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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. 73 / No. 4 / January 2010**

# Family Law Update - 2009

**BY MICHAEL DIKMAN & DAVID DIKMAN**

David Dikman

Michael Dikman

During the past year, there were a number of legislative changes that should be called to the attention of the matrimonial bar, in addition to two important Court of Appeals decisions in the field of Family Law, that merit reporting, together with some commentary.

**LEGISLATION**

**Domestic Relations Law (DRL) § 240** and **FCA § 651** were amended, effective January 23, 2009, by Chapter 595 of the Laws of 2008, requiring the Court, except in an emergency, to conduct a computer review of related proceedings, orders of protection, arrest warrants and sex offense registries, prior to making any temporary or permanent custody or visitation order. They were further amended by Chapter 292 of the Laws of 2009, effective August 11, 2009, requiring various database searches before the entry of any temporary or permanent custody or access order. In order to implement those changes, in any custody, access (visitation) orders or judgments we prepare, the following language should be included: "**DATABASE SEARCH** - Pursuant to Chapter 595 of the Laws of 2008, as amended by Chapter 295 of the Laws of 2009, the Court has searched the required databases and has notified the parties and counsel of said results and has considered the results of that search in making this determination."

**Family Court Act (FCA) § 516** was repealed as of May 19, 2009, in Chapter 32 of the Laws of 2009. That was the law that required judicial approval of child support settlements relating to out of wedlock children.

**DRL § 236 (B) (2)** was amended to add a new subdivision (b), that provided for ***AUTOMATIC RESTRAINING ORDERS***. Such orders have been utilized in Erie County for several years, and were adopted by Hon. Sidney F. Strauss, upon the recommendation of Judge Kaye's Divorce Commission in 2006. Such orders have been routine, as a part of the Preliminary Conference Orders in Nassau County, for a number of years. The practice will now be uniform and state wide. The new law (Chapter 72 of the Laws of 2009) provided that effective September 1, 2009, the Plaintiff in a matrimonial action must serve a copy of the statutory automatic orders, simultaneously with the service of the summons. The order is binding upon the Plaintiff upon the filing of the summons, and binding upon Defendant upon service. The order is required to contain the following language:

*1) Neither party shall sell, transfer, encumber, conceal,*

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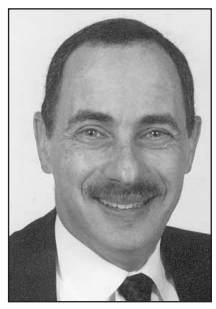
# CPLR Update 2009

**BY DAVID H. ROSEN, ESQ.**[1]



David H. Rosen, Esq.

**Appellate Practice**

In *M Entertainment v Leydier*,[2] the Court of Appeals considered the effect of a seemingly minor error in serving a notice of appeal. The appellant had timely filed the notice of appeal with the Clerk of the Court, and had placed a copy in the mail to his adversary, also within the requisite thirty day period. Unfortunately, the mailbox was in New Jersey.

So what, you ask? CPLR 5515 (1) specifies that an appeal is taken by both serving the notice of appeal on the adversary, and by filing it in the office where the underlying order or judgment was entered. Pursuant to CPLR 5513 (a), both steps must be accomplished within thirty days after service of the order or judgment with notice of entry, and pursuant to CPLR 5514 (c), the time limit must be strictly enforced. CPLR 2103(b)(2), which governs service of papers upon attorneys by mail, specifies that the mailing must be within the state.

The Appellate Division dismissed this appeal due to the defect, holding that the mailing outside of the state was a nullity, and that the appellant had therefore failed to take the appeal timely.[3] In doing so, it relied on two Court of Appeals cases which dismissed motions for leave to appeal as untimely, since the motion papers were served in Washington, D.C., and not within the state.[4] The failure to serve the notice of appeal within the state was thus described as "a fatal jurisdictional defect."

The Court of Appeals reversed, holding that CPLR 5520 (a) gives an appellate court discretion to allow a party to cure an omission in the appeals process caused by "mistake or excusable neglect," so long as the notice of appeal was timely served or filed. It distinguished its earlier cases, on the ground that the appellants there had taken neither step timely. The courts in those cases therefore had no discretion to allow curing of the defects.

It should be stressed that this case involved appellate practice, and not the service of papers generally. It was peculiarly determined by the rules governing timely taking of appeals. Nonetheless, the statute says what it says concerning mailings, and out-of-state mailing of interlocutory papers simply invites collateral litigation over the effectiveness of service. One might assume that in most cases CPLR 2001 applies, to categorize such defects as mere irregularities to be disregarded. The Appellate Division, however, described the out-of-

*Continued On Page 7*

# Wage & Hour Laws: Five Brief Things That Queens Businesses and Their Attorneys Should Know

**BY STEPHEN D. HANS**

In these difficult economic times, business owners in Queens and throughout New York State have found themselves facing increased regulation from various administrative agencies as governments try to find new ways to generate revenue. In recent years two such agencies – the United States Department of Labor and the New York State Department of Labor – have vastly increased their enforcement efforts in conducting investigations and levying assessments against employers for alleged violations of federal and state wage and hour laws. Indeed, in January 2009, Governor Patterson announced that the NYS Department of Labor collected and distributed $24.6 million in back wages from NYS businesses in 2008 – the highest year on record in the Department's existence and a 38% increase from 2006. The Wage and Hour Division of the U.S. Department of Labor is also increasing its enforcement under the new administration, having recovered $82 million in back wages nationwide for the first six months of in 2009 alone and hiring an additional 250 field investigators.

Queens business owners and their attorneys simply cannot

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## *"The Gift of Giving-Local Bar Presidents Give to Charity"*

**Mamie Stathatos, Hellenic Lawyers Assn; Fearonce LaLande, Macon B. Allen Black Bar Assn; Susan Beberfall, Brandeis Assn; Guy Vitacco, Jr., Queens County Bar Assn; Nestor Diaz, Latino Lawyers of Queens County Assn; Tracy Catapano-Fox, Queens County Women's bar Assn; and Hon. Maureen Healy, St. John's Law School Alumni Assn.**

## INSIDE THIS ISSUE

# The Docket . . .

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

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

## 2009 FALL CLE Seminar & Event Listing

**January 2010**

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

**February 2010**

| | | | |
|---|---|---|---|
| Wednesday, | February | 3 | Ethics & Real Estate Practice 1:00 - 2:00 p.m. |
| Wednesday, | February | 10 | Evidence Seminar 6:00 - 8:00 p.m. |
| Friday, | February | 12 | Lincoln's Birthday, Office Closed |
| Monday, | February | 15 | President's Day, Office Closed |
| Monday, | February | 22 | Stated Meeting |
| Tuesday, | February | 23 | Small Claims Arbitrator Training |

**March 2010**

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

**April 2010**

| | | | |
|---|---|---|---|
| Friday, | April | 2 | Good Friday, Office Closed |
| Monday, | April | 19 | Judiciary Night |
| Tuesday, | April | 20 | Basic Criminal Law – Pt 1 |
| Wednesday, | April | 21 | Equitable Distribution Update 6:00 - 8:00 p.m. |
| Tuesday, | April | 27 | Basic Criminal Law – Pt 2 |

**May 2010**

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

***CLE Dates to be Announced***

Civil Court Seminar
Elder Law
Insurance Law
Juvenile Justice Law
Taxation Law

**Leslie S. Nizin**

# Editor's Message

On behalf of all of the officers and staff of the Queens County Bar Association I wish you a very happy and healthy New Year.

The Bar Bulletin is written by the members of the association, for the benefit of our members.

I welcome articles from members who may wish to contribute a poem, a letter, or an article to be published in a future paper.

I can be reached at lnizin@aol.com

Les Nizin



# New Members

Stephanie Angelique Ariot
Guljit K. Bains
Risa Greenberg Chain
David C. Fults
Michael Gasi
Stewart Lee Karlin
Nicholas A.G. Lamb
Michelle Fran Laskin
Ron Clifton Llewellyn
Claudene Marshall
Julianne Marie Navarro
Patrick James Reilly
Giannina Santo
Ezra Seth Schulman
Andrea Radica Shaw
Sarah E. Valentine

# Necrology

Ralph L. Pliskin

## 2009-2010
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### of the
## Queens County Bar Association

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**President-Elect - Chanwoo Lee**
**Vice President - Richard Michael Gutierrez**
**Secretary - Joseph F. DeFelice**
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**Queens Bar Bulletin**
**EDITOR - LESLIE S. NIZIN**

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# President's Message

I would like to wish all members of the Queens County Bar Association a Happy and Healthy New Year.

Our Annual January issue of the Queens County Bar Association Bulletin is dedicated to updates on the new laws for the New Year. I wish to thank all our contributors who have taken the time to write an article for this issue. Also, I would like to thank our Editor, Leslie Nizin, who does a fine job. Les puts a lot of time and effort into putting together our bulletin each month and does a fine job. Thanks, Les.

Our Holiday Party this year was a huge success. I wish to thank our Chairman

George Nicholas for a great job in organizing the event, getting the band and most importantly, getting people to attend. I also would like to thank all our Co-Sponsors. We had in excess of 200 people strong. I think all in attendance had a wonderful evening.

Our Program Chairman, Joe Carola, is putting together a program for our upcoming stated meeting and a flyer will be going out soon. I hope to see everybody there.

As always if you have any questions or concerns please contact me.

I look forward to seeing all of you at one or our many activities.

GUY R. VITACCO, JR.

# Court Notes

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

**Gary R. DeFilippo (September 22, 2009)**
On November 14, 2008, the respondent was convicted after a jury trial in Supreme Court, Richmond County, of assault in the second degree, a class D felony. As a result of his New York felony conviction, the respondent was automatically disbarred pursuant to Judiciary Law §90(4).

**Mark Crutchfield, admitted as Mark Edward Crutchfield, a suspended attorney (September 29, 2009)**
The respondent was disbarred, on default, upon a finding that he was guilty of failing to submit written answers to complaints of professional misconduct filed against him and failing to comply with the lawful demands of the Grievance Committee.

**Gary W. Gramer, a suspended attorney (September 29, 2009)**
On September 10, 2008, the respondent entered a plea in the County Court, Suffolk County, of guilty to one count of grand larceny in the third degree, a class D felony. As a condition of his plea, the respondent was obligated, *inter alia*, to surrender his law license. Pursuant to Judiciary Law §90(4), the respondent was automatically disbarred.

**Genaro R. Hathaway (September 29, 2009)**
On August 26, 2005, the respondent executed a resignation from the practice of law in Connecticut, which, he acknowledged, was submitted "knowingly, voluntarily, and of his own free will." Pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York, following a hearing, based upon his Connecticut resignation.

**James G. Kalpakis, a suspended attorney (September 29, 2009)**
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges that he practiced law after June 30, 2005, the effective date of his suspension from the practice of law.

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

**Fawn D. Balliro, admitted as Fawn Daveen Balliro (September 22, 2009)**
By order of the Supreme Court for Suffolk County of the Commonwealth of Massachusetts dated January 29, 2009, the respondent was suspended from the practice of law for a period of six months. Upon the Grievance Committee's application 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 six months, commencing October 22, 2009, with reinstatement contingent upon her reinstatement in Massachusetts.

**Diana J. Szochet**

**Thomas A. Giamanco, a suspended attorney (September 29, 2009)**
The Supreme Court of the State of New Jersey, by three separate orders, suspended the respondent from the practice of law for consecutive periods totaling 2 ☐ years. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was suspended from the practice of law in New York for five years in view of his "neglect, indifference to his clients, failure to cooperate with the New Jersey Bar authorities, and his extensive disciplinary history…"

**James Joseph Quail (September 29, 2009)**
Following a disciplinary hearing, the respondent was found guilty of engaging in conduct prejudicial to the administration of justice by ignoring or otherwise violating multiple federal court orders; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; engaging in conduct adversely reflecting on his fitness as a lawyer by submitting an affidavit containing inaccurate facts; neglecting a legal matter; engaging in conduct adversely reflecting on his fitness as a lawyer by failing to file a counter-statement and/or papers in opposition to a motion for summary judgment, failing to appear for a scheduled court conference, and failing to comply with orders and deadlines imposed by the Court; engaging in conduct prejudicial to the administration of justice by failing to properly respond to legitimate demands of the Grievance Committee; engaging in conduct reflecting adversely on his fitness as a lawyer by reason of the foregoing; engaging in conduct prejudicial to the administration of justice by failing to advise his law partner about the Grievance Committee's *sua sponte* complaint and/or investigation, and lying to his law partner about having filed a response thereto; engaging in conduct adversely reflecting on fitness as a lawyer by reason of the foregoing; failing to adhere to banking and/or bookkeeping duties by failing to maintain required banking and/or bookkeeping records for his escrow and/or operating accounts; engaging in conduct reflecting adversely on his fitness as a lawyer by reason of the foregoing; failing to preserve client funds entrusted to him as a fiduciary; engaging in conduct reflecting adversely on his fitness as a lawyer by reason of the foregoing; engaging in conduct prejudicial to the administration of justice by failing to provide a client with a written retainer agreement that complied with 22 NYCRR §1215; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; breaching his fiduciary duty by failing to promptly pay or deliver funds received on behalf of a client or third person to a third person who was entitled to receive such funds, as requested; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; violating his duty as a fiduciary by withdrawing a disputed fee from escrow prior to the dispute being resolved; misappropriating funds entrusted to him as a fiduciary by withdrawing a disputed fee from escrow without permission; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; charging and collecting an excessive fee; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; breaching his fiduciary duty by failing to promptly deliver funds belonging to a client to the client's lawyer, as requested; engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; engaging in conduct prejudicial to the administration of justice by failing to maintain a copy of a client's retainer agreement for seven years; and engaging in conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing. He was suspended from the practice of law for a period of five years, commencing October 29, 2009.

**Cesar G. Cardona, admitted as Cesar G. Cardona, Jr. (September 30, 2009)**
The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest as a result of his substantial admissions under oath and other uncontroverted evidence of professional misconduct.

**Eric G. Oster (September 30, 2009)**
The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest as a result of his failure to cooperate with the Grievance Committee and uncontroverted evidence of his failure to re-register with the Office of Court Administration (OCA) for four consecutive registration periods.

**Paulette R. Bainbridge, admitted as Paulette Rose Bainbridge (October 7, 2009)**
The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that she was guilty of professional misconduct immediately threatening the public interest as a result of her failure to cooperate with the Grievance Committee and substantial admissions under oath.

**The Following Suspended Or Disbarred Attorneys Were Reinstated To The Practice Of Law:**

Frank Sheehan, a suspended attorney
(September 29, 2009)
John Kennedy O'Hara, a disbarred attorney
(October 6, 2009)
Philip Dale Russell, a suspended attorney
(October 6, 2009)
Alvin Dorfman, a disbarred attorney
(October 13, 2009)
Jack Fisher, admitted as Jack Robert Fisher, a suspended attorney
(October 13, 2009)
Michael G. Rosenberg, admitted as Michael Geoffrey Rosenberg, a suspended attorney
(October 13, 2009)
Robert C. Schuster, admitted as Robert Churchill Schuster, a disbarred attorney
(October 13, 2009)

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

- Failing to re-register as an attorney with the New York State Office of Court Administration (2)
- Failing to properly supervise a paralegal employed by the attorney
- Failing to act with reasonable diligence and promptness in representing a client; failing to promptly comply with a client's reasonable requests for information; giving legal advice to an unrepresented person whose interests conflicted with those of the attorney's client; and failing to promptly cooperate with the Grievance Committee
- Neglecting a matrimonial matter and failing to comply with the rules in matrimonial cases by failing to provide the client with a Statement of Client's Rights and

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# An Open Letter To Stanley H. Fischer

It's not usual to express one's feelings for a business partner in an open letter.

But our relationship has been anything but usual – I feel that our history and the special bond we have developed over more then 37 years (33 of then as founding partners of our law firm) is worthy of this letter.

To understand and appreciate our unique and special relationship I have to turn back the clock to May, 1972 where it all began.

You were a young lawyer and I was a first year law student seeking a summer job at the law firm where you were employed.

My dad was the postman for your office building and he gave me a list of the law offices in your building. Your office was on the top floor and that's where I began my in-person search for a summer position.

I walked into your office without appointment and without a resume.

You took a few minutes to chat with me and readily agreed to allow me to do at least part time work during the summer of 1972.

When I reported to the office on my first day of work you told me not to remove my coat since I was going to deliver, in person, a Writ of Certiorari to the United States Supreme Court in Washington, D.C.

It's hard to describe the adrenaline rush this first year law student felt about going to the highest Court of our land on his first day as a law student intern. Wow!

Thereafter I worked with you the following summer, and full time after taking the New York Bar exam in the summer of 1974.

During this entire time you were my mentor and my teacher. You were my role model for how a lawyer should dress, comport one self and ultimately, by example, you instilled in me the professional ethics and attitudes that are critical to our profession.

So what is so unique and unusual about everything I have described?

The fact is, that at least superficially, we are two completely different personalities. Anyone who knows us knows this to be so. Yet for all our differences we have always been blessed to learn from each other's differences.

We have always been respectful and sensitive to each other and to each other's families.

We have been blessed to have spent memorable occasions together with our families not only on office trips but on extended vacations domestically and abroad.

We have seen our children grow up and marry and we enjoy the grandchildren they have given us. I have been fortunate to have 2 young children too.

We have worked hard and diligently and have been privileged to earn good livings to provide for our family's education and welfare.

Most importantly, we have been fortunate to have enjoyed generally good health.

In thinking about our partnership I remember, with great fondness the first days after we opened our own law practice in early 1976.

We were young and confident even though we didn't know where the first client would come from. We worked day and night. And how many other lawyers who started together with a total combined capitalization of $1,100.00 can point to the amazing success we have enjoyed?

How many other partners can joyfully point to the fact that they still provide counsel to their very first clients and those clients' children and grandchildren? We can.

Over the years we have had the good fortune to have expanded our law practice and we now have offices in 3 locations, with 2 more partners (each of whom has been with us for about 20 years).

We enjoy mentoring a new generation of young associate attorneys who I know will grow and follow in our path.

We live in homes whose backyards adjoin one another. In business, we have often spent more times over the years with each other than with our respective wives and children. We did and continue to do what needs to be done as dedicated lawyers.

You have always been there for me and my family – whether it was for business, personal reasons or family occasions. We have laughed with each other and we have cried and embraced each other when we have suffered the loss of a loved one. I have done my best to reciprocate.

I have learned much by observing you and I hope the reverse is also true.

At a time when we too often see professional and business partnerships involved in nasty break-ups and litigation, we have enjoyed a remarkable professional and personal life together.

Who could ask for anything more? Let's enjoy the years ahead with the same enthusiasm as we have the past nearly 4 decades.

I love you, my partner, my friend and my brother.

HARRY

# Farewell to Our Friend

**BY MARK WELIKY***

At the Landlord and Tenant seminar at the Queens County Bar Association (QCBA) on November 19th we were happy to see our friend Ivan Werner and wish him a happy holiday season. Ivan, who for many years headed up QCBA's pro bono program, even in his retirement was often in attendance at our seminars and meetings. We were saddened to learn that only a few days later that Ivan had passed away at the age of 81.

Ivan L. Werner came to QCBA in 1991 as the founding Director of the Queens Volunteer Lawyers Project (QVLP), our association's pro bono program. Ivan with the support of QCBA Presidents Gary Darche, Hon. Sidney Strauss, Perry Sklarin and Executive Director Arthur Terranova helped get QVLP off the ground and established as an effective program serving the indigent community in Queens County. Ivan single-handedly ran QVLP with the strong support of pro bono volunteer lawyers and the QCBA Board of Managers until his retirement in 2001.

Ivan, came to us at QCBA after an extensive career as an educator. A native of Brooklyn he graduated from Erasmus Hall High School and received a B.A. in Sociology from Brooklyn College, Phi Betta Kappa. He went on to earn another bachelor's degree in Education before getting his Masters Degree in 1953. In 1952 he began a 35 year career with the New York City Board of Education culminating with him holding the position of Principal of Public School 261 in Brooklyn. In 1991 Ivan started a new career when he received his Juris Doctor degree from the CUNY School of Law. QCBA was then fortunate to have him accept the offer of heading up our new pro bono program. He did a great job of creating our pro bono volunteer panel and assisting the low-income community in Queens who were facing serious legal problems.

Ivan, a longtime Bayside resident with his wife Thelma, a retired teacher, raised three daughters who went on to various accomplished professional careers. Ivan had many other ways in which he volunteered his time to the community. For instance, for several decades he was a volunteer reader at Recording for the Blind and a volunteer mediator for Small Claims Court.


Ivan Werner

The proof of his great accomplishment in sheparding our pro bono program from its inception is that QVLP continues today to be effective in assisting Queens residents who would have no where else to turn when facing serious legal issues. We owe Mr. Werner a great deal of gratitude for his service to our association and he will be sorely missed.

** Mark Weliky is Pro Bono Coordinator of the Queens County Bar Association*

# Wage & Hour Laws: Five Brief Things That Queens Businesses and Their Attorneys Should Know

*Continued From Page 1*

afford to ignore these figures, which do not even include data from wage and hour lawsuits brought in the state and federal courts, an area of law that continues to experience explosive growth. The impact of such investigations on small and mid-sized businesses can be devastating for a variety of reasons. Following are five crucial things that many employers and general practitioners may not know about the federal and state wage and hour laws that can lead to potentially damaging Department of Labor assessments and/or costly employee lawsuits:

- **Employers may be liable for wage violations going back six years.** Although federal law only allows for violations to be assessed for up to three years past, NYS law allows the Department of Labor or individual employees to seek recovery for any alleged wage and hour violations going back a full six years in time. This can turn what might otherwise be a small violation into a five figure or even a six figure assessment once it is applied to all of a company's current and past employees who worked during the past six years.
- **Wage and hour laws are more than just minimum wage and overtime pay.** When most business owners think of wage and hour laws, they think of the applicable minimum wage rate and the requirement to provide overtime pay at 1 ☐ times an employee's regular hourly rate for any hours worked over 40 per week. Although these are undoubtedly the most commonly enforced provisions of federal and state wage and hour laws, they are *not* the only provisions that employers must follow. Many employers must also comply with other wage and hour requirements, such as split shift pay, spread-of-hours pay, and tip credit requirements, among many others. A business owner who pays minimum wage and overtime pay but ignores his/her other lesser known wage and hour obligations does so at their own peril.
- **Various forms of penalties and interest mean that a violation for unpaid wages is just the beginning.** In order to deter violators and compensate employees for lost income, both federal and state wage and hour laws provide for the imposition of stiff penalties and interest against an offending employer. For instance, under NYS law an employee can recover in addition to any unpaid wages an extra 25% of such wages as "liquidated damages," as well as back interest at the rate of 16% per year (going back up to six years, as discussed above). Additionally, the state can assess civil money penalties of up to 200% of any unpaid wages that are found to be due to employees, as well as further fines for various types of recordkeeping violations. With all of these extra fines, penalties and interest tacked on, it is easy to see how even a relatively small wage and hour violation can snowball into something that can "break the bank" for a small or mid-sized employer.
- **Proper recordkeeping is crucial to limiting exposure to wage and hour violations.** In our legal system, your case is only as good as your proof. When investigated by the Department of Labor or sued by a private attorney for wage and hour violations, business owners must have adequate records showing the hours worked and pay received by each and every employee in order to mount a successful defense. Without them, an employer will have difficulty proving that his/her employees received adequate compensation for the hours that they worked. But failing to maintain accurate and compliant wage and hour records has an even more devastating consequence for businesses: when an employer does not have adequate records, the law shifts the legal burden of proof to *the employer* to prove that the hours and pay that an employee is claiming are incorrect. Thus, without adequate records, whatever hours an employee claims he/she worked and whatever pay he/she claims to have received will generally be accepted as true unless the employer can meet his/her burden of proof to rebut any such claims. As you can imagine, this is extremely difficult – indeed, nearly impossible – without adequate records of hours worked and pay received by each employee.
- **Federal and State law provide for individual liability for wage and hour violations.** Many business owners think that by incorporating, they avoid personal liability for any debts incurred in connection with the operation of their business. However, when it comes to wage and hour violations this is not the case. Both federal and state wage and hour laws provide for individual liability for business owners and managers who are responsible for controlling and/or overseeing employee work and payroll. In fact, in some instances even an absent shareholder-investor in a non-publicly-traded corporation may be held personally liable for wages owed to the corporation's employees. Because there is potentially much more at stake than just a business' assets, business owners and managers need to take extra steps to make sure that they are compliant with all wage and hour requirements.

If any of the above-listed facts seem shocking to you – they should. Many small and mid-sized business owners take wage and hour compliance for granted, believing that they are reasonably compliant with existing law and not fully appreciating the risks and exposure that they face. With the increased enforcement efforts of the federal and state Departments of Labor, and the continued proliferation of employee lawsuits, employers simply cannot afford to ignore the serious threat posed by possible wage and hour violations. All businesses – no matter how small – should arrange for a comprehensive review of their payroll and recordkeeping procedures by an experienced employment attorney in order to avoid and/or minimize liability in the event of an investigation or litigation. Doing so could help to prevent potentially devastating financial consequences at a time when most employers can ill afford them.

*Stephen D. Hans & Associates, P.C. is an employment and labor law firm with over 30 years of experience representing New York City area businesses in wage and hour litigation and all other areas of employment law.*

# Court Notes

*Continued From Page 3*

Responsibilities as well as a written retainer agreement

- Neglecting a legal matter; failing to communicate with his/her client; and failing to cooperate with the Grievance Committee
- Neglecting three client matters; failing to promptly respond to inquiries from clients and other attorneys; failing to provide statements for services rendered in accordance with his/her written retainer agreement; failing to provide clients' files to substituting counsel; and misrepresenting the status of a matter to a client
- Failing to promptly pay to his/her client funds to which the client was entitled and failing to notify clients, and the Office of Court Administration, of changes in his/her office address
- Failing to maintain required bookkeeping records for his/her IOLA account; making a check from said account payable to cash; failing to promptly remove unearned fees from his/her IOLA account, thereby commingling personal and client funds; and writing a check from said account before depositing commensurate funds
- Failing to properly denominate his/her escrow account; failing to maintain a ledger or similar record of escrow deposits and withdrawals as required; and making cash withdrawals from escrow
- Withdrawing from a litigated matter without obtaining permission of the tribunal and/or taking steps reasonably practicable to avoid foreseeable prejudice to the client, including giving the client due notice
- Engaging in a conflict of interest by representing tenants in a building in which the attorney previously represented the owner and managing agent

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

# Family Law Update - 2009

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*assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.*

*2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.*

*3) Neither party shall incur unreasonable debts hereafter, including but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.*

*4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.*

*5)Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.*

The order will "remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement of the parties duly executed and acknowledged".

In our view this is a very positive step, eliminating a great many motions by "non-monied" spouses and placing the burden on a minority of litigants, who need to seek modifications or special provisions. It is suggested that in the event your client is served with a summons that does *not* contain the automatic order, you consider serving and filing one on behalf of defendant, so as to be certain plaintiff is bound by it, if deemed advantageous to your client. How the court will treat summonses served without the required order is uncertain at this time.

As a "practice tip", it would be a good idea to have your affidavit of service of the summons recite that what was served was not only the "Summons with Notice" but also, the "Automatic Orders required by **DRL § 236 (B) (2)**".

**DRL § 236 (B) 5 (d)** (the section that spells out the criteria courts must consider in making equitable distribution of marital property) was amended, by Chapter 229 of the Laws of 2009, effective September 14, 2009, so as to add a new subdivision 5, and re-number old subdivisions 5 through 13 by adding one to each, making them 6 through 14. The new subdivision 5 requires the court to consider "THE LOSS OF HEALTH INSURANCE BENEFITS UPON DISSOLUTION OF THE MARRIAGE". This same addition is made to the statutory factors relating to maintenance determinations, by renumbering DRL § 236 (B) (6) (a) (11) as subdivision 12, and making this new criterion number 11.

**DRL § 240** and **FCA § 413** are among numerous sections of the Domestic Relations Law, Family Court Act and Social Services Law which have been amended by the passage of what is referred to as the **"CHILD SUPPORT MODERNIZATION ACT"**, most of which is effective on January 31, 2010. The so-called "cap" of $80,000 of combined parental income, as to which the application of the guideline percentages is almost mandatory, has been raised to $130,000. SCU will now clearly be permitted to initiate and prosecute enforcement proceedings on behalf of anyone receiving SCU services. There is also a mechanism set up for revising the "cap" every two years, based upon the consumer price index specified. The use of the word "cap" is actually a misnomer. Just as the prior $80,000 was not the top amount to which the guidelines were to be applied, it is beyond doubt that this new law is intended to operate in the same fashion: that the $130,000 combined income amount is the sum as to which the court should apply the guidelines, except in very limited situations. But there is no suggestion that this should, in any way, abrogate or modify the holding in the landmark Court of Appeals case, CASSANO v. CASSANO, 85 N.Y. 2d 649, 628 N.Y.S. 2d 10, which made clear that when the combined income is above $80,000 (the "cap" in the then existing statute) the Court has *two options*: either apply the percentage to some or all income above the $80,000 *OR* fashion an award based upon the statutory criteria. It is submitted that courts still have the same power and authority to fix child support, if deemed warranted, by applying the guidelines to some or all combined income above $130,000.

**DRL § 177** (relating to the health insurance notice that was required) has been repealed, modified and replaced by a new law (Chapter 143 of the Laws of 2009), **DRL § 255**, which was effective October 9, 2009. The old law, as written, created a number of procedural and practical problems, which were sought to be ameliorated by the new statute. According to the new statute, prior to the entry of a judgment of separation, divorce or annulment, the Court is required to ensure that both parties have been notified (by such means as the court shall determine) that after the entry of the judgment a party may or may not be eligible to be covered under the other party's health insurance plan, depending upon its terms. It will be sufficient notice to a defaulting defendant, if a notice is served with the summons, indicating that once a judgment is signed a party may or may not be eligible to be covered under the other party's health insurance plan, depending upon its terms. As a

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# CPLR Update 2009

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state mailing as a nullity under CPLR 2103, not limiting that ruling to notices of appeal. If the Court of Appeals disagreed with that characterization it could have said so, but it didn't.

If an interlocutory paper such as an answer is served by mailing from out-of-state, is the service to be deemed a nullity, and the defendant deemed to be in default? That result is rather difficult to accept. What is to be the holding where jurisdiction depends on a mailing? Consider, for example, service of a summons and complaint by substituted service, or by "nail-and-mail."[5] Proper mailing of the summons and complaint is an essential component of acquisition of personal jurisdiction, and not subject to being disregarded under CPLR 2001. Or, take the middle case, where the service of the paper by mail is not jurisdictional, but commences a time period which is strictly enforced. The time to move for summary judgment, for example, is rigidly limited, normally to 120 days after the filing of the note of issue. What will be the result if the non-filing party is served with the note of issue by a mailing from out-of-state? Will there be an extension of time to move? Since service of the note was not properly done before filing, should the note of issue be vacated? Must there be a showing of actual prejudice, as by delayed receipt?

Even those of us who enjoy technicalities might find these a bit much.

*People v D'Alessandro*[6] was a criminal appeal, but the issue of appellate procedure it presented was a general one: whether the Court of Appeals had authority to look behind the order of the Appellate Division to determine for itself whether the appeal was from a motion for reargument or in reality something else. The Court determined that it had the authority to determine the true nature of the proceeding before the Appellate Division, and here it found that the order mischaracterized that proceeding.

Nine years before the proceedings at issue here, the defendant in this criminal matter petitioned the Appellate Division for a writ of error coram nobis, which had been denied. Now, he brought another petition for coram nobis relief, claiming that the original appellate counsel had neglected to raise a speedy trial argument. The Appellate Division denied the second writ, deeming it a motion for reargument.

Ordinarily, no appeal lies from a denial of reargument in the Appellate Division, and the People sought dismissal of the appeal. The threshold issue therefore was whether the Court was concluded by the Appellate Division's determination that the second writ really was a motion for reargument. The Court held that it was not so concluded, and was required to determine for itself what the nature of that proceeding was. Any other conclusion would allow an error in the Appellate Division order to bar relief, and would interfere with the authority of the Court of Appeals to determine its own jurisdiction.

Here, the application for the second writ relied on none of the bases involved with reargument. There were no claims that the Appellate Division has overlooked or misapprehended points of law or fact, and the defendant raised an entirely new argument based upon ineffective assistance of appellate counsel. This new argument could not be characterized as "reargument." Indeed, to accept such a characterization of defendant's argument would be tantamount to holding that such new arguments could be made on reargument motions, which would lead to numerous motions raising new arguments under the guise of reargument. The Court would not accept such an unintended consequence, and stated its certainty that the Appellate Division did not intend it either.

The matter was therefore remitted to the Appellate Division for consideration on the merits.

**Attorney and Client**

Where an attorney in a medical malpractice case has referred the matter to another attorney for trial, by a written agreement providing that the referring attorney is to receive one third of the entire legal fee, what is to happen when the receiving attorney himself takes on trial counsel, and the trial court allows an enhanced fee? In *Samuel v Druckman & Sinel*[7] the Court of Appeals held that the referral agreement is to be enforced as written, and the referring attorney gets one third of the entire, enhanced fee.

The referral agreement provided that the referring firm, Druckman & Sinel, was to be compensated by one third of the "entire legal fee." Both Elliott Sinel and Steven Samuel, the receiving attorney, signed the referral letter. The client was notified in writing, was informed that while Samuel would undertake most of the litigation Druckman & Sinel would continue to assist and consult, and that no additional fees would result. The client consented in writing.

The matter was a difficult one, including an application by the defendant for a *Frye* hearing. Samuel himself brought in additional counsel, Steven Pegalis, to assist in successfully opposing that motion and in the trial. The case settled during trial for $6.7 million. Pursuant to Judiciary Law § 474-a (2), the resulting fee was $805,767.30. Samuel and Pegalis moved for an enhanced fee pursuant to Judiciary Law § 474-a (4), which the trial court granted. The enhanced fee was approved, and the trial court awarded a total fee of $1.9 million, with $1,137,826.41 awarded to Samuel and $762,173.59 awarded to Pegalis. Samuel sent Sinel a check for one third of his portion of the enhanced fee, but no portion of the fee awarded to Pegalis. Sinel rejected the check, demanding a third of the entire enhanced fee. The action here was by Samuel, for a declaration that Druckman & Sinel was entitled to nothing at all.

The basis for the claim was that the agreement with the client failed to adequately advise that both firms would continue to be responsible for the litigation.[8] Sinel, in a counterclaim, demanded one third of the entire enhanced fee. Both sides moved for summary judgment, which the trial court denied.

Appellate Division held that the referral agreement with the client was proper, but that Sinel was entitled only to a third of the unenhanced fee, since he did not provide any of the services leading to the enhanced fee. There was a dissent, which would have enforced the agreement as written, awarding Sinel one third of the total, enhanced fee.

The Court of Appeals agreed with the Appellate Division dissenters. As to the referral agreement with the client, the client consented to the referral, was properly advised that there would be no increase in total fee, and adequately conveyed that both firms would continue to be responsible for the litigation.

As to the portion of the fee covered by the agreement, however, the Court concluded that it was clear and unambiguous on its face and therefore enforceable as written. "One third of the entire fee recovered" means just that, not one third of some lesser portion of the entire fee recovered. That Sinel did not take part in the work leading to the enhanced fee is of no moment, since courts will not engage in precisely calculating the worth of counsel's services. Where each lawyer assumes joint responsibility, they can negotiate any division of the fee they see fit. Sinel was therefore entitled to one third of the entire enhanced fee.[9]

A comment as to the specific nature of the referral agreement with the client is necessary. The fact that the agreement did not spell out, explicitly, that both firms were to retain responsibility for the litigation was the grounds on which Samuel sought to cut Sinel out entirely. The Appellate Division and the Court of Appeals agreed that the circumstances were such as to convey to the client that such would be the case. It would, of course, have been better if this point had been made explicitly. Under the current Rules of Professional Conduct there *must* be a writing given to the client by which each lawyer assumes joint responsibility. However, referring counsel should also of course be aware, that by doing so he obligates himself to supervise the actions of the receiving counsel. Retaining responsibility includes retaining liability for any malpractice, including that of the receiving attorney.

Responding to certified questions from the US Court of Appeals for the Second Circuit, our Court of Appeals has clarified the applicability of Judiciary Law § 487 regarding acts of deceit by attorneys. That section provides for treble damages against any attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . ." Specifically, the Court held that the deceitful attorney is liable for treble damages even if the deceit is unsuccessful, and that the costs of a successful defense against a complaint containing a material misrepresentation of fact may be treated as the proximate result of the misrepresentation (and hence subject to a treble award) even if the court on which the deceit was practiced never acted on a belief in the truth of the false representation.

The case was *Amalfitano v Rosenberg*.[10] The details of Rosenberg's misconduct were not material to its determination, and our Court of Appeals gave only the briefest summary of the facts. His acts, as set forth by the Second Circuit, read like a TV script depicting a lawyer with no regard for the truth.[11]

Rosenberg had brought an action in New York State Supreme Court against the Amalfitano family on behalf of his client, Peter Costalas.[12] The complaint contained a material statement of fact of which he had personal knowledge was false. In an arm's - length agreement resolving prior litigation, negotiated by Rosenberg, Peter had been removed as a partner in a family business. The complaint, prepared by Rosenberg, was purportedly brought against the Amalfitanos on behalf of the partnership, on the claim that Peter was still a partner. Not only that, but when the Amalfitanos moved to dismiss, Rosenberg prepared and submitted Peter's affidavit swearing that the agreement was only a sham. Supreme Court granted the Amalfitanos' dismissal motion, concluding that because Peter was no longer a partner he had no standing to sue.

Rosenberg then prosecuted Peter's appeal to the Appellate Division, First Department. The record on appeal included Peter's affidavit characterizing the agreement as a sham, and several of the partnership tax returns, which listed Peter as a partner despite the agreement removing him. The Appellate Division reversed and reinstated the complaint, finding open questions as to whether or not the agreement was a sham and whether or not Peter was still a partner.[13] When the matter reached trial, the Amalfitanos moved to dismiss at the close of plaintiff's evidence, which motion was granted and this time affirmed on appeal.[14]

The action now at bar was commenced by the Amalfitanos against Rosenberg in the US District Court for the Southern District of New York, on diversity grounds. Damages assigned were the costs of the successful defense of the action in Supreme Court. The District Court found, in addition to the false representations just described, what it described as "a persistent pattern of unethical behavior" during the state court litigation.[15] (1) The District Court found that when a family accountant was due to be deposed, Rosenberg had sent him a letter claiming that all communications, contracts and documents were subject to privilege. Rosenberg did not attend the deposition, but the accountant brought personal counsel, whose fee the Amalfitanos were obliged to pay. Rosenberg could not support the claim of privilege as a matter of law. (2) Rosenberg failed to correct material misstatements in Peter's deposition testimony. (3) Rosenberg failed to produce Peter's tax returns, claiming they were irrelevant. After being compelled to produce them by the court, the returns showed that Peter had not claimed any interest in the partnership after

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PHOTO CORNER

# Holiday Party - Thursday, December 10, 2009

Bernie Vishnick, Larry Litwack, Ed Rosenthal and Jim PieretArt Terranova, Joe

DeFelice, Dave Adler, Arthur Mosley and Dave Cohen

Dave Dikman, Kenneth Brown, Ilene Fern and Tom McCullough

David Wasserman, Jim O'Connor and Bob Bellone

George Nashak and Hon. Maureen Healy


Gifts donated by attendees to Forestdale, Inc.

Hon. Cheryl Chambers, Seymour James and Dave Adler

Hon. Jeff Lebowitz, Hon. Cheree Buggs and Hon. Sid Strauss

Photos by Walter Karling

PHOTO CORNER

# Holiday Party - Thursday, December 10, 2009

**Hon. Robert Nahman, Al Gaudelli and Hon. Peter Kelly**

**James Wrynn, David Adler, Larry Litwack and Jay Abrahams**

**Janet Deluca, George Nicholas, Hon. Bernice Siegal, Gary Muraca and Mary Marshall**

**Joseph Zodda, Kelly Snitkin, Hilary Bauer and Carmencita-Mia Fulgado**

**June Briese and Deborah Garibaldi**

**Miriam Singer, Russ Rodriguez, Kenneth Brown, Steve Singer and Heidi Henle**

**Mrs. Seinfeld, Steve Hans and Martin Seinfeld**

**Paul Pavlides, Dawn Munro, Paula Pavlides and George Campos**

Photos by Walter Karling

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practical matter, the required notice could be added to the automatic restraining orders, and attached to the summons.

If the parties enter into an agreement, resolving all issues, it shall contain a provision relating to the health care coverage of each party, and shall either: a) provide for the future coverage of each party or, b) state that each party is aware that he or she will no longer be covered under the other party's health insurance plan and that each party will be responsible for his or her own health insurance coverage, and may be entitled to purchase it on his or her own through a COBRA option, if available.

The new language was intended to give judges greater discretion as to how this health insurance notice is to be given. The specific language still makes it mandatory to include the required statement in all agreements. However, the prior law, which seemed to require a separate signature on the health insurance notice page, is no longer applicable, and the notice or representation can simply be made one of the various provisions of the agreement.

**DRL § 240**, **FCA § 413** and **CPLR § 5241 (h)** have been amended by long, complex legislation, effective October 9, 2009, relative to health insurance and includes a new term: "Cash Medical Support". The court is required to determine the availability of private health insurance and each party's contributions to the cost. The "Cash Medical Support" is the amount ordered to be paid toward the cost of health insurance and uncovered health care expenses. Unless the parties otherwise agree, these costs are to be *pro rated* and are not to be more than 5% of gross income, to make them "reasonable in cost" as provided in the statute. In income deduction and income execution orders, the employer is directed to first deduct the basic child support, then the health insurance premium money and then any existing arrears, with the income percentage limits previously enacted.

**CASE LAW DEVELOPMENTS**

The Court of Appeals resolved a question of law, reversing a much criticized position taken by the First and Second Departments previously, and in the process, made a variety of significant statements, certain to be quoted often. This actually relates to two decisions, both rendered on May 8, 2009.

**MAHONEY-BUNTZMAN v. BUNTZMAN** 12 N.Y. 3d 415, 881 N.Y.S. 2d 369

(5/8/09) and **JOHNSON v. CHAPIN** 12 N.Y. 3d 461, 881 N.Y.S. 2d 373 (5/8/09).

In MAHONEY-BUNTZMAN, the husband remarried while he was obligated to pay maintenance to his first wife. He had also sold his stock in two *pre-marital* corporations to his father, during the marriage, for a lump sum, which was increased by 17% to account for an added tax liability, occasioned by reporting the proceeds on a 1099 form as self-employment business income ($1,800,000). Also, during the marriage, the husband obtained a Fordham University doctorate in education, which had required a student loan, repaid 2 years later. There were also questions raised relative to each party having used marital funds to assist relatives. In the Appellate Division, the wife was given a recovery of 50% of the maintenance payments the husband had made to his ex-wife from marital funds (a pre-marital debt). The wife was also awarded 50% of the student loan ($24,081) inasmuch as the doctorate was found not to have enhanced his earnings.

The Court of Appeals acknowledged that parties share the profits and losses of the "economic partnership", and both assets and liabilities have to be distributed upon dissolution. Despite the broad discretion the trial court has in considering the various factors, the court elected to modify the decision. It stated a reluctance to go back and examine various transactions, in the following language, believed to be quite important:

"*If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred. As a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the non-titled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end*."

As a result, the credit to the wife, for maintenance payments to the ex-wife, was eliminated. The court stated that the wife "*seeks to recoup money that was expended during the marriage to pay the husband's obligation to his former wife for maintenance. We hold that the wife is not entitled to such recoupment. Expenditures made during the life of the marriage towards maintenance to a former spouse, as well as payments made pursuant to a child support order, are obligations that do not enure solely to the benefit of one spouse*." These are "*not the type of liabilities entitled to recoupment*." Yet, the Court recognized that some expenditures of marital funds may enter into equitable distribution calculations, including "*marital property used to pay off a separate debt ... or add to the value of ...separate property*." Excessive expenditures can still be claimed as marital waste or dissipation, and parties may still be held accountable for expenditures they made utilizing fraud or concealment.

A very serious issue, one often encountered in our cases, stems from the following portion of the language quoted above: "*Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the non-titled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second guess the economic decisions made during the course of a marriage*". There is an abundance of authority, in all four departments, for the proposition that when one contributes separate property to a marital asset, upon divorce he or she gets back that separate property contribution, dollar for dollar (generally without appreciation) and any remaining portion of the value is equitably divided. Did the Court of Appeals intend to reverse that entire line of cases, and declare that once a person contributes separate property to a marital asset, there should be no adjustment for that in equitable distribution? To the writers, that seems unlikely. It would mean ignoring very real and measurable contributions one party made to the acquisition of a particular asset and the uniformly accepted rule that marital property need not necessarily be divided equally. We are still not a "Community Property" state. Yet, the quoted language is there - to be argued either way and interpreted in later decisions. Stay tuned!

In the MAHONEY-BUNTZMAN decision, the wife's award, relative to the student loan incurred during the marriage, was vacated. If the degree conferred an economic benefit, she would have shared in it. But the loan was a marital obligation.

Turning to the $1,800,000 the husband received for selling his stock in pre-marital corporations, it was properly classified as *marital property*, since the husband had "made representations that the money was business income for tax purposes." The court used the following key language: "*A party to litigation may not take a position contrary to a position taken in an income tax return.... We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns*."

In JOHNSON, the same issue was involved, regarding the payment of support to a former wife. Again, the Court held that the wife was not entitled to any award, based upon the husband's having paid maintenance and child support to his first wife, citing the Mahoney-Buntzman v. Buntzman decision, decided the same day.

In addition, the husband had a pre-marital home, into which some $2,000,000 was invested for renovations during the marriage. The Trial Court awarded the wife 50% of the appreciation and the Appellate Division cut that to 25%. There was also an award of counsel fees for $100,000, affirmed in the Appellate Division, with a finding that the husband had "engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation."

There had been a *pendente lite* award of $18,465/mo. maintenance plus $10,625 child support. The trial court awarded maintenance of only $6,000/mo. This brought up the question as to whether or not the husband was entitled to *recoup the overpayment*. The Court of Appeals said: "*When a pendente lite award of maintenance is found at trial to be excessive or inequitable, the Court may make an appropriate adjustment in the equitable distribution award. Supreme Court did not abuse its discretion in giving the husband a credit representing the amount of the pendente lite maintenance he paid that exceeded what he was required to pay under the final maintenance award*." However, such a credit was not afforded the husband in connection with the excess child support payments. "*It has long been held that there is a 'strong public policy against restitution or recoupment of support overpayment*'."

The Second Department had regularly rejected any form of recoupment of support over payments, as a result of excessive temporary awards, whereas insufficient awards were subject to retroactive recoveries. That inequity has now been eliminated, at least insofar as excessive temporary maintenance awards are concerned.

Turning to the separate property appreciation issue, the court stated that: "*any appreciation in the value of the separate property due to the contributions or efforts of the NON-TITLED SPOUSE will be considered marital property (citing PRICE v. PRICE)*." It is noteworthy that in giving examples of a non-titled spouse's contributions to the appreciation, the Court includes "*any direct contributions to the appreciation, such as when the non-titled spouse makes financial contributions towards the property, as well as when the non-titled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to or renovating a marital residence*." The notable omission is indirect contributions, e.g. homemaking and child rearing. This decision strongly suggests that such indirect contributions are NOT the type that entitles a non-titled spouse to share in even active appreciation, unless they were necessary to release the titled spouse to make such contributions. In the case at bar, the increase in value was attributed to both parties' direct efforts, and the Court of Appeals affirmed the Appellate Division's reduction of the wife's award to 25%. "*The husband's income was the sole source of the funds expended on the property and, as admitted by the wife, husband's involvement in the renovations were far more extensive*." What is not obvious from the Court of Appeals decision is the additional reasoning of the Appellate Division, which was a very clear statement of the sometimes misunderstood or misapplied distinction between "active" and "passive" appreciation, affirmed by the Court of Appeals. The Appellate Division decision included the following: "*Market forces over the approximately 11 years of marriage accounted for some of the property's increased value. The wife was not entitled to a credit for any portion of this 'passive' appreciation. Thus, a 75%/25% division of the appreciation... is a more equitable apportionment in the circumstances*." In some decisions, the court has declined to make a distinction between active and passive appreciation only because no proof was adduced, from which the court could quantify one from the other. In this case, the Appellate Division was so firmly intent upon maintaining the strict letter of the statute, that even in the absence of such proof, it reduced the wife's share from 50% to 25%, making sure to include the language quoted above, that she was not entitled to any part of the passive appreciation.

The counsel fee award was also affirmed, inasmuch as "*the court considered the parties' financial positions as well as the delay incurred as a result of the husband's obstructionist tactics*."

The above-quoted language is likely to be cited often, relative to a variety of issues, in briefs, memoranda and motion papers. An amended decision was published in the JOHNSON v. CHAPIN case, which did not make any changes in the substantive holdings discussed above.

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the agreement. (4) Rosenberg personally told the Amalfitanos that he had certain audio recordings which would be damaging to them were they revealed. He actually produced them only after the court compelled to do so, at which time they turned out to be "unintelligible." (5) Rosenberg produced to the court, and tried to introduce into evidence an agreement, signed only by Peter, which stated that he was still a member of the partnership. Rosenberg had personal knowledge that the original agreement, removing Peter, was valid. (6) Finally, Rosenberg produced to the court, and tried to introduce into evidence, a tax return made by Peter which listed an interest in the partnership. The purported tax return bore no stamp indicating that it had been filed with the IRS, and directly contradicted the return described above, which did bear an IRS receipt stamp, which did not show any such interest and which had been produced by Rosenberg as part of disclosure.

The record before the Second Circuit thus contained findings of fact (which the court found no basis to disturb) that Rosenberg had successfully deceived the Appellate Division into reversing the initial dismissal order, and unsuccessfully attempted to deceive the trial court both before and after the Appellate Division ruling. On appeal to the Second Circuit, Rosenberg did not challenge the finding that his acts had been intentional, and the court assumed that it was. To the extent that the District Court's award was based upon Rosenberg's deceit of the Appellate Division, the Second Circuit found no unresolved question of New York law. However, as to the attempted and unsuccessful deceit of the trial court, the Second Circuit did find New York law unclear.

The first question certified by the Second Circuit, then, was whether the attempted deceit of the trial court could form the basis of a claim under Judiciary Law § 487, since the Amalfitanos had in fact defeated the lawsuit. The question was necessary, since the District Court had included damages flowing from the period before the successful deceit of the Appellate Division, when Rosenberg was unsuccessfully attempting to deceive the trial court.

Rosenberg argued that an unsuccessful attempt at deceit could not be actionable, analogizing the cause of action under Judiciary Law § 487 to a claim for fraud. Clearly, false representations are not actionable as fraud if the recipient of the representations is not deceived and does not rely on them.

The Court of Appeals, however, rejected this analogy, relying on the history of Judiciary Law § 487, which turns out to extend, essentially unchanged, to the era of Magna Carta. The original dates to the first Statute of Westminster, of 1275. This provides for imprisonment for a year and a day for any "serjeant or pleader" who may "do any manner of deceit or collusion in the King's Court." Our Legislature, in 1787, adopted a law which stated

"if any counsellor, attorney, solicitor, pleader, advocate, proctor, or other, do any manner of deceit or collusion, in any court of justice, or consent unto it in deceit of the court, or to beguile the court or the party, and thereof be convicted, he shall be punished by fine and imprisonment and shall moreover pay to the party grieved, treble damages, and costs of suit."[16]

The similarity of language is obvious, and the principal difference is the addition of the liability to treble damages. Essentially similar language was carried over to the Revised Statutes of 1836,[17] the Penal Code of 1881,[18] the Code of Civil Procedure,[19] the Penal Code of 1909,[20] and entered the Judiciary Law as § 487 when the present Penal Law was enacted in 1965.[21] The Court remarked on the fact that the law has been thus essentially unchanged for over seven centuries, entering our law before the adoption of the Constitution.

The law is not related to the common-law claim for fraud, it is "a unique statute of ancient origin in the criminal law of England." For most of its history in New York, the law was part of penal statutes. It focuses on whether the attorney has attempted to deceive the parties or the court, not on whether the deceit was successful. To limit the statute's reach to cases where the deceit was successful would not promote the its intent: "to enforce an attorney's special obligation to protect the integrity of the courts and foster their truthseeking function."

The Court thus answered the first certified question in the affirmative.

The second certified question required substantially less discussion. It was whether the costs of defending a litigation based upon a complaint containing material misrepresentations of fact can be considered as damages if the court never acted on the belief that the misrepresentations were true. In view of its answer to the first question, the Court held that the trial court's belief in the truth of the misrepresentations is immaterial. The opposing party must still defend the lawsuit, and the costs of that defense are a proximate result of the misrepresentations.

A client enjoys a presumptive right to inspect his attorney's case files upon the termination of the representation.[22] Does that right apply in class action litigation, where the client seeking to inspect the files is an absent class member? In *Wyly v Milberg Weiss Bershad & Schulman*,[23] the Court of Appeals said it does not apply, even where the absent class member has a substantial stake in the class litigation, and the portion of counsel's fee which may fairly be attributed to the client's interests runs to multiple hundreds of thousands of dollars.

An absent class member is a member of the class in the class action, who is not himself a named party.

The matter before the Court was an appeal from a judgment in a special proceeding, collateral to severa; consolidated class actions, which were pending in the US District Court for the Eastern District of New York. The class actions concerned certain alleged irregularities in accounting practices by the officers and directors of Computer Associates ("CA"), a major information technology company. Petitioner Wyly was a major shareholder in CA. Several class actions were commenced against CA in the Eastern District, which were eventually consolidated into two, assigned to the same District Judge. They were certified for settlement by the District Judge in 2003. Wyly was a member of the settlement class. The settlement would have made 5.7 million shares in CA available to the settlement class, and the law firms representing the class would have received approximately 1.444 million shares as fees, with some $3 million more as reimbursement for expenses.

Wyly, through his counsel, objected to the settlement by communication between his attorney and the attorney for the class. He claimed that the settlement was likely procured by fraud, citing the admission by CA's former general counsel that he had obstructed the investigation into CA's practices by government officials, and the fact that some 23 boxes of supposedly crucial CA documents had mysteriously appeared at the offices of CA's outside counsel after the settlement had been certified by the District Judge.

Wyly's counsel then filed a motion in District Court, seeking to vacate the settlement as to them, citing new evidence, misconduct and fraud on the court. CA opposed the motion and Wyly's demands for disclosure in support of the motion. As part of this motion, Wyly estimated that he and his family members were entitled to 1% of the shares to be distributed, with a value at that time of some $120 million.

While the motion was pending, Wyly's counsel wrote to the attorney for the class, demanding to see a broad range of documents produced during the course of the class actions, including all documents showing the class attorney's pre-trial investigation, and all materials created by the class attorney relating to the class actions. Wyly's counsel based his entitlement to these materials on the attorney-client relationship between Wyly and the class attorney. He deemed the aspect of the pending motion relating to disclosure to be irrelevant to his entitlement to see the files.

As a result of the proceedings in the District Court, Wyly obtained a portion of the materials he sought (including the mysterious 23 boxes of documents), but not the class attorney's work product and analysis of the case. The motion, including the

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request for further disclosure, was eventually denied by the District Court, on the grounds that Wyly had not shown any basis for overturning the settlement, or that anything in the 23 boxes required further disclosure or reopening the settlement.

While the motion was still pending in District Court, Wyly commenced this special proceeding in Supreme Court, seeking a turnover the class files, including "all emails, attorneys' notes, internal memorada, document requests, indices, privilege logs, drafts and research" related to the class actions. Wyly claimed to be entitled to the same rights to inspect the attorney's files as would be accorded to a client in an ordinary (that is, a non-class) action.

In Supreme Court, the Appellate Division and then the Court of Appeals, the court's analysis turned on Court of Appeals'1997 decision in *Sage Realty v Proskauer Rose Goetz & Mendelsohn*.[24] That had been a case of a mortgage financing and restructuring deal, where Sage Realty initially retained the Proskauer firm, then hired a different firm and demanded to see Proskauer's internal documents relating to the transaction and representation. The Court of Appeals held there that the client was presumptively entitled to see the documents, having after all paid for their creation. It also noted that the client would normally be unable to demonstrate a particular need for an individual document without having seen it first, and that the attorney would be in a better position to show that a particular document would not serve the client's need for further advice. The question, as all concerned agreed, was whether this analysis of a traditional, one-to-one attorney-client relationship could be applied to the case of an absent class member.

Supreme Court granted the petition and directed the class attorneys to turn over their files to Wyly, finding the relationship between the class attorney and Wyly to be sufficiently similar to the traditional attorney-client relationship to give him the benefit of the presumptive entitlement. The Appellate Division reversed, finding to the contrary that the relationship between the class attorney and an absent class member was fundamentally different from the traditional one. The Appellate Division found that an absent class member would have to establish his entitlement to inspect the class attorney's files on a case-by-case basis, and that Wyly had not done so here.

The Court of Appeals agreed with the Appellate Division, and affirmed its dismissal of the petition. The Court made a detailed analysis of the relationship between a class attorney and the members of the class, including both named representative members and absent members. Absent class members such as Wyly, have a unique status, in that they are not required to appear, and generally are not subject to liability for fees, costs, adverse claims, or sanctions. Their status is in many respects different from the traditional litigant. By the same token, the class attorney occupies a non-traditional role, in that his responsibility is to the entire class.

The Court accepted the argument that the relationship between the absent class members and the attorney for the class is too much unlike the traditional relationship for the presumption of access established in *Sage Realty* to apply. The very nature of class actions, which may involve thousands of absent class members, requires a different rule in order to avoid unduly burdensome requests from numerous members.

The Court stated that where a demand for the class attorney's file is made by way of a special proceeding after the representation has been terminated, the first consideration should be whether or not the absent class member has a substantial stake in the outcome. If, as here, all parties accepted that such was the case, the next question should be whether or not the absent class member had demonstrated a "legitimate need" for the file. Here, where Wyly had access to the documents in the 23 boxes, which prompted his objection to the settlement in the first place, and had been unable to convince the District Judge that there was anything requiring a re-opening of the settlement, the state court was in effect being asked to "second-guess" the District Judge, and the Court of Appeals did not view the Appellate Division's refusal to do so as an abuse of discretion.

There was a dissent by Judge Smith who, while agreeing that not every absent class member has a presumptive right of access to counsel's files, would have found that in this case Wyly had a sufficiently large stake in the outcome to justify him being granted that right. As he noted,

"A recurrent danger in class action practice — a danger all too often realized — is that the lawyers' interests and those of the class members will not be well aligned. . . . It would be a good thing, I think, if the lawyers for a class were always aware that class members with weighty interests were entitled to scrutinize their work."

**Commencement of Actions**

In *Matter of Garth v Board of Assessment Review*[25] the Court of Appeals confronted an vexing practical issue frequently encountered when a special proceeding is commenced by notice of petition, namely that the notice of petition is required to contain a return date, but the court may have its own ideas and procedures for setting the actual hearing date which the petitioner may not be able to ascertain before filing. The Court of Appeals adopted a liberal, common-sense approach, but limited its holding specifically to the type of proceeding at issue, those under RPTL Article 7 to challenge tax assessments. Whether the determination will be given broader application must await further developments.

The petitioner here filed the petition to challenge his tax assessment in Ontario County. The Notice of Petition contained no return date, despite the direction in CPLR 403(a) that "A notice of petition shall specify the time and place of the hearing on the petition . . . ." The respondent Board of Assessment moved to dismiss for lack of personal jurisdiction based upon the error. In opposition, petitioner submitted proof that the Ontario County Clerk directed him to leave the date out, due to a vacancy in the Court which made it impossible to schedule hearings. The court would set the date and notify the parties when the vacancy was filled. The respondent conceded that the Clerk did, in fact, inform it as to the actual return date.

Supreme Court denied the dismissal motion, but the Appellate Division reversed and dismissed the petition, finding the omission of the return date in a tax certiorari petition to be a jurisdictional defect. The Court of Appeals reversed and reinstated the petition.

The Court noted the disconnect between what the statutory language requires and what the petitioner can in practice do: the petitioner is required to include the return date on the petition, but it is the judge (who has not yet even been assigned to the case) whose part rules govern which days are actually available. Combining this with the extremely short limitations period applicable (30 days, pursuant to RPTL 702[2]) places the petitioner in a difficult position.[26]

The Court referred to its 2005 decision in *National Gypsum v Town of Tonawanda*,[27] where the petition as filed had a return date on it, which was changed by court officials to comport with the actual practice of the court. The Court of Appeals held there that the "fictitious return date" did not render the petition jurisdictionally defective. Any other interpretations would be unfair to the petitioner. That proceeding, also, was a tax certiorari.

A key factor in the Court's determinations in *National Gypsum*, and here, was that tax certiorari proceedings are remedial in character, and invoke the principle that a taxpayer should not have his right to review lost by a technicality. If the "fabricated" return date in *National Gypsum* did not result in a lack of jurisdiction, neither should the absence of any return date at all.

The Court noted that its ruling was limited to tax certiorari proceedings under RPTL Article 7, and that it was not ruling as to special proceedings generally.

**Disclosure**

*Arts4All, Ltd., v Hancock* [28] had been one of those cases where the parties had allowed their personal animus to interfere with the orderly prosecution and defense of the case, to the point that they had both willfully and contumaciously ignored multiple disclosure orders, had both engaged in what the Appellate Division described as "excessive, frivolous and retaliatory motion practice involving disclosure and other issues," and had otherwise engaged in abusive practice, making court management of the litigation an impossibility. The Supreme Court eventually threw up its hands, in effect said "a plague on both your houses," and dismissed both parties' pleadings. The Appellate Division agreed, and now so has the Court of Appeals, ruling on review of the submissions.

**Judgments**

One of the oddities of the CPLR is that while a money judgment is valid for twenty years (CPLR 211[b]), a lien on real property extends only for ten years (CPLR 5203[a]). The lien may be renewed for an additional ten-year period, by the commencement of a new action for the extension (CPLR 5014). The new action for the extension is specifically described as an action on a money judgment, which underscores that it may be commenced by a summons and notice of motion for summary judgment, pursuant to CPLR 3213. In order to avoid a gap in the record, where the initial lien has lapsed before the renewal lien is in place, CPLR 5014 provides that the new action may be brought during the tenth year, while the initial lien is still alive, and that the renewal lien only becomes effective upon the expiration of the initial lien.

What if the judgment creditor delays in commencing the action for the renewal lien? Is the renewal lien to be given effect nunc pro tunc to the expiration of the initial lien, or is there now a period during which rights in the property may be conveyed superior to the lien?

In *Gletzer v Harris*,[29] the Court of Appeals held that the renewal lien cannot be given effect nunc pro tunc, and that if the judgment creditor delays, persons relying on the public record may acquire rights in the affected property unaffected by the renewal lien. Gletzer obtained a judgment against Harris in 1991, for some $470,000. The judgment was docketed against a condominium owned by Harris on October 23, 1991, starting the initial ten-year lien period. Foreclosure on the condo proved unavailing, as did other collection efforts. On October 22, 2001, the day before the lien expired, Gletzer commenced the action to renew it. In February, 2005, Gletzer's motion for summary judgment was granted, and Supreme Court granted him a renewal lien, nunc pro tunc to the expiration of the initial lien on October 23, 2001.[30]

Since the initial lien expired the day after the renewal action was commenced, there was a gap during which there was no lien in place. During the gap period, Harris took out two mortgages on the condominium, with two lenders, for $1.145 million, which were recorded in 2003.

The mortgagees brought an action to vacate so much of the judgment in the renewal lien action as purported to give it retroactive effect, or in the alternative for a declaration that their liens were superior to the renewal lien. They claimed to have relied on the public record before issuing the mortgages, which showed only that there had been a lien and that it had expired. Supreme Court dismissed this action, on the theory that Gletzer had commenced his action timely, and the lien holder should not be penalized for any delay in the adjudication.

The Appellate Division reversed, holding that CPLR 5014 allows a diligent lien holder sufficient time in which to act to avoid a lien gap, but does not eliminate the possibility. Further, the subsequent mortgagors were entitled to rely on the public record, which at the time of their loans showed no extant lien.

The Court of Appeals affirmed the Appellate Division. CPLR 5014 was amended in 1986 to provide for the commencement of the renewal action during the last year of the initial lien, and to provide for the commencement of the renewal lien only upon the expiration of the initial lien. Gletzer argued in the Court of Appeals that the language of the statute required the elimination of any lien gaps by automatically giving nunc pro tunc effect to the renewal lien. The Court rejected this argument for the same reason the Appellate Division had – the statute does not say that. If the lien holder has acted diligently, and acquired the renewal lien while the initial lien was still effective, the statutory language makes the ten-year period of the renewal lien commence only upon the expiration of the initial lien, thus guaranteeing the lien holder a full ten-year term of the renewal lien.

The Court noted that giving nunc pro tunc effect to judgments is generally reserved for correcting irregularities in judgments or other procedural errors, and should not be employed where, as here, there are third parties with "substantive rights in play." Parties to transactions creating real property rights must be able to rely on the public record, and should not be required to discover the pendency of an action which might create a right superior to theirs at some point after their rights had been acquired.

The Court emphasized that a diligent lien holder, who files at the beginning of the tenth year of the initial lien, and alerts the court to the time problems, should be able to obtain the renewal lien in time.[31]

In *Koehler v Bank of Bermuda, Ltd.*,[32] the Court of Appeals, split 4 - 3, held that

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where the court has personal jurisdiction over an entity, holding property of a judgment debtor out of the state, the court can compel that entity to deliver the property (or its value) to a judgment creditor within the state. This is so, even where none of the parties, their dispute, or the disputed property have any connection to New York.

The issue came to the Court by way of a certified question from the US Court of Appeals for the Second Circuit. Koehler had obtained a judgment against a Bermudan resident, Dodwell, in the US District Court for the District of Maryland, in 1993. Koehler registered the judgment in the US District Court for the Southern District of New York. Dodwell owned shares in a Bermuda corporation, and had pledged the shares to the Bank of Bermuda Limited as collateral for a loan. The bank ("BBL") had the stock certificates in its possession. Also in 1993, Koehler filed a petition in the Southern District against BBL, seeking a turnover of the shares or their value. The petition was served on the Bank of Bermuda (New York) Ltd., which he deemed to be a subsidiary of BBL. The District Court ordered the certificates or of funds sufficient to pay the judgment, to be turned over to Koehler.

There followed ten years of litigation over the issue of whether service on Bank of Bermuda (New York) was sufficient to obtain personal jurisdiction over BBL. In October, 2003, BBL consented to the court's jurisdiction, as of the time of commencement of the turnover proceeding. In 2004, however, BBL admitted that the stock certificates had been transferred to a Bermudan company organized for Dodwell's benefit, after the loan from BBL had been repaid. The District Court then dismissed Koehler's turnover petition, on grounds including that a New York court could not attach property outside of the state. The issue was appealed to the Second Circuit, which finding no controlling precedent, certified the issue to the New York Court of Appeals.

Judge Pigott, writing for the majority, began his analysis by considering the distinctions between attachment under CPLR Article 62 and enforcement of judgments under Article 52. He noted that they differ fundamentally regarding the question of jurisdiction. As a general proposition, attachment requires jurisdiction over the property involved, while enforcement proceedings require jurisdiction over persons. The purpose of an enforcement proceeding is to compel the person or entity in possession of the judgment debtor's property to turn it over to the judgment creditor. As such, it may eventually turn into a multi-party litigation concerning which of the competing parties has actual title to the property. An attachment, on the other hand, is a provisional remedy, seeking to keep the disputed property out of the defendant's control so as to keep it available to satisfy an eventual judgment. It may also serve as a jurisdictional predicate where the defendant is not otherwise subject to personal jurisdiction but owns property in the state ("quasi-in-rem" jurisdiction). Thus, where jurisdiction over the defendant has not been obtained, attachment requires that the property be located in the state.

In an enforcement proceeding, the crucial issue is whether personal jurisdiction over the parties has been obtained. Once the parties are under its jurisdiction, the court can then compel them to comply with its decrees, even if this requires performance of acts outside the state. The turnover order here requires BBL, over which the District Court has jurisdiction, to bring its property into the state.

BBL agreed that this is so where the judgment debtor is himself subject to the court's personal jurisdiction. Dodwell was not, and BBL contended that any authority over the property must therefore be based on rem jurisdiction, that is to say, the property must itself be within the state. The Court of Appeals disagreed, finding no such limitation in CPLR Article 52. CPLR 5225 has two procedures for turnover proceedings. Where the judgment debtor has the property in his own possession, a mere motion on notice to the judgment debtor is sufficient. Where the property is in the possession of a non-party, a special proceeding is necessary to obtain jurisdiction over the garnishee.

Since a judgment debtor, already subject to the court's personal jurisdiction, may be compelled to bring out-of-state property into the state and turn it over to the judgment creditor, there is nothing in Article 52 which prevents the same order being given to a garnishee, once brought within the court's jurisdiction.

The dissent argued that this holding allowed forum-shopping on a massive scale, since it allowed New York proceedings to reach the assets of any judgment debtor, held anywhere in the world, by any bank with a presence in New York. While the language of Article 52 does not preclude the majority's result, neither does it compel that result. The dissent found unprecedented the notion that an independent garnishee, which came into possession of the judgment debtor's property through an arm's-length transaction, can be compelled to bring assets into the state.

The dissent also raised constitutional concerns arising out of the assertion in New York of enforcement rights arising out of transactions with no relation at all to New York.

When is the last moment an outstanding judgment can be satisfied, and an execution sale prevented? That question was presented to the Court of Appeals in *Rondack Constr. Servs., Inc. v Kaatsbaan Intl. Dance Ctr., Inc.*[33]

Plaintiffs obtained a judgment against the defendant Kaatsbaan International Dance Center. When the judgment was not paid, plaintiff executed upon certain real property. The Dutchess County Sheriff scheduled the judicial auction and sale for 11:00 a.m. on September 6, 2006. At 11:15 a.m., the Sheriff's lieutenant gave an orientation and introduction and read the terms of sale. Only then did Gregory Cary, Kaatsbaan's Executive Director, speak up to inquire if the sale could be stopped if he paid the entire judgment "right now by check." The lieutenant indicated he would cancel the sale if payment were made.

A bidder objected, and the lieutenant called the County Attorney's office for advice. Before the response came, Cary offered the lieutenant a certified check sufficient to satisfy the judgment, including interest, poundage and other fees. After the response came back from the County Attorney, the lieutenant refused the check and went ahead with the sale. The high bidder was Shawn Pratt, on behalf of TBays, LLC.

On September 13, 2006, Kaatsbaan moved to vacate the sale and compel the Sheriff to accept the check. TBays cross-moved to direct the sheriff to execute and deliver the deed. Supreme Court denied Kaatsbaan's motion and granted the cross-motion.

The Appellate Division reversed.[34] When the judgment debtor tenders the amount required to satisfy the judgment the execution lien is discharged. The "instantaneous effect" of the tender is to discharge the execution lien and terminate the Sheriff's authority to conduct the sale. The right to redeem is extinguished after the sale is concluded, but here the tender was made before bidding began. The sale was set aside, and the Sheriff was directed to accept the check.

In affirming, the Court of Appeals reaffirmed the 1875 holding of *Tiffany v St. John*,[35] which established the "instantaneous effect" of the tender of an amount sufficient to discharge the lien. The tender is equivalent to a payment, ousting the sheriff of the authority to sell the property. It rejected the argument that either CPLR 5236 (abolishing the former right to redeem property after a sale) had any adverse effect on the right to redeem before the sale. Similarly, CPLR 5240 (giving the court broad discretion to regulate enforcement procedures) does not require an application to the court before the tender can be made and the property redeemed.

**Limitations**

When, in a personal injury action, a physician examining the plaintiff on behalf of the defendant actually causes injury during the course of the examination, is the resulting claim one for malpractice or ordinary negligence? The answer determines the applicable statute of limitations. If the claim is for ordinary negligence, the three-year period applies, but if it is considered as malpractice, the shorter two years and six months applies. In *Bazakos v Lewis*,[36] the Court found a "limited physician-patient relationship," and held that the claim sounded in malpractice.

Plaintiff alleged that while the defendant Lewis conducted a physical examination on behalf of the defendant in an automobile negligence case, he "took [plaintiff's] head in his hands and forcefully rotated it while simultaneously pulling," thus causing plaintiff injury. In order that we might have this discussion, the plaintiff then obligingly waited more than two years six months before commencing the action, but less than three years. The defendant of course moved to dismiss on limitations grounds, and Supreme Court agreed and dismissed.

The Appellate Division held that it is ordinary negligence, and that the three-year limitations period applies, so that the action was still viable.[37] Medical malpractice requires the existence of a physician-patient relationship. Such a relationship is fundamentally a consensual one, "characterized by the confidentiality and trust necessary to facilitate the securing of adequate diagnosis and treatment." A physical examination on behalf of an adverse party in litigation, on the other hand, is fundamentally an adversarial and nonconsensual process. The choice of physician is not the plaintiff's own and his attendance is required by law. The examination is not for the plaintiff's benefit, but for the benefit of the adversary, his counsel and insurer. The examining physician does not even owe the plaintiff a duty to arrive at an accurate diagnosis.[38] In the absence of a physician-patient relationship, the duty of physician to patient does not arise. The claim sounds in ordinary negligence, the action is governed by the three-year period, and accordingly, was timely.

The Court of Appeals disagreed, however, in a 4 – 3 decision. Conceding that there is "some logic" to the argument adopted by the Appellate Division majority, the Court's majority nonetheless found the result to be arbitrary. Plaintiff's injury arose out of the defendant's failure to exercise professional skill. It found the defendant's negligent performance of an act requiring that skill to be "a prototypical act of medical malpractice." The limitations period should be no different in this case than it would be if the defendant had made the same error on a private patient. The majority found it unlikely that the Legislature would have found less of a reason to protect physicians performing insurance examinations than those performing the same examinations for more traditional reasons, or that it intended to make any distinction between them.

Characterizing the relationship between the parties as a "limited physician-patient relationship," the majority found that the defendant physician was under a duty only to conduct the examination so as not to cause harm to the patient, but that this limited duty still arose out of the physician's professional skill.

The dissenters adopted the position of the Appellate Division majority, finding that while the defendant may have employed medical techniques, no medical treatment was contemplated or provided. Without any rationale in treatment of a patient, the defendant's actions cannot be described as medical malpractice. "Propinquity . . . is not to be confounded with medical treatment."

The dissent recognized that physical examinations on behalf of adversaries in litigation are themselves adversarial in nature and are not in any respect undertaken for the benefit of the examinee. The extremely limited duty of the examiner, merely to cause no harm to the examinee, bears no relationship to the broad duties imposed on a treating physician by law and deriving from the Hippocratic oath.

The dissent found this result entirely in keeping with the purpose of the shorter limitations period in malpractice cases. The purpose was not to protect those in "litigation support services," but to ensure proper medical coverage for the people of the state by ensuring that providers would be able to obtain malpractice insurance at reasonable rates.

In *Bloomingdales, Inc. v New York City Tr. Auth.*,[39] a contractor acting on behalf of the Transit Authority cut what it took to be a dead underground water main, and installed in its place a conduit encased in concrete. The pipe was, in actuality, a working drainpipe from Bloomingdale's roof, and blocking it caused water to back up into the store when it rained. Eventually, Bloomingdale's hired a contractor to excavate the area, who found the blockage and the new conduit. Bloomingdale's sued for the cost of installing a new drainpipe.

The municipal defendants moved to dismiss on the basis of the year-and-ninety-days limitations period in the Public Authorities Law, the General Municipal Law, and the CPLR.[40] The Supreme Court granted the motion, but the Appellate Division reversed, finding a continuous trespass. The Court of Appeals affirmed the Appellate Division. If the only claim had been the cutting of the drain, the action would have been barred by the year-and-ninety-day limitations period. The actual claim, however, included the blockage of Bloomingdale's right of way for its drain, and its need to install anew drain in a new path around the conduit. This was a trespass, giving rise to successive causes of action.

**Parties**

The real issue in *Fasso v Doerr*[41]

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involved the substantive issue of whether a health insurer's equitable subrogation claim survived a settlement between the insured and a medical malpractice defendant. That issue, being beyond the usual scope of this Update, will only be summarized. The case is noted here, however, since the Court took the opportunity to invite the Legislature to re-examine the intervention statute as it applies to such claims.

The insurer had paid the insured's medical and surgical bills, totaling $780,000. It had been allowed to intervene in the medical malpractice action so as to recover those expenses from the tortfeasor under the doctrine of equitable subrogation.[42] The insurer intended to rely on the plaintiff's proof of negligence, and was prepared to present evidence only on the issue of its own losses. When the insured and the tortfeasor decided to settle the action for less than half of the insured's claimed damages, they stipulated that the insurer's equitable subrogation claim would be extinguished and dismissed, since the insured had not been made whole. The insurer, of course, did not join in this stipulation. It was held by the Court that the equitable subrogation claim could not be circumvented in this manner, and that the insurer could continue its claim against the portion of insurance coverage left over after the settlement.

The issue on which the Court invited Legislative attention was whether the intervention was proper. Since neither the insured nor the tortfeasor objected to the intervention, the issue was not actually before the Court. It noted that the presence of the injured party's insurer as a party to the tort action creates conflicts between it and the injured party, since their interests are clearly divergent, each wanting as much of the tortfeasor's assets as possible, without regard for the other. The Appellate Divisions are split on the question of whether the insurer should be allowed to intervene, with the majority view disapproving intervention on the grounds that the conflicts discourage or prevent settlements. The Fourth Department, however, allows intervention on a discretionary basis.

Under the circumstances, the Court of Appeals did not resolve the conflict between Departments. It noted that the issue of permissive intervention by insurers is part of the larger issue of how health insurers should be able to claim equitable subrogation. The collateral source rule[43] addresses part of this question, but only with regard to preventing double recovery by plaintiffs where an action has proceeded to verdict. It does not directly affect settlements, and does not affect the insurer's equitable subrogation rights. The Court invited the Legislature to examine these issues, which are both procedural and substantive in nature.

**Pleadings**

In a follow-up to last year's decision in *Pludeman v Northern Leasing*,[44] the Court of Appeals this year considered two cases involving the degree of specificity required of a complaint in a fraud case. As in *Pludeman*, the complaints sought to impose fraud liability on individuals other than those directly making the fraudulent representations. In *Pludeman,* plaintiffs sought to impute corporate fraud to the individual officers and directors. In *Eurycleia Partners v Seward & Kissel*[45] the defendant was a law firm that had drafted a hedge fund's offering memoranda containing false representations about limitations on investments and the identity of an auditor. *Sargiss v Magarelli*[46] was an outgrowth of a divorce action, in which the now-deceased husband had allegedly given false testimony about his assets. The defendants were the husband's executor, his brother and sister-in-law, and the business involved in the alleged fraud.

The general rule for specificity of statements in a pleading is only that they be sufficiently particular to give the court and the adversaries notice of the transactions and occurrences intended to be proved, and to state the material elements of each cause of action or defense.[47] Fraud cases present an exception, found in CPLR 3016(b), which provides that "the circumstances constituting the wrong shall be stated in detail." How detailed does that have to be?

The Court held in *Pludeman* that CPLR 3016(b) is met by allegations which state facts sufficient to allow an inference of fraud. While the "the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud."

The plaintiffs in *Pludeman* were customers of the corporate defendant in the leasing of office equipment. The fraudulent conduct complained of was that plaintiffs were presented with contracts in such a way that three of four pages were deliberately hidden, and that the hidden pages contained onerous terms of which the plaintiffs were not informed. The scheme was allegedly perpetrated as part of a consistent and nationwide pattern over a period of years. The allegations against the individual defendants were only that they were involved in the fraud as corporate officers and that under the circumstances they must have known of the fraudulent conduct and participated in it. That is to say, there were no specific allegations of any fraudulent conduct against the individual defendants.

The Court of Appeals upheld the complaint. In cases of corporate fraud, corporate officers and directors are individually liable if they had knowledge of the fraud or participated in it, whether or not they profited individually.[48] While CPLR 3016(b) clearly requires more than the mere "notice" pleading of CPLR 3013, and while it must inform the defendant of the detail the allegedly fraudulent conduct, that does not mean that the complaint must set forth "unassailable proof of fraud." It will be met where the stated facts will allow "a reasonable inference" of fraud. The problem, of course, is that the specific activities are peculiarly within the defendants' knowledge, and to require more would make it impossible for a defrauded plaintiff to state a claim with sufficient particularity.

The court found that the allegations in the complaint were sufficient that they allowed an inference that the corporate officers and directors sued in fact had knowledge of the fraudulent conduct. The allegations were sufficient to raise the inference that the scheme originated with corporate officers and not from the sales agents. Since the specifics of each individual defendant's participation in the marketing scheme are necessarily not within the plaintiffs' knowledge, the complaint was properly regarded as sufficient at this early stage, subject to later disclosure.

The claim in *Eurycleia Partners* involved a hedge fund named Wood River Partners. Wood River was begun in 2003, and issued an offering memorandum representing that it would commit no more than 10% of its funds to any one investment at any time, so as to ensure adequate diversification. Periodic updates to the offering memorandum were issued, making the same representation. The offering memorandum and the updates were drafted by Wood River's counsel, the present defendant Seward & Kissel.

Unbeknownst to the investors, however, starting at some point in 2004 the fund's management invested some 65% of its total assets in Endwave Corporation. The value of Endwave declined and then crashed in 2005, the hedge fund was unable to meet redemption requests. S & K resigned as counsel at the end of September, 2005. The SEC stepped in in October, and by May 2007, Wood River's principal manager, John Whittier, pled guilty to securities fraud. At his allocution Whittier admitted to having intentionally concealed the extent of the investment in Endwave.

Plaintiffs claimed that S & K knew that the claims in the offering memorandum and updates as to the 10% cap were false, and that Wood River was in fact exceeding that limit as to Endwave. The specific causes of action relevant here were actual fraud and aiding and abetting fraud.

As to actual fraud, the complaint alleged that S & K had become aware, in January of 2005, that Wood River had purchased 10% of Endwave's stock. There was no indication, however, that S & K knew of the cost of this stock, or of Wood River's total assets. This allegation, therefore, provided no factual basis for the claim the S & K knew that more than 10% of Wood River's assets were tied up in Endwave.

In contrast to *Pludeman*, where the defendants were corporate officers who might reasonably be inferred to have known of the fraudulent scheme, the defendant here was merely outside counsel. Significantly, in drafting the complaint the plaintiffs had Whittier's assistance, yet they could not state any factual basis for the assertion of S & K's knowledge that the offering memoranda contained falsehoods. Therefore, the circumstances surrounding the known facts provided no support for plaintiffs' claims.

A secondary allegation was that the offering memorandum represented that American Express Tax and Business Services would be Wood River's auditor, which S & K also knew was false. Here, the claim was aiding and abetting the fraud. Again, neither the actual allegations of the complaint nor the surrounding circumstances allowed an inference of knowledge of the fraud.

In *Sargiss*, plaintiff sued concerning allegedly false statements made under oath in divorce proceedings between herself and her now deceased ex-husband, Isaac Sargiss. The statements concerned his interest in Panrad Automotive Industries. His 1996 Statement of Net Worth listed Panrad as an asset, but did not give a value to it. At his deposition, in 1998, Isaac testified that his interest in the company had been sold to his brother Julius some five years previously, pursuant to an agreement made three years before that. The purchase price had been $250,000. Based on these statements, the parties had reached a settlement, the assets were divided, and the divorce was finalized.

Isaac died in 2004. His daughter found documents among his effects which seemed to indicate that there have been no sale of the Panrad assets, and that the Statement of Net Worth and the deposition testimony were false. This action followed, in which the divorced wife claimed that she justifiably relied on the false statements as to Isaac's net worth and settled for less than she would have otherwise. The defendants were Isaac's executor, Julius, his wife Alice, and Panrad. The defendants moved to dismiss, claiming that the complaint failed to make sufficiently specific allegations of fraud.[49]

The allegations of the complaint as against Julius and Panrad were less detailed than those against Isaac's estate. Nonetheless, the relevant documents (which were submitted with plaintiff's opposition to the motion) allowed the inference that if there was a fraud, Julius and Panrad were involved with it. Isaac would not have been able to carry out the alleged fraud without their participation, since the scheme allegedly involved payments to Isaac after he had supposedly sold his interest to Julius, and Julius controlled Panrad. Since the same inferences could not be drawn against Alice, however, the complaint as against her was dismissed.

**Trial Practice**

*Salm v Moses*[50] was a dental malpractice case. Defendant and his expert were insured by, and were shareholders of, the same insurance company. Defendant moved *in limine* to preclude plaintiff from cross-examining the expert with regard to those circumstances. Plaintiff did not request a voir dire of the expert, but opposed the motion. The trial court granted the motion in limine, finding that the probative effect of the inquiry would be outweighed by the prejudicial effect of revealing defendant's insurance coverage. There was a verdict in defendant's favor, and plaintiff appealed, principally on the denial of opportunity to investigate the witness' possible bias. The Appellate Division affirmed, as did the Court of Appeals.

The Court restated its holdings that ban evidence of the defendant's insurance coverage as creating the potential for prejudice. The rule is not absolute, however, and if the evidence is relevant to a material issue, it may be admitted. Here, the trial court found that the evidence of the expert's bias was "illusory," a conclusion supported by the record. There was therefore no abuse of discretion. Had there been a voir dire outside the presence of the jury, there might have been more support on the issue of bias.

There was a concurrence by Judge Pigott, in which he took the view that insurance coverage should no longer be regarded as "the third rail of trial practice." He noted that prospective jurors are routinely asked if they have an interest in an insurance company,[51] and are subject to challenge for cause should the answer be "yes." He found it incongruous that the jurors are prevented from hearing that the defendant's expert has the same disability that would have prevented them from serving. He concurred with the affirmance, however, since on the facts of the case the plaintiff failed to request a voir dire by which the extent of the witness' interest in the insurer, and the existence of an actual bias, could have been ascertained.

The Court of Appeals held in *Duffy v Vogel*[52] that the failure to poll a jury upon request is a per se reversible error, and that the failure is not subject to harmless error analysis. Thus, even though all the jurors signed the response to each of the interrogatories exonerating the defendants, even though there was no actual indication that any of the jurors in fact dissented from the verdict, and even though it would have taken two dissents to overturn the result, the matter was remitted for a new trial.

This was a long medical malpractice trial, in which the jury interrogatories fell into four groups. The first group consisted of ten

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interrogatories concerning the defendants' liability. The next six concerned the negligence of two non-party physicians, the third group concerned the plaintiff's possible contributory negligence, and the last three concerned apportionment and damages. The jury was instructed that if they found in the defendants' favor in the first ten interrogatories, they were to proceed no further, but were cease deliberations and report their verdict to the court. The jury seemed to hold in favor of both defendants. answering the first ten interrogatories in their favor. Each juror signed the verdict sheet below the answer to each interrogatory. At that point, the jury should have ceased its deliberations as instructed by the court. Nonetheless, the jury continued to respond to the interrogatories, finding negligence and causation as to the non-party physicians, negligence but no causation as to the plaintiff, and finding that the plaintiff had been harmed in the amount of $1.5 million.

Upon the jury's return to the courtroom, the foreman announced the verdict. Each question was read aloud, and each time the foreman announced that the verdict had been unanimous.

Plaintiff claimed at first that the verdict was inconsistent and asked the trial court to direct the jury to continue deliberations. The trial court refused, and the plaintiff then asked that the jury be polled. The court refused to do that, on the grounds that there was no need, given the clearly unanimous verdict. The court then discharged the jury. On plaintiff's motion, the trial court set aside the verdict, now viewing the refusal to poll the jury as reversible error.

The Appellate Division[53] began its analysis by describing the right to have the jury polled as "absolute," and agreed that it was error for the trial court not to have done so. The issue, as the court saw it, was whether the error was of such magnitude to nullify the results of a three-week trial. In the absence of any demonstration that the failure to poll the jury had any impact on the outcome, or of any demonstration of prejudice, then the interests of justice are not served by directing a new trial. The "objective facts," to the contrary, demonstrated that polling the jury would not have changed it in any way.

Here, the verdict was consistent notwithstanding the fact that the jury failed to obey the direction to cease deliberations once it found that the defendants were not at fault. The answers given to all of the questions were consistent with each other, and supported by the weight of the evidence. The plaintiff could not claim prejudice from the inclusion of the non-party doctors among the questions answered by the jury, since the jury found the defendant doctors not to have been at fault.

There was a two-judge dissent, which found it a "bedrock principle" that a party has a right to have the jury polled prior to the entry of judgment. The trial court's "inexplicable" failure to do so requires a new trial. The dissent pointed to the purpose of polling the jury, which is to ensure each juror's assent to the verdict in open court, and to ensure that each party to know with certainty that the verdict was in fact unanimous and not the product of coercion. The dissent found the individual juror's signatures on the verdict sheet to be an insufficient assurance that each juror in fact assented to the verdict.

In the Court of Appeals, again, all of the Judges agreed that the right to have the jury polled was "absolute." The Court, with Judge Smith dissenting, disagreed with the Appellate Division as to the applicability of harmless error analysis. It found that the polling of the jury is an indispensable part of the publication of the verdict. The verdict is not "finished or perfected" until it is recorded, and where polling has be requested it may not be recorded until the poll is taken. This view of the position of the jury poll has been "uncontroversial," and leads to the conclusion that harmless error analysis is inapplicable. That doctrine applies to a perfected verdict, and cannot be used to perfect the verdict in the first place.

The jury poll, in the Court's view, is each juror's last chance to reflect upon the verdict, and to decide whether or not to publicly affirm his or her assent to the verdict as announced. This is a determination which cannot be predicted. The mere fact that the verdict has been signed by the jurors in the jury room is not a substitute for this public affirmation, under circumstances which make it clear that a public renunciation of the verdict is permissible, and that the otherwise "solemn and intimidating atmosphere of the courtroom" is not an obstacle.

Harmless error analysis, in the majority's view, would amount to mere speculation as to the minds of individual jurors. Its holding, it said does not depend on the likelihood of a juror taking the opportunity to change his or her mind. The litigants have a right to a verdict publicly delivered, and publicly stated by each of the jurors.

Judge Smith, in dissent, stressed that the polling of the jury has no roots in statute, and that the precedents which establish the "absolute" right to a jury poll do not support the conclusion that a wrongful denial of that right always require a reversal. He viewed the majority's concerns, as to a juror seizing the opportunity to change his mind, as "fanciful." He noted that the possibility is in fact so remote that most trial lawyers never see a verdict overturned in that way, and that those who do "tell the story to the end of their days." Especially in this case, where the overturning of the verdict would have required two such last-instant changes of heart, the possibility was so far-fetched that the establishment of a rule of per se reversal was certain to work an injustice. He viewed the entire procedure of a jury poll as a "quasi-medieval ritual," and saw no purpose to elevating its status.

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

*2*. *M Entertainment v Leydier*, 13 N.Y.3d 827, ___ NYS2d ___, 2009 N.Y. Slip Op. 07671 [October 27, 2009]

*3*. 62 A.D.3d 627, 880 N.Y.S.2d 40 [2009]

4. *Nat'l Org. for Women v. Met. Life Ins. Co*., 70 N.Y.2d 939, 524 N.Y.S.2d 672 [1988]; *Cipriani v. Green*, 96 N.Y.2d 821, 729 N.Y.S.2d 431 [2001]

*5*. CPLR 308 (2), (4)

*6*. *People v D'Alessandro*, 13 N.Y.3d 216, ___ NYS2d ___, 2009 NY Slip Op 07669 [October 27, 2009]

*7*. *Samuel v Druckman & Sinel, LLP*, 12 N.Y.3d 205, 879 N.Y.S.2d 10 [March 31, 2009]

*8*. *See*, Code of Professional Responsibility 2-107 (former 22 NYCRR 1200.12); *compare* Rules of Professional Conduct (22 NYCRR Part 1200) Rule 1.5 (g)

*9*. Whether Pegalis was to contribute any portion of the fee awarded to him is not discussed. It was, after all, Samuel who had brought him into the case, and he had no direct agreement with Sinel.

*10*. *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 874 N.Y.S.2d 868 [2009]

*11*. *Amalfitano v Rosenberg*, 533 F.3d 117 [2d Circ., 2008]

*12*. Costalas and the Amalfitanos were related, and the history of the dispute, as set forth by the Second Circuit covers years before the underlying lawsuit here. The misconduct ascribed to Peter Costalas is, perhaps, more egregious than that ascribed to Rosenberg, and would probably make a more interesting TV script. Family intrigue is so much more interesting, after all. We, however, are concerned only with the conduct of the lawyer, and so his misconduct is all we will describe.

*13*. *Costalas v. Amalfitano*, 305 A.D.2d 202, 760 N.Y.S.2d 422 [1st Dept., 2003]

*14*. *Costalas v. Amalfitano*, 23 A.D.3d 303, 808 N.Y.S.2d 24 [1st Dept., 2005]

*15*. *Amalfitano v. Rosenberg*, 428 F.Supp.2d 196, 203 [USDC, SDNY, 2006]

*16*. L 1787, ch 36, § 5

*17*. 2 Rev Stat of New York, chap III, art 3, § 69 [1836]

*18*. L. 1881, ch 646, § 148 [1], which referred to § 70 of the Code of Civil Procedure

*19*. Code of Civil Procedure §70

*20*. Penal Code, § 273

*21*. L. 1965, ch. 1031

*22*. *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 [1997]

*23*. *Wyly v Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y.3d 400, 880 N.Y.S.2d 898 [May 7, 2009]

*24*. *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 [1997], *supra*

*25*. *Garth v. Board of Assessment Review for Town of Richmond*, 13 N.Y.3d 176, ___ NYS2d ___ [October 15, 2009]

*26*. The Court framed the dilemma as a choice between filing the petition without knowing the actual return date, or waiting until the assignment of a judge. Until the petition is filed and the proceeding commenced, however, how is a judge to be assigned?

*27*. *National Gypsum v Town of Tonawanda*, 4 NY3d 680 [2005]

*28*. *Arts4All, Ltd. v. Hancock*, 12 N.Y.3d 846, 881 N.Y.S.2d 390 [May 12, 2009]

*29*. *Gletzer v Harris*, 12 N.Y.3d 468, 882 N.Y.S.2d 386 [May 12, 2009]

*30*. It appears that the collection efforts took place in Missouri, where Harris then resided. He then raised his Missouri residency as opposition to jurisdiction in New York, claiming that there was no jurisdictional basis here. A referee held that he was a New York domiciliary, subject to jurisdiction here. Supreme Court confirmed the report. The availability of this jurisdictional defense underscores the point that the renewal lien requires a separate action, which is not merely a supplemental proceeding in the original action.

*31*. The renewal lien action in this case took 3 ☐ years to reach a judgment. The Court of Appeals noted that fact, but did not otherwise comment on the delay. There is a footnote in the opinion at Supreme Court (*Greenpoint Mortg. Funding, Inc. v. Gletzer*, 16 Misc.3d 1114(A), 847 N.Y.S.2d 896, 2007 N.Y. Slip Op. 51416(U) [2007]), in which the court blames the delay on resolution of the jurisdictional issue, as well as the necessity of resolving the Missouri litigation before the New York litigation could proceed. There is no indication of whether Gletzer or Supreme Court were aware, before the issuance of the nunc pro tunc judgment, that Harris had in fact taken advantage of the lien gap to mortgage his property.

*32*. *Koehler v Bank of Bermuda Ltd*., 12 N.Y.3d 533, 883 N.Y.S.2d 763 [June 4, 2009]

*33*. *Rondack Constr. Servs., Inc. v Kaatsbaan Intl. Dance Ctr., Inc*., ___ NY3d ___, ___ NYS2d ___, 2009 NY Slip Op 09264 [December 15, 2009]

*34*. *Rondack Constr. Servs., Inc. v Kaatsbaan Intl. Dance Ctr., Inc*., 54 A.D.3d 924, 864 N.Y.S.2d 127 [2d Dept., 2008]

*35*. *Tiffany v St. John*, 65 NY 314 [1875]

*36*. *Bazakos v Lewis*, 12 N.Y.3d 631, 883 N.Y.S.2d 785 [June 24, 2009]

*37*. *Bazakos v Lewis*, 56 A.D.3d 15, 864 N.Y.S.2d 505 [2d Dept., 2008]

*38*. *Savarese v Allstate Ins. Co*., 287 A.D.2d 492, 731 N.Y.S.2d 226 [2d Dept., 2001]; *LoDico v. Caputi*, 129 A.D.2d 361, 517 N.Y.S.2d 640 [4th Dept., 1987]

*39*. *Bloomingdales, Inc. v New York City Tr. Auth*., 13 N.Y.3d 61, 886 N.Y.S.2d 663 [June 11, 2009]

*40*. Public Authorities Law §1212, General Munipal Law §§ 50-e and 50-i, and CPLR 214.

*41*. *Fasso v Doerr*, 12 N.Y.3d 80, 875 N.Y.S.2d 846 [February 24, 2009]

*42*. The statute of limitations had passed on its direct claim against the tortfeasor.

*43*. CPLR 4545

*44*. *Pludeman v Northern Leasing Sys., Inc*., 10 N.Y.3d 486, 860 N.Y.S.2d 422 [2008]

*45*. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 N.Y.3d 553, 883 N.Y.S.2d 147 [June 4, 2009]

*46*. *Sargiss v Magarelli*, 12 N.Y.3d 527, 881 N.Y.S.2d 651 [June 4, 2009]

*47*. CPLR 3013

*48*. *Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]

*49*. They also claimed that the action was untimely. It had been commenced within two years of the discovery of the documents, but not within six years of the alleged fraud. Here, the Court held that there was nothing in the record from which it could be concluded that the plaintiff knew or could have known of the alleged fraud earlier than she did.

*50*. *Salm v Moses,* 13 N.Y.3d 816, ___ NYS2d ___, 2009 NY Slip Op 07479 [October 22, 2009]

*51*. See, CPLR 4110(a)

*52*. *Duffy v Vogel*, 12 N.Y.3d 169, 878 N.Y.S.2d 246 [March 31, 2009]

*53*. *Duffy v Vogel*, 49 A.D.3d 22, 849 N.Y.S.2d 52 [1st Dept., 2007]