HAPPY NEW YEAR

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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 72 / No. 4 / January 2009**

Family Law Update - 2008

BY MICHAEL DIKMAN & DAVID DIKMAN

During the past year, as usual, there were a number of appellate decisions in the field of Family Law, that merit being called to the attention of our membership, together with some commentary. Following the discussion on case law developments, some new legislation will also be listed.

SPENCER v. SPENCER, 10 N.Y. 3d 60, 853 N.Y.S. 2d 274 (Ct. of App., Feb. 14, 2008)

Where there was a Connecticut divorce judgment and the husband remained in Connecticut, child support ended at age 18. When the mother sought to have a *de novo* determination made in New York, where she and the children had lived for years, the Court of Appeals ruled against her, holding that it was tantamount to a request for a modification of the Connecticut decree, over which the New York court had no subject matter jurisdiction. The Court specifically rejected the argument that since the order had expired, there was nothing to modify.

MESHOLAM v. MESHOLAM, 11 N.Y. 3d 24, 862 N.Y.S. 2d 453 (Ct. of App., June 26, 2008)

For a substantial number of years, there has been a difference of opinion among the Appellate Division Departments, as to the issue of what date is to be used, for the termination of acquisition of marital property or for valuation, when a first matrimonial action is discontinued or dismissed and then a second action is commenced. Our Second Department's rule was consistent, namely, that the answer depends upon why the first action was terminated. If it was in order to reconcile, no matter whether or not successful, the so-called marital partnership was resumed, and all property acquired up until the commencement of the *second* action would be "marital" and valued any time between the commencement of action number two and the trial. But, if there was no reconciliation component, the commencement date of the first action would be the termination and earliest valuation date, on the theory that the marital partnership had never been resumed. THOMAS v. THOMAS, 221 A.D. 2d 621, 634 N.Y.S. 2nd 496, (App. Div. 2nd Dept.); SEE v. SEE, 45 A.D. 3d 832, 845 N.Y.S. 2d 745 (App. Div. 2nd Dept.) and numerous other decisions. The First Department position was that when DRL § 236 B (4) (b) said valuation must be between "the date of commencement of the action and the date of trial" it meant the *current*, second action, regardless of why the first ended. If there was no reconciliation, and the parties did nothing for each other or in connection with the acquisition or appreciation of marital property, between actions, the reasoning was that the court could account for and consider that in the distribution or fixing of percentages in the property distribution. GREENWALD v. GREENWALD, 164 A.D. 2d 706, 565 N.Y.S. 2d 494 (App. Div., 1st Dept.). However, this difference among the departments has now been finally resolved by the Court of Appeals in the MESHOLAM case, cited above. The First Department view won out. The bottom line was that the Court concluded: "the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce." For whatever reason, utilizing the date of a prior, unsuccessful action would be "inconsistent with the statutory scheme".

David Dikman

Michael Dikman

GRAEV v. GRAEV _ N.Y. 3d _, _ N.Y.S. 2d _ (Ct. of App., Oct., 2008)

All of us, practicing in the field of Family Law, have from time to time taken instruction from a "wake up call" in a reported decision, article or seminar presentation, and changed something we had customarily done. In particular, the "standard language" we use in various clauses of our Separation Agreements and stipulations, has always been a work in progress, modified when needed. The advent of the CSSA required changes, as did decisions which mandated that the actual calculation of the "presumptive amount" be in the agreement, if it was to be enforceable. Many of us have standard language for what we refer to as a "cohabitation clause". That is the provision, calculated to circumvent the extremely difficult burden imposed by DRL § 248, to terminate maintenance when the recipient established a new, living together relationship for an agreed upon time. The recent Court of Appeals case, cited above, should remind us to be ever vigilant, careful and clear when drafting agreements. The "cohabitation clause" I have used for

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Estates Update

BY DAVID N. ADLER

The year in trusts and estates anticipates the pending consecutive year transition of the federal estate tax levels while continuing to reflect the growing impact of scientific methods as a factor in the proof of kinship.

David N. Adler

TAXATION

The past year is the culmination of a period of relative stability in the area of estate taxation. Since 2000, the estate tax threshold has gradually risen from $650,000.00 to the present $2,000,000.00. This threshold represents the value of an estate, after deductions, that is not subject to estate taxation. The increase, though gradual, was a marked departure from the prior history of estate taxation which had fixed the threshold at $600,000.00 for a period of approximately 20 years prior to the year 2000.

As of 2009, the final three years of the present tax law begin to operate. As such, the tax threshold for the year 2009 shall be $3,500,000.00. In 2010, the estate tax is abolished, essentially resulting in an unlimited threshold. Yet, in 2011, the estate tax threshold is rolled back to $1,000,000.00, the number that it originally was at the outset of the present tax legislation.

Without making any reference to the political aspects of estate taxation, this scenario creates a problematic model for estate planners. Certain common planning tools such as the credit shelter (by pass) trust contain language geared to the federal threshold amount. Further, the inconsistency of the present law coupled with the possibility of change occasioned by a new administration shall serve to limit present planning options. It seems prudent for planners to advise all clients of the imminent tax law changes, and, to the extent possible, maintain flexibility in one's planning vehicles.

PROOF OF OWNERSHIP

As noted in this column last year, DNA testing has been confirmed as an element of proof of paternity by which non-marital children may inherit. The statute EPTL 4-1.2 (C) (D), and subsequent case law have confirmed the validity of both pre-death testing and post death testing as one component of proof of paternity. This genetic component, when combined with open and notorious

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Holiday Party

Pamela Jordan, President of QWCBA, Alexander Rosado, President, LLAQC, Steven Orlow, President, QCBA and Richard Lazarus, Representative of Brandeis Assn. at QCBA's annual Holiday Party held December 4, 2008 at Terrace on the Park.
For more photos, see the centerfold on pages 8-9.

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

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

2009 WINTER CLE Seminar & Event Listing

January 2009

Tuesday, January 20	Article MHL 81/Guardianship Training - 2:30 - 5:00 pm
Wednesday, January 21	Supreme Court & Torts Section Seminar

February 2009

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

March 2009

Monday, March 23	Past Presidents & Golden Jubilarians Night - **TENTATIVE**

April 2009

Wednesday, April 1	Equitable Distribution Update
Monday, April 20	Judiciary Night – **TENTATIVE**
Wednesday, April 22	Selection of a Jury
Thursday, April 23	Basic Criminal Law Seminar – Part 1
Thursday, April 30	Basic Criminal Law Seminar – Part 2

May 2009

Thursday, May 7	Annual Dinner & Installation of Officers

CLE Dates to be Announced

Court Evaluator Training	Elder Law
Ethics Seminar	Juvenile Justice Law
Labor Law	Real Property Law
Surrogate's Law	Taxation Law

New Members

J. Barrington Jackson
Akhilesh Krishna
Bernard S. Silverman
Michael Zen

Necrology

Hon. Thomas V. Polizzi

NYS SUPREME COURT QUEENS COUNTY

THE NEW QUEENS COUNTY SEX OFFENSE COURT PRACTICE AND PROCEDURES

TUESDAY, JANUARY 13, 2009 1:00-2:00 P.M.

Kew Gardens Criminal Courthouse 8th Floor Boardroom

SPEAKERS:
Hon. Sheri S. Roman, Presiding Justice
ADA Marjory Fisher, Bureau Chief, Special Victims
Larry Menzie, LMSW, Director, Queens Center for Change
Douglas L. Knight, Jr., Director, Alternative Sentencing, Queens DA

CLE CREDIT: 1.0 Hour of Continuing Legal Education credit will be offered for this session without charge.

Please RSVP by January 12, 2009
(718) 298-1441

You May Bring Your Lunch

Leslie S. Nizin

Editor's Message

As we start a New Year, on behalf of the President and members of the Board of Managers I wish each of our members and their families a Healthy and Happy New Year.

This month's paper continues the tradition of updating the various disciplines with articles from David Adler, Mike Dikman and David Dikman I thank them for their excellent articles.

— Les Nizin

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

"A lawyer's time and advice are his stock in trade"

– Abraham Lincoln

The constituency of the Queens County Bar Association is composed, overwhelmingly, of solo and small firm practitioners. I certainly count myself among that category.

How maddening it is to drive to court, find and pay for parking, and then sit in court, oft times waiting for the adverse party's attorney. Worst of all, how often is it that all this time, effort and expense is for no apparent purpose at all: motions, where oral argument is not even permitted, and all that need be done is submit papers; conferences that do not require the resolution of issues but simply end with the submission of a completed pre-printed standard form. Other examples of time wasted by attorneys, through mandated court procedures, are too numerous to mention. And all this, in the throes of a technology revolution, the benefits of which abound, all around us.

Steven Orlow

For those areas within a practicing attorney's sole control, technology has assumed its appropriate place. There is hardly a colleague of ours who has not brought the computer age into his office and email, faxes, scanning and the like have become commonplace every day events in virtually all our offices.

For those of us with at least some of our practice involving the federal courts, the extent of incorporation of modern technology compared to our state courts could not be more striking.

The commitment of this bar association's administration was to begin the process whereby solo and small firms could realize the benefits of modern technology by expanding those advances to the courts in Queens. While much of this administration's attention has, to date, been diverted to the explosive foreclosure crises (and to which our membership has responded in a truly gratifying and overwhelming fashion), we have not lost sight of our commitment to pursue other areas relating directly to the welfare of our members.

We plan a Stated Meeting in February devoted to this important issue. The starting point is a report issued by a special commission established within the last few years by Chief Judge Judith Kaye. The suggestions emanating from that report are superb - and implementation of even a few recommendations would go far to alleviate unnecessarily burdensome procedures now weighing heavily on small firm attorneys.

We would welcome submission of suggestions from each of you so that we can possibly include them in the mix to be discussed and considered with court officials, including our Administrative Judge and Supervising judges in Queens. Please let us hear from you, and may we all hope that this New Year ushers in changes that will improve some of the routines which so many of us constantly experience in our practice of law.

Notice Of Nominating Committee Meetings:

Please take notice that those members who wish to be considered for nomination as Officers or Members of the Board of Managers of the Queens County Bar Association should submit written requests and <u>resumes highlighting your activities in the Association</u> prior to January 14, 2009.

<u>Tentative meetings pursuant to the by-laws</u> have been scheduled by the Nominating Committee on January 21, 2009 and finally on February 4, 2009. Said meetings are scheduled for 5:00 P.M. in the Board of Managers Room - in the Headquarters Building, 90-35 148th Street, Jamaica, N.Y.

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

Joseph J. Risi, Jr.
Secretary

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

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

The Annual Election of Officers and Managers will be held on March 6, 2009. The newly elected Officers and Managers will assume their duties on June 1, 2009.

Dated: December 12, 2008
Jamaica, NY

Letters

July 24, 2008
Hon. Ann Pfau, J.S.C.
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
Suite 1048
New York, NY 10004

Re: The Report of
The Commission to Examine Solo and
Small Firm Practice
(February 2006)

Dear Judge Pfau:

In assuming the position of President of the Queens County Bar Association, I have indicated that one of the utmost priorities of my administration will be to begin a process whereby reforms are instituted which will assist in diminishing the burdens upon the sole and small firm practitioner. I was particularly pleased to learn of the report issued by the above noted Commission, which was created by Judge Kaye, and which dealt explicitly with this area of concern.

The purpose of this letter is simply to inquire as to whether or not the Office of Court Administration has taken any steps dealing with the many suggestions raised in the Commission's report. If so, I would be most interested in contacting the individual at OCA who has been assigned to, or is concerned with, that particular task. It is my intention to work as closely as possible with the Administrative Judge Jeremy Weinstein and Supervising Judge Bernice Siegel to produce changes consistent with the report submitted to Judge Kaye. The knowledge that the Office of Court Administration is "on board" would, of course, be of great benefit in this instance.

I look forward to your response and to working with you and the OCA in furthering the excellent suggestions presented in the Commission's report.

Yours truly,
STEVEN S. ORLOW

SSO:jh
cc: Hon. Judith Kaye
Hon. Judy Harris Kluger
Hon. Jeremy Weinstein
Hon. Bernice Siegel

December 18, 2008

Dear Mr. Orlow,

Thank you so much for following up my suggestion to convey your thanks directly to June Castellano rather than indirectly to me. It was indeed a great report, the product of hard work, and I knew it would please her (as it does me) to know of your praise.

This letter permits me to add my thanks to both of you. Indeed I hope you will continue the dialogue between you – Monroe to Queens – to assure the recommended reforms are implemented.

Sincerely,
Judith Kaye
Chief Judge of the State of New York

cc: June Castellano

Steven S. Orlow, Esq.
Queens County Bar Assn.
90-35 148th Street
Jamaica, NY 11435

Dear Mr. Orlow:

Thank you for your inquiry concerning the status of the report and recommendations to the Commission to Examine Solo and Small Firm Practice, issued in February 2006.

The court system is presently implementing many if the Commission's recommendations. In response to a request from New York State Bar Association President Bernice Leer, who has expressed a strong interest in following up on the Commission's work, we are in the process of preparing a report on the status of recommendations contained in the Commission's report. We will be glad to share that report with you as soon as it is ready. Should you have any questions in the meantime, please do not hesitate to contact Ms. Barbara Zahler-Gringer, Esq., who is overseeing our efforts in this regard. She can be reached at (212) 428-2120.

Thank you for your interest in the Commission to Examine Solo and Small Firm Practice.

Very truly yours,
Ann Pfau

cc: Barbara Zahler-Gringer

10 Signs Your Client Should Consider Bankruptcy

BY NEIL COLMENARES

In today's economic slowdown, times are tight for almost everyone. It will be likely that you will have more than a few individuals come into your office who are experiencing financial difficulties. This article is designed to apprise the practicing professional of "red flags" to be aware of in advising clients. This article is not designed nor intended to make you a Bankruptcy Attorney. As with any area of the law, it is strongly recommended you seek the advice of a professional with many years of experience in the field.

The following list is what I consider to be the 10 most important signs you should be aware of that your client should consider filing Bankruptcy.

1.) The client **cannot pay their bills as they come due and/or is making minimum payments on credit card debt**. This sounds obvious enough but its importance cannot be overstated. Other signs include borrowing from Peter to pay Paul, etc. An important point to remember is that the client does not have to be flat broke to file Bankruptcy. In fact, Bankruptcy merely requires financial distress. Finally, because individuals normally wait until they are flat broke to seek Bankruptcy advice, this unnecessary delay precludes options available to them which may help them reorganize their finances and permit them to keep part or all of their property. For example, an individual normally waits until the day before a foreclosure sale to seek Bankruptcy advice where had they sought advice earlier, their chances of losing the property would have been diminished significantly.

2.) The client is in the process of a **Credit Card Debt Consolidation Plan**. This is one of the biggest scams going in the industry. It is the extremely rare situation that Credit Card Debt Consolidation actually works to benefit a Debtor. Here are five quick and dirty reasons why your client should consider Bankruptcy if they are in a "Debt Consolidation Plan."

- There is no cap on the amount of interest a Credit Card can charge you. That's right, your Credit Card Company can charge you 1000% interest a day if they want to.
- Your current interest rate can change at any time! When you read the fine print of your contract (and try to find all the other text it makes reference to) you will discover a brutal, deceptive and sleazy truth. The terms of your credit card (including interest) can be changed with 30 days notice, which normally comes in that fine print document which accompanies your monthly statement. So if you think you have a 4% interest rate on your credit card for as long as you have the card, think again!
- If your make a late payment on one of your bills, then the other credit cards can raise your interest rates! This is known as the Universal Default Clause. So let's say someone stole one of your credit cards and you refuse to pay that bill, the other credit cards can raise your interest rates as a result of the late payment. This is not limited to credit card payments this can apply to a late mortgage payment, store card payment, etc.
- The Credit Card Industry has consistently refused to put plain language in your monthly bill stating how long it would take you to pay your bill if you make the minimum payment. They have refused to do this because they know people would think twice about making a minimum monthly payment on a $100.00 debt if they know it will cost them $1,000.00 over several years.
- If a creditor cancels some of your debt, you have to pay taxes on that amount! Cancellation of debt is a taxable event that requires you to pay taxes for that money. This does not apply if a person receives a discharge in Bankruptcy.

Neil Colmenares

3.) The Client is having their **Wages Garnished and/or has frozen bank accounts**. If this has happened, the Client in all likelihood had a judgment entered against them. If this is so, and the client owns a home, then the Client's home now has a lien on it. At this point, Bankruptcy may be in the Client's best interest to avoid the lien (get rid of) to the extent the lien impairs the homestead exemption. In New York, the homestead exemption is $50,000.00 ($100,000.00 for Joint Debtors). Regardless of whether the Debtor is a homeowner, the Bankruptcy process will stop the wage garnishment and "unfreeze" the Debtor's bank accounts (limitations apply).

4.) The Client is in **foreclosure** or is in danger of imminent foreclosure. We are all currently paying the price of the promiscuous lending practices of the credit industry. With limited exceptions, the entire industry is guilty of putting people into mortgages they cannot afford. Most people were drawn into mortgages they could not afford by unscrupulous lenders and brokers who, for example, did not advise the homeowner that they could not legally rent out the basement of their new home. Nor did they advise the homeowner that most properties will be vacant a certain amount of time of the year, etc. If the Client is in foreclosure, then Bankruptcy may be an option! There is a federal law that requires a mortgage company to stop a foreclosure action immediately upon filing Bankruptcy and gives the homeowner a chance to catch up on their mortgage payments in manageable monthly installments (restrictions apply). Under Chapter 13 of the Bankruptcy Code, individuals with steady incomes who want to pay their debts can do so with the protection of the Federal Court and without the harassment of collectors and attorneys (such as the law firm which commenced the foreclosure action). Special provisions apply to be eligible for Chapter 13.

5.) The Client **owes more on their home than their home is worth**. In situations like this, there is a knee jerk reaction to try to have a "short sale." The problem with this is that the amount of debt that is forgiven is considered taxable income (certain limitations apply). To avoid this and keep the homeowner in their home, the Client should consider Bankruptcy. The possibilities are too numerous to discuss in this article but one Bankruptcy option is worth mentioning. Lets say that the homeowner has two mortgages and the value of the house is less than the amount owed on the first mortgage. In this scenario, the homeowner can strip off (get rid of) the second mortgage in its entirety! As one would imagine, there are restrictions but it is certainly something worth looking into for the cash strapped homeowner.

6.) The Client is about to or is in the process of getting a **divorce**. It has been said that financial difficulties can put a tremendous strain on a relationship and is a leading cause of divorce. Once again, the Bankruptcy possibilities are limitless but I would like to talk about one Bankruptcy option in particular. Alimony, Maintenance and Support are non-dischargeable in Bankruptcy. That's the bad news. The good news is that Property Settlements are dischargeable in Chapter 13 Bankruptcy! So if you have a client that is considering a divorce, perhaps a good piece of advice would be to structure the distribution of marital assets and liabilities as a Property Settlement. In doing so, the Property Settlement may be dischargeable in Chapter 13 Bankruptcy! As always, there are restrictions and Bankruptcy Judges can look beyond the labels put on certain settlements but is certainly something to keep in mind. Finally, Bankruptcy should always be considered a financial planning tool particularly for people about to get divorced.

- 7.) The Client **does not have health insurance**, is underinsured, or is sick and will need treatment. The best thing that can be done here is to speak to a Bankruptcy attorney to discuss a long-term strategy for maintaining assets. It is a sad state of affairs that the wealthiest nation on earth requires its citizens to file Bankruptcy because of illness.

8.) The Client is **borrowing from exempt assets** to pay dischargeable debts. For example, your Client keeps taking out pension loans, borrows from their 401K's, etc. to pay credit card bills or to make ends meet. In this scenario, the best thing that can be done here is to speak to a Bankruptcy attorney to discuss a long-term strategy for maintaining assets. The Bankruptcy Code permits individuals to maintain certain assets despite filing Bankruptcy. These "certain assets" are known as exemptions. There are numerous policy reasons for having exemptions among which are to prevent individuals from becoming public wards. Speak to a Bankruptcy Attorney to discuss asset preservation.

9.) The Client has signed numerous **personal guarantees** on business debts. A common example of this is when an individual owns a corporation and personally guarantees much of the corporations' debts. Another common problem is when a corporation does not pay taxes and thereby leaves the principal or responsible officer, i.e. your Client, responsible to pay same. A Bankruptcy or at the very least Bankruptcy planning is needed at this juncture.

10.) The client has excessive **liens** levied against their assets for everything from non-payment of credit card debt, tax liens, consensual and non-consensual liens, etc. The individual should consider bankruptcy. The Bankruptcy process and/or good pre-Bankruptcy planning can strip away those liens and help the individual save their assets.

This is a non-exhaustive list of "red flags" that should apprise the practicing professional that the Client should consider Bankruptcy or at the very least, speak with a Bankruptcy Attorney to consider asset preservation strategies. Remember, every situation is unique and must be approached with that in mind. The sooner a Client seeks Bankruptcy advice, the more likely that the Client will be able to preserve their assets.

Neil E. Colmenares, Esq. is the Bankruptcy Committee Chairman at the Queens County Bar Association and has offices in both Queens and Nassau Counties.

An Analysis Of The Motion To Set Aside The Verdict: Part IV[i]

BY ANDREW J. SCHATKIN

In three previous articles, this writer analyzed and considered the three grounds under CPL Sec. 330.30, the statutory section setting forth the grounds and bases to set aside a Criminal jury verdict. Those three grounds are as follows:

A ground appearing in the record, which if raised upon appeal from the Judgment of Conviction would result in a reversal or modification of that Judgment by the Appeals Court;

That during the trial there occurred, out of the presence of the Court, improper conduct by a juror or another person in relation to a juror, which could have affected a substantial right of the defendant;

That new evidence has been discovered since the trial, which could not have been produced by the defendant at the trial, even with due diligence on his part, and which is of such a character as to create a probability that if the evidence had been received at trial, the verdict would be more favorable to the defendant.[1]

This article will consider, more specifically, the proper interpretation of the language in Subsection (2), which references, as a basis for setting aside the verdict, conduct by a juror, of an improper character, which could have effected a substantial right of the defendant, during the trial, outside of the presence of the court.

There is a general rule that the trial court is invested, with discretion, with respect to this specific matter and issue. People v. McMillan[2] is instructive. In McMillan, the Appellate Division First Department ruled that the summary denial of a Motion to Set Aside a Verdict of guilty of Criminal Possession of a Controlled Substance in the Third Degree, on the ground of misconduct during jury deliberations, was an appropriate exercise of discretion. The Court stated that the Motion papers contained only conclusory allegations that the incident in question constituted improper influence on the jury verdict and the dropping of the bag of candy could not reasonably have been viewed as determinative of the ultimate issue in case, as to whether the defendant criminally possessed crack cocaine with the intent to sell it, and upon which issue the People offered overwhelming evidence.

Andrew J. Schatkin

Again, in People v. Costello[3], the Appellate Division Second Department held that the trial judge is vested with broad discretion in ruling on the issue of juror prejudice.[4]

Another general rule interpreting this particular statutory language concerns, which concerns itself with proper, or rather improper, juror conduct, is the standard of review. In general, one may say, that the standard of review as to a juror's alleged misconduct is that it must create a substantial risk of prejudice to the rights of the defendant, in some way. Thus, in People v. Maragh[5], the New York State Court of Appeals held that a reviewing court should evaluate whether a juror's alleged misconduct has created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors, as well as her own.

In the same way, in People v. Rivera[6], the Appellate Division Second Department held, fashioning almost the exact rule as stated in Maragh, that generally absent a showing of prejudice to a substantial right, proof of juror misconduct does not entitle a defendant to a new trial, since not every misstep by a juror rises to the adherently prejudicial level at which reversal is automatically required.[7]

There are a number of sub-rules interpreting this particular, discrete rule. Thus, it has been held that the failure to challenge a juror by the reason of the want of knowledge as to the cause is not a ground for this Motion.[8]

There is a general rule that a verdict rendered by a jury containing some persons, who should have been excluded for technical reasons, is not void. This rule is extended to where a verdict is rendered in the presence of a juror, who was disqualified because of prior jury service.[9]

It has been held that improper communication with the jury can be a ground for granting this Motion. Thus, in People v. Khalek[10], the New York State Court of Appeals held that the defendant was entitled to have the jury's final verdict set aside as a remedy for the Court Supervisor's usurpation of the Judicial function in telling the jurors, who had been directed to cease deliberation for the day, that their verdict finding the defendant not guilty on all counts would not be reported to the court that night. The jurors were sequestered overnight, and rather than reporting the same verdict in the morning, continued their deliberations and later reported their verdict that differed from their unreported verdict of the previous evening.

People v. Flores[11] also restates this rule. In Flores, the Appellate Division Second Department held that the court officer improperly usurped the trial court's function by permitting the jury to believe that it could allow one of their members to translate a letter, written in Spanish, which injected non-record evidence into the calculus of judgment, which the defendant could not test or refute by a cross-examination, thus warranting a new trial.[12]

There is a rule concerning discussions or conversations among jurors, concerning the case. Thus, in People v. Durling[13], the

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COURT NOTES

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

Frank J. Hancock (September 16, 2008)

The respondent was found guilty, following a disciplinary hearing, of aiding a disbarred attorney (Burton Pugach) in the unauthorized practice of law[1]; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (by making a false assertion to the Appellate Division); accepting compensation in a domestic relations matter without entering into a written fee agreement; engaging in conduct adversely reflecting on his fitness as a lawyer (based upon the foregoing); and failing to reveal information to tribunals that Burton Pugach (a disbarred attorney) had perpetrated frauds upon the tribunals. Notwithstanding the mitigation advanced and the character evidence submitted, the Court held, "the record reveals that the respondent afforded so little regard to his law license as to allow a disbarred felon to use his name freely on court papers and to advertise himself as a paralegal."

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

Jason Moroff (September 16, 2008)

The respondent was found guilty, following a disciplinary hearing, of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (as a result of submitting, to at least two courts, documents requiring his attestation which, pursuant to his instructions, were signed by someone else) and engaging in conduct prejudicial to the administration of justice, which reflects adversely on his fitness (as a result of the foregoing). He was suspended from the practice of law for a period of six months, commencing October 16, 2008, with leave to apply for reinstatement upon the expiration of said period.

Diana J. Szochet

Edward Shapiro (September 16, 2008)

The respondent was found guilty, following a disciplinary hearing, of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (as a result of filing, in the District Court, Suffolk County, Third District, affirmations containing misrepresentations, and summonses and complaints which did not bear his true signature); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (as a result of filing, in the Civil Court of the City of New York, documents which required his signature, including verified complaints, motions for summary judgment, notices of trial and affidavits of service, which were signed by someone other than the respondent or the person who actually served the papers); engaging in conduct prejudicial to the administration of justice, which reflects adversely on his fitness (as a result of the foregoing); failing to ensure that lawyers under his supervision conformed to the Disciplinary Rules and failing to adequately supervise an associate and/or work submitted by the associate to a court of law. He was suspended from the practice of law for a period of six months, commencing October 16, 2008, with leave to apply for reinstatement upon the expiration of said period.

Robert L. Clarey (September 23, 2008)

The respondent was found guilty, following a disciplinary hearing, of engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer in that he was convicted of crimes within the meaning of Judiciary Law §90(2) (to wit, operating a motor vehicle under the influence of drugs or alcohol, an unclassified misdemeanor, and leaving the scene of an accident involving a personal injury, a class A misdemeanor) and engaging in conduct that adversely reflects on his fitness as a lawyer as a result of the foregoing. He was suspended from the practice of law for a period of one year, commencing October 23, 2008, with leave to apply for reinstatement no sooner than six months prior to the expiration of said period.

Robert M. Fuster (October 7, 2008)

By order of the Supreme Judicial Court of Massachusetts, entered February 13, 2008, the respondent was suspended from the practice of law in the State of Massachusetts for a period of 18 months, effective April 14, 2008, for failing to provide competent representation and act with reasonable diligence in three cases; failing to communicate adequately with clients; failing to segregate and account adequately for client funds, and maintain adequate IOLA records; failing to supervise his employees adequately; and knowingly failing, without good cause, to cooperate with Bar Counsel. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was suspended from the practice of law in New York for a period of 18 months, commencing November 7, 2008, and continuing until further order of the Court, with leave to apply for reinstatement no sooner than six months prior to the expiration of said period.

Yohan Park (October 17, 2008)

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

The Following Suspended Or Disbarred Attorneys Were Reinstated As Attorneys And Counselors-At-Law By Order Of The Appellate Division, Second Judicial Department:

Scott M. Stollwerk, admitted as Scott Michael Stollwerk, a disbarred attorney (October 1, 2008)

William M. Nolan, admitted as William Michael F. Nolan, a disbarred attorney (October 1, 2008)

Jeffrey M. Adams, admitted as Jeffrey Mark Adams, a suspended attorney (October 15, 2008)

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

Failing to re-register as an attorney with the Office of Court Administration (5)

Neglecting a legal matter

Neglecting a legal matter and failing to communicate with a client

Neglecting a legal matter; failing to cooperate with substituting counsel; failing to reply to communications from another attorney; borrowing funds from a client absent a written agreement reflecting that the client was advised about the perils of entering into such a business relationship; and failing to repay said loan prior to a complaint being filed with the Grievance Committee

Failing to properly safeguard escrow funds and failing to cooperate with the Grievance Committee's investigation

Permitting a third party to direct the attorney's professional judgment(s) in rendering legal services; failing to safeguard the interests of a client; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by falsely indicating that there was a down payment in connection with a real estate transaction; and engaging in an impermissible conflict of interest by representing both the purchaser and seller in the same real estate transaction

Failing to promptly provide a client with their portion of settlement proceeds and failing to timely file a Closing Statement with the Office of Court Administration

Failing to timely satisfy a judgment relating to the attorney's practice of law

Simultaneously representing clients with differing interests

Failing to properly supervise employees and failing to ensure that funds were deposited in escrow before drawing checks

Engaging in an impermissible conflict of interest by representing both the lender and the purchaser at a closing and using the attorney's own abstract company

Communicating with an adverse party, known to be represented by counsel, on the subject of the representation

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

[1] Mr. Pugach was convicted in 1959 of hiring three men to throw lye in the face of his ex-girlfriend, Linda Riss. Ms. Riss suffered significant injuries, including near total blindness. Following his release from Attica Correctional Facility in 1974, the then-disbarred Mr. Pugach returned to the practice of law as an "assistant" to other attorneys, including Mr. Hancock. Ms. Riss also became his wife.

New York's "Spread of Hours" and "Split Shift" Regulations: A Primer for Practitioners

BY AVROHOM GEFEN

Practitioners who deal with labor and employment law even casually quickly come to realize that it is a potential minefield for their clients. This is especially true regarding compliance with wage and hour laws. Many attorneys have heard anecdotes of naive employers with seemingly good intentions that have stumbled in their compliance with New York State regulations which results in unexpected liabilities. This is sometimes the result of an employer's reliance upon inaccurate advice and in other instances the employer is just doing what they believe everyone else in the industry is doing. The potential liability for even unwitting violations is heightened because under both the federal Fair Labor Standards Act (FLSA) and the New York State statutes regulations, employers that are found liable may also be liable for "liquidated damages" and attorney's fees.[1]

Two of the more arcane New York State wage and hour regulations are the "spread of hours" and "split shift" payment requirements. These regulations are not found under the New York labor laws regarding payment of wages but rather are buried in the New York Codes, Rules and Regulations (NYCRR). These regulations, and the "spread of hours" regulation in particular, have been the topic of several recent Federal and state cases and this article will discuss recent developments on this issue.

Generally speaking, for any day that an employee works more than 10 hours, the employer is required to pay that employee an additional 1 hour at the minimum wage.[2] This" spread of hours" payment is in addition to the 1.5 times the employee's regular hourly rate that an employer must pay for any time over 40 hours per week that the employee works.[3] For example, if an employee works 10.1 hours on a particular day at the New York State minimum wage,[4] the employer is required to pay that worker for 11.1 hours. The "spread of hours" payment remains the same regardless of how many hours over 10 the employee worked on that day and the payment is for one hour at the minimum wage; not the employee's regular wage or overtime wage.

A second provision requires an additional payment of one hour at the minimum wage if the employee works a "split shift" which is a shift with non-consecutive hours. For example, if an employee works an 8 hour shift with a 2 hour break, the employee is entitled to one extra hour at the minimum wage. An exception to this requirement is for a meal break of one hour or less.


Avrohom Gefen

Taken together, it is possible for an employer to owe an employee two extra hours for each day the employee works 10 or more hours and has a break of more than 1 hour. Multiply these two extra hours per workday by the 6 year statute of limitations on state wage claims and factor in multiple employees and you can begin to picture the potentially huge liability faced by non-compliant employers. Remember, of course, that "willful" violations are also subject to an additional 25% "liquidated damages" penalty as well as attorney's fees.[5]

It is interesting to note that the "split shift" payment requirement does not apply to restaurant and hotel workers. While the term "split shift" is defined in the regulations concerning these workers, an additional payment is required only for "spread of hours." Perhaps this is the legislature's acknowledgment of the food service and hospitality industries unique labor requirements.

The New York State Department of Labor has consistently interpreted the "spread of hours" regulation as requiring an employee's total weekly compensation to equal the minimum wage plus one extra hour of minimum wage for each work day in which there is a "spread of hours" scenario. This means that an employer who pays as little as one dollar over the minimum wage will be exempt from the regulation. For example, if an employer pays $8.00 per hour for 55 hours per week with each workday exceeding 10 hours, the employees total weekly compensation should be $500 (40x $8.00 plus 15x $12.00 for overtime). If the employee was paid the bare minimum wage of $7.15 plus the extra hour for "spread of hours", he would be entitled to $482.55 for the week (40x $7.15 plus 15x $10.72 for overtime plus 5x $7.15 "spread of hours" payment).

Since the employee's total weekly compensation in the above example exceeded what they would be entitled to under the bare minimum wage plus the spread of hours payments, the Department of Labor's opinion is that the regulation would not apply.

Several recent court decisions have discussed the Department of Labor's interpretation and have reached different conclusions regarding its validity. In *Yang v. ACBL Corp.*,[6] the court rejected the Department of Labor's interpretation, holding that the state "spread of hours" regulation required an extra hours pay for each workday exceeding 10 hours, regardless of the gross weekly pay for that employee.[7] The court noted that nothing in the regulation indicated that employees whose gross pay exceeded the minimum wage plus the "spread of hours" payment were exempt.

Several months later, however, in *Chan v. Triple 8 Palace, Inc.*,[8] another Southern District case, Judge Gerald Lynch held that the Department of Labor's interpretation of the regulation was correct and that no additional payment is required where the gross wage exceeds the minimum wage plus the "spread of hours" payment[9]. In *Espinosa v. Delgado Travel Agency, Inc.*, [10] Judge Scheindlin agreed with Judge Lynch that "[b]y its plain language, section 142-2.4(a) only provides supplemental wages to workers who are paid the minimum wage required under New York law. It does not ensure additional compensation to employees whose wages sufficiently exceed that floor." In deciding a subsequent motion for reconsideration, Judge Scheindlin confirmed her interpretation but clarified that in calculating the gross wage the correct formula is as follows: "40 Hours times Minimum Wage per Hour + Number of Overtime Hours times Regular Rate times 1.5 + Spread of Hours days times Minimum Wage per Hour." This means that while the straight pay is calculated at the bare minimum wage for spread of hours purposes, the overtime premium is calculated at 1.5 times the employees regular rate. Under this formula, to avoid a spread of hours requirement the gross wages may need to be substantially higher than might be expected, especially and counterintuitively, where the employee's regular rate substantially exceeds the minimum wage.

The trend of federal courts following the NYS Department of Labor's interpretation of the "spread of hours" regulation has continued in recent months. In *Jenkins v. Hanac, Inc.*[11], a home health aide brought an action that included a "spread of hours claim" against the agency that employed her. The agency moved for partial summary judgment dismissing the spread of hours claim because the employee's gross pay exceeded the minimum wage plus the spread of hours payment. The District Court deferred to NYS Department of Labor's opinion and dismissed the claim.

Similarly, in *Almeida v. Aguinga* [12] a domestic service employee brought a "spread of hours" claim against her employers, relying on the interpretation by the court in *Yang v. ACBL Corp*. The court rejected *Yang*, accepted the Department of Labor's interpretation and dismissed the claim

In February of 2007, the Second Department, the highest state court to deal with the issue, also followed the Department of Labor's interpretation. The plaintiff in *Seenaraine v. Securitas Sec. Servs. USA, Inc.*[13] brought a "spread of hours" claim against his employer. The employer brought a motion for summary judgment using its payroll records to demonstrate that the employee's gross wages exceeded the amount required to satisfy the Department of Labor's interpretation of the regulation. Affirming the lower court's dismissal, the Second Department held that the interpretation of the Department of Labor was "not unreasonable or irrational" and did not "conflict with the plain meaning" of the statute.

It should be noted that there are no reported cases that deal with the "split shift" payment that is also contained in the regulation. This is possibly because most instances in which there is a split shift occur in industries that are exempt from this regulation such as the restaurant and hospitality industries. Presumably, the courts would apply the same reasoning and look at an employee's gross wages to determine if a split shift payment must be made.

Unless and until the Court of Appeals holds otherwise, attorneys and their clients who are employers can probably safely assume that the courts will continue to adhere to the NYS Department of Labor's interpretation of the spread of hour's regulation. Attorneys should, however, be aware of the regulation and counsel their clients regarding its application, especially clients who employ

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PHOTO CORNER

Holiday Party At Terrace on the Park Thursday, December 4, 2008."

Al Lapinski, Paul Kerson, David Adler and Arthur Terranova.

Arthur Mosley, Kathryn Donnelly Gur-Arie, Estelle Roond and Steven Orlow.

Arthur Terranova and Steven Orlow with Sasha Khan and Janice Ruiz, Staff at QCBA.

Attendees enjoying the buffet dinner at the holiday party.

Boogying on the Dance Floor.

David Cohen, April Newbauer and Seymour James.

Deborah Garibaldi, Ilene Kass, Sally Unger and Greg Brown.

Guy Vitacco, Jr., George Campos, Paul Pavlides and Steven Orlow.

Hon. Peter Kelly, Hon. Charles LoPresto, Larry Litwack, Hon. Joseph Risi, Hon. Edwin Kassoff and Hon. Jeffrey Lebowitz.

Photos by Walter Karling

PHOTO CORNER

Holiday Party At Terrace on the Park Thursday, December 4, 2008."

Hon. Seymour Boyers, Joe Baum, Paul Pavlides, George Nashak and Greg Brown.

Mona Haas, Luke Scardigno and Cameron Smith, Sponsor-TX Direct Payment Solutions.

Nicole Vasquez, Juan Ortiz and Sandra Valle-Ortiz.

Tracy Catapano-Fox, Hon. Charles LoPresto and Hon. Thomas Raffaele.

Pascale and Timothy Rountree.

Richard Lazarus, Pam Jordan, Tracy Catapano-Fox, Janice Ruiz and Sasha Khan.

Robert Bellone and David Wasserman.

Toys for Forestdale, Inc., Foster Care Agency in Queens.

Photos by Walter Karling

Trial Advocacy: How To Persuade Judge And Jury

BY GERALD LEBOVITS

Trial lawyers' main goal is to persuade the jury or, in a bench trial, the judge to rule in their clients' favor. To do so, trial lawyers need more than logical arguments. Persuasion is more than convincing. Persuasion uses both emotion and appeal to reason. Impressions are important. This is especially true for jury trials. Jurors make decisions based on perceptions and impressions, not only on logic.

Aristotle defined persuasion in the three books that make up his Treatise on Rhetoric by summarizing persuasion in four principles. He explained that speakers who want to persuade should get the audience on their side, maximize their strong points and minimize their weaknesses, refresh the memory of their audience frequently, and impart emotion. He grounded his principles on credibility (ethos), the audience's emotions and psychology (pathos), and patterns of reasoning (logos), all while emphasizing style (word choice, metaphor, and sentence structure) and arrangement (organization). Aristotle's principles apply to modern-day trial advocacy. He even enunciated the distinction between jury and judge trials: the required level of emotion.

Trial persuasion techniques and styles vary on whether lawyers present their case to a judge or a judge and a jury, but the goal stays the same: to win. In front of a judge, trial lawyers persuade by using effective legal analysis supported by ample legal research. Trial lawyers must restrain emotions and remain dispassionate. In front of a jury, persuasion is different. Jurors are unfamiliar with legal terms and concepts; lawyers should alter their strategy accordingly. They must adapt their oral presentation using appropriate emotions so that jurors can empathize and understand the case and the client.

The basis of persuasion is the same in front of a judge or a jury. Lawyers must gain the attention of their audience, hold their interest, make it impossible for them not to understand their arguments, and make it easy for the audience to agree. Every trial, every jury, and every judge is different. Trial lawyers cannot expect to use the same formula for every case. Persuasion requires preparation and knowledge, not only of the case, but more importantly of the audience. Lawyers must appeal to the audience by identifying their beliefs, personality, and values.

Most important, trial lawyers must convince their audience that they are sincere. They must sincerely believe in their case and effectively project that sincerity to their audience. Otherwise, their audience might not consider them credible. Credibility is one thing lawyers cannot afford to lose. Audiences, juries and judges included, will be convinced only if they believe the speaker.

Here are fifteen pointers to guide lawyers in persuading judges and juries that their arguments should prevail.

(1) Know your audience. To persuade, lawyers must appeal to their audience. They must know whom they are trying to convince. In a jury trial, lawyers should establish juror profiles during jury selection to identify individuals likely to render a verdict in their client's favor. After establishing the profiles, they should collect information on the prospective jurors to see whether they match the right profile. Good trial lawyers modify their strategy according to the jurors. They should consider juror's age, gender, and occupation to know what will appeal to them and what will offend them. Trial lawyers must relate to the jurors. They need to put themselves into the jurors' shoes to consider what the jurors will want to hear. Jurors often make decisions based on feelings and then look for evidence to support that emotional decision. Effective trial lawyers re-learn to think like real people to anticipate questions that will be important to jurors. They gain their attention, hold their interest, and make it easy for them to agree with their case. For trials in front of a judge, lawyers should start by getting to know the judge. They should ask their colleagues for advice on what that judge likes or dislikes so they can structure their presentation to appeal to the judge. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach while talking about passionate issues. Trial lawyers should also become familiar with and respect the court's rules. They do not want to lose on a technicality.


Gerald Lebovits

(2) Give a strong opening statement. The opening statement should be the strongest part of the trial lawyers' presentation. Trial lawyers should try to make the opening so strong that their adversary can never recover. The opening statement is important: It is the first opportunity, after the voir dire, for trial lawyers to explain their case. Jurors and judges are the most attentive then. Trial lawyers should seize the opportunity to summarize the case in a compelling way. They should not start their opening statement with a bold adversarial statement. Making bold adversarial statements at this early stage might give the impression that the lawyer is overly aggressive. They should not make arguments during opening statements. Arguments do not persuade at this early stage and, in any event, trial procedure forbids hem. Stating the facts creates far-more-effective and memorable mental pictures. An effective opening statement should last between 5 and 30 minutes. If shorter, important facts and themes will be missing. If longer, trial lawyers risk losing the jurors' attention and overwhelming them with details. The opening statement is the opportunity for trial lawyers to tell their story. They should enjoy it. It is the time to steal their adversary's thunder.

(3) Have a theme. Themes are an essential part of trial persuasion. Themes summarize what the case is about. Themes are crucial in jury trials; jurors can get lost sorting through complicated information without a theme. To project a memorable image about the case, effective trial lawyers know to choose simple, familiar words and phrases for their themes. Lawyers should emphasize and deemphasize their arguments and facts to fit their themes. Themes should be announced in the opening statement and repeated throughout the trial. The best themes appeal to jurors' common sense, experience, and fairness. They are short, easy to understand, hard to forget, and encompass all phases of the case. They serve as the moral foundation of the case. Here are some examples of good themes: life, liberty, no fury like a woman scorned, and actions speak louder than words. Trial lawyers should also know the other side's theme so that they can contradict it. Theme selection is important in a trial. If chosen wisely, the jurors will adopt the theme and use it in deliberations to convince others that one side's arguments should prevail. Lawyers should never use more than two or three themes. More will the theme unmemorable and unimpressive.

(4) Show; do not tell. Effective trial lawyers do not speak in a conclusory way, but rather in a convincing manner. They do not impose their beliefs. They offer concrete, vivid details. They lead their audience to their conclusions by telling them their story of the case and then letting them decide on their own. They do not assume that judges or jurors will agree with their point; they make sure their argument is stated clearly. The best trial lawyers act like teachers, not preachers or advocates. They tell stories. Juries process facts by storytelling. Storytelling makes ideas stick. In showing, lawyers should establish clean story lines and leave out needless details, places, dates, and history. Specific rather than vague or general words increase the impact of the ideas. Before the trial, lawyers should create a storyboard with important facts in chronological order and themes to tell the story during trial. Action is critical to a good story. This is why trial lawyers should focus on the people, not on the problem. They should emphasize the events but not the legal issues. Jurors will not base their decisions upon laws and previous decisions. They will side with the arguments that affect their sense of justice.

(5) Know the case. Good trial lawyers are always prepared. They never take a case for granted. They have a strategy. They find witnesses and exhibits to support their version of the disputed facts and prepare them efficiently and credibly. They know which of their own arguments are the strongest and the weakest. They play up strong arguments and minimize weaker ones. They do not skip over their weaker arguments. They address them and make them stronger by giving good explanations for points that will comprise the other side's strongest arguments. Not addressing weaker points risks letting adversaries argue that they wanted to hide the problem. Effective trial lawyers know not only every aspect of their case, but also the other sides' arguments. They know what their adversary will argue and are prepared to refute their arguments. By refuting the other side's arguments, lawyers show that they are right because they are right, not only because the other side is wrong. Preparation is the key to persuasion. Unprepared lawyers will fail to connect with their audience. They show they do not care about their work. If the audience senses that the lawyer does not care, the audience will not care either, or the audience will believe that even the lawyer thought that the case was a loser.

(6) Be focused. Being focused is an important persuasive skill for trial lawyers. Focus means knowing what you want and taking action to get it. Trial lawyers need to have their head in the game; it is not the time to think about the weekend. They must be quick on their feet. They should take notes about what is happening in the courtroom so they can address them later on, while examining witnesses or during summation. Being focused is also essential to assuring that the jurors or the judge will understand the case. Lawyers, who present their arguments illogically, jumping from issue to issue, will lose their audience. The audience will be confused about their theory of the case and might side with the adversary. Trial lawyers should make it easy for the judge or the jury — no case should be presented as a mystery novel. They should establish a speaking outline to avoid unnecessary repetition and to present arguments cogently and efficiently. If the lawyers' minds are clear and focused, they will know what they want to get, and so will the jurors and the judge. Having focus also means thinking about the trial before it begins — thought-out conclusions designed under the appropriate burden of proof to satisfy or disprove the elements of the cause of action, defense, affirmative defense, or counterclaim and also to correspond both to the forthcoming summation and judge's jury charge.

(7) Be eloquent. Trial lawyers should strive for eloquence. Eloquent lawyers persuade by captivating their audience from the start. They know that trial advocacy is all about communication and, thus, choose their words carefully. They vary their tone and body language. They make their presentation interesting by being clear and effective. They use different communication techniques like rhetorical questions and analogies to make their presentation more interesting and powerful. They repeat statements to emphasize important information to ensure that their audience will remember. Eloquent lawyers are not afraid of silence. Silence can be persuasive; it lets the audience process the idea. Persuasive lawyers do not look at notes too often or read them. Doing so separates them from the jurors and the judge. How can lawyers be persuasive if they are riveted to their notes or, if they must look at their notes, to say why their client is innocent? They should use only an outline of their presentation, and only just in case they need to remember what to say next.

(8) Be organized. Trial lawyers must be organized. Being organized will help trial lawyers when they need to think and react quickly — for instance, while questioning witnesses. Trial lawyers should prepare a trial notebook to outline what they are going to say. The notebook should include documents needed during the presentation. They should know where every document or piece of evidence is at all times; they do not want to lose an argument due to a missing paper. Lawyers should also always keep their counsel table clutter-free. Being organized favors persuasion: It shows that lawyers know what they are doing and that they are prepared. Jurors will have confidence in them.

(9) Be clear. Trial advocacy requires clarity. Lawyers cannot persuade if they are misunderstood. Trial lawyers should use plain language when presenting their case. They should also tell the story of the facts using concrete nouns and, better, active verbs and few, if any, adverbs and

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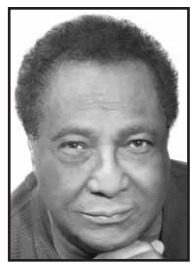
THE CULTURE CORNER

BY HOWARD L. WIEDER

Themes of psychological rebirth and new beginnings resonate in renowned playwright LESLIE LEE'S new play THE BOOK OF LAMBERT, to be presented at the highly esteemed LA MAMA, EXPERIMENTAL THEATRE CLUB ("LA MAMA" or "LA MAMA, E.T.C.") at 74A, East 4th Street, in Manhattan's East Village. The premiere of this brilliant, masterpiece psychological drama is on Friday, February 13, 2009. It takes guts for theater people to schedule an opening night of the premiere of a play on Friday the 13th!! The question is not in urging you to buy tickets for THE BOOK OF LAMBERT, this MUST SEE theatrical event, but in how many times you will go to see it. The play runs from February 13 through March 1, 2009.

Also discussed are the moving piano recital of Maestro DANIEL BARENBOIM at the METROPOLITAN OPERA and his conducting of "Tristan und Isolde" there during December 2008. THE METROPOLITAN OPERA has sensational productions of popular beloved repertoire staples "Il Trovatore," "Madama Butterfly," "Rigoletto," and excellent productions of "Orfeo ed Euridice" and "Eugene Onegin." CANTOR YITZCHAK MEIR HELFGOT recently gave a memorable, extraordinary, and spiritually uplifting rendition of Jewish cantorial songs. Soprano MEASHA BRUEGGERGOSMAN will be performing on Sunday, March 8, 2009, at the newly renovated Alice Tully Hall.



Leslie Lee

THE BOOK OF LAMBERT

I read THE BOOK OF LAMBERT, noted playwright LESLIE LEE'S masterpiece psychological and psychotherapeutic drama on the survival of the human mind and spirit, in November and recognized instantly that it was a breakthrough, dramatic masterpiece. THE BOOK OF LAMBERT deserves to be on the short list of finalists for every major award, including the Pulitzer Prize for drama.

In THE BOOK OF LAMBERT, seven psychologically lost persons inhabit a deserted subterranean New York City subway platform, the consequence of their mind's escape from real life hardships endured on the streets above. The nucleus of the group is Lambert, an African American intellectual in his late 20s, who is as comfortable in quoting Shakespeare as he is in talking the jargon of each of his neighbors on the platform, whether it be an Irish cop or a former drug addict. The roles are played by a talented cast, some of whom are members of Actors equity in this ACTORS EQUITY SHOWCASE production. Playing Lambert is the exciting, handsome, and charismatic actor CLINTON FAULKNER.

Clinton Faulkner

THE BOOK OF LAMBERT has comedic, tragic, and action elements and is a gripping psychological drama. During the journey of the play, the characters make several discoveries. Ten hours after I survived a mugging and assault by two men wielding a gun, on December 13, 2008, where I resisted the attempted armed robbery, with the physical marks to prove it, I appeared at the initial auditions for the role of Michael Clancy, an Irish cop who, because of his psychological trauma, has repressed any memory of his background. I was invited to callbacks and was fortunate to be offered this exciting role that follows my November, 2008 theatrical debut in "Yellow Face."

This was a situation of method acting in reverse. Since I wanted to play the role of an Irish cop, I could not see just submitting to armed muggers. But, as many of you have counseled me, I will not test Fate again. The muggers got no money, but some bruises and a lesson that intended victims can just say "NO!" I may have gotten some physical aftermath, but my pride and self-esteem remain intact.

Howard L. Wieder

The other talented actors in THE BOOK OF LAMBERT are: Joresa Blount, Sadrina Johnson, Heather Massie, Gloria Sauve, Arthur French, and Omrae D. Smith.

Even had I not been offered the role of Michael Clancy, after reading the script, I was planning to write about THE BOOK OF LAMBERT in my column. Without the word psychotherapy being mentioned once in the play, LESLIE LEE'S new brilliant work clearly understands its subject as Lambert succeeds in putting Clancy through a Freudian based dynamic psychotherapy. Once launched, no one can predict the trajectory of Michael Clancy's emotional voyage of repressed memories and the feelings attached to them that Clancy has buried from consciousness over 40 years ago.

The psychological voyage of the other characters in THE BOOK OF LAMBERT, each confronting painful experiences from their past, as part of process designed to promote emotional healing, is eye opening and stimulating. Living on the deserted subterranean subway platform, the seven inhabitants are psychologically dead when the action begins. LESLIE LEE's masterful play examines whether healing is possible, and, like Lazarus in the New Testament, whether resurrection is possible, though in a more profound, meaningful, and real psychological sense, not simply magic of the gospel sort of way.

LESLIE LEE understands that the human "spirit" and "soul" is an extraordinary "substance" and gift far more important than heaven/hell conceptions attached to it by organized religion. In attempting to repair the psychological decay that has attached to the cerebellums of his seven characters, they transcend boundaries of race, age, and professional and educational attainment recognizing that each human life is precious.

LESLIE LEE'S use of language for the various characters, each of whom is very different from the other, shows tremendous depth. Mr. Lee shows a profound understanding of psychotherapy and the resistance often encountered in patients who, while, at first, willing subjects, then resist treatment midstream, especially when forced to tackle difficult, personal, and painful areas.

Whereas LESLIE LEE has been widely recognized for plays that show African American family, history, and struggles, in THE BOOK OF LAMBERT, even where most of its characters are black, he has written a dramatic classic that persons of all colors and nationalities would prize for tackling the issue of whether healing is possible. Can these characters lives be converted, as LESLIE LEE brilliantly and eloquently questions, to persons "who can give birth to tomorrow, instead of being killed slowly by yesterday."

In this regard, LESLIE LEE'S, THE BOOK OF LAMBERT should be of great interest to judges and lawyers and their families. Only 10 15 years ago, judicial questionnaires used to demand of judicial applicants whether they ever sought psychological counseling and required details and waivers on disclosure forms. I was appalled by such questions that clearly showed a lack of boundaries by the questioners. Such judicial questionnaires resulted in driving problems underground. Specifically, rather than raise the level of consciousness for judges, judicial nominees, and lawyers to seek psychotherapy or psychological counseling, the questionnaires promoted the idea that seeing a doctor meant that one is mentally ill. Such questions and questionnaires are probably of dubious legality, were deplorable, and are anathema.

I do not think that such questionnaires are still employed. If they are, they should be challenged immediately. Encouraging psychotherapy and psychological counseling will help promote a better judiciary and a more ethical Bar, certainly winnowing out the judges who believe that donning robes is a license to abuse lawyers and litigants and reducing the number of lawyers who believe they can steal from estates and their clients.

Relevant to us in the legal profession, Lambert advises: "There's a brokenness up there. Be a lawgiver that helps repair it, not tear it apart. Make people's dreams come true, because once they die life ain't nothing but a big ass bird that can't clear the trees." Mr. Lee is correct, in his play that blesses psychotherapeutic healing, because how can judges administer justice or even discern which litigant is telling the truth when they fear dealing with their own demons. To dispense justice, the lawgiver needs a healthy mind.

LESLIE LEE is a Professor of Dramatic Writing at NYU's Tisch School for the Arts. He received his BFA from the University of Pennsylvania and his MA in Theater from Villanova University. His plays include: Black Eagles, The First Breeze of Summer (Obie Award, Outer Critics Circle Award, Tony nomination), Elegy to a Down Queen, Colored People's Time, The War Party, Between Now and Then. His screenplays include: The First Breeze of Summer, Almos' a Man, Go Tell It on the Mountain (American Playhouse), Summer Father. Mr. Lee's awards include the NEA grant in play writing, Rockefeller Foundation Play writing Grant, Shubert Foundation Play writing Grant, New York State Council on the Arts grant for play writing, and play writing fellow at the O'Neill Playwrights Conference.

LESLIE LEE'S Obie Award winning play THE FIRST BREEZE OF SUMMER, timeless portrait of family bonds, received a Tony Award nomination for Best Play during its 1975 run at Broadway's Palace Theatre.

Cyndy A. Marion

Acclaimed theatrical director CYNDY A. MARION is directing the premiere of THE BOOK OF LAMBERT. CYNDY A. MARION has been described, by the general consensus of the American press, as one of the most exciting and sought after directors of the contemporary American theatrical stage. An avalanche of glowing critical acclaim has followed Cyndy A. Marion's ample directorial work. Plentiful press reviews praise the direction that CYNDY A. MARION has brought to numerous plays, including SMALL CRAFT WARNINGS, TRUE WEST, A LIE OF THE MIND, STATES OF SHOCK, THE LATE HENRY MOSS, A LIE OF THE MIND, BURIED CHILD, IN THE BAR OF A TOKYO HOTEL, among others.

CYNDY A. MARION is also regarded as the foremost interpreter of the plays of SAM SHEPARD. Mr. Shepard, of interest to judges and lawyers, is represented by my friend ROBERT F. MARSHALL, ESQ., OF GREENBERG GLUSKER, the prominent entertainment law firm, at 1800 Avenue of the Stars, in Los Angeles, California [see, www.ggfirm.com].

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An Analysis Of The Motion To Set Aside The Verdict: Part IV[i]

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Court of Appeals held that claims, if true, that members of the jury in a homicide prosecution discussed the case on several occasions before submission in the presence of the general public, expressed views as to the guilt or innocence of the defendant and as to certain witnesses in public places, and prior to rendition of a verdict, and from the jury room, carried on conversations and received communications form prosecution witnesses through open windows, empowered the trial court to grant a new trial.

Similarly in People v. Romano[14], the Appellate Division Second Department held that the defendant was entitled to have the jury verdict set aside on the ground of juror misconduct, where there was evidence that the jurors and alternate jurors discussed trial testimony, credibility of witnesses, and defendant's guilt or innocence before deliberations commenced, that some jurors and alternate jurors read and discussed newspaper articles about the case, and that jurors and alternate jurors engaged in improper communications during deliberations.[15]

Generally, it may be said, that written communications by or with jurors to the court by one juror to the Foreman of the jury, or even a letter, sent by a juror, to the District Attorney's Office applying for the position of Investigator is not a ground, under this Statute, to set aside a verdict.[16]

Generally, if a juror examines exhibits, this is not a basis for a new trial under this Statute.[17]

There is varying law concerning juror's experimentation. Thus, in People v. Santi[18], the Court of Appeals held that it would be improper for a juror to engage in experimentation, investigation, and calculation that necessarily relied on facts outside the record and beyond the understanding of the average juror. Jurors are not, however, the court stated, required to check their life experiences at the courtroom door.

On the other hand, in People v. Kelly[19], the Appellate Division First Department held that jurors may conduct a jury room crime reenactment or demonstration, provided it involves no more than the juror's application of everyday experiences, perceptions, and common sense to the evidence.[20]

There is varying law, concerning allegations of improper juror conduct in the course of Voir Dire. Thus, in People v. Rodriguez[21], the New York State Court of Appeals held that the jury verdict, convicting the defendant of Criminal Sale of a Controlled Substance, would not be automatically set aside on the ground that the juror, during Voir Dire, intentionally concealed his acquaintance with the county prosecutor, who was not involved in the prosecution of the defendant's case.

On the other hand, in People v. Ceresoli[22], the Appellate Division Fourth Department held that the county court was required to set aside a Grand Larceny verdict, on the ground of jury misconduct, where the juror indicated, during Voir Dire, that he was not familiar with the club, which the victim was charged of theft of, but in fact, the juror was a former member of that club.[23]

In general, it may be said, also, that the juror's acquaintance with the defendant is not a basis for granting this Motion. Thus, in People v. Owens[24], the Appellate Division Secdond Department held that the juror's failure to disclose, during jury Voir Dire, that she knew the defendant did not require reversal, on the ground of jury misconduct, since the juror revealed sufficient evidence, during Voir Dire, to allow the defendant to recall the juror's identity at that time, but he chose not to challenge her placement on the jury and, in fact, actually requested that she be restored to the jury panel under "Batson", after the People had used a Peremptory Challenge to remove her.[25]

In general, a jury verdict cannot be impeached by probes into the jury's deliberative process. People v. Maragh[26]. Also, in People v. Testa[27] the New York State Court of Appeals stated that examination of the jury's deliberative process to assess claims of improper jury influence must be performed with caution, for inquiry into such process with a purpose of impeaching a verdict should not be undertaken, except in extraordinary circumstances.[28]

There is varying case law as to whether a juror's use of extraneous information can constitute improper conduct. Thus, in People v. Brown[29], the New York State Court of Appeals held that "improper influence" includes well intentioned jury conduct, which tends to put the jury in possession of information not introduced at trial. In People v. Saunders[30], the trial court held that the cumulative effect of four acts of juror misconduct, which involved outside influences and extraneous material, led to the conclusion that the verdict was affected by outside influences and extraneous material.[31]

There is a rule as to where a juror does independent research. This is a ground for the granting of this Motion.[32]

There are a number of cases concerning the matter of alcohol and drug use by jurors. For example, in People v. Brandon[33], the trial court held that the consumption of alcohol by a juror during deliberations, in prosecution on multiple counts of Petty Larceny, was not presumptively prejudicial. The Brandon Court went on to state that the jurors' alleged use of alcohol during deliberations was not an "outside influence" on the jury, and jury testimony with respect thereto was inadmissible to impeach the verdict in prosecution on multiple counts of Petty Larceny.

People v. Edgerton[34] states a rule about jurors reporting defendant's bad conduct or prior convictions to other jurors. The Edgerton Court held that the improper conduct by a juror, who during deliberations related to other jurors information that the defendant, who was on trial for Arson, had set fires in other counties, testified vacating Arson convictions. On the other hand, in People v. Caputalo[35], the trial court held that the defendants were not entitled to a new trial because two jurors had learned of the defendant's convictions on a former trial.[36]

In general, there is a sub-rule that juror access to law book materials is not be a basis for granting this Motion. Thus, in People v. Priori[37], the New York Court of Appeals held that the fact that a juror had a copy of the Penal Code and the Code of Criminal Procedure, which he read and exhibited to some of his fellows, but which was taken from him as soon as it was discovered, was not a ground for a new trial, in the absence of evidence that it affected the result or was prejudicial to the defendant.[38]

There is also a rule concerning the juror's use of news reports. In general, the juror's exposure to news reports will not mandate the granting of this Motion. People v. Smith[39] is apropos of this rule. In Smith, the trial court improperly found, after an abortive preliminary Hearing, that a newspaper article, read by and related to jurors during deliberations was presumptually prejudicial and that the presumption of prejudice was not rebutted by the People so as to justify setting aside the verdict. The court held that the verdict should not have been set aside without a showing as to what extra-record material came before the jury, if any, and its impact on the jurors' opinions and its ability to render a fair verdict.

In the same way in People v. Horny[40], the Appellate Division First Department held that publicity concerning general claims of police brutality, without any reference to the defendant, was not prejudicial to the defendant, especially where the defendant did not establish that the jury deliberations were poisoned by this media publicity, since there was no claim that any juror read the article, and only one juror claim that the headline had any influence on him.[41]

There is also a rule concerning juror note-taking. In People v. Saunders[42], the trial court held that note taking by a juror, and use of notes during deliberations, created a likelihood that the rights of the defendant were substantially prejudiced. People v. Mann[43] stated that where the evidence permitted a finding that the juror who took unauthorized notes during a trial did not use those notes in any significant way, during deliberations, so that no prejudice resulted to the defendants, even though the court never issued cautionary instructions with regard to the taking of the notes, since the jurors were never authorized to take the notes. People v. Dexheimer[44] states a rule that where the defendant never requests a cautionary instruction on note-taking, or makes any objection regarding note-taking during trial, the defendant waives any claim on this issue.

In general, there is a rule that where jurors show overt prejudice or bias, this is a ground for granting this Motion. In People v. Leonti[45], the New York Court of Appeals held that a juror's disqualification, shown by undenied Affidavits as to his statement after the rendition of a verdict of conviction that he would not believe a person of defendant's nationality under oath, required a new trial. Similarly, in People v. Webb[46], the Appellate Division First Department stated that a juror's response when asked if he would be able to keep an open mind in light of knowledge of defendant's previous conviction, that evidence of prior crimes would partially sway his decision and would effect his judgment, constituted sufficient grounds to dismiss the juror for cause, requiring reversal. The court noted that the defense had to exercise a Peremptory Challenge and thus exhausted all of its Peremptory Challenges prior to the end of jury selection.[47]

Also, there is a rule concerning separation of the jury as a ground for the granting of this Motion, if the separation is of a sufficient length of time. This can be the ground for the granting of this Motion, although the Motion is not easily or frequently granted.[48]

CONCLUSION

This article has analyzed and sought to indicate the proper interpretation and construction of improper or proper juror conduct within the context of sub-section (2) of Section 330.30 of the Criminal Procedure Law. There are a number of basic rules. First, the trial court is invested with broad discretion on the matter. Second, the juror's alleged misconduct must create a substantial risk of prejudice to the rights of the defendant in some way. The case law sets forth a number of specific rules. For example, the failure to challenge a juror by reason of the want of knowledge as to the cause is not a ground for this Motion. There is a rule that improper communication with the jury can be a ground for the granting of this Motion. There is a sub-rule concerning discussions or conversations among jurors concerning the case. There are rules concerning written communication by or with jurors, and when a juror examines exhibits. There is varying law concerning juror's experimentation, as well as law concerning of improper juror conduct in the course of Voir Dire. In general, there is a rule that a juror's acquaintance with the defendant is not a basis for granting this Motion, and, as well, there is a rule that a jury verdict cannot be impeached by probes into the jury's deliberative process. There are rules concerning the juror's use of extraneous information such as can constitute improper conduct, and a rule where a juror does independent research. There is a case law concerning the use of alcohol and drugs by jurors, and a rule about jurors reporting defendant's bad conduct or prior conviction to other jurors. There are sub-rules concerning juror access to law books and concerning the juror's use of news reports. There is a sub-rule concerning juror note-taking, and there is a general rule concerning where jurors show overt prejudice or bias. Finally, there is a rule concerning separation of the jury as the ground for the granting of this Motion.

It is hoped that this article will provide some sort of guide to the practitioner through this detailed and somewhat complex field of improper juror conduct under Subsection Rule (2) of Sec. 330.30 of the Criminal Procedure Law.

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ENDNOTES

[i] The case law cited in this article has its source in the annotations of McKinney's Consolidated Laws, Sec. 330.30, Volume 11A, West Publishing Company. This is also true of the citations in the prior article entitled "An Analysis of the Motion to Set Aside a Verdict", analyzing subsection (2) of Sec. 330.30 of the Criminal Procedure Law.

[1] At any time after rendition of a verdict of guilty, and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of a verdict; or

That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial event with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

[2] 197 AD2d 476, 602 NYS2d 847 (1st Dept. 1993)

[3] 104 AD2d 947, 480 NYS2d 565 (2nd Dept. 1984)

[4] See also on this People v. Maragh, 94 NY2d 569, 708 NYS2d 44 (2000) and People v. Phillips, 87 Misc.2d 613, 384 NYS2d 906 (1975)

[5] Id.

[6] 304 AD2d 841, 759 NYS2d 136 (2nd Dept. 2003)

[7] See also on this rule, People v. Brown, 48 NYS2d 388, 423 NYS2d 461 (1979); People v. Johnson, 110 NY 134, 17 NE 684 (1888); People v. Leonard, 252 AD2d 740, 677 NYS2d 639 (3rd Dept. 1998); People v. Stanley, 212 AD2d 983, 624 NYS2d 313 (4th Dept. 1995); People v. Edgerton, 115 AD2d 257, 495 NYS2d 858 (4th Dept. 1985); People v. Rodriguez, 183 Misc. 2d 867, 705 NYS2d 485 (S. Ct. Kings Co. 1999); People v. Phillips, Id.; People v. Catalanotte, 67

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Trial Advocacy: How To Persuade Judge And Jury

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adjectives. They should avoid legalese and foreign languages. They should speak in everyday Joe six-pack English. They should use short sentences. It is pointless for lawyers to use complex language and complicated arguments in front of jurors unlikely to understand their point. Lawyers should aim to reducing their idea to their clearest form: What may seem clear to lawyers who have been working on a case for years might be unclear to a jury. For trials in front of a judge, the same principles apply. Judges are busy professionals who multi-task and hear different cases. Lawyers should make it easy for them to understand their arguments and difficult to rule against them. Being clear is crucial to persuasion. Otherwise, jurors and judges might not understand where lawyers stand on facts and issues.

(10) Be concise. The best trial lawyers know that their presentation of the case need be not only clear but also short and sweet. They work on every part of the trial: motions in limine, jury selection, opening statements, witness examinations, evidence introduction and exclusion, jury-charge requests, summations, and exceptions to the jury charge. They know the time they have before a jury or judge is limited. They learn to boil down arguments to the crucial facts only. They rehearse their oral presentation to ensure that every issue is stated with maximum concision and clarity to avoid losing the jurors' attention. They do not try to fit every argument into their presentation; they select the best ones. They do not rush; they take their time to make every word count. Concision helps audiences better understand lawyers' arguments and demonstrates the lawyer's dedication to the case. An excessively long or boring factual statement encourages audience skepticism.

(11) Be presentable. Because persuasion is partly based on impressions and perceptions, trial lawyers should never neglect how they present themselves. They must dress appropriately: neatly and professionally. A messy appearance will distract the audience from the lawyers' message. They should also be aware of their body language. Body language is not something lawyers can fake. Audiences will perceive dishonest body language and disbelieve what they hear. Lawyers should avoid closed posture, such as crossed arms, and favor open posture and gestures that communicate sincerity and openness. They should also make eye contact with their audience to establish a connection and to demonstrate honesty. Trial lawyers should also try to sit with the fewest people at the counsel table, or preferably alone. Lawyers need to put themselves in the place of jurors, who will see David versus Goliath if one side has several lawyers at their table and the other side has only one. Jurors are more sympathetic toward the poor lawyer alone against a larger group of greedy lawyers. Trial lawyers should also avoid drinking water at the counsel table in front of the jury. Jurors do not have water during the trial. To demonstrate that they are on the same level, lawyers should not drink either.

(12) Be trustworthy. To project sincerity and be credible in the jury's eyes, trial lawyers must be honorable. They cannot hide anything. They should request side bars only when necessary; jurors feel excluded by this procedure. Lawyers should also make understandable objections so that jurors or the judge do not conclude they are trying to conceal information. Jurors or judges will not rule in the favor of lawyers perceived as deceitful and dishonest. Trial lawyers should never exaggerate, overstate, or generalize. By understating, lawyers emphasize content, not style, to make their arguments powerful. Lawyers should never use sneaky techniques to hide important facts: honesty is the only policy. They win by stating the facts accurately and then by providing strong explanations and evidence to prove their conclusions. Trial lawyers should also stick to the record and provide accurate and precise references. Doing so gives credibility to lawyers and shows they worked on the case. They should never over promise and risk not fulfilling their promises. Lawyers should be careful in their opening statement when they tell jurors what to expect.

(13) Be reasonable. The best trial lawyers know that the way to win in the long run is to be reasonable. They use good judgment and common sense. They portray the situation accurately and always present valid arguments. They object only for a good reason. Reasonable lawyers are logical and fair when arguing their position and asking for relief. They know whether and when to concede and when to stand their ground. Conceding when appropriate allows lawyers to concentrate their efforts on important arguments while appearing reasonable. Being reasonable also means that lawyers should not prolong trials. Reasonable lawyers are pleasant to work with; jurors and judges appreciate them and will be more likely to cooperate with them. Opposing counsel might even be more likely to concede or settle on favorable terms.

(14) Be yourself. Trial persuasion requires lawyers to be engaging to get their audience interested in what they are saying. Trial lawyers should be original when presenting their case to get the audience's attention. No one style is suitable to all trial lawyers. Being original does not mean that lawyers should try to use trial skills or strategies with which they are uncomfortable. Lawyers should be themselves, without pretense. Jurors can tell when lawyers are uncomfortable or nervous. Trial lawyers should also be able to manage their nerves. Some nervousness can be useful, however; it proves that lawyers are aware of the seriousness of the matter to their client and their resulting responsibilities and that any case can be won or lost. Lawyers should not take themselves too seriously: Most jurors already have a preconceived idea of egotistical lawyers. Trial lawyers can use humor, but they should be careful not to offend. Jokes should never be memorized and rehearsed; if humor is used, it should be spontaneous. Trial lawyers should also practice caution with theatrics. They can use it sparingly to make a point or to get attention, but overuse will turn the trial into a comedy routine.

(15) Be professional. Trial lawyers should always act professionally. Professionalism persuades in two ways. First, lawyers will be more likely to win points with judges and jurors if they are charming, civil, and likeable. Second, acting professionally helps lawyers maintain the credibility necessary to persuade audiences. Being professional as a trial lawyer means consistently respecting the judge, the jury, and the court personnel. Professionals are never rude. They are able to defend their client's interests efficiently without forgetting their good manners. They never lie or mislead. Jurors and judges see everything that happens in the courtroom. They see how lawyers act with one another and with court personnel. If the audience sees lawyers being respected and acting professionally, they are more likely to listen and trust them. Determination and perseverance for a cause are also important qualities of trial lawyers. Winning a case is worth it only if the lawyer behaves ethically and maintains integrity. Professionals know when to let something go.

Conclusion

Trial advocacy is complex. Cases are lost and won on atmosphere. Lawyers can only try their best to control it in their favor. They should be themselves and think of a trial as a conversation and not a speech. The key to persuasion is to believe in what one is doing — and then to make it easy for the audience to rule for you and to make the audience want to rule for you. If lawyers are sincere in their presentation, the judges and jurors will want to rule in their favor.

Editor's Note: Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor of law at St. John's University School of Law, in Queens, New York, where he teaches trial and appellate advocacy. For her research help, Judge Lebovits thanks Amélie Plouffe Deschamps, a law student from the University of Ottawa, Civil Law Section, his alma mater.

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Misc.2d 351, 324 NYS2d 106 (S. Ct. Kings Co. 1971); People v. Kraus, 147 Misc. 906, 265 NYS 294 (Ct. of Gen. Sess. NY Co. 1933); People v. Smith, 187 NYS 836 (S. Ct. Chenango Co. 1921).

[8] People v. Mack, 35 AD 114, 54 NYS 698 (3rd Dept. 1898)

[9] See on this People v. Foster, 100 AD2d 200, 473 NYS2d 978 (2nd Dept. 1984); People v. Morrisey, 1 Sheld. 295 (1872)

[10] 91 NY2d 838, 666 NYS2d 1020 (1997)

[11] 282 AD2d 688, 725 NYS2d 655 (2nd Dept. 2001)

[12] On this see also, People v. Simms, 176 AD2d 833, 575 NYS2d 159 (2nd Dept. 1991); People v. Catalanotte, Id.; People v. Smith, Id.

[13] 303 NY 382 (1952)

[14] 8 AD3d 503, 778 NYS2d 517 (2nd Dept. 2004)

[15] See also on this, People v. Leonard, Id.; People v. Barrett, 231 AD2d 806, 647 NYS2d 311 (3rd Dept. 1996); People v. Hill, 225 AD2d 902, 639 NYS2d 857 (3rd Dept. 1996); People v. Moon, 219 AD2d 817, 631 NYS2d 958 (4th Dept. 1995); People v. Marrero, 83 AD2d 565, 441 NYS2d 12 (2nd Dept. 1981); People v. Catalonotte, Id.

[16] See People v. Kelly, 94 NY 526 (1884); People v. Rivera, 262 AD2d 235, 694 NYS2d 13 (1st Dept. 1999); and People v. Phillips, Id.

[17] See People v. Gallagher, 11 NYAnn.Cas. 348, 75 AD 39 (4th Dept. 1902) and Wilson v. People, 4 Parker Cr.R. 619 (1859)

[18] 3 NY3d 234, 785 NYS2d 405 (2004)

[19] 11 AD3d 133, 781 NYS2d 75 (1st Dept. 2004)

[20] See also on this People v. Brown, 48 NY2d 388, 423 NYS2d 461 (1979); People v. Pino, 264 AD2d 571, 695 NYS2d 548 (1st Dept. 1999); People v. Horney, 112 AD2d 841, 493 NYS2d 130 (1st Dept. 1985).

[21] 100 NY2d 30, 760 NYS2d 74 (2003)

[22] 222 AD2d 1096, 635 NYS2d 849 (4th Dept. 1995)

[23] See also People v. West, 4 AD3d 791, 772 NYS2d 166 (4th Dept. 2004); People v. Demetsenare, 243 AD2d 777, 663 NYS2d 299 (3rd Dept. 1997); People v. Morales, 121 AD2d 240, 503 NYS2d 374 (1st Dept. 1986); People v. White, 22 AD2d 830, 253 NYS2d 583 (3rd Dept. 1964); People v. Rosenthal, 264 AD 822, 35 NYS2d 215 (4th Dept. 1942); People v. Rosen, 251 AD 584, 297 NYS 877 (3rd Dept. 1937); People v. Rodriguez, Supra.; People v. Childs, 56 Misc.2d 581, 289 NYS2d 922 (Co. Ct. Seneca Co. 1968)

[24] 191 AD2d 715, 595 NYS2d 518 (2nd Dept. 1993)

[25] See also on this, People v. Sharpe, 295 AD2d 957, 744 NYS2d 606 (4th Dept. 2002); People v. Gonzales, 228 AD2d 722, 643 NYS2d 707 (3rd Dept. 1996); People v. Mack, Id.

[26] Id.

[27] 61 NY2d 1008, 475 NYS2d 371 (1984)

[28] See also on this, People v. Brown, Id.; People v. Browne, 307 AD2d 645, 763 NYS2d 695 (3rd Dept. 2003); People v. Paccione, 295 AD2d 450, 743 NYS2d 561 (2nd Dept. 2002); 23 Jones Street Associates v. Beretta, 280 AD2d 372, 722 NYS2d 229 (1st Dept. 2001); People v. Anderson, 249 AD2d 405, 671 NYS2d 149 (2nd Dept. 1998); People v. Carthrens, 171 AD2d 387, 577 NYS2d 249 (1st Dept. 1991); People v. Thomas, 170 AD2d 549, 566 NYS2d 323 (2nd Dept. 1991); People v. Scales, 121 AD2d 578, 503 NYS2d 629 (2nd Dept. 1986).

[29] Id.

[30] 120 Misc.2d 1087, 467 NYS2d 110 (S. Ct. NY Co. 1983)

[31] See also on this, People v. Hartung, 17 How. Prac. 85, 4 Parker Cr.R. 256, 8 Abb. Prac. 132 (1859); U.S. v. Tin Yat Chin, 275 F. Supp.2d 382 (2003); People v. Santi, Id.; People v. Kelly, 11 AD3d 133, 781 NYS2d 75 (1st Dept. 2004); People v. Robinson, 1 AD3d 985, 768 NYS2d 50 (4th Dept. 2003); People v. Corines, 308 AD2d 457, 764 NYS2d 117 (2nd Dept. 2003); People v. Camacho, 293 AD2d 876, 742 NYS2d 402 (3rd Dept. 2002); People Cepeda, 251 AD2d 343, 674 NYS2d 68 (2nd Dept. 1998); People v. Marquez, 188 AD2d 619, 591 NYs2d 501 (2nd Dept. 1992); People v. Hooker, 118 Misc.2d 760, 462 NYS2d 123 (S. Ct. Kings Co. 1983).

[32] See on this People v. Thomas, 184 AD2d 1069, 584 NYS2d 706 (4th Dept. 1992).

[33] 5 Misc. 3d 501, 785 NYS2d 286 (Criminal Co. NY Co. 2004)

[34] 115 AD2d 257, 495 NYS2d 858 (4th Dept. 1985)

[35] 138 Misc. 344, 246 NYS 706 (Ct. of Gen. Sess. NY Co. 1930)

[36] See also on this, People v. Gardella, 55 AD2d 607, 389 NYS2d 118 (2nd Dept. 1976)

[37] 164 NY 459, 58 NE 668 (1900)

[38] People v. Gardella, 55 AD2d 607, 389 NYS2d 118 (2nd Dept. 1976); People v. Draper, 28 Hun 1 (1882); People v. Gaffney, 1 Sheld. 304, 14 Abb. Prac. NS 36 (1872)

[39] 187 AD2d 365, 590 NYS2d 191 (1st Dept. 1992)

[40] 112 AD2d 841, 493 NYS2d 130 (1st Dept. 1985)

[41] People v. Testa, 61 NY2d 1008, 475 NYS2d 371, 463 NE2d 1223 (1984); People v. Lafferty, 177 AD2d 1043, 578 NYS2d 56 (4th Dept. 1991); People v. Costello, 104 AD2d 947, 480 NYS2d 565 (2nd Dept. 1984); People v. Lubin, 190 AD 339, 179 NYS 691 (1st Dept. 1920); People v. Whitmore, 45 MIsc.2d 506, 257 NYS2d 787 (S. Ct. Kings Co. 1965)

[42] 120 Misc.2d 1087, 467 NYS2d 110 (S. Ct. NY Co. 1983)

[43] 125 AD2d 711, 510 NYS2d 196 (2nd Dept. 1986)

[44] 214 AD2d 898, 625 NYS2d 719 (3rd Dept. 1995)

[45] 262 NY 256 (1933)

[46] 5 AD3d 115, 772 NYS2d 333 (1st Dept. 2004)

[47] See also on this People v. Thompson, 198 NY 396, 91 NE 838 (1910); People v. Browne, Id.; People v. Rivera, 304 AD2d 841, 759 NYS2d 136 (2nd Dept. 2003); People v. Adams, 278 AD2d 920, 719 NYS2d 428 (4th Dept. 2000); People v. Gonzales, 228 AD2d 722, 643 NYS2d 707 (3rd Dept. 1996); People v. Rukaj, 123 AD2d 277, 506 NYS2d 677 (1st Dept. 1986); People v. Stewart, 96 AD2d 622, 464 NYS 2d 885 (3rd Dept. 1983); People v. Rodriguez, 183 Misc. 2d 867, 705 NYS2d 485 (S. Ct. NY Co. 1999); People v. Smith, 175 Misc.2d 692, 670 NYS2d 310 (S. Ct. Queens Co. 1998); People v. Whitmore, Id.

[48] See on this People v. Dunbar Contracting Co., 215 NY 416, 109 NE 554 (1915); People v. Hoch, 150 NY 291, 44 NE 976 (1896); Stephens v. People, 19 NYS 549 (1859); People v. Buchanan, 25 NYS 481 (1893); People v. Douglass, 4 Cow. 26, 15 Am.Dec. 332 (1825); People v. Schad, 58 Hun 571, 35 NYSt. Rep. 148 (1891); People v. Menken, 36 Hun 90 (1885)

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years does not even contain the word "cohabitation". Rather, maintenance is terminated and it is deemed a "re-marriage" when the person receiving the maintenance (say the wife) is found "living or residing with an unrelated adult for more than (an agreed upon number of days), not necessarily consecutive, in any continuous one year period."

Unfortunately for the husband, in the cited GRAEV case, his lawyer either drafted or did not seek a change of the language in the "cohabitation" clause. The $10,000 a month support (with cost of living adjustments) was to end, *inter alia*, upon the "cohabitation of the Wife with an unrelated adult for a period of sixty (60) substantially consecutive days". The agreement did not go on to define "cohabitation", which, using hindsight, was a big mistake. Mr. Graev stopped making support payments, based upon his claim that his ex-wife's cohabitation with another man for 60 days had been documented and photographed by professionals, who had been hired for the surveillance. The agreement having been incorporated into a divorce decree, the wife moved to enforce her maintenance entitlement. The husband presented his proof of an obvious serious relationship, the 60 days sleeping over at her summer home and that the two were "lovers and life partners". The wife claimed the relationship was platonic, and did not involve the sexual relations she said had to be part and parcel of "cohabitation". The wife also claimed that the husband's burden included a need to show that she and her significant other were an "economic unit". She established that her "live-in maintained his own Connecticut home and claimed that he did not contribute to the cost of her summer home. After significant motion practice and a hearing, the Supreme Court discussed several reported decisions on related questions, and Black's Law Dictionary definition, and ultimately found in favor of the wife.

The Appellate Division, First Department, affirmed, with two dissents, and the appeal to the Court of Appeals followed. In the Appellate Division, the majority held that in this context, "cohabitation" required "an economic relationship akin to a shared possessory interest in one home" which could be proven "with evidence that two people keep their personal belongings and receive their mail at the same address". Although the Court found that the man, referred to as MP, spent more than 60 substantially consecutive nights with the wife in the summer of 2004, and that their relationship had become romantic in 2003, this was not found to be decisive since MP owned his own home and there was no proof that they shared household expenses or operated as one economic unit.

The Court of Appeals *reversed*, saying that absent an explicit provision in the agreement to the contrary, "cohabitation" does not contemplate changed economic circumstances or shared household expenses. Holding that neither case law nor the dictionary supplies an authoritative or plain meaning, it was noted that a listing of varying dictionary definitions established that "living together" was an element common to all. The Court stated that this agreement may have been intended to include sexual relations, or, on the contrary, changed economic circumstances, and found that there was an ambiguity in the use of this word, in this agreement. There was no "plain meaning". As a result, the Appellate Division decision was reversed and the case ***remitted*** to the Supreme Court, for further proceedings, presumably another hearing! There was a dissent, with Judge Graffeo concluding that the husband should have had his maintenance obligation terminated, the time period in the agreement having been the most important criterion.

The lesson is clear! Don't use words that may be ambiguous. The writers agree with the dissent. When we opt out of the § 248 language, we clearly seek to avoid the necessity of proving that a couple "held themselves out

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The Culture Corner

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boundaries have always been the focus of the work created and performed at LA MAMA.

LA MAMA envisions art as a universal language. Cultural pluralism and ethnic diversity have been inherent in the work created at LA MAMA. To sustain this global vision, LA MAMA has become one of this country's foremost presenters of international performance, calling artists from over seventy nations part of the LA MAMA family. LA MAMA has been honored with over thirty Obie Awards, dozens of Drama Desk Awards, Bessie Awards, and Villager Awards. LA MAMA has an incredible roster of theatre, movie and multi-media luminaries for whom LA MAMA was an early artistic home.

MAESTRO DANIEL BARENBOIM and the METROPOLITAN OPERA

THE METROPOLITAN OPERA has sensational, eye-catching productions of popular beloved repertoire staples "Il Trovatore," "Madama Butterfly," "Rigoletto," the twin Cav/Pag bill, i.e., "Cavalleria Rusticana" and "Pagliacci"and excellent presentations of "Orfeo ed Euridice" and "Eugene Onegin." These operas include a cast of today's superstars. Handsome and vocally unrivaled baritone DMITRI HVOROSTOVSKY as the evil, manipulative, and diabolical Count di Luna in "IL TROVATORE," the Verdian masterpiece of a plan for revenge that explodes in its originator's face, a theme Verdi also did in "RIGOLETTO." My extended discussion of the artistry of DMITRI HVOROSTOVSKY is found in my March 2008 column of this paper [see www.qcba.org , and then click MEMBERSHIP and then click PUBLICATIONS, and then choose a particular issue].

Go buy tickets at www.metopera.com . To see Hvorostovsky in "IL TROVATORE," please check the schedule on the Met Opera's web site, since there are two casts.

I had heard and seen MAESTRO DANIEL BARENBOIM conduct great orchestras. I had not heard him at the piano keyboards. After his performance on Sunday, Dec. 14, I will not likely ever forget that performance. His tender interpretations and delicately exquisite execution of piano sonatas by Franz Liszt [1811 1886] in the Tre Sonetti di Petrarca, followed by glowing and beautiful renditions of St. Francois d'Assise: La Predication aux oiseaux and Apres une lecture de Dante (Fantasia quasi sonata) were of great, mature emotional depth. Add to that experience that it was my first opportunity, 39 hours after an attempted armed robbery and assault, to experience emotionally that I had survived, after my foolhardy attempt in fighting with armed gunmen. I am in debt to MAESTRO BARENBOIM. His musicianship and sensitive playing allowed me to feel my emotions and to realize that I was, indeed, alive. I do not know whether these performances by MAESTRO BARENBOIM have been recorded, but they ought to be.

The concert was the first time that the stage of the MET OPERA was used for a piano recital in thirty years! The audience was in rapture, and its ovation for MAESTRO BARENBOIM was continuous in volume and exuberance. The Maestro returned to the stage for several much appreciated encores, and, finally, only his covering of the keyboard signaled to the reluctant to leave audience that they had to go home.

MAESTRO DANIEL BARENBOIM was superb conducting the Wagner opera "TRISTAN UND ISOLDE." When I attend Wagner, as a culture critic and reviewer, I put aside, as reviewers are required to do, the personal lives of the artist. So I ignore, when reviewing Wagner, the composer's nasty nature, vicious anti Semitism, and compulsive wife stealing. But in reviewing the worth of a musical or artistic endeavor, I cannot put aside the excessive length of Wagner's opera. During the excruciating length of "TRISTAN UND ISOLDE," which afforded me the time for several naps in its five hours of duration, I speculated that, had psychotherapy been available in RICHARD WAGNER'S time [1813 1883], the length of the opera would have likely been cut in half. Psychotherapy can also help creative artists, not just judges and lawyers.

A friend whom I had invited to the opera left after three hours. Tempted to do the same, I was reminded that my duty as a critic obliged me to stay to the bitter end. One woman sitting near me snuck a glass of wine from the lobby for the final act, and I found myself yearning for a straw, and a pillow.

Still, "TRISTAN UND ISOLDE," where Richard Wagner made great contributions to composing by introducing orchestral color and tonality, was gloriously conducted by MAESTRO BARENBOIM. He skillfully cued, not only the orchestra, but the singers with his baton. LINDA WATSON, with a lovely and strong voice, skillfully replaced an ailing Katarina Dalayman as Isolde. PETER SEIFFERT was excellent as Tristan in this demanding tenor role. MICHELLE DEYOUNG stole the show as Brangane, Isolde's faithful servant and friend. MICHELLE DEYOUNG's voice is a gift of a Higher Power, and we need to see and hear more of this talented singer.

Unfortunately, there is little action in TRISTAN UND ISOLDE, so the audience member is left only with hours and hours of singing, with no accompanying movement. In light of the failure to include dramatic action, I question lighting designer Max Keller's blinding use of white colors which often rendered unreadable the translation provided behind each seat of the Met Opera and set designer Jurgen Rose's minimalist set. Perhaps the use of blinding white light as a main backdrop was to compensate for the failure to include any meaningful dramatic movement or action. The stage design was intriguing, in its simple, geometric forms, but was inappropriate, given the paucity of drama in the work itself, to provide the intended effect and contrast. The staging in Act III of little trinkets or figurines throughout the stage was inexplicable. Intriguing - - yes; mystifying - - yes; but comprehensible - - no.

CANTOR YITZCHAK MEIR HELFGOT

CANTOR YITZCHAK MEIR HELFGOT, on the subject of prominent vocal performances, gave a memorable, extraordinary, and spiritually uplifting rendition of Jewish cantorial songs. Held on Saturday night, December 13, 2008, at the PARK EAST SYNAGOGUE, on East 67th Street, on Manhattan's Upper East Side, I could not help thinking, several times during the concert, that CANTOR HELFGOT belonged on the other side of town, at the METROPOLITAN OPERA. In fact, he performed a virtual one-man cantorial feat when he gave a memorable concert at the METROPOLITAN OPERA, on December 3, 2006, covered in my January 2007 column for this paper.

Like RICHARD TUCKER, a tenor who basked in Jewish cantorial music, CANTOR YITZCHAK MEIR HELFGOT is in a class and league by himself. He attached fierce emotional power to his singing of Jewish prayers, such that I felt as though connected mysteriously to my Jewish ancestors in Poland, who must have heard the same melodies. Another concert goer, Ms. PEARL BEYLUS of Hillcrest, Queens, had a similar reaction. Referring to CANTOR YITZCHAK MEIR HELFGOT's "unbelievable spirituality" in his prayers, she added: "He has the ability to awaken every Jewish soul." To that I offer two modifications: CANTOR YITZCHAK MEIR HELFGOT's abilities and talents are believable and he has the ability to awaken every soul, Jewish or gentile.

Indeed, as a cantor, he could not have asked for a better or more appropriate name; "HELFGOT" in Yiddish, means "to help God." CANTOR YITZCHAK MEIR HELFGOT is the principal cantor of the PARK EAST SYNAGOGUE at 163 East 67th Street, Manhattan.

CANTOR YITZCHAK MEIR HELFGOT shared the stage with MOSHE HASCHEL, the Chief Cantor of St. John's Wood Synagogue, in London, England. CANTOR HASCHEL sang ably and gave several lively accounts. The night, however, belonged to CANTOR YITZCHAK MEIR HELFGOT, and it is almost unfair to force anyone to share the "stage" or the billing with him in light of his unique voice and the inevitable comparisons. After listening to CANTOR HELFGOTT again, I understood why legendary [non-Jewish] tenor ENRICO CARUSO avoided scheduling anything that would interfere with his passion for going to synagogues to hear the leading cantors of his time.

MEASHA BRUEGGERGOSMAN

On Sunday, March 8, 2009, soprano MEASHA BRUEGGERGOSMAN, a brilliant singer with a fabulous and golden voice who does not find her way to New York City often enough, makes a rare visit to the Big Apple. Do not miss her performance with the CHAMBER MUSIC SOCIETY OF LINCOLN CENTER at ALICE TULLY HALL. MEASHA BRUEGGERGOSMAN will be performing with internationally renowned French pianist JEAN YVES THIBAUDET and famed Taiwanese American violinist CHO LIANG LIN, together with Susie Park Violin; Paul Neubauer Viola; Daxun Zhang bass; Stephen Taylor oboe; and David Shifrin clarinet.

For more on MEASHA BRUEGGERGOSMAN, check her interesting website at www.measha.com . Measha Brueggergosman has four available CDs are: Surprise!, Extase!, So Much to Tell!, and Beethoven Symphony number 9. I recommend them all.

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

Estates Update

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acknowledgement of the child by the parent, shall satisfy all statutory requirements for full and complete proof of paternity.

An area of controversy has arisen in the manner of procuring said DNA evidence. Said evidence, which is relatively easily procured from blood or tissue samples provide an extremely high degree of accuracy. To date, said samples do not, standing alone, serve to prove paternity without open and notorious acknowledgement. Yet, recent case law has granted broad latitude in procuring said samples (In Re Poldrugovaz, 851 NYS 2d 254). Clearly, the magnitude of open and notorious acknowledgement required to prove paternity is far greater than the magnitude required merely to procure DNA samples. Of course, the method of procuring samples and their preservation provide a chain of custody that must be established in any proceeding utilizing this manner of proof.

QUEENS COUNTY

As is our tradition, Surrogate Robert L. Nahman again served as moderator of our annual seminar and opened up his Courtroom and his excellent staff to the bar. This year, our Bar Association, in conjunction with the Surrogate's Court, presented a practical skills seminar on Probate and Will Execution. It examined the evolution of a Will, from execution through final probate. Grounds for objections to probate were also discussed. Our outstanding faculty included Lee Coulman and Daphne Loukides of the Law Department, Louis M. Laurino, Vice Chairman of our Committee and Gerard J. Sweeney, Counsel to the Public Administrator. Many thanks to all involved for their efforts.

Editor's Note: David N. Adler is a Past President (1998-1999) of the Queens County Bar Association and Co-Chair of its Surrogate's Court, Estates and Trusts Committee.

New York's "Spread of Hours" and "Split Shift" Regulations: A Primer for Practitioners

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workers and pay them at or near the bare minimum wage.

Editor's Note: Avrohom Gefen is an associate in Capell Vishnick's Litigation Practice group specializing in commercial and employment litigation. Mr. Gefen is a member of the Commercial and Federal Litigation Section of the New York State Bar Association, as well as the Queens County Bar Association.

[1] 29 U.S.C.A. § 216 (b); NY LABOR § 198

[2] 12 NYCRR 142-2.4; 12 NYCRR 137-1.7

[3] 12 NYCRR 142-2.2

[4] Currently $7.15 per hour.

[5] NY LABOR § 198

[6] 2005 WL 3312000 (S.D.N.Y. Dec. 5, 2005)

[7] The decision also contains an interesting discussion of the deference that a court should give to an opinion letter issued by a governmental agency when the court is interpreting a statute.

[8] 2006 WL 851749 (S.D.N.Y. Mar. 30, 2006).

[9] In *Chan v. Triple 8 Palace, Inc*, the plaintiffs' motion for summary judgment on the spread of hours issue was denied. At trial, *Chan v. Sung Yue Tung Corp*. 2007 WL 313483 (S.D.N.Y. Feb. 1, 2007), the court ultimately found the defendants liable for spread of hours payments because the defendants were using a "tip credit" to reduce the required minimum wage. Once the court found that the tip credit was improper, the "dominos began to fall" and the gross wages paid to the plaintiffs no longer satisfied the spread of hours requirement.

[10] 2007 WL 656271(S.D.N.Y. Mar. 2, 2007.

[11] 493 F..Supp.2d 556 (E.D.N.Y. 2007)

[12] 500 F.Supp.2d 366 (S.D.N.Y 2007)

[13] 37 A.D.3d 700, 830 N.Y.S.2d 728 (2nd Dept. 2007)

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as husband and wife". We rarely intend that the maintenance pay or, as in the cited case and most often the husband, should have to prove, in addition to the living together, the engaging in sexual relations or what the couple's economic relationship is. Proving the 60 day joint residence is hard and expensive enough. It seems reasonable that if a wife signs an agreement with a 60 day "cohabitation clause", she should know that if she has a man living with her for 60 days, her maintenance is in jeopardy. But to avoid the hideous result of having to go through all of the litigation in the case above (still not resolved since the initial motion, 4 years before the Court of Appeals decision) - make the agreement clear!

JOHNSON v. CHAPIN, 49 A.D. 3d 348, 854 N.Y.S. 2d 18 (App. Div. 1st Dept., March, 2008) and

MAHONEY-BUNTZMAN, 51 A.D. 3d 732, 858 N.Y.S. 2d 698 (App. Div. 2nd Dept., May, 2008)

It has generally been recognized that when one spouse (say the husband) uses marital property to pay off pre-marital debt, the wife could recoup her share of that marital property. Thus, in DEWELL v. DEWELL, 288 A.D. 2d, 733 N.Y.S. 2d 114 (App. Div., 2nd Dept.), where the husband used marital property to pay off $203,000 of pre-marital debt, in connection with his medical school bills, the wife was ruled entitled to 50% of the amount of marital funds used. This is but one of numerous examples of the general proposition. However, in the writers' view, the two cases from 2008, cited above, one from the First and one from the Second Department, have carried the concept too far!

In March, the First Department decided JOHNSON v. CHAPIN, supra. This was a "big money" case (the husband's average income over the past 5 years having been some 3 million dollars per year), with a variety of issues involved. One issue, however, seemed to result in an unusual decision. The wife was given an extra $641,000, in addition to other, very substantial awards, as recoupment to her of half of the $1,282,000 the husband had paid during the marriage, in after tax marital funds to pay pre-marital obligations to his first wife, consisting of maintenance ($584,000) and a distributive award ($698,000).

Two months later, the Second Department decided MAHONEY-BUNTZMAN v. BUNTZMAN. Here, again, the court increased a substantial distributive award ($2,467,151) primarily to add 50% of the $58,545 the husband had paid from marital property, during the marriage, as maintenance to his first wife. The theory, again, was that this was his sole, pre-marital responsibility, and should not impair the wife's share of marital property utilized.

Neither decision appeared to involve recoupment of child support to the first wife. But there does not seem to be any justification for exempting that from the rationale of both of these cases. That reasoning appears to us, respectfully, to be absurd, unless it is clear that the party had sufficient separate property from which those obligations could have been paid. Even then, the concept is a stretch, and was described by the dissent in JOHNSON as a "remarriage penalty" which establishes bad public policy. The dissent could not reconcile the majority decision with KOHL v. KOHL, 24 A.D. 3d 219, 806 N.Y.S. 2d 35 (App. Div. 1st Dept., 2005), in which decision it was held that money gifted by the husband to his former wife and children was not a wasteful dissipation of marital assets, and not penalized at all. The same conclusion was reached in the Second Department in XIKIS v. XIKIS, 43 A.D. 3d 1040, 841 N.Y.S. 2d 692 (App. Div. 2nd Dept.). We believe that it is inequitable to say, as would be the result, based upon these decisions, that if a man remarries when his children are grown and his maintenance obligation has ended, he can utilize marital property to make reasonable gifts to the children on his first marriage without penalty. But, if they are younger, and he makes payments pursuant to an agreement or court order, he will have to pay back 50% of that now non-existent money to his second wife, should they divorce. Speaking in non-legal terms, when wife two agreed to marry the husband, she obviously knew about his obligations to his first family. She married knowing that money would have to be paid. There should not be a result where she winds up with an unintended savings plan; to be collected upon divorce, to the extent of 50% of all money paid to satisfy these known obligations to the first family. In more legal terms, one might argue that the marital property, as earned or acquired, was obtained *subject to a lien*, to the extent of the legal debt to the first wife. Whatever way you want to approach it, two things appear quite clear: first, that the result seems to contradict common sense and establish poor public policy, as the First Department dissent argued; but, second, that if you represent the second wife, for your own good, this is a claim you should not fail to pursue.

PEOPLE v. CONNIE CLARK, 19 Misc. 3d 6, 855 N.Y.S. 809 (Appellate Term, 2nd Dept., Jan. 2008)

A person is guilty of eavesdropping, in violation of Penal Law § 250.05, if he or she engages in the "mechanical overhearing of a conversation" without the consent of at least one party to the conversation. This case involved a prosecution against a child care provider, for endangering the welfare of a child, in connection with which a tape recording was offered into evidence. The subject child was autistic and the mother, having seen the child come home with unexplained bruises and redness, had placed a tape recorder in his back pack. The defendant argued that the tape was inadmissible, pursuant to CPLR §4506, in that it was made in violation of PL § 250.05, since no party to the conversation had consented to the recording. The trial court agreed with Defendant, and not with the People's argument that the mother could consent on behalf of the child.

At the Appellate Term, notwithstanding the strong public policy protecting citizens against eavesdropping, the decision cited Federal precedent, establishing that when a parent can demonstrate a good faith, objectively reasonable basis to believe that it was necessary for the welfare of the child to record a conversation, a parent may consent to the recording on the child's behalf and be exempt from liability under the Federal wiretap statute. Other state precedents, to the same effect, were cited, and in this case the recording was admitted and no eavesdropping violation found. The court was careful to warn that children can, at times, provide their own consent and that not all such recordings of children, by parents, will be permissible.

Some of the past year's legislative developments follow:

Domestic Relations Law, § 240 was amended by Chapter ** of the Laws of 2008, effective January 23, 2009, requiring the Court to consider prior Article 10 proceedings and registry information, except in emergency situations, prior to the issuance of any temporary or permanent custody order.

Domestic Relations Law, § 240 (1) (a) was amended by Laws of 2008, Chapter 538, effective September 4, 2008, to provide that a person shall not be penalized in a child custody case for making a good faith effort to protect a child against abuse.

Chapter 435 of the Laws of 2008 amended various provisions of the DRL, Social Services Law, Judiciary Law and Public Health Law, effective November 3, 2008, by providing for a registry, listing whether or not biological parents consent to having their identifying information made known to an adopted child, which consent will be revocable by either biological parent.

A new **EPTL § 5-1.4** (Laws of 2008, Chapter 173, effective July 7, 2008), repeals the former section and provides that a divorce judgment revokes any revocable disposition or appointment of property to a former spouse, whether by will, beneficiary designation or revocable trust.

Laws of 2008, Chapter 326, effective July 21, 2008, amends various Family Court and Criminal Court acts, to expand "members of the same family or household" for order of protection and other such purposes, to include former spouses, regardless of whether in the same household, and unrelated persons with an intimate relationship, whether or not they lived together at any time.