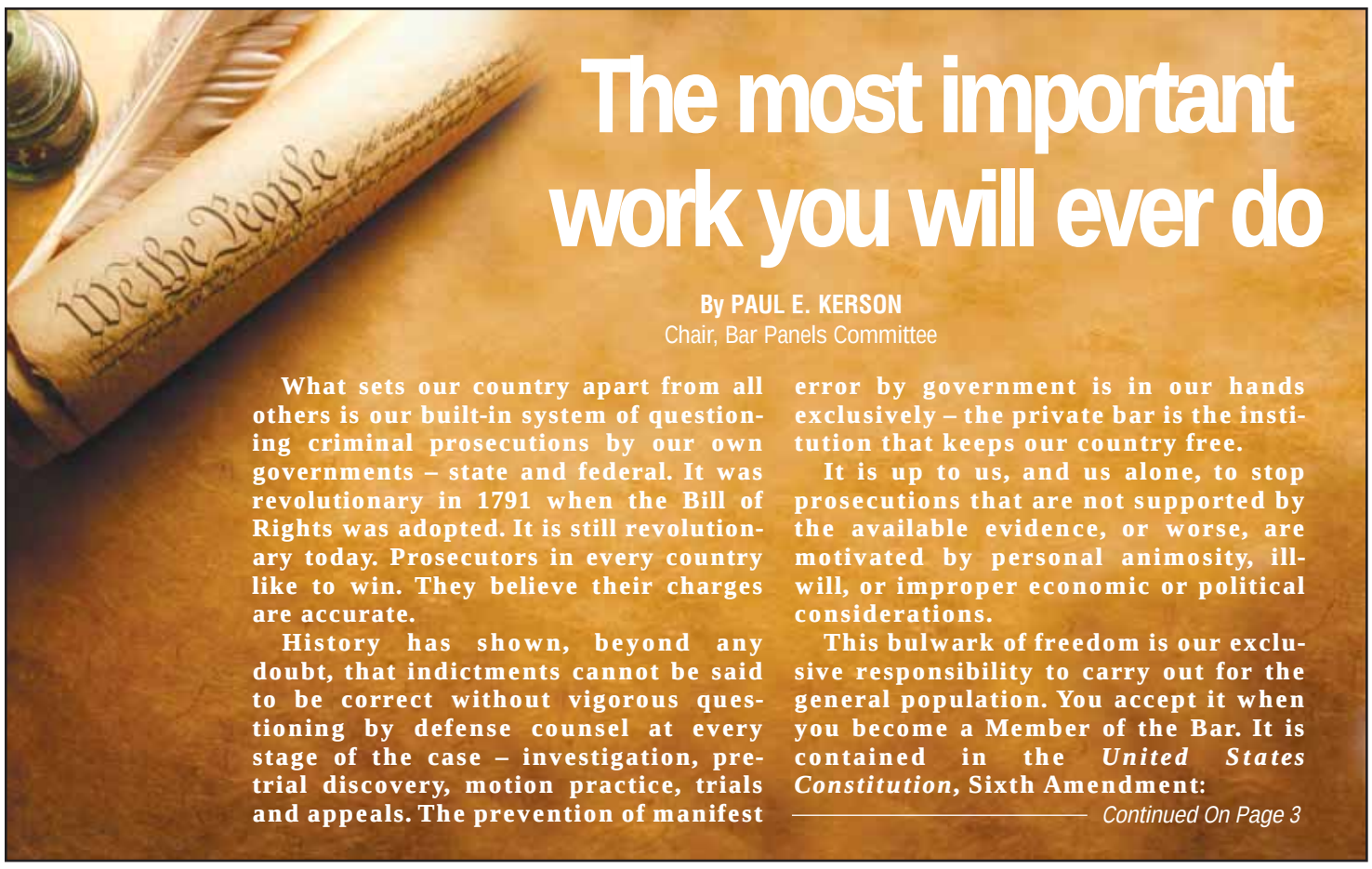

The most important work you will ever do

By PAUL E. KERSON
Chair, Bar Panels Committee

What sets our country apart from all others is our built-in system of questioning criminal prosecutions by our own governments – state and federal. It was revolutionary in 1791 when the Bill of Rights was adopted. It is still revolutionary today. Prosecutors in every country like to win. They believe their charges are accurate.

History has shown, beyond any doubt, that indictments cannot be said to be correct without vigorous questioning by defense counsel at every stage of the case – investigation, pretrial discovery, motion practice, trials and appeals. The prevention of manifest error by government is in our hands exclusively – the private bar is the institution that keeps our country free.

It is up to us, and us alone, to stop prosecutions that are not supported by the available evidence, or worse, are motivated by personal animosity, ill-will, or improper economic or political considerations.

This bulwark of freedom is our exclusive responsibility to carry out for the general population. You accept it when you become a Member of the Bar. It is contained in the *United States Constitution*, Sixth Amendment:

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Sex Offender Management & Treatment Act

by DEIDRE CHUCKROW AND LUCINDA SUAREZ*

The Sex Offender Management and Treatment Act ("SOMTA"), Chapter 7 of the Laws of 2007, was signed by Governor Spitzer on March 14, 2007 and became effective April 14, 2007 to provide treatment to sex offenders and to protect the public from their recidivist conduct. SOMTA authorized civil management of sex offenders who are serving a sentence on a felony sex crime committed prior to the effective date or on parole supervision and who suffer from a mental abnormality that predisposes them to engage in repeat sex offenses. SOMTA also created the Office of Sex Offender Management which is charged with coordinating agency activities, providing advice on the most effective ways to manage sex offenders, and establishing standards.

In addition, SOMTA made significant changes to sex crimes prosecutions. The Act defined a new crime, Penal Law 130.91, Sexually Motivated Felony, provided sentencing for such crimes under new section 70.80, and enacted longer periods of post-release supervision for all felony sex crimes. Additionally, the Act re-classified certain existing sex crimes from non-violent to violent crimes.

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CPLR Update

Civil Forfeitures

by DAVID H. ROSEN, ESQ.[i]

Petitioner in *Matter of Schwartz v Morgenthau*[ii] had pleaded guilty to insider trading charges in the US District Court for the Southern District, and of fraud charges in state Supreme Court. In both instances he was directed to make restitution payments. The federal restitution, of $786,402, was due within 90 days of the end of three years of supervised release. In addition to restitution in the state case ($750,000, but not at issue here), petitioner agreed to pay $250,000 "in lieu of forfeiture," to be "distributed according to CPLR § 1349."

While still on federal supervised release, and thus before the federal restitution was due, petitioner was informed that the $250,000 in state forfeiture was being retained by the District Attorney, with the exception of $80,000 which was being distributed to the state substance abuse service fund pursuant to CPLR 1349 (2)(g). The District Attorney rejected the notion that the state forfeiture funds should be applied to the federal restitution obligation, since CPLR 1349 was intended to benefit the victims of crimes, not the perpetrators.

This Article 78 proceeding, in the

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THE DOCKET...

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

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

2008 Spring CLE Seminar & Event Listing

February 2008

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

March 2008

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

April 2008

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

May 2008

Thursday, May 1	Annual Dinner and Installation of Officers

NEW MEMBERS

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David Joseph Conn	David B. Katz	Wadeedah Sheeheed X
Nicholas Corona Jr.	Dimitri Kotzamanis	Alex Tomaidis
Zamirah El-Amin	Sally Rose Maiolo	Farrah Starr Wax
Emily Grajales	Venus Diana Marinescu	Brad Lawrence Wolk
Jose Grajales	Laura Margaret Mullaney	John P. Zervopoulos

NECROLOGY

Hon. Moses M. Weinstein

A New Member Benefit from Queens County Bar Association

QCBA recently selected a credit card program that is specifically designed for law firms and sole practitioners. QCBA members receive reduced processing rates and multiple features built to properly process client-attorney transactions. Opening a Law Firm Merchant Account is easy and helps your practice.

- **Safeguard and segregate client funds.**
- **Properly process retainers.**
- **Attract clients and win business.**
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With a Law Firm Merchant Account credit cards that are accepted for retainers are deposited into your trust account while processing fees are paid from the operating account to avoid the commingling of client funds.

If you are considering or already accept credit cards in your practice, we encourage you to confirm that your program is competitive and can properly processes transactions. Call for a no obligation consultation with our partner Affiniscape Merchant Solutions, 800.376.0950 or click here for more information!

Les Nizin

EDITOR'S NOTE...

On behalf of all of the officiers and staff of the Queens County Bar Association we wish a very happy and healthy New Year to our members and their families.

The bar bulletin is written by the members of the association, for the benefit of the members of the association.

I welcome new participants who may wish to contribute a poem, a letter, or an article to be published in our publication.

I can be reached at lnizin@aol.com

LAWYERS ASSISTANCE COMMITTEE

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

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

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

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

Lawyers Assistance Committee
Confidential Helpline
718-307-7828

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PRESIDENT'S MESSAGE

David Cohen

I received an anonymous letter inquiring, in essence, as to why there is not more minority participation in Bar Association activities. While normally I would not respond to an anonymous letter, the issues raised are too important to ignore.

The QCBA offers services to members who live and work in this County. Our mission is to improve the lot of the practicing lawyer through the numerous programs of various types that we make available to our members. We offer numerous free and low cost continuing education programs to enable our members to comply with OCA's requirement.

The Lawyer Referral program provides a source of new business. This is particularly important as many of our members are solo or small firm practitioners.

The Queens Volunteer Lawyer Program provides free legal services to low income residents who would not otherwise be able to afford quality legal services. Our members also participate in a number of programs to provide free legal services in Landlord-Tenant matters, and we recently participated in a program to assist pro se litigants in collection matters in Civil Court.

We conduct programs at local law schools on How to Start a Law Practice to enable young lawyers to return to their communities and provide much needed legal services to community residents. This program is particularly important as many of the recent law school graduates are from the diverse communities of our County.

We make many of our programs available to members of all of the ethnic and local community based bar associations in Queens County. We are constantly reaching out to all lawyers in Queens to become active members of our association. We continually seek to increase the diversity on our Board of Managers.

These are some of the things that the QCBA does to provide a home for all of the lawyers who practice in Queens. We strive to be inclusive. Historically, efforts have been made to increase the diversity of our membership. In the past we have met with ethnic bar associations to seek ways to increase their participation in our programs.

So what can be done to increase minority participation? The answer lies not in the QCBA but in the minds of those in the minority community who feel that they are not welcome. Nothing can be further from the truth. Please let us know what we can do to make you feel welcome. Are there specific types of programs or CLE courses that we should be providing that are of specific interest to minority lawyers? Let us know what you want and we will make every effort to implement these programs. We are willing to work with all Queens' lawyers to make them feel that the QCBA is a place where they can come to improve their legal practices as well as to enable them to network with other members of the Queens legal community.

I am committed to resolve the issues that cause any lawyer to feel that he or she is not welcome to become an active member of the QCBA. However, in order to do this I need your assistance. I plan to create a task force to study your comments and to implement measures to increase minority participation.

Queens is one of the most diverse communities in America. I call on "anonymous" and all Queens' lawyers to think seriously about this issue and work with us to increase minority participation. I look forward to hearing from you and working to implement your suggestions to enable us to move forward on this important issue. ■

The most important work you will ever do

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Paul E. Kerson

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…and to have the Assistance of Counsel for his defense."

It is also contained in the *New York State Constitution*, Article I, Section 6.

Most people arrested do not have funds to hire a lawyer. From the period 1791 to 1963, the right to defense counsel in a criminal case was not enforced very well for this reason. It depended on volunteers. People who were admitted to the Bar before 1963 will tell stories about attending Criminal Courts volunteering their services because they thought it was the right thing to do. But this was wholly inadequate.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court addressed this question. The Court held that governments must pay for defense counsel for indigent people accused of crime. This led to the enactment of statutes to provide the money. The federal statute for use in federal courts is the Criminal Justice Act, 18 U.S.C. 3006A, currently allowing legal fees of $75 per hour.

For many years, New York State lagged far behind the federal reimbursement level. We have now caught up for defense of a felony. The rate is $75 per hour as set forth in Article 18-B, Section 722-b of the County Law of the State of New York. It is $60 per hour for misdemeanors. There are caps of $2400 for misdemeanors and $4400 for felonies. Courts are permitted to exceed the maximums in "extraordinary circumstances." This rule was set forth in a highly unusual joint opinion by both the Appellate Divisions, First and Second Departments in *People v. Perry*, 27 A.D. 2d 154 (lst and 2d Depts. 1967). The rule is as follows:

"There should be a finding of 'extraordinary circumstances' only if the court concludes from the facts that a denial of additional compensation would be grossly unjust."

In an age when corporate lawyers routinely charge $600 per hour to simply do the negotiations and paperwork to reorganize a company, it is respectfully submitted that "extraordinary circumstances" apply in each and every criminal case.

We who volunteer to work at the low end of the legal wage scale to ensure that democracy continues in our country deserve the top dollar, not the bottom. When a citizen is facing jail time, he or she should have a lawyer who can pay attention to his or her case alone and make sure that justice is done. The current $75 per hour rate with absurdly low caps insures that a lawyer's attention is divided among dozens of cases. It is thus inevitable that people get jail time who should not have, had the lawyer had more time to devote to the case.

Our past Administrator, Hon. Malvina Nathanson, was of the opinion that a member of our Panels should only undertake to defend against six or less serious felony indictments every year. Remember that each case's pre-trial hearings and trial can take one month or more, plus numerous conferences and adjournments leading up to the actual taking of testimony. At the pitifully low reimbursement rate and caps set forth by statute, the other six months must be reserved for making a living at civil cases.

With absurd $4400 maximums, this means that a diligent appointed defense attorney makes only $26,400 for six months' hard work. Factoring in the cost of the law office secretary, computer, Westlaw, telephone and insurance means the attorney gets less than the minimum wage. The financial pressure to plea-bargain is thus enormous. Cynics say this is what the Mayor, Governor and District Attorneys really want. I refuse to be that cynical. *People v. Perry*, cited above, gives our judiciary the right *and responsibility* to award adequate defense counsel legal fees in these cases, consistent with the letter and spirit of the Sixth Amendment.

Under no circumstances should a lawyer undertake the defense of a defendant charged in a felony indictment if he or she "does not have the time" for the hearings and trial. Although many cases are resolved by plea-bargaining, the only way to truly get a favorable plea-bargain is to be fully prepared to go to trial, and even to start the trial itself.

There is an alternative system – full time public defenders on salary from a government agency or private not-for-profit corporation. This system results in even more cases per attorney, and frequent burn-out. A lawyer who only argues criminal cases is certain to feel, after three or four years, that the world is filled largely with crime and criminals, and to suffer skewed judgment because of that fact.

Jails and prisons are terrible places. Inmates are regularly assaulted by each other and by staff. Little effort is made at improvement. I spent 19 years on our Panels and scored five acquittals in homicide or attempted homicide indictments, which I believe is something of a record.

During my career to date, three of my clients **died** as a result of injuries sustained in jail or prison – John Green, Herman Powe and Harry Williams. Their memories are always with me. In a civilized system, they should not have died. One does not receive capital punishment for small time drug dealing, assault or theft. My definition of a civilized justice system is one where no prisoner whatsoever dies as a result of injuries sustained in prison.

One should prepare for trial as if the defendant were your own child, sibling or close friend. If the District Attorney wants a plea-bargain involving no jail time (and thus no prison injuries or death), this is something to consider together with the defendant. But if the prosecutor is looking for many years in prison, you must be prepared to devote substantial time and energy to the trial of the indictment. *The New York State* and *United States Constitutions* demand no less.

As a result of these experiences, my law partner John Duane and I gathered 37 cases of badly assaulted prisoners and tried to join them in a federal civil rights claim. The U.S. Court of Appeals would not let us do it. See *Webb v. Goord*, 340 F. 3d 105 (2d Cir. 2003).

However, one of these cases was permitted to go to trial thereafter, *Britt v. Garcia*, *Connolly and Goord*. I was able to cross-examine the State Corrections Commissioner himself, and get him to admit that he took few, if any, steps to insure prisoner safety. The jury awarded $7.65 million in damages, $7.5 million of it in punitive damages, for running an unconstitutional prison system where cruel and unusual punishment in violation of the 8th Amendment was the order of the day.

In this case, the State Department of Correctional Services ignored death threats *in writing* against the prisoner that had been forwarded to them by the sentencing State Court Justice and defense counsel. Both of them, together with the prosecutor, testified for the prisoner at the federal civil rights trial. See "Top Officials Held Liable for Stabbing of Inmate," May 7, 2004 *New York Law Journal*, pages 1 and 4. My law partner Ira Greenberg and I conducted this trial for the prisoner. The U.S. Court of Appeals, 2d Circuit sustained liability and ordered a new damages trial. See 457 F. 3d 264 (2d Cir. 2006).

The pay is low for accepting assignments to defend indigent criminal defendants. Prisoners in civil actions depend on the contingency fee. This is no way to get wealthy, or even comfortable.

But, I urge each and every member – present your qualifications to our Bar Panels Committee. Our Committee has jurisdiction to recommend members for appointments in the Queens County Supreme Court, the Queens County Criminal Court, the Queens County Family Court and for Queens cases in the Appellate Division, Second Department and New York State Court of Appeals.

Take just a few criminal defense or prisoner cases every year. Devote your best efforts to each one. Depend on the rest of your practice to make a living. But hold your head up very high and maintain a very high level of pride and dignity on the days you enter a prison, jail or criminal courtroom. On those days, you and you alone are the living embodiment of the Bill of Rights for the prisoner you are going to see.

For an American lawyer, there is no greater source of pride than that fact alone.

Paul E. Kerson is a Member of the Board of Managers, Associate Editor of this Bulletin, Chair of the Human Rights Committee and Chair of the Bar Panels Committee. He is a partner in the law firm of Leavitt, Kerson & Duane.

CPLR Update: Civil Forfeitures

Continued From Page 1

nature of mandamus, then followed. Petitioner sought to compel the District Attorney to apply the forfeited amount, together with accumulated interest, to his federal restitution obligations. His argument was that CPLR 1349 sets forth the priority according to which forfeited amounts must be distributed. Third on the list, well ahead of payments to the substance abuse fund, are:

(c) Amounts ordered to be paid by the defendant in any other action or proceeding as a restitution, reparations or damages to a victim of any crime committed by the defendant even though such crime did not constitute the basis for forfeiture under this article, to the extent that such amounts remain unpaid[.][iii]

The District Attorney moved to dismiss the petition on grounds of timeliness as well as lack of standing. Supreme Court held the petition timely, and further found that the petitioner had standing to enforce the priority of distribution. Any "indirect" benefit to him was within the contemplation of the legislature in enacting the forfeiture statutes. Finding that the District Attorney had failed to follow the required priority, Supreme Court granted the petition. The Appellate Division reversed, and dismissed the petition both on timeliness grounds and for lack of standing.

The Court of Appeals affirmed the dismissal, on standing grounds alone. Standing depends on whether the injury or interest asserted by the petitioner falls within the "zone of interests" protected by the legislative enactment. Here, petitioner sought to achieve a "windfall," by using one forfeiture payment to satisfy two obligations. This was not within the "zone of interests" protected by CPLR Article 13-A. Rather, the purpose of the Article, as repeatedly refined by the Legislature, is to "take the profit out of crime." This end is not achieved by allowing a convicted criminal to compel the distribution of forfeited monies to suit his own purposes.

The Court also mentioned that the "claiming authority," in this case the District Attorney, is only required by CPLR 1349(2)(c) to apply the forfeited funds to restitution debts only "to the extent that such amounts remain unpaid". This means that a criminal defendant's resources must be exhausted before forfeited funds can be applied to restitution obligations. This observation is made in the same paragraph as the observation that victims of the petitioner's other crimes would have standing to make claims against the district attorney for the forfeited funds. How far those claimants would have to go to show exhaustion of the petitioner's resources is not addressed by the Court's opinion.

Collateral Estoppel/Res Judicata

Launders v Steinbergiv involved our old acquaintance, Joel Steinberg. You'll recall that he was convicted of first degree manslaughter in the death of his adopted daughter Lisa. This action was commenced by the administratrix of Lisa's estate against Joel, Hedda Nussbaum, and others. The claims at issue before the Court of Appeals involved allegations of prior abuse. Supreme Court granted partial summary judgment as to these causes of action, holding that the criminal conviction collaterally estopped Steinberg from contesting the issues. The Appellate Division affirmed.

The Court of Appeals sent the matter back to Supreme Court for further proceedings, since the jury in the criminal case was not asked to determine whether Lisa had been subjected to repeated abuse prior to the injuries which caused her death. The issue was not "necessarily decided" in the criminal action. In the absence of the required identity of issues, collateral estoppel was not warranted.

Application of the doctrines of res judicata and collateral estoppel require us to carefully parse the issues decided in the related proceedings. *City of New York v Welsbach Elec. Corp.*[v] was such a case.

This action for indemnification and contribution grew out of a motor vehicle case involving an intersection collision. Both drivers claimed that the traffic light had been green in their favor. The plaintiffs (Angerome) sued the second driver (Malin), as well as the City of New York and Welsbach Electric. The theory as against the City was that it had negligently failed to maintain the light, leading to the green-green condition. Welsbach was sued on the theory that it had the contractual obligation with the City to maintain the traffic light. Malin cross-claimed against the City and Welsbach, and Welsbach cross-claimed against the City and the other defendants. The City made no cross-claim against Welsbach.

Welsbach moved for summary judgment on the grounds that it owed no duty in tort to the general public, only a contractual duty to the City. It also argued that it had in fact performed its obligations under its contract. Supreme Court granted the motion, but only on the grounds of lack of duty.[vi]

After a trial, the City was found 100% at fault. The jury specifically found that each motorist had had a green light, and that neither had been negligent.[vii] The amount of the judgment was reduced by the Appellate Division,[viii] and the City paid it.

The City then commenced this action against Welsbach, claiming common-law and contractual indemnification and contribution, due to Welsbach's alleged negligence in maintaining the traffic light. Welsbach moved for summary judgment, on grounds of res judicata and collateral estoppel, asserting that the City's claims were precluded by the results of the Angerome action.

Supreme Court denied Welsbach's motion. As to res judicata, it held that the Angerome action had not involved any transaction between the City and Welsbach, and so the City in this action was not seeking any second bite at the apple. Collateral estoppel was not available to bar the City's claims, since the grant of summary judgment to Welsbach had not involved any determination as to Welsbach's fault for the accident, and Welsbach's fault was not part of the issues presented to the Angerome jury.

The Second Department reversed. As it viewed the case, the summary judgment order had necessarily involved Welsbach's performance of the contract, and so the City's claim was barred. The Court of Appeals reversed the Second Department, and reinstated the complaint.

Res judicata only applies where the same parties are the ones litigating the successive claims. Here, where the City had made no claim against Welsbach in the Angerome action, the doctrine was inapplicable. Collateral estoppel also could not bar the City's action. The order granting summary judgment did not in fact make any finding as to Welsbach's performance of its contract. True, Welsbach had raised the issue as part of its motion, but in granting summary judgment the court ruled only that Welsbach owed no duty to Angerome as part of the general public. Welsbach's performance under its contract was not one of the issues litigated in the Angerome action, and was not considered by the jury.

Commencement of Action

In 2006, the Court of Appeals decided *Harris v Niagara Falls Bd. of Ed.*,[ix] in which it resolved the issue of whether errors in the commencement of actions required dismissal as a matter of subject matter jurisdiction, or on some other ground. It determined that such errors did not affect the court's subject matter jurisdiction, but that they would require dismissal if the defendant timely moved to dismiss. If the defendant failed to make objection, the defect would simply be ignored.

Now, the Legislature has stepped in, amending CPLR 2001 to provide that errors in the manner of commencement may be corrected, just as with other errors, subject to payment of any outstanding fees.[x] The devil, as always, lurks in the details, and we must consider what kinds of blunder are correctable as merely a "mistake, omission, defect or irregularity," and what kinds continue to be uncorrectable and dismissable.

The legislative memorandum in support of the amendments states that it is in response to the determinations of the Court of Appeals in *Harris*, as well as in the cases harmonized by *Harris: Matter of Gershel v Porr,*[xi] and *Matter of Fry v Village of Tarrytown*.[xii] The intent of the amendment is to avoid dismissals for "technical, non-prejudicial defects." Clearly stated, however, is the intent not to excuse all mistakes. A complete failure to file within the limitations period continues to be dismissable, as is the failure to file the appropriate initiatory papers. "The purpose of this measure is to clarify that a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED, is a mistake subject to correction in the court's discretion."[xiii]

The memorandum states explicitly, for example, that the amendment is not intended to overrule *Parker v Mack*, in which the Court of Appeals held that "No action is commenced by the service of a summons alone which neither contains nor has attached to it a notice of the nature of the action and of the relief

sought."[xiv]

Disclosure

In *Ortega v City of New York*[xv] the Court of Appeals held that there is no cause of action cognizable in New York against a non-party to an action who negligently destroys evidence crucial to the case. The action involved allegedly negligent repairs to plaintiff's vehicle, which caused it to burst into flames, injuring the plaintiff and another occupant, Peralta. The vehicle was stored in facilities owned by New York City, a stranger to the issues surrounding the plaintiff's injuries. The City would not allow Peralta's attorney to inspect the vehicle, since it didn't belong to him. Peralta commenced a proceeding to prevent the destruction of the vehicle, which the City did not oppose. Supreme Court issued an order allowing Peralta to inspect the vehicle, and directing the City not to destroy it until the inspection was done. The order was served on the City, which forwarded it to the property clerk at the auto pound. Notwithstanding the order, the City followed its usual procedures for disposing of unclaimed vehicles. It tried to contact plaintiff, but the notice failed since the City did not have the proper address. The vehicle was disposed of as scrap metal.

Neither plaintiff nor Peralta sued the repair shop or the manufacturer. Rather, they sued the City for damages resulting from their injuries, asserting first that the City was liable on a theory of negligent spoliation of evidence, and second that the City was guilty of contempt in violating the order to preserve the vehicle.

The Court of Appeals analyzed decisions of sister states, some of which recognized third-party spoliation as an independent tort, and others which viewed it as a form of ordinary negligence, and some of which declined to recognize it. The Court concluded that New York should not recognize the tort at all. While destruction of evidence by those under a duty to preserve it cannot be condoned, existing remedies are sufficient to deter the wrongful conduct and compensate those harmed. Plaintiff and Peralta could have, but did not, seek to hold the City liable for contempt in the original proceeding for violation of the preservation order.

The Court found that allowing the creation of this new tort, and seeking thereby to hold the City liable for all damages which plaintiff claimed she would have recovered had the vehicle been preserved, all because she cannot prove her ordinary tort claim against the repair shop. There is simply no way to know or prove what an inspection of the vehicle would have shown, and the claim would thus necessarily involve a considerable amount of speculation.

Two cases this year have expanded on the concept of ex parte interviews with non-party witnesses whom the adversary would consider highly sensitive. The Court of Appeals first dealt with the issue in 1990, in *Niesig v Team I.*[xvi] There the Court allowed attorneys for a party to have ex parte interviews with non-managerial employees of adverse parties, but prohibited such communications with employees having authority to speak for the adversary, or with certain other highly placed employees who might have been privy to communications with adverse counsel. The Court intended to find a middle path which would avoid allowing counsel to circumvent the protections afforded a represented adverse party, while still allowing counsel to obtain information through informal investigation.

In the first of this year's cases, *Siebert v Intuit Inc.*,[xvii] the interviewee had been a highly placed employee of the plaintiff. He had, before the termination of his employment, been closely involved in the plaintiff's litigation strategy. After his termination (which appears to have been on friendly terms) defense counsel interviewed him over the objections of plaintiff's counsel. Defense counsel was careful to warn the former employee not to speak of privileged matters, or to reveal anything concerning plaintiff's legal strategy. After learning about the interview, plaintiff's counsel successfully moved to disqualify defense counsel. The Appellate Division reversed, on the grounds that the record failed to show that any privileged information had been revealed, and that the interview was otherwise proper under the rationale of *Niesig*.

The Court of Appeals affirmed the Appellate Division, holding that the policy considerations behind Niesig allow interviews with former employees of a represented adverse party, so long as adequate measures are taken to avoid disclosure of privileged or confidential information. Since at the time of the interview the employee no longer could bind the plaintiff by what he said, no longer was involved with plaintiff's counsel or plaintiff's litigation strategy, and had no stake in the litigation, and since interviewing counsel candidly disclosed who they represented and what their interests were, the interview was proper.

In *Arons v Jutkowitz*[xviii] the Court of Appeals resolved the contentious issue of whether a personal injury plaintiff could be compelled to authorize ex parte interviews with his treating physicians by defense counsel. The Court came down squarely in favor of compelling such authorizations, finding neither an unwarranted expansion of appropriate disclosure proceedings or any violation of the federal Health Insurance Portability and Accountability Act (HIPAA). Further, the Court rejected the rulings of lower courts, that such interviews were to be followed by a turnover of the notes taken by the interviewing attorneys.

The case involved consolidated appeals of three Appellate Division cases. In all three cases, the Supreme Court had directed service of the authorizations, imposing varying conditions, and in all three the Appellate Division had reversed. *Arons v Jutkowitz*[xix] was the lead case, in which the Second Department found that such interviews were improper, notwithstanding the waiver of medical privilege due to the commencement of the lawsuit. The Appellate Division found that such interviews were not part of the carefully constructed disclosure scheme of CPLR Article 31, and while a physician who had given such an unauthorized interview could not be precluded from testifying on that ground, the plaintiff could not be compelled to consent to it. In the second case, *Webb v New York Methodist Hospital*,[xx] the Second Department followed its own holding in *Arons*. The Fourth Department[xxi] followed the Second in *Kish v Graham*.

The Court of Appeals rejected all three holdings. It based its analysis on the policy considerations of *Niesig* and *Siebert*, favoring ex parte interviews of

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Sentencing and Post-Release Supervision

PL §70.80: Sentences of imprisonment for conviction of felony sex offenses
PL § 70.45: Determinate sentence; post-release supervision

All sentences are Determinate except where noted

1st Felony Sex Offense Conviction (violent and non-violent)

Felony Class	Sentence Range	Post-Release Supervision	Post Release if violent
B	5 – 25	5 – 20	5 – 20
C	3.5 – 15	5 – 15	5 – 15
D	2 – 7 determinate, or probation or definite sentence	3 – 10	3 – 10
E	1.5 – 4 determinate, or probation or definite sentence	3 – 10	3 – 10

Predicate Felony Sex Offender, Non-violent past offenses*

Felony Class	Sentence Range	Post-Release Supervision **	
B	8 – 25	10 – 25	
C	5 – 15	7 – 20	
D	3 – 7	5 – 15	
E	2 – 4	5 – 15	

Predicate Felony Sex Offender
Violent Predicate and Non-Violent Instant Offense*

Felony Class	Sentence Range	Post-Release Supervision **	
B	9 – 25	10 – 25	
C	6 – 15	7 – 20	
D	4 – 7	5 – 15	
E	2.5 – 4	5 – 15	

Predicate Felony Sex Offender
Violent Predicate and Violent Instant Offense
(still sentenced pursuant to PL § 70.04)

Felony Class	Sentence Range	Post-Release Supervision**	
B	10 – 25	10 – 25	
C	7 – 15	7 – 20	
D	5 – 7	5 – 15	
E	3 – 4	5 – 15	

*Any conviction for a second Child Sex Assault shall be sentenced pursuant to §70.07
** Post-release supervision for second Child Sex Assault (any class): 10 – 20 years

Judge Ciparick Reappointed to New York Court of Appeals

by SPIROS A. TSIMBINOS*

In late November Governor Spitzer announced that he was reappointing Judge Carmen Beauchamp Ciparick as a Judge of the New York Court of Appeals. Judge Ciparick's reappointment was widely expected and she will now be able to serve until

2012 when she will reach the mandatory retirement age. Judge Ciparick is highly regarded and received well qualified ratings from numerous bar associations. She is also well known to our bar association having appeared on several occasions at our Annual Court of Appeals Program. We congratulate Judge Ciparick on her reappointment and look forward to her continued distinguished service on the Court.

Enclosed below is a biography on Judge Ciparick as it appears in the official brochure of the New York Court of Appeals.

Biography of Judge Ciparick

Carmen Beauchamp Ciparick, Senior Associate Judge of the Court of Appeals was born in New York City in 1942. She grew up in Washington Heights, graduated from Hunter College in 1963 and received her J.D. from St. John's University School of Law in 1967. She was appointed a staff attorney with the Legal Aid Society in New York City in 1967. In 1969, she became an Assistant Counsel for the Judicial Conference of the State of New York; in 1972, Chief Law Assistant of the New York City Administrative Judge. In 1978, she was appointed Judge of the New York City Criminal Court and, in 1982, was elected to the New York State Supreme Court. She was appointed to the Court of Appeals on December 1, 1993 by Governor Mario M. Cuomo, confirmed by the State Senate and sworn in on January 4, 1994. She and her husband, Joseph Damian Ciparick, have one daughter.

Editor's Note: Spiros A. Tsimbinos is a Past President (1995-1996) of the Queens County Bar Association and the Editor of the New York State Bar Association Criminal Newsletter.

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fact witnesses as a method of informal disclosure. The Court stated that it saw no essential difference between non-party physicians and the employees in *Niesig* or the former employee in *Siebert*. The plaintiffs in these personal injury cases having waived the relevant medical privilege by affirmatively placing their physical condition in issue, could not be allowed to use that privilege to prevent discovery of the facts by the defendants. The Court was unimpressed by the argument that such interviews are outside the disclosure devices of Article 31. Interviews with potential fact witnesses are conducted as a matter of course in most litigation, and are not inconsistent with Article 31. Also unpersuasive was the argument that informal interviews with treating physicians could lead to overreaching by interviewing counsel, causing the physician to reveal matter where the privilege had not been waived. The Court assumed that interviewing counsel would properly identify themselves and their interests in the litigation, and would act ethically. It also specified that interviewing counsel must make clear that any discussion with counsel is voluntary and limited to the medical condition at issue in the litigation.

As to HIPAA, the Court noted that the medical privilege had been waived in these cases by the commencement of the action, and so furnished no basis for a refusal to allow the authorizations for interviews. HIPAA embodies a privacy rule, as well as a litigation exception to that rule, but does not in fact address whether ex parte interviews are allowed. The HIPAA privacy rule imposes procedural rules, nothing more. These rules are most easily complied with through the mechanism of an authorization. The authorizations do not compel the physicians to consent to the interviews, they merely establish that the requisites of HIPAA have been complied with.

The Court did not specify the format of the authorizations, as did the trial courts in these three cases. Thus, there is no appellate authority at this time as to the language of the authorizations. The Court did note that directions in the trial court orders involved in these cases, directing defense counsel to turn over notes of the interviews, were improper. It stated in a footnote that it did not take issue with those portions of the trial orders that directed defense counsel to identify themselves and their interests, to limit the interview to the condition at issue, and to affirmatively advise the physicians that they need not consent to the interview.

Judgments

If a trial attorney commits an error so egregious that a new trial is required, but the result at the second trial is much more favorable to the client than at the first trial, does an action for malpractice still lie against the attorney? And if so, how are damages to be measured? And is interest to be awarded on the difference between the two verdicts? These issues were presented in *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*.[xxii]

The underlying action was a straightforward pedestrian knockdown in an intersection controlled by a traffic light. The driver had been making a left turn into the intersection. There was a factual issue as to whether or not the plaintiff had been in the crosswalk. The claim of malpractice was that the defendant attorneys had asked the court to charge the jury on the wrong section of the Vehicle and Traffic Law. The relevant provision was actually VTL § 1111, which governs intersections controlled by traffic control devices, including lights. A pedestrian with a green signal in his favor has the right of way, and traffic entering the intersection must do so cautiously, yielding the right of way to other traffic in the intersection or a crosswalk. Unfortunately, the defendant attorney asked the court to charge VTL § 1151, which refers to intersections without traffic control devices. While it, too, gives pedestrians the right of way, it also imposes a duty of care upon pedestrians not to leave the curb and walk into the path of an oncoming vehicle so close that the driver cannot yield. Clearly, the requested charge was much less favorable to the plaintiff than the proper charge.

The court gave the requested charge of VTL § 1151. The jury returned a verdict apportioning fault between the driver and plaintiff at 50% apiece. Damages were fixed at the total sum of $255,000, to be reduced by plaintiff's 50% share of fault.

Plaintiff retained new counsel to move to set aside the verdict on the basis of the erroneous charge. The trial court, unsurprisingly, denied the motion, since it gave the charge that the plaintiff requested. The Appellate Division reversed and ordered a new trial,23 reaching the unpreserved issue in its interest-of-justice jurisdiction and finding the error to be fundamental, affecting the jury's consideration of the plaintiff's fault. On retrial, nearly three years after the original trial, the proper charge was given and the liability verdict was solely against the driver. On damages, plaintiff called five experts. While the jury was out, the case settled for $750,000.

This legal malpractice action ensued. Plaintiff asserted that the defendant attorney was negligent in requesting the wrong VTL section to be charged. Damages were claimed in the amount of the legal fees on the motion to set aside the initial verdict and the appeal from the adverse determination, the witness fees and other expenses on the second trial. Most significantly, plaintiff sought to collect interest on the eventual settlement of $750,000, from the time of the initial verdict to the settlement. Figured at the judgment rate of 9%, this would have amounted to about $190,000. The defendant attorney interposed a counterclaim for unpaid legal services from the first trial.

Supreme Court granted plaintiff's motion for summary judgment, awarding $28,703.27, plus interest, for the legal and expert fees and other expenses. It denied the application for interest on the $750,000 settlement. The Appellate Division reversed and dismissed the complaint entirely, on the grounds that since the plaintiff eventually recovered $750,000, there had been no damages from the initial malpractice.

The Court of Appeals reinstated the judgment as to the $28,703.27 in fees and expenses, but upheld the ruling that plaintiff was not entitled to interest on the eventual settlement amount. The Court found damages in the additional amounts the plaintiff had to expend in order to correct the defendant attorney's mistake. Damages in legal malpractice cases, as with other negligence cases, are intended to make the plaintiff whole, and may include litigation expenses incurred in order to avoid or ameliorate the attorney's negligence. In this case, the litigation expenses to correct the mistake included the attorney's fees involved in obtaining a new trial, and the expert witness fees on the second trial. The $750,000 settlement did not obviate the defendant attorney's obligation to pay these expenses, since it was compensation for the original injury and not for the attorney's malpractice.

The plaintiff's claim to interest on the eventual settlement from the date of the original verdict rested on the assertion that had the jury been properly charged on liability, it would have returned a larger verdict on damages, and the defendant attorney was therefore liable to pay interest on the difference. The Court found this assertion to be pure speculation, and rejected it.

In a footnote, the Court pointed out that it was not deciding whether predecision interest could be recoverable in legal malpractice actions with different facts.

Limitations

In *Nussenzweig v diCorcia*[xxiv] the Court of Appeals applied the single-publication rule to privacy violations under Civil Rights Law §§ 50 and 51. Therefore, when the unauthorized photographs of the plaintiff were sold in 2001, but did not find out about it until 2005, his claim was time-barred.

The defendant diCorcia is a professional photographer, and took candid photographs of various passersby in Times Square between 1999 and 2001. The subjects of the photographs were not aware that their pictures were being taken. The photographs were exhibited, and copies were sold, at the gallery of the defendant Pace/McGill in 2001. One of the subjects was the plaintiff.

It wasn't until 2005 that the plaintiff only found out that his photograph had been sold to the public. He sued for a violation of his right of privacy as set forth in Civil Rights Law §§ 50 and 51.[xxv] The defendants sought summary judgment on the grounds that a Civil Right Law privacy claim is subject to a one-year limitations period, running from the initial publication.[xxvi] Plaintiff argued that the limitations period should run from his discovery of the wrong. Supreme Court granted the motion and dismissed. The Appellate Division affirmed, as did the Court of Appeals.

The Court noted that the single-publication rule arose in the context of defamation cases.[xxvii] The defamation claim is deemed to accrue, and the limitations period to start running, on the date of the first publication. Subsequent publications are not deemed to commence new limitations periods. The majority of Appellate Division cases have applied this rule to privacy claims, and the Court accepted this as the proper rule.

Interestingly, the Court did not directly address the issue of plaintiff's alleged late discovery of the publication of the photographs. Here, courts construing the single-publication rule in defamation cases generally hold that the limitations period runs from the actual first publication, and not from the plaintiff's discovery of the wrong.28

Motion Practice

Statutory and Rule Changes
Service of Cross-Motions

An amendment to CPLR 2214 and 2215 became effective July 3, changing the service time on cross-motions.[xxix]

Recall that CPLR 2214 sets the minimum service time for a motion at eight days prior to the return date, and the time for service of opposing papers at two days prior to the return date, unless the plaintiff does two things: (1) gives the opposing parties more notice time; and (2) demands additional notice of the opposing papers.

The previous version of 2214 said nothing about cross-motions, which were governed by CPLR 2215. Previously, a cross-motion could be served three days before the return date of the motion-in chief, giving the original movant insufficient time to respond before the return date.

The amendment to 2214 provides that if the movant gives sixteen days' notice of the motion [instead of the prior twelve], he may demand that any cross-motion, as well as any opposing papers, be served at least seven days prior to the return date.

The amendment to CPLR 2215 resolves an issue on which Appellate Division decisions conflict. The issue is whether or not CPLR 2103(b)(2) applies to the service of cross-moving papers. That provides that where a time period is measured from the service of a paper and service is made by mail, five days are to be added to the prescribed period. The Second Department has held that this applies where cross-moving papers are

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Pendente Lite Motions

By GEORGE J. NASHAK, JR.*

On November 29, 2007, I attended the first in a luncheon series at the Nassau County Bar Association. This series is the result of the efforts of Justice Robert A. Ross and Stephen W. Schlissel, Esq. It was co-sponsored by:

Nassau County Supreme Court, Matrimonial Center, Matrimonial and Family Committee, NCBA, New York Chapter of the American Academy of Matrimonial Lawyers, and New York Family Inns of Court.

The topic was:

"Pendente Lite Relief: What do Judges Like to See?"

It was an open discussions format with Justices Robert A. Ross and Denise Sher and their law secretaries Linda Kevins, Esq. and Cara A. Patton, Esq.

Before taking questions from the audience, Justice Ross shared with us some of things he hopes to see.

1. Tabs on exhibits.

2. Complete net worth statements with income tax returns, both individual and corporate attached. If your client is on extension, attach copy of extension request.

3. The more complete counsel fee affirmation the better. He looks to see the size of the retainer received by the other attorney. How much of the retainer of the applicant remains unused and what work is left to accomplish. He tries to level the playing field.

4. Attach photographs to show lifestyle.

5. No nasty remarks.

6. Consent to as many items requested as possible. It shows you are looking for a correct decision.

7. Recent decisions should be cited. . He recommends checking new decisions each Thursday. (www.courts.state.ny.us/reporter/Most_Recent_Decisions.htm).

8. Google the name of businesses. You will be surprised at what you can find.

9. He comes down hard on total fabrication, willful and deliberate scams. Make sure you point them out in your papers.

10. Make motions to renew and reargue when you think he made a mistake. He would prefer to correct them, rather than have the Appellate Division make the corrections.

11. Treat your fellow attorneys respectfully, even if they don't reciprocate.

12. He will modify restraining orders to allow for payment of counsel fees, education costs etc.

13. Back up expenses with documentary proof.

The participants made the following points in answering questions from the audience.

1. Highlight your important points don't bury them.

2. Must show efforts to amicably resolve discovery issues, before making motion. This is not required to make pendente lite motions. Justice Ross does not believe judges can require their permission before you can make a motion. Justice Sher, who sits in the IDV part, requests telephone conferences before bringing motions.

3. Justice Sher says don't delay making your pendente lite motion until the case is transferred to the IDV part.

4. Basically pendente lite motions should set forth three things.

a. What you want.

b. Reasons you need it.

c. Your proof.

5. Most ex parte relief now requires notice to the other side. Justice Ross tries to act on these requests in one or two days.

6. To obtain temporary custody and exclusive occupancy, show danger and availability of alternative residence.

7. Justice Ross bifurcates grounds trials.

8. In applying the Child Support Guidelines, Justice Ross uses a $225,000.00 combined income cap. He feels that is sufficient to support a child. He doesn't apply the guidelines on pendente lite motions. He strives to keep the status quo.

This is all I can remember from the luncheon. I hope it will be of help to the matrimonial practitioners of the Queens County Bar Association, who were not in attendance.

George J. Nashak Jr. is a Past President (2005-2006) of the Queens County Bar Association, Vice-Chair of its Family Law Committee and a partner in the firm Ramo, Nashak & Brown.

PHOTO CORNER

Stated Meeting, Monday, November 19, 2007

Meet Our New Administrative Judge, Criminal Term – Hon. Randall T. Eng

Catherine Lomuscio, David Cohen and Hon. Evelyn Braun

George Nashak, Chanwoo Lee and Greg Brown

David Cohen introducing guest speaker Hon. Randall T. Eng

Hon. Evelyn Braun and others listening to a question that David Cohen is making

District Attorney Richard Brown stating a point

Hon. Martin Ritholtz, David Cohen, Al Gaudelli and DA Richard Brown

Hon. George Heymann, Hon. Randall Eng, Catherine Lomuscio and Hon. Evelyn Braun

Hon. Randall Eng addressing the attendees

Chanwoo Lee and Hon. Randall Eng

Hon. Randall Eng answering a question

Photos by Walter Karling

Hon. Randall T. Eng

New members Steven Raiser and Thomas Kenniff

Hon. Randall Eng making a point

Seymour James and other attendees listening attentively

Hon. Randall Eng and David Cohen

William Knisley, Carmen Velasquez and Hon. Arthur Cooperman

Spiros Tsimbinos, George Nashak, Joe Carola, Chanwoo Lee, Paul Goldblum and Greg Brown

Attendees to Stated Meeting

Stephen Singer, Hon. Randall Eng, Hon. Richard Brown and Al Gaudelli

Spiros Tsimbinos, Carmen Velasquez, Chanwoo Lee, Paul Goldblum and Wei Zhu

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served by mail, thus requiring an additional five days' notice of the cross-motion.[xxx] The First Department has held CPLR 2103(b)(2) inapplicable, thus allowing service by mail on the third day prior to the return date.[xxxi]

The amended 2215 provides that where the cross-motion is served by mail, it must be served three days earlier than otherwise provided.

Submission of Orders and Judgments

22 NYCRR 202.48 (c)(2) has been amended to provide that when a proposed counter-order or judgment is submitted, a copy must be submitted with it, "clearly marked to delineate each proposed change". The format of the marking is not specified.

This affirmance by the Court of Appeals in *Nonnon v City of New York*[xxx ii] points out that where a motion is denominated by the moving party as being one to dismiss for failure to state a cause of action, before the motion court considers affidavits as to the actual merits of the claim it must actually convert the motion to one for summary judgment, giving both side appropriate notice and an opportunity to submit a full set of affidavits and other proof.

The case involved a toxic New York City landfill and its alleged effects on the health of nearby residents. Nine personal injury lawsuits were consolidated. The defendant City moved pursuant to both CPLR 3211 and 3212 to dismiss certain of the claims on limitations grounds, and pursuant to 3211(a)(7) to dismiss all the complaints for failure to state a cause of action. The basis for this latter branch of the motion was the City's claim that the plaintiffs could not prove a causal connection between the City's actions and their injuries. Both sides submitted expert affidavits on the causation issue. Supreme Court dismissed certain of the claims on limitations grounds, but denied the motion as to the merit of the action. The Appellate Division modified as to one of the limitations issues, but otherwise affirmed. Underscoring that the determination was actually as to the merits of the actions, the opinion in the Appellate Division concentrated mainly on *Frye* issues.

The Court of Appeals affirmed, but did so only on the procedural grounds that the motion had not been converted by Supreme Court to one for summary judgment. The Court stressed the different functions of factual affidavits on a motion to dismiss for failure to state a cause of action, and on a motion for summary judgment. On a motion to dismiss, such affidavits flesh out the pleadings so as to supply any deficiencies in factual allegations, while if the motion has been converted to one for summary judgment, the affidavits and other proof are intended to establish a complete record.

Here, the plaintiffs were not put on notice that they needed to submit all of the proof at their disposal. In the Court of Appeals, the plaintiffs contended that they had in fact not submitted all of their proof, leading the Court to conclude that the City was not entitled to a dismissal for failure to state a cause of action, at least on the existing record.

Parties

Tedesco v. A.P. Green Industries, Inc.,[xxxiii] was an asbestos injury case, in which the defendant/third-party plaintiff distributor was a dissolved corporation. The issue was whether or not it was entitled to maintain the third-party action against DuPont despite its dissolved status. The court held that it was.

The defendant/third-party plaintiff in question was Insulation Distributors, Inc. (IDI), which went out of business in 1996, and was dissolved for non-payment of taxes in 1999.

Plaintiff's decedent had been an electrician for DuPont for some time, retiring in 1992. He was diagnosed with asbestos-related illnesses in 2000, and died later that same year. The action against defendant/third-party plaintiff Insulation Distributor, Inc., was commenced in 2001, and IDI commenced its third-party action against DuPont for contribution and indemnification.

During disclosure, IDI refused to provide certain disclosure demanded by DuPont, citing its dissolved status as justification. DuPont responded by moving to amend its answer to assert lack of capacity to sue as an affirmative defense, and to dismiss the action on that ground. Supreme Court granted leave to amend and dismissed. The Appellate Division reversed, and the Court of Appeals affirmed the Appellate Division.

Pursuant to Business Corporation Law §§ 1005 and 1006 allow a dissolved corporation to carry on business only for the purpose of winding up its affairs, specifically including the power to sue or be sued. IDI therefore had the capacity to bring the third party action, so long as it was part of "winding up its affairs," which the Court found that it was. Resolving asbestos suits against it, such as the plaintiff's was necessary to wind up its affairs, and asserting third-party claims such as the one here was part of that process.

DuPont argued that this claim could not be part of "winding up" IDI's affairs, since it did not even exist at the time IDI was dissolved. The decedent did not suffer a "grave injury," within the meaning of the Worker's Compensation Law, until 2000. The cause of action for contribution or indemnity asserted in the third-party complaint has not accrued even yet, since IDI has not yet paid the underlying claim. That the claim was only contingent at the time IDI was dissolved does not preclude it from interposing the claim. To hold to the contrary would preclude dissolved corporations from collecting on debts which became due after dissolution, giving windfalls to the debtors. The BCL provisions on winding up a dissolved corporation's affairs should not be so narrowly interpreted, and the Appellate Division was correct in rejecting the defense.

The Court did not rule on the details of the disclosure dispute which was the cause of the original motions to amend and dismiss, leaving to further direction from the trial court.

Settlements

GOL § 15-108 has been amended so as to exempt settlements for no consideration from the usual provisions of that section.[xxxiv]

remove roadblocks to settlements with defendants who prove to have no liability. Recall that under the statutory scheme, an alleged tortfeasor who settles with the plaintiff truly "buys his peace," that is, he is discharged from further liability not only as to the plaintiff, but also as to contribution claims from the other parties, while at the same time giving up any claims to contribution from them. He remains liable to indemnification claims. The non-settling parties are protected, since if they are ultimately found to have been at fault they will receive credit for the settling defendant's equitable share of fault, or for the dollar amount of the settlement, whichever is greater. This requires, of course, that the issue of the settling defendant's fault is still put before the jury. If the settling defendant overpaid, the remaining defendants get the benefit of his largesse and the plaintiff does not receive a windfall. If, on the other hand the settling defendant made a favorable bargain, the remaining defendants are not required to pay more than their equitable shares and the plaintiff has obtained less than his full damages in exchange for the certainty of some recovery.

The risk of making a bad bargain is of course common to all settling plaintiffs. In a one-on-one case no one will ever know what the jury would have done, but if one of several defendants settle, the jury's verdict will reflect on the wisdom of the settlement along with the actual fault of the remaining parties.

One of the places the statutory scheme breaks down is where the plaintiff discovers that one of several defendants is, in fact, not liable at all. A plaintiff proceeding in good faith would normally wish to streamline the litigation by simply discontinuing the action against the blameless defendant, who would be only too happy to be let out of the case. The plaintiff might reason that he is losing nothing, since there is no liability on the blameless defendant anyway. The remaining defendants, however, may not agree that "Mr. Blameless " is, in fact, without fault. Indeed, it might well turn out that a case for the liability of Mr. Blameless can be made. Then, it would be excellent litigation strategy for the remaining defendants to attempt to heap blame on the now empty chair, possibly lessening their exposure at the expense of the magnanimous plaintiff. The unhappy plaintiff might find that he has given away a portion of his damages for nothing.

Even where Mr. Blameless' lack of liability appears incontrovertible, a prudent plaintiff, aware of the general principle that "no good deed goes unpunished," and of the consequences of a too-hasty discontinuance against Mr. Blameless, might well decline the invitation to simply let him out of the case. Plaintiff might inform Mr. Blameless that if a motion for summary judgment were made, plaintiff would not oppose it. If Mr. Blameless made such a motion successfully, his non-liability would be established against the remaining defendants also, and he really would be out of the case. The remaining defendants, therefore, are greatly inclined to oppose the motion if there are any colorable grounds for doing so. This leads to increased summary judgment motion practice, even where Mr. Blameless is apparently exactly that.

The amendment to GOL § 15-108 is intended to ameliorate this situation, by removing settlements for no or purely nominal consideration from the equation. That is, a settlement for less than one dollar will no longer trigger the provisions of the statute. It is intended that the release of Mr. Blameless will get him out of the case, but it will not immunize him from contribution claims asserted by way of impleader or later separate actions for contribution. Instead, it will leave him exactly where he would have been if plaintiff never sued him in the first place.35 The remaining defendants might also be able to obtain a partial set-off of liability for non-economic loss by asserting Mr. Blameless' fault under CPLR Article 16.

The amendment is limited to those agreements where the plaintiff's dispute against the settling party is "completely or substantially" terminated. This is intended to exclude "high-low" agreements, or those which simply limit the issues.

Also excluded from the rule are post-judgment settlements.

A caveat is in order. Many practitioners are under the impression that a settlement by one defendant, for any amount, automatically removes him from the action. That is not so. Pursuant to CPLR 3217, a stipulation of discontinuance requires the agreement of all parties, not just the plaintiff and the settling defendant. If the only claims among the defendants relate to contribution, the non-settling defendants will have no remaining claims against the settling defendant nor he against them, and there will be no reason for the non-settling defendants to refuse to sign such a stipulation. If they do refuse to do so, the settling defendant will be entitled to an order of discontinuance.[xxxvi] Still, the non-settling defendants may have claims against the settling defendant which are not vitiated by the settlement. They may, to pick the most obvious and common example, have indemnification claims. There are many cases where the court was required to evaluate whether the non-settling defendants had valid claims which survived the settlement.[xxxvii] Where the settling party cannot obtain a stipulation of discontinuance from all other parties, it is prudent to seek dismissal of any claims by motion.

High/Low Agreements

In *re Eighth Judicial Dist. Asbestos Litigation (Reynolds v Amchem Prods. Inc.)*,[xxxviii] was a toxic tort case, in which two defendants were left at the time of trial, Niagara Insulations and Garlock Sealing Technologies. Plaintiff and Niagara entered into a high/low arrangement, whereby Niagara's liability to the plaintiff was limited to a range between $155,000 and $185,000. The existence of the arrangement (although not the details) was known to the court, but was not disclosed to Garlock either by the court or the parties to it. The jury rendered a verdict against both defendants, apportioning liability at 60% to Garlock and 40% to Niagara. Damages were fixed by the jury at $3.75 million.

The trial court rejected so much of Garlock's posttrial motion as was to set the verdict aside on the grounds of non-disclosure of the high/low agreement, and the Appellate Division affirmed. It found that there had been no prejudice to Garlock, since Niagara retained the incentive to disprove or minimize its liability, while seeking to maximize Garlock's. Garlock failed to show how the agreement had "realigned loyalties so as to prejudice it."

There was a dissent, which considered the court's failure to advise Garlock of the high/low as a breach of its obligation

to disclose an ex parte communication. The dissent found it unnecessary for Garlock to show specific prejudice, finding the potential disadvantage to be sufficient. For example, Garlock wsas unable to examine opposing witnesses for possible bias or collusion based upon the agreement. The dissent would have remanded for a new trial, at which the court should have determined whether the agreement should have been made known to the jury, and if so under what terms.

The Court of Appeals was clearly unhappy with the secret nature of the agreement, finding that secret agreements are inherently prejudicial to the non-settling parties, and that they "distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system." It found specific prejudice to Garlock in this case. It therefore, reversed, setting forth as a blanket rule that the existence of a high/low agreement must always be disclosed to the non-settling defendants.

In the specific case, the Court found that the high/low served as an undisclosed incentive for the plaintiff to attempt to maximize liability as to Garlock, while minimizing it as to Niagara. Moreover, Garlock was deprived of the knowledge of the true risks of proceeding to trial, specifically that it was now the target defendant. It was also deprived of the opportunity to adjust its trial strategy accordingly. The Court pointed out that Garlock might have sought to have its peremptory jury challenges separated from Niagara's, or sought to have been allowed to disclose the agreement to the jury, or cross-examine witnesses concerning the agreement.[xxxix]

More generally, the Court held that disclosure served the needs of the adversarial process by ensuring that all parties are informed of the "true posture" of the litigation, and allowing the parties and the trial courts the opportunity to determine whether and how the agreement may be used at trial.

Trial Practice

It has been an oddity of New York practice that a party or one under a party's control could be compelled to attend a deposition by a mere notice served on the party's counsel, but that attendance at trial could be compelled only by a subpoena served directly on the witness. This requires the expense of a process server. A new section has been added, CPLR 2303-a, which provides for service on the party's counsel of record, in the same manner as litigation papers generally.40 The provision takes effect January 1, 2008, and applies to all parties or persons under their control whose attendance could previously have been procured by a trial subpoena.

The legislative memo makes it clear that the new section is intended only to affect the manner of service. It neither enlarges nor restricts the class of persons who can be subpoenaed. Three points should be made in connection with this. First, the attorney to be served is specifically stated to be the party's attorney of record. Where trial counsel has been retained, good practice would seem to indicate service of notice of the subpoena on trial counsel as well, but the service necessary to enforce the subpoena is on the attorney of record. Second, the service can be made by any of the usual means listed in CPLR 2103(b), including ordinary mail, without a process server. This would seem to indicate that where the attorney has consented to service of papers by fax or e-mail, an original document is not necessary to compel appearance. Finally, the new provision does not obviate the necessity of the witness fee being tendered to the witness either with the subpoena or at some point prior to the testimony

i. 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.

ii. *Matter of Schwartz v Morgenthau*, 7 NY3d 427, 823 NYS2d 761 [2006]

iii. First priority is given to liens or claims against the forfeited property, pursuant to court order; and second priority is given to amounts ordered to be paid by the defendant to victims of the crime for which forfeiture was ordered. CPLR 1349 (2)(a & b).

iv. *Launders v Steinberg*, 9 N.Y.3d 930, 845 N.Y.S.2d 215 [2007]

v. *City of New York v Welsbach Elec. Corp.*, 9 N.Y.3d 124, ___ NYS2d ___, 2007 NY Slip Op 07910 [2007]

vi. See, e.g., *Ray v Hertz Corp.*, 271 A.D.2d 374, 707 N.Y.S.2d 161 [2000]; *Powell v. City of New York*, 250 A.D.2d 409, 673 N.Y.S.2d 86 [1998]; *Little v. City of New York*, 183 Misc.2d 739, 704 N.Y.S.2d 793 [2000]; *see contra, Davilmar v City of NY*, 7 A.D.3d 559, 775 N.Y.S.2d 880 [2004].

vii. *Supposedly*, that is a physical impossibility. *Supposedly*, the traffic lights are set up so that if there is a malfunction, both sides get a red signal. The jury, however, accepted the green-green scenario, and there was no appeal of that portion of the verdict. We're stuck with that conclusion for the purpose of this discussion, and we'll just have to deal with it. OK?

viii. 300 AD2d 423 [2002]

ix. *Harris v Niagara Falls Bd. of Ed.*, 6 N.Y.3d 155, 811 NYS2d 299 [2006]

x. L. 2007, ch. 529, effective 8/15/07. The new text of CPLR 2001 is as follows:

§ **2001. Mistakes, omissions, defects and irregularities.** At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

xi. *Matter of Gershel v Porr,* 89 NY2d327, 653 NYS2d 82 [1996]

xii. *Matter of Fry v Village of Tarrytown*, 80 NY2d 714, 658 NYS2d 205 [1997]

xiii. L. 2006, ch. 529, Legislative Memorandum. Emphasis in original. [Hasn't the Legislature heard that WRITING IN CAPITALS is now considered shouting?]

xiv. *Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882 [1984] This case was decided when an action was commenced by serving the initiatory papers, but it is generally understood that the same rule applies to actions commenced under commencement-by-filing (see, *Matter of Fry v Village of Tarrytown*, 80 NY2d 714,

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2007 Family Law Update

By MICHAEL DIKMAN & DAVID DIKMAN

There were a number of legislative developments this year, which will first be addressed.

Domestic Relations Law § 177

This new law, effective October 30, 2007, requires all agreements to contain language relating to the health care coverage of each individual, before it will be accepted and entered in a divorce judgment. The agreement must **either** provide for the future coverage **or** that the individual is aware he or she will no longer be covered by his or her spouse's insurance plan and that the individual will be responsible for his or her own health insurance coverage. The statute sets forth the following **specific statement**, required to constitute adherence to this law:

"**I, , fully understand that upon the entrance of this divorce agreement, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance.**

(Spouse's signature) Date"

Subdivision (2) requires that prior to rendering a decision after trial, the judge must notify both parties that once the judgment is entered, a person may or may not be eligible to be covered under his or her spouse's health insurance plan, depending upon the terms of the plan.

If a judge finds that an agreement fails meet the requirements of this law, he will require compliance and may grant a thirty day continuance to afford an opportunity to procure new health insurance coverage.

In order to avoid problems, it is suggested that matrimonial attorneys make the required changes in their agreement and judgment forms, to comply with this new requirement. It is similar in theory (to provide for informed consent) to the rules mandating that agreements set forth that parties know how a judge would calculate child support, if not for the parties' agreement. That law has been strictly construed, and agreements failing to set forth the "presumptive amount" of child support a judge would order have been set aside.

Domestic Relations Law § 250

Amendments to this section, effective July 3, 2007, changed the statute of limitations for making claims directed to agreements relating to marriage. As to agreements covered by DRL § 236 (B)(3) the statute of limitations is three years. However, subdivision (2) tolls that period until (a) process has been served in a matrimonial action or (b) either party dies. This provision does not apply to Separation Agreements or to agreements made during the pendency of a matrimonial action or in settlement thereof.

Social Services Law § 413 (1)

This statute was amended, effective October 1, 2007, to expand the number of mandatory child abuse reporters to include most school teachers and counselors.

Social Services Law § 413 (1)

This statute was further amended, effective October 15, 2007, to impose additional duties on social service workers, relative to reporting child abuse.

Criminal Procedure Law § 140.10 (4)

This provision, for mandatory arrests in Family Offense and Order of Protection violation claims, was extended from April 9, 2007 to September 1, 2009.

Family Court Act § 812 (1)
Criminal Procedure Law § 530.11 (1)

Both of these statutes were amended, effective November 13, 2007, to add "criminal mischief" to the enumerated family offenses over which the Family and Criminal Courts have concurrent jurisdiction. (This law does not specify which of the 4 degrees of Criminal Mischief are included. Accordingly, it should be expected that all four can be the subject of a family offense.)

Criminal Procedure Law § 530.14

An amendment, effective August 2, 2007, provides for revocation of firearm licenses for willful violation of orders of protection involving physical injury (previously "serious physical injury).

Family Court Act § 249-b

This new law requires the OCA to establish court rules, establishing workload standards for Law Guardians, on or before April 1, 2008. There was a requirement that OCA report preliminary recommendations to the legislature by November 15, 2007.

Family Court Act § 516-a (b & c)

These sections were amended, effective October 30, 2007, to provide for orders of paternity or excluding the father, despite an acknowledgement, on the basis of DNA testing. However, no such test shall be performed upon a written finding by the court that such testing would not be in the best interests of the child on the basis of *res judicata*, equitable estoppel or a presumption of legitimacy of a child born to a married woman.

CPLR § 2308 (a)

Effective January 1, 2008, the maximum penalty for non-compliance with a subpoena was increased from $50 to $150.

CPLR § 2303 (a)

Effective January 1, 2008, this new law allows trial subpoenas to be served upon the witness' attorney of record, pursuant to CPLR § 2103 (b) methods.

COURT RULES

22 NYCRR § 202 (7) (f) provides that the advance notice required, regarding Orders to Show Cause seeking temporary relief, does not apply to Order of Protection requests.

22 NYCRR § 202.48 provides that when you submit counter orders or counter judgments, you must now clearly indicate what changes from the origi-

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BOOKS AT THE BAR

Since the January issue of **THE QUEENS BAR BULLETIN** is considered the most widely-read, especially for its annual legal updates, the responsibility to describe and recommend worthwhile books is taken seriously. In this vein, I have chosen books of a diverse spectrum appealing to a broad audience.

THE BOOKS OF DR. BRIAN H. BIX

In the delightful 1956 [Jules Styne/Betty Comden/Adolph Green] musical comedy "The Bells Are Ringing," [famous for hit songs such as "Just in Time" and "The Party's Over"], Academy and Tony Award winning actress Judy Holliday [born Judith Tuvim, 1921-1965, of Russian Jewish parents], playing lovably naive and sincere switchboard operator Ella Peterson, is unsuccessfully being tutored by the company in a sure-fire recipe for success in the song "Drop That Name." In the song, whether you actually have met the person whose name you are invoking is insignificant; it's the mere suggestion intimating that you are close with such a person that will help gain acceptance by and entree into a powerful clique.

Howard L. Wieder

So here goes my name-dropping, for entree into the halls of immortality: Aristotle, Saint Thomas Aquinas, John Austin, John Locke, Thomas Hobbes, David Hume, Hugo Grotius, Hans Kelsen, U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., U.S. Second Circuit Court of Appeals Judge Jerome Frank, the American Legal Realists, Immanuel Kant, Jeremy Bentham, Rudolf von Jhering, Francois Geny, Sir Henry Sumner Maine, Roscoe Pound, Lon Fuller, Hans Kelsen, H.L.A. Hart, John Rawls, Karl Nickerson Llewellyn, John M. Finnis, Joseph Raz, Ronald Dworkin, Duncan Kennedy, and U.S. Seventh Circuit Court of Appeals Judge Richard A. Posner.

How many of you spotted the common denominator in the aforementioned list of names? They are all great legal philosophers. While "Drop[ping] That Name" is not going to gain for me any celebrity-by-association, the beginning of the new millennium has already opened the doors of the Pantheon of the great philosophers of law to a richly-deserving American legal scholar - - Professor of Law **DR. BRIAN BIX** of the University of Minnesota School of Law. **DR. BIX Does Not Need To Drop Names For His Intellectual Distinction.** His recognition by his peers has been rightfully earned by a huge amount of distinguished, seminal scholarly writings. **Dr. BRIAN BIX** has the ability to take a complex legal problem or situation and brilliantly zero in on the critical legal question and analysis required for resolution.

DR. BRIAN H. BIX is the Frederick W. Thomas Professor of Law and Philosophy (2002-date); Associate Professor (2001-2002)] at the **UNIVERSITY OF MINNESOTA LAW SCHOOL.** Prior to 2002, he was Professor of Law at Quinnipiac University School of Law, Visiting Professor of Law at Georgetown University Law Center, Visiting Professor of Law at George Washington University Law School, Lecturer in Law at King's College, University of London, and Part-Time Lecturer in Law St. Edmund Hall at Oxford University. **In addition to an expertise in both Family Law and Legal Philosophy, Dr. BRIAN BIX is a member of the prestigious American law Institute.**

DR. BRIAN H. BIX has an impressive educational background. He is a *summa cum laude, phi beta kappa* graduate of the Washington University in St. Louis (B.A. Degree 1983), where he earned a merit-based full tuition scholarship. **BRIAN H. BIX** received his J.D. from Harvard Law School, where he graduated magna cum laude in 1986, and, in 1991, he received his Ph. D. Degree in Law from Oxford University, where he studied under the supervision of famous legal philosopher **JOSEPH RAZ.**

Before embarking on a distinguished law school teaching career, **DR. BRIAN H. BIX** was a Law Clerk for distinguished state and federal judges, including Justice Alan Handler (1986-1987), U.S. Ninth Circuit Court of Appeals Judge Stephen Reinhardt (1987-1988), and Massachusetts Appeals Court Justice Benjamin Kaplan (1993-1995).

Among the numerous books by **DR. BRIAN H. BIX** are: ***A DICTIONARY OF LEGAL THEORY*** (Oxford University Press, 2004) [now being translated into both Chinese and Spanish]; ***LAW, LANGUAGE AND LEGAL DETERMINANCY*** (Oxford University Press 1993), now available in paperback by Clarendon paperbacks, a division of Oxford Univ. Press); ***JURISPRUDENCE: THEORY AND CONTEXT,*** 5th ed. (Sweet & Maxwell (UK), Carolina Academic Press (US), forthcoming) (1st ed. 1996; 2nd ed. 1999, 3rd ed. 2003, 4th ed. 2006) [now being translated into both Spanish and Greek], (Editor) ***PHILOSOPHY OF LAW: CRITICAL CONCEPTS IN PHILOSOPHY***, four volumes (Routledge, 2006); (Editor) ***JURISPRUDENCE: CASES AND MATERIALS*** (2nd ed., LexisNexis, 2006); ***FAMILY LAW: CASES, TEXT, PROBLEMS***, 4th ed. (LexisNexis, 2004); and (Co-Editor, with Kenneth Einar Himma) ***LAW AND MORALITY*** (Ashgate, 2005).

A full list of **DR. BRIAN H. BIX'S** published law review writings and book reviews is too great in scope. **DR. BIX'S** most important published articles may be found at www.law.umn.edu or at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=119209.

The challenge to persuade practicing lawyers to purchase and read a book of legal philosophy is daunting. Lawyers are busy meeting clients, opposing adversaries, securing adjournments, preparing court papers, beating deadlines, collecting fees, aside from juggling their personal/family lives. My earnest suggestion is that since the practice of law enables you to pay the bills and make a living, you can reciprocate by buying and reading **AT LEAST ONE BOOK** that gives you a better understanding of the field. **The one book on the Philosophy of Law that I urge you to buy is A DICTIONARY OF LEGAL THEORY** (Oxford University Press, 2004) [$64.95, 227 pages], a work which you will find accessible and easy to understand. **You Can Save 30% Off The Price Of This Handsome, Hardcover Book By Purchasing It At www.amazon.com.**

Aside from providing a precise biographical description of the most important legal thinkers and philosophers, ***A DICTIONARY OF LEGAL THEORY*** (Oxford University Press, 2004) will define - - simply and lucidly - - important concepts of law, including "zero sum game," "law and economics," "law and literature" "American legal realism," "legal positivism," "critical race theory," "critical legal studies," "legal pluralism," and "postmodernism,"and many other modern terms that an ***educated*** American lawyer needs to know.

Your trial memorandum of law and appellate brief on the constitutionality of a harsh law might sparkle if you were able to invoke "lex iniusta non est lex." Want to know its definition? Buy the book and turn to page 127. **OXFORD UNIVERSITY PRESS** [www.oup.com, **where this book can be ordered**] is to be congratulated for publishing this work and many others of **DR. BIX!**

If you have enjoyed ***A DICTIONARY OF LEGAL THEORY*** (Oxford University Press, 2004), your next purchase should be ***LAW, LANGUAGE AND LEGAL DETERMINANCY*** (Oxford University Press 1993), now available in paperback by Clarendon paperbacks, a division of Oxford Univ. Press) and ***JURISPRUDENCE: THEORY AND CONTEXT***, (Carolina Academic Press (4th ed. 2006), both exploring at greater length the differences between schools of legal philosophy and legal theories.

For corporate lawyers who draft contracts and for commercial litigators, **PROFESSOR BIX** masterfully edits a collection of essays on contract law in two volumes in ***CONTRACT LAW*** (2 vols., International Library of Essays in Law and Legal Theory, 2nd Series, Ashgate, 2000).

The great overall contribution by **BRIAN H. BIX**, in his books on the philosophy of law, is that he takes concepts that were previously abstract and dry and makes them accessible, comprehensible, and interesting! **BIX** has a talent for making the field of legal philosophy available to the non-expert reader in a thorough, lucid, and engaging way. His genius also is in his ability to take a complex legal problem and go to the jugular instantly, dissecting the problem's component parts with surgical skill and providing an excellent analysis and solution and I look forward to the publication of his many other works, scheduled for publication soon!

DEATH BY RODRIGO

In the classic British television series "Monty Python's Flying Circus" [1969-1974], a scene change would occur abruptly with the voice of John Cleese, as radio commentator, saying only: "And now for something completely different . . ." From the seriousness of legal philosophy, turning to "something completely different," litigator and criminal lawyer Ron Liebman of Washington D.C.'s prestigious law firm of Patton Boggs, LLP, has written a legal novel ***DEATH BY RODRIGO*** (Simon & Schuster, 280 pages, $24.00).

Before continuing, I am not an expert of fiction and read and enjoy principally nonfiction books. Nevertheless, I started reading, and even enjoying, ***DEATH BY RODRIGO***, depicting the everyday life of two law firm partners. The depiction was accurate, as practitioners especially in Queens County will find, and the narrative was colorful and entertaining. In many ways, the book seemed to me destined for television and film. The scenes depicted were reminiscent of the brilliant Showtime television series "Huff," where excellent actor Oliver Platt, played a smooth and fast-talking lawyer and partner, whose addiction to cocaine use got him into overwhelming trouble. The characters in Liebman's ***DEATH BY RODRIGO*** are not so addicted, but they are human, with their own vices and characteristics as they hustle to make a living.

I then read the portion involving an important annual Bar Association dinner, where the two protagonists apparently bribed or generously tipped someone to change the seating chart and they thus managed to be seated with the Chief Justice of the State's highest appellate court and his wife. The lurid sexual incident then depicted was too much for my taste. I am not a prude and not self-righteous, but, at that point, I could not read on. My own reaction reminded me of that depicted in the original classic and recent remake of Mel Brooks' "The Producers," with a well-dressed couple striding up the aisle toward the exit, on opening night of the new musical "Springtime for Hitler," offended by the paeans to the Fuhrer in the first production number, and the wife, turning to the stage before leaving, saying: "Talk about poor taste!"

Unwilling to read more, I turned to **PROFESSOR OF LAW LEONARD GROSS,** for help. **PROF. LEONARD GROSS** teaches both at the University of Southern Illinois School of Law in Carbondale, Illinois and at the University of Washington School of Law

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in St. Louis, Missouri. **PROFESSOR GROSS** is an expert in several fields of law including the Law of Remedies and Corporations. He is also probably one of the top five leading experts in the United States on legal ethics and professional responsibility. He is also a regular columnist for an Illinois newspaper. Unlike me, as a diversion, **LEONARD GROSS** loves fiction novels of all sorts from murder mysteries, spy thrillers, legal suspense, and action-adventure.

When I told **LEONARD GROSS** that I was offended by the description of the sexual act committed at the Bar Association function, involving a Chief Judge, Lenny disagreed with me, saying that he thought the scene depicted was hysterically funny! I guess the differences of our opinions make for the success of television film critique shows such as "Ebert and Roeper." At any rate, I defer to the opinion of **PROF. LEONARD GROSS,** who loves the genre of fiction. The following portion of this column concerning **DEATH BY RODRIGO** is by guest columnist **PROF. LEONARD GROSS:**

"***DEATH BY RODRIGO*** is a fun read. Ron Liebman, a noted Washington, D.C. attorney, weaves together several subplots involving both legal drama and black comedy. It reminded me of "Hill Street Blues" in that it combines the seamy side of law with the personal problems of the characters. The lawyers face legal and ethical dilemmas as well as extreme physical danger. Liebman uses his knowledge of the law to create situations which border on being over the top. Nonetheless, there are elements of realism that give it a ring of truth."

"Liebman's protagonist, Junne Salvatore, is a former cop turned lawyer. Liebman has him as well as most of the other characters speaking in street language - - New Jerseyese. He also uses many asides to tell us what his characters are thinking and what they believe others are thinking."

"The principal characters have so many problems it is a wonder that they can make it thorough the day. The dangers that the clients pose to them are so great that our own problems pale in comparison. Nonetheless, we care about his characters. They are so flawed that we have sympathy for them."

"In addition, there are many colorful bit players who spice up the tale. I have read many legal thrillers with sexual subplots. But this is unique in a number of respects. Having the protagonist confused about his own sexuality is a real twist."

My only criticism is the editing. Three times Liebman refers to secretary Janice pronounced "Janiese." On p. 163, there are words omitted: "seated back there about killed you." Also, on p. 169, line 3: "I'm was waiting." The biggest issue from an editorial standpoint is that sometimes the protagonist speaks too elegantly and does not carry off the street lingo. For example on p. 65, Junne states: "As I walk I feel this uncomfortable mix of warm nostalgia and sadness for things bygone." Junne also seems too literate on p.21 by displaying his knowledge of Walt Whitman's *Leaves of Grass*. He also calls "Oscar Wilde, a big influence on one of America's major twentieth century poets Allen Ginsburg." Given his apparent literacy or the lack thereof, it is hard to believe he would be so familiar with all that poetry.

At any rate these are only minor quibbles in what was a thoroughly enjoyable novel. It would really do well as an audio book. After reading ***DEATH BY RODRIGO***, I was so favorably impressed that I have just bought Liebman's prior novel, ***GRAND JURY***."

Thank you, PROFESSOR LEONARD GROSS, for the excellent guest review!

"And now for something completely different . . ."

CLEAR AND TO THE POINT: 8 PSYCHOLOGICAL PRINCIPLES FOR COMPELLING POWERPOINT PRESENTATIONS

CLEAR AND TO THE POINT: 8 PSYCHOLOGICAL PRINCIPLES FOR COMPELLING POWERPOINT PRESENTATIONS, although written for "PowerPoint" presentations, should be purchased and read by lawyers, especially trial lawyers who rely on charts to sway juries and litigators who prepare court papers. The book, published by highly regarded Oxford University Press [222 pages, paper, $16.95, 2007] is by Professor **STEPHEN M. KOSSLYN, the Chair of the Department of Psychology at Harvard University.** In terms of ethos, it's hard to beat such a prestigious credit. The book costs only $16.95 and putting aside any tax deductibility by practicing lawyers, **its tips for legal practitioners are priceless.**

Anyone who has read my **"Books at the Bar"** and **"The Culture Corner"** columns will notice that I use topic headings and sub-topic headings and make use of **BOLD PRINT type** and *italics* to break up a lengthy column, to give a road signal for a reader, or to make a point or for emphasis. Making a presentation, by either the spoken or written word, is not a means of self-gratification. It is meant to be absorbed by a listener or reader.

Judges and law secretaries, as a practical matter, generally are hard-pressed to spend much time on each motion. Litigators need to realize that fact in their writing. A failure to make a crucial point cogently and in a way and manner to be appreciated by the reader can be fatal to the client's cause. **STEPHEN M. KOSSLYN** urges the use of **"Bullet Points"** and repetition in making a presentation. I readily saw and read how a litigator can benefit from this excellent book! If I were a litigator, I would readily use **"Bullet Points"** in making or opposing a motion for summary judgment. Moreover, in a "Serious Injury" case under Insurance Law section 5102(d) or a "Fall from an Elevated Height" case under Labor Law sections 220 and 221, assuming excellent legal research that directly addresses the pertinent legal issue and a captivating writing style, I would readily use **Headings in Boldface type,** subheadings - - where appropriate - - as a roadmap for the reader, Bullet Points, and artful use of repetition to make a point in motion papers that will stick in the reader's head and make a winning, convincing impression.

CLEAR AND TO THE POINT by **STEPHEN KOSSLYN** has many other helpful tips that may be mined successfully by lawyers and litigators, but you'll have to buy the book . . . . **OXFORD UNIVERSITY PRESS** never ceases to amaze me with its cogent, accessible books for the busy professional! **Check out the U.S. web site for www.oup.com!**

GIULIANI: NASTY MAN

This book by former Mayor Edward Koch, once a fan of Rudy Giuliani, was first written in 1999, but new material, consisting of a new prologue, enabled its new release in 2007 - - just in time for Presidential politics. The chapters in the book consist of columns that Mayor Koch, upon returning to private life, wrote about Giuliani, in the 1990's. As I read this convenient paperback, I was amazed how, despite the events of September 11, 2001, little has changed in Giuliani's emotional makeup.

I read **GIULIANI: NASTY MAN** in July 2007, but it was not until I saw CNN's Republican "You Tube" debate in November, 2007, that I realized the importance of the book. During that old debate, the Giuliani that always needs an enemy to attack and belittle resurfaced. Whether provoked or not, Giuliani could not resist, during the debate, from baring his claws and mauling Governor Mitt Romney, his perceived enemy de jour! By all post-debate commentaries, and my own observation, former Mayor Rudolph W. Giuliani appeared small and petty, living up to the perception of being mean-spirited.

By his nasty attacks during the recent debate, Giuliani thoughtlessly gave his political foes a goldmine of ammunition questions: When America is already embroiled in a trillion dollar war; do we need a President who will only fan the flames of international controversy? As Edward Koch reminds us, in October 1995, when Giuliani was Mayor, he ordered Yasser Arafat expelled from a concert at Lincoln Center. See Michael Roston, "Giuliani Revises His Telling of Kicking Arafat Out of '95 Concert," Oct. 17, 2007, at www.huffingtonpost.com. History will probably find that Arafat (1) was never truly interested in living in peace with Israel and (2) plundered his own people's finances. Yet, deserving or not, Arafat was worshiped, at the time, by his people, and he was **UNIVERSALLY** recognized as the head of the Palestinians. Is a rude humiliation of the universally recognized leader of the Palestinian people the type of diplomatic conduct that (1) should be expected from a future President of the United States and (2) would likely be conducive to bringing all warring factions in the Middle East to the bargaining table, as the United States has repeatedly tried to do? Giuliani, who ironically has written [with Ken Kurson] a book on **"LEADERSHIP,"** should know better.

The same Giuliani who humiliated Arafat in this fashion has seen no problem, however, when upon returning to private life, in the conduct of his multi-million dollar business, from taking huge fees from the government of Qatar, as his client. Qatar, while an ally of the United States, has publicly cheered and extolled Hezbollah for its attempt to annihilate the State of Israel.

Giuliani, in 1995, blew an opportunity to show a cordial American face to a Palestinian leader and thereby build the U.S.'s image as an honest broker in Israeli-Palestinian negotiations. Giuliani's rudeness surely enraged Palestinians and played right into the hands of manipulative enemies of the U.S. among all Arab populations. Giuliani's disgraceful treatment of a visiting State dignitary showed (1) cheap, political pandering, (2) a natural impulse toward confrontation, and (3) a lack of long-term vision, eschewing the benefits of being hospitable to a visiting leader for a quick political fix. Giuliani's rash actions stand in contrast with the courage that French President Nicolas Sarkozy recently displayed. Sarkozy, elected on May 6, 2007, invited and welcomed Colonel Muammar el-Qaddafi of Libya to a five day State visit to France, this past December, against much protest, after he successfully convinced Qaddafi to release Bulgarian nurses imprisoned and tortured for eight years in Libya on false charges in the "HIV trial." Sarkozy is also now negotiating for the release of Ingrid Betancourt and other hostages held captive for five years by "FARC" guerrillas in Colombia, trying to gain the support of all South American leaders in this humanitarian effort. Sarkozy understands the importance of diplomacy, and its use to help save human life. Giuliani, on the other hand, is a master of nasty confrontation.

Even more questions have surfaced since November, 2007. How did Giuliani, with a history of libertarian, liberal views on social issues, manage, in support of his presidential bid, to get the support of evangelical Christian leaders who would have found his past stances anathema and abhorrent? How did a Mayor whose divorce lawyer once calculated his client's net worth as only $7,000 suddenly transform into a man, with a Giuliani empire of various enterprises, with a net worth of $70 million? In light of the kaleidoscopic change of views, can one safely predict such a man's future judicial choices? Mayor Koch's previously published essays and columns on Giuliani's intimidation of judges, when Giuliani served as Mayor, provide a

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much needed *aide memoire* at a time when politicians do an "extreme makeover" of views to conform to at-the-moment notions of "electability."

BARRICADE BOOKS [www.barricadebooks.com] deserves lot of credit for **GIULIANI: NASTY MAN'S** re-publication [175 pages, paper, $14.95]. The pivotal Presidential caucuses and primaries are scheduled this month, leading to a delegate-rich field of primaries on February 5, 2007. Even if you are a longtime supporter of "Rudy," such as his chief aides and long-time advisors Dennison Young, Randy Mastro, and neoconservative Norman Podhoretz, it would be folly to ignore this important book, since its contents and accusations will likely re-surface in the contentious months of mudslinging ahead. The book's re-release in 2007 would have been far more valuable if Koch provided his own "P.S." analysis following each of the older essays, highlighting Giuliani's contradictions and hypocrisies in the manner I have done. The book's other major flaw is the lack of an index. Koch's book, however, is a useful reminder of the not-so-kosher side of "America's Mayor."

MELVIN BELLI: KING OF THE COURTROOM

BARRICADE BOOKS, in addition to **GIULIANI: NASTY MAN**, also published in 2007 **MELVIN BELLI: KING OF THE COURTROOM by MARK SHAW.** Shaw's writing style is gripping, in describing a legendary trial lawyer whom he plainly adores. In this book also, Barricade Books has failed to provide an index, and the failure to do so here is disappointing.

MELVIN BELLI was a larger than life figure. He was a master of the courtroom and loved drama. His favorite actor was John Barrymore, and **BELLI** would insist on going to courtrooms ahead of a scheduled trial to get acquainted with his stage. His chief jump to fame was his legal representation of Jacob Rubinstein also known as Jack Ruby, the killer of President Kennedy's assassin, Lee Harvey Oswald. Shaw laments that "[t]oday there are few tangible remembrances of **MELVIN BELLI**." Actually, he wrote sixty books, which Shaw lists. Just recently, a six volume work by **BELLI** [ostensibly] on the art of trial practice sold on eBay for $350.

Shaw's book discusses the lavish excesses of **BELLI'S** lifestyle and the trouble he encountered with a disciplinary authority on the print endorsement of a scotch, which today would be deemed unconstitutional. **BELLI**, in the nature of publicized and brilliant celebrity trial lawyers was narcissistic. In this respect, I read a fascinating law review essay attacking **BELLI'S** contemporary Louis Nizer, whose books describing his trial exploits captured my attention growing up, on the number of first person pronouns "I" used by Nizer. Brilliant persons understandably have an appreciation for their own talent and don't mind reminding you of it.

Shaw himself is a lawyer and writer, and I would have preferred to read a more detailed and penetrating account of some of **BELLI'S** cases. Nevertheless, **MELVIN BELLI: KING OF THE COURTROOM** is a fine and engaging account of a trial lawyer extraordinaire. I urge not only lawyers and litigators to read this book, but also law students, encouraging them to provide the next generation of Clarence Darrows, Louis Nizers, and **MELVIN BELLIS.**

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Sex Offender Management & Treatment Act

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Civil Management and Commitment

New Article 10 of the Mental Hygiene Law, entitled Sex Offenders Requiring Civil Commitment or Supervision, provides for two civil management options. The first option, strict and intensive supervision and treatment, allows offenders to remain at large but closely supervised by the Division of Parole. The second option provides for civil commitment of more dangerous offenders. The procedural provisions of the Act have come under constitutional attack and the litigation is ongoing. *Mental Hygiene Legal Service and Shawn Short v. Elliott Spitzer, Andrew Cuomo, Michael Hogan, Diana Jones Ritter, and Brian Fisher,* 2007 Lexis 85163 (S.D.N.Y. November 16, 2007).

New Crime: Sexually Motivated Felony

SOMTA created a New crime, Sexually Motivated Felony, defined in Penal Law § 30.91, which makes SOMTA's civil commitment and other provisions relating to sex crimes applicable to crimes outside of Article 130. The specified offenses which may be charged as "sexually motivated" include an attempt or conspiracy to commit the following felonies: Assault in the Second Degree, PL § 120.05, Assault in the First Degree, PL § 120.10, Gang Assault in the Second Degree, PL § 120.06, Gang Assault in the First Degree, PL § 120.07, Stalking in the First Degree, PL § 120.60, Manslaughter in the Second Degree, PL § 125.15, Manslaughter in the First Degree, PL § 125.20, Murder in the Second Degree, PL § 125.25, Aggravated Murder, PL § 125.26, Murder in the First Degree, PL § 125.27, Kidnapping in the Second Degree, PL § 135.20, Kidnapping in the First Degree, PL § 135.25, Burglary in the Third Degree, PL § 140.20, Burglary in the Second Degree, PL § 140.25, Burglary in the First Degree, PL § 140.30, Arson in the Second Degree, PL § 150.15, Arson in the First Degree, PL § 150.20, Robbery in the Third Degree, PL § 160.05, Robbery in the Second Degree PL § 160.10, Robbery in the First Degree, PL § 160.15, Promoting Prostitution in the First Degree, PL § 230.32, Compelling Prostitution, PL § 230.33, Disseminating Indecent Material to Minors In the First Degree, PL § 235.22, Use of a Child in a Sexual Performance, PL § 263.05, Promoting an Obscene Sexual Performance by a Child, PL § 263.10, Promoting a Sexual Performance by a Child, PL § 263.15.

An indictment charging this new crime must assert facts supporting the allegation that the offense was sexually motivated and contain the required statutory language, "as a sexually motivated felony." A crime prosecuted as a "sexually motivated felony" can apply to juvenile offenders. Charging a specified crime, for example, Assault in the First Degree, "as a sexually motivated felony," not only subjects the defendant to longer terms of post-release supervision, but also requires him to register as a convicted sex offender pursuant to the New York Sex Offender Registration Act.

Determinate Sentences for "Felony Sex Crimes"

Under the new act, sentences for felony sex crimes are determinate with some exceptions for class D and E felonies. These changes lessen the importance of the distinction between violent and non-violent crimes in that the new sentence for 1st non-violent sex offenses is now the same as the sentence for 1st violent felonies and the new sentence for 2nd non-violent sex offenses, with a prior non-violent felony conviction is the same range as for violent felonies, and the new sentence for the 2nd non-violent sex offense with a prior violent felony conviction is the same range as for a 2nd felony offense with a prior violent felony offense. The distinction is further diminished by changes to Class D and Class E felonies which were formerly classified as non-violent. The New Class D violent felony sex offenses are Rape in the Second Degree, PL § 130.30, Criminal Sexual Act in the Second Degree, PL § 130.45, and Facilitating a Sex Offense with a Controlled Substance, PL § 130.90. The New Class E violent felony offenses are Persistent Sexual Abuse, PL § 130.53, and Aggravated Sexual Abuse in the Fourth Degree, PL § 130.65(a). While the classification for CSA 3 and Rape 3 remains nonviolent, the authorized sentence is the same under SOMTA, regardless of whether the felony sex offense is violent or nonviolent.

Increased Post-Release Supervision

The Act increased post-release supervision for all felony sex crimes committed on or after April 14, 2007, as set forth in Penal Law §70.45. A "felony sex offense" is defined as completed, attempts and conspiracy to commit the following: (1) any felony Article 130, Sex offenses, (2) Sexually Motivated Offense, PL § 130.91, (3) Patronizing a Prostitute in the First Degree, PL § 230.06, (4) Incest in the Second Degree, PL § 255.26, (5) Incest in the First Degree, PL § 255.27. The chart that follows indicates the increased post-release supervision.

The 5-year cap on re-incarceration for a violation of post-release supervision has been abolished for any defendant serving a term of post-release supervision for a conviction of a felony sex offense. A defendant may be subject to a further period of imprisonment up to the balance of the remaining period of post release supervision. New Section 1-a of Penal Law § 70.45, relates to determinate sentences and post-release supervision, and provides for the manner in which the parole board must determine when a defendant may be re-released to post-release supervision after a conviction for a felony sex offense and who owes three years or more of post release supervision.

Sentencing Considerations

"In imposing a sentence within the authorized statutory range for any sex offense, the court may consider all relevant factors set forth in section 1.05 of this chapter, and in particular may consider the defendant's criminal history, if any, including any history of sex offenses, the defendant's ability or inability to control his sexual behavior, and if the defendant had difficulty controlling such behavior, the extent to which that difficulty may pose a threat to society."

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CPLR Update: Civil Forfeitures

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xv. *Ortega v City of New York*, 9 N.Y.3d 69, ___ N.Y.S.2d ___, 2007 NY Slip Op 07741 [2007]

xvi. *Niesig v Team I*, 76 NY2d 363 [1990]

xvii. *Siebert v Intuit Inc.*, 8 NY3d 506 [2007]

xviii. *Arons v Jutkowitz*, ___ NY3d ___, ___ NYS2d ___, 2007 NY Slip Op 09309 [2007]

xviiii. *Arons v. Jutkowitz*, 37 A.D.3d 94, 825 N.Y.S.2d 738 [2007]

xx. *Webb v. New York Methodist Hosp.*, 35 A.D.3d 457, 825 N.Y.S.2d 645 [2006]

xxi. *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 [2007]

xxii. *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 835 N.Y.S.2d 534 [2007]

xiii. *Rudolf v. Kahn*, 4 A.D.3d 408, 771 N.Y.S.2d 370 [2004]

xxiv. *Nussenzweig v diCorcia*, 9 N.Y.3d 184, ___ NYS2d ___, 2007 NY Slip Op 08783 [2007]

xxv. The Civil Rights Law provides as follows:

"§ 50 Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages [in relevant part]

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation . . . practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed . . ."

xxvi. CPLR 215 (3)

xxvii. *Gregoire v G.P. Putnam's Sons*, 298 NY 119, 125126 [1948]

xxviii. See, *Rand v. New York Times Co.*, 75 A.D.2d 417, 424, 430 N.Y.S.2d 271 [1st Dept., 1980]; *Seymour v. New York State Elec. & Gas Corp.*, 215 A.D.2d 971, 627 N.Y.S.2d 466 [3d Dept.,1995]; *Karam v. First American Bank of New York*, 190 A.D.2d 1017, 593 N.Y.S.2d 640 [4th Dept.,1993]

xxix. L. 2007, ch. 185, effective as to all notices of motion served on or after July 3, 2007.

xxx. *D'Aniello v. T.E.H. Slopes, Inc.*, 301 A.D.2d 556, 756 NYS2d 54 [2d Dept., 2003]

xxxi. see, *Guzetti v City of New York*, 32 AD3d234, 820 NYS2d 29 [1st Dept 2006]

xxxii. *Nonnon v City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 [2007]

xxxiii. *Tedesco v. A.P. Green Industries, Inc.*, 8 N.Y.3d 243, 832 NYS2d 141 [2007]

xxxiv. L. 2007, ch. 70, effective July 4, 2007, as to all agreements executed on or after that date.

xxxv. Well, not in *exactly* the same place. If facts come to light showing that Mr. Blameless may have liability after all, and the non-settling defendants implead him, can the plaintiff now assert a direct cause of action against him? If plaintiff has been so rash as to tender Mr. Blameless a release, clearly not. What if there has been no release?

xxxvi. *Mielcarek v Knights*, 50 AD2d 122, 375 NYS2d 922 [1975]

xxxvii. See, *County of Westchester v Welton Becket Associates*, 102 A.D.2d 34, 478 N.Y.S.2d 305 [1984]; *Fox v County of Nassau*, 183 A.D.2d 746, 583 N.Y.S.2d 482 [1992]; see also, *Rosado v Proctor & Schwartz*, 66 N.Y.2d 21, 494 N.Y.S.2d 851 [1985]

xxxviii. *In re Eighth Judicial Dist. Asbestos Litigation (Reynolds v Amchem Prods. Inc.)*, ___ NY3d ___, ___ NYS2d ___, 2007 N.Y. Slip Op. 05579 [2007]

xxxix. The Court did not, however, rule that the agreement should in fact have been disclosed to the jury, leaving that to the "sound discretion" of the trial court.

xl. L. 2007, ch. 192, effective January 1, 2008.

2007 Family Law Update

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nal are being made or requested, by means of highlighting or otherwise.

CASE LAW DEVELOPMENTS

Two case law decisions of interest are brought to the attention of the bar below.

KEANE v. KEANE, 8 N.Y. 3d 115, 828 N.Y.S. 2nd 283 (Court of Appeals, December, 2006)

Court of Appeals and several Appellate Division decisions advised the trial courts that they must guard against "double dipping", when making awards of equitable distribution (of businesses and enhanced earnings) as well as maintenance, since to some extent both are derived from the same income stream. Mrs. Keane received a distributive award of half the value of a rental property the husband was going to keep, and also received maintenance, which was partially based upon 100% of the rental income from the subject property. The Court of Appeals discussed this and found that it did not constitute inappropriate or prejudicial double dipping. The explanation was that its prohibition was intended to relate only to the evaluation of intangible assets, such as a license or degree. Here, the real property was a tangible asset. The reasoning was that notwithstanding the utilization of the rental income, the value of the asset did not diminish, and would continue to exist as a marketable asset.

We question whether or not the result would have been the same if the wife got the income producing property and the husband were awarded non-income producing property of equal value. Would the court then charge the wife with all of the income from the property, lowering or eliminating her need for maintenance? That remains to be seen. For now, we are told that double dipping is only prohibited when it relates to awards stemming from enhanced earning capacity. There are various scenarios that appear to suggest this decision could work injustices. Hon. Anthony J. Falanga and his Law Secretary, Charlene Malone, wrote a scholarly and well-reasoned article in this regard, which appeared in the Law Journal of March 16, 2007.

TARASKAS v. RIZZUTO, 38 A.D. 3d 910 (2nd Dept., March, 2007)

In fixing child support the general rule, as specifically provided in the child support law, is to base the award on the income set forth on the tax return last filed or required to be filed by the payor (unless the tax return is found to be inaccurate). However, in this case the Family Court Magistrate's award was **affirmed**, although the current year's income was used, rather than the prior year's tax returns, which also eliminated the use of the prior year's overtime. The finding was that use of the prior tax return would make the award "unjust or inappropriate" since there was credible evidence produced to verify that the prior overtime was no longer available. This appears to be an equitable and appropriate decision. However, such a result cannot be expected without very specific and credible proof of the reality of a good faith reduction in income, not manipulated or caused by the payor's fault or voluntary action.