Queens
BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

March 2020 | Volume 87, No. 6

New York's Bail Legislation Explained

HON. DAVID J. KIRSCHNER

As part of the State's 2020 Budget, the New York Legislature enacted sweeping changes to the criminal justice system. While a sizeable portion focuses on overhauling the current discovery and speedy trial laws, public attention has gravitated toward the dramatically transformed bail structure. Specifically, monetary release conditions or "cash bail" (e.g., cash, credit card, bonds) have been eliminated for virtually all misdemeanors and non-violent felonies—meaning that persons charged with "non-qualifying" offenses must be released from custody. Additionally, law enforcement officers must issue desk appearance tickets (a formal arrest without being held until arraignment) to individuals charged with misdemeanors and Class E felonies (the lowest class level of felony offenses) in lieu of effecting a custodial arrest unless they have an outstanding warrant, a temporary order of protection is being sought, or a driver's license suspension is mandated.

That said, mandatory release from custody without bail for non-qualifying offenses does not necessarily mean release without any conditions. If a judicial determination is made that certain measures are necessary to reasonably assure a person will return to court, several non-monetary conditions may be imposed. Non-monetary conditions include pre-trial supervision (e.g., a probation-type monitoring and reporting program), electronic monitoring, passport surrender and travel restrictions. And, bail could nevertheless be imposed if a person "persistently and willfully" fails to appear in court as directed, commits another felony after being released on a felony, intimidates or tampers with a witness, or violates domestic, family and certain other types of protective orders. But when a person fails to appear, a court must wait 48 hours before ordering a bench warrant to provide the opportunity for a voluntary return.

The legislation purportedly seeks to eliminate pre-trial detention of persons unable to afford modest bail for offenses that will eventually be resolved in non-incarceratory (e.g., probation, community service, rehabilitation programs or fines) or negligible jail sentences because extended incarceration jeopardizes employment, housing, and other life circumstances. Agree or disagree, it distinguishes between crimes unlikely to result in substantial prison sentences (non-qualifying offenses) and those that are (qualifying offenses). This distinction is largely, though not exclusively, based on the categorization of offenses as either misdemeanors or felonies and designation as either non-violent or violent. Regardless of whether a charged offense qualifies for bail, however, judges are required to select the least restrictive alternative conditions that will reasonably assure a person's return to court.

Generally, misdemeanors subject a person to less than one year in jail; felonies to one year or more. And, all jurisdictions classify crimes based on the sentencing exposure commensurate with the severity of the prohibited conduct. New York has three classes of misdemeanors; six for felonies. Misdemeanors, however, are not statutorily designated as violent regardless of whether the prohibited conduct appears to be. Examples include assault in the third degree, which is intentionally inflicting physical injury, obstruction of breathing or blood circulation, menacing in the second and third degrees, arson in the fifth degree, sexual abuse in the second and third degrees, sexual misconduct and forcible touching.

Felonies designated as non-violent include reckless and vehicular manslaughter, robbery in the third degree, which is using physical force to steal property from another person (without using/threatening use of a weapon or causing physical injury), burglary in the third degree, which is entering a building while intending to commit a crime inside (also without using/threatening use of a weapon or causing physical injury), rape in the third degree, which is a lack of actual or legal consent, arson in the fourth degree and, of course, larceny and drug sale and/or possession. But the test of whether felonies are designated as non-violent or violent has little to do with whether the prohibited conduct appears violent or the title of the offense. Rather, it is based on the legal gravity of the conduct.

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QUEENS COUNTY BAR ASSOCIATION
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Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

MARCH 2020
Tuesday, March 10
CLE: Discovery & Speedy Trial
Wednesday, March 11
CLE: Ethics Update 2020
Wednesday, March 18
CLE: Meet the New Supervising Judge of the Civil Court, Queens County – 1:00 pm
Tuesday, March 31
Judiciary, Past President's & Golden Jubilarian Night

APRIL 2020
Thursday, April 2
CLE: LGBTQ+ & Immigration/ Naturalization Committees
Friday, April 10
Good Friday - Office Closed
Wednesday, April 22
CLE: Equitable Distribution Update
Thursday, April 23
CLE: Breakin' Up is Hard to Do: Basics of Business Dissolution
Wednesday
CLE: CPLR & Evidence Update

MAY 2020
Thursday, May 7
Annual Dinner & Installation of Officers
Monday, May 25
Memorial Day - Office Closed

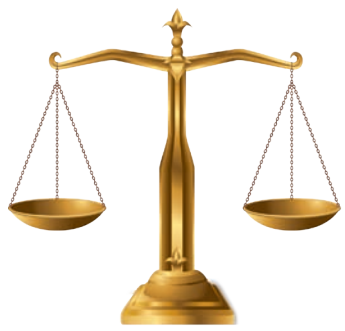
JULY 2020
Friday, July 3
Observation of Independence Day – Office Closed

SEPTEMBER 2020
Monday, September 7
Labor Day – Office Closed
Monday, September 14
Golf & Tennis Outing at the Garden City Country Club

New Members

David A. Bowen
Daniel Cerritos
David P. Horowitz
Lloyd Katz
Andrew Rozo
Emili Kilom
Neyci V. Lopez

Necrology



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Publisher:
Queens Public Media, LLC, under the auspices of Queens County Bar Association. The Queens Bar Bulletin is published monthly from October to May.

Advertising Office:
Queens Daily Eagle
8900 Sutphin Boulevard, LL11,
Jamaica, Queens, NY 11435
(718) 422-7412

Send letters and editorial copy to:
Queens Bar Bulletin 90-35 148th Street, Jamaica, NY 11435
Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 452-520) is published monthly except June, July, August, and September by Queens Public Media, LLC, 8900 Sutphin Boulevard, LL11, Jamaica, NY 11435, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Flushing, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

Lawyers Assistance Committee

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

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

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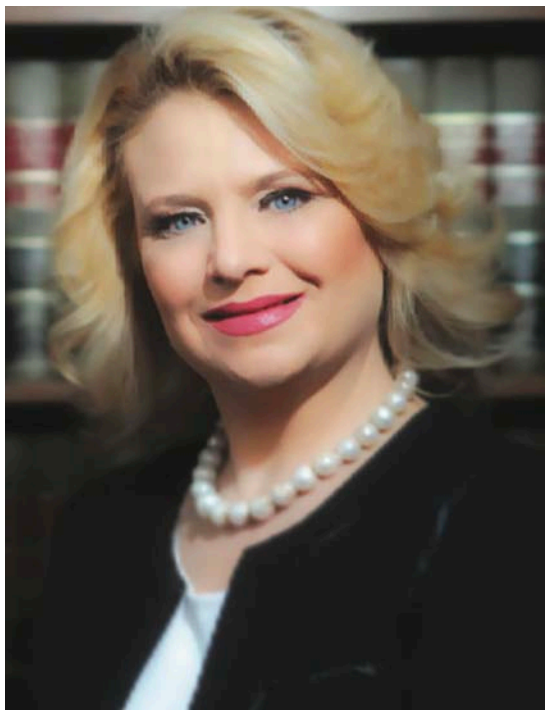

President's Message

"Every great dream begins with a dreamer. Always remember, you have within you the strength, the patience, and the passion to reach for the stars to change the world." ~ Harriet Tubman

Greetings Dear Members,

Happy Springtime to all of you! As the world awakens from its winter slumber, I wish you all a smooth and good transition into Spring.

This past January, I referenced the word "liberty" during my discussion of defining the Rule of Law; this word and its meaning have been in my mind since that time. Liberty calls to mind the Statue of Liberty, which for me is a steadfast reminder of justice, liberty and freedom. For many years, immigrants from all over the world arriving to the United States have been greeted by this statue as they have come seeking freedom and a better life for themselves and their families. I mentioned previously that liberty has not automatically been bestowed on people who live in this country; long-hard battles have been fought for people to gain their liberty in this country and the battles continue today.

The Queens County Bar Association has historically at different times reflected upon the word "liberty"; I am now taking a moment to do so again. The notion of liberty in the United States is the most often designated seminal idea and selling point for people from all over the world; in fact, people cherish and revere the notion of liberty and freedom in this nation. I would like to highlight two people from very different backgrounds, both born in the United States, who were committed to advancing the principals of liberty and freedom.

Digging through the Queens County Bar Association's published anniversary booklet entitled "Spirit of '76, 100th Anniversary, 1876-1976," I found an excerpt from an address on the subject of liberty entitled, The Spirit of Liberty," given by Judge Learned Hand in Central Park, on May 21, 1944. Judge Billings Learned Hand (b. January 27, 1872 – d. August 18, 1961) was born and raised in Albany, New York. He majored in philosophy at Harvard College, and graduated with honors from Harvard Law School. After a short career as a lawyer in Albany and New York City, he was appointed at the age of 37 as a Federal District Judge in Manhattan, NY in 1909.

The words of Judge Hand's, May 21, 1944, Central Park's speech are poignant and still relevant today. Below is a portion of the excerpt of the speech that was published in 1976, in the Queens Bar's 100th Anniversary Booklet:

"The Spirit of Liberty"

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes…What then is the spirit of liberty? … The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded;…" "(From the address of Judge Learned Hand on "I Am An American Day," delivered in Central Park on May 21, 1944 to a vast audience including hundreds of new citizens)," as cited in the article "Our Contributions to the Court of Appeals," Queens County Bar Association, Spirit of '76, 100th Anniversary, 1876-1976, The Alpert Press Inc., 1976, p.46.

On March 10th this nation will commemorate and celebrate Ms. Harriet Ross Tubman (b. circa 1820 – d. March 10, 1913), an extraordinary woman who was deeply committed to standing for and advancing the principals of liberty and freedom. On March 13, 1990, Public Law 101-252 of the 101st Congress (104 STAT. 99, S.J. Res. 257), a Joint Resolution passed by the Senate and House of Representatives of the United States of America proclaimed, "Whereas Harriet Tubman – whose courageous and dedicated pursuit of the promise of American ideas and common principles of humanity continues to serve and inspire all people who cherish freedom died at her home in Auburn, New York on March 10, 1913, Now, therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that March 10, 1990 be designated as Harriet Tubman Day, to be observed by the people of the United States with appropriate ceremonies." Approved March 13, 1990, LEGISLATIVE HISTORY – S.J. Res. 257; Congressional record, Vol 136 (199); Mar. 6, considered and passed Senate; Mar. 7, considered and passed House. See http://www.harriettubman.com/day.html

The Resolution outlines the reasons for creating the Public Law, enumerating the following important facts and achievements of Harriet Ross Tubman: Harriet Tubman was born into slavery in Bucktown, Maryland in or around the year 1820; Ms. Tubman escaped slavery in 1849 and became a "conductor" on the Underground Railroad, she undertook a reported nineteen trips as a conductor, endeavoring despite great hardship and great danger to lead hundreds of slaves to freedom, she became an eloquent and effective speaker on the behalf of the movement to abolish slavery, she served in the Civil War as a soldier, spy, nurse, scout and cook, and as a leader in working with newly freed slaves, and after the War, she continued to fight for human dignity, human rights, opportunity and justice. See http://www.harriettubman.com/day.html

So, Dear Members, I hope that you are able to discern from the discussion of the lives of these two very different people, Judge Billings Learned Hand and Ms. Harriet Ross Tubman, that we all have the capacity and ability to advance the principals of liberty, no matter what walk of life we come from. I do hope that my discussion of liberty has inspired you, with the work that you do, to uphold the principals of liberty and freedom in the law. Working together as a community, we can become more empowered to advance the principals of liberty and freedom, as part of our pursuit of excellence and upholding justice in the law. I invite you to reach out to me and to each other to share your thoughts and ideas about liberty and freedom.

SINCERELY YOURS,

MARIE-ELEANA FIRST I PRESIDENT

Editor's Note

Lessons From the Archives: The Bitter Struggles of Co-op Boards

As cooperative and condominium apartment houses continue to be built in Queens County, disputes between their Boards of Directors and their apartment owners have become increasingly common.

However, a Co-op Board or Condominium Board, though governed by the New York Business Corporation Law (BCL) is much more similar to a village, town, or city government than it is to a business corporation.

This bit of judicial philosophy was set forth by former Chief Judge Judith Kaye of the New York State Court of Appeals in Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y. 2d 530, 554 N.Y.S. 2d 807 (1990).

In Levandusky v. One Fifth Ave. Apartment Corp., Chief Judge Kaye gave us all the following guidance:

"As Courts and commentators have noted, the cooperative or condominium association is a quasi-government – "a democratic sub society of necessity" (Hidden Harbour Estates v. Norman, 309 So.2d 180, 182 [Fla.Dist. Ct.App]). The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decision making to promulgating regulations regarding pets and parking spaces (see generally Note, Promulgation and Enforcement of House Rules, 48 St. John's L.Rev. 1132 [1974]). Authority to approve or disapprove structural alterations, as in this case, is commonly given to the governing board. (See, Siegler, Apartment Alterations, N.Y.L.J., May 4, 1988, at 1, col 1." (Emphasis added)

A careful reading of Justice Kaye's philosophy on this subject was revealed in a bitter struggle on a Queens County Co-op Board some years ago where my law firm represented the tenant-shareholder.

In Co-op Board v. Smith and Jones, we represented Ms. Smith and Ms. Jones, former members of the Co-op Board. (The names have been changed to protect the privacy of the litigants).

Its seems that after Ms. Smith and Ms. Jones had completed their terms as members of the Co-op Board, they complained to the new members of the Board of Directors that the apartment house was inadequately maintained and that the superintendent was not doing his job. Ms. Smith and Ms. Jones also complained that the finances of the Co-op Board were in disarray and adequate accounting procedures were not being followed.

The new Co-op Board, headed by the new president, Mr. Maniac, then filed a Summons and Complaint against Ms. Smith and Ms. Jones in the name of the Co-op Board with the following causes of action:

Replevin. The Co-op Board sought repossession of "numerous financially sensitive and privileged documents of the corporation" that Ms. Smith and Ms. Jones allegedly kept after their term on the Co-op Board had expired. The fact of the matter was that the Co-op Board continued to maintain all of its own records all of the time.

Conversion. The Co-op Board claimed that Ms. Smith and Ms. Jones, the former members of the Board wrongfully converted the documents.

Conspiracy. The Co-op Board took the position that Ms. Smith and Ms. Jones were part of a conspiracy to deprive the Co-op Board of its "sensitive documents".

Prima Facie Tort. The Co-op Board claimed that Ms. Smith and Ms. Jones' failure to return these "sensitive documents has caused substantial harm" to the Co-op Board in its daily operations.

Punitive Damages. The Co-op Board wanted punitive damages against Ms. Smith and Ms. Jones, its former members and its neighbors in the same apartment house.

In their Ad damnum Clause the Co-op Board requested $500,000 from Ms. Smith and Ms. Jones, its former members and its continued neighbors in the very same apartment house.

Years later it is easy to chuckle over this kind of dispute. But while it was going on Ms. Smith and Ms. Jones felt very threatened in their own home. Ultimately, after two years of litigation in our home court, the Queens County Supreme Court in Jamaica, New York reason prevailed and Mr. Manaic's lawyers were able to convince him to withdraw the Co-op Board's Complaint.

Accomplishing this objective on behalf of Ms. Smith and Ms. Jones required numerous Court appearances for Motion practice seeking to dismiss the Complaint. We of course submitted an Affidavit of our clients. We were also able to obtain an Affidavit from a different member of the Co-op Board, Ms. Blue, who testified that the entire litigation was wrongful, and that the Co-op Board never was missing any of its records.

We were also able to obtain an Affidavit from the former Treasurer of the Co-op Board Mr. Auditor, who stated that he made a Motion at a Board meeting of the Co-op Board to have the Complaint dropped, but this Motion was never entertained and not put to a vote.

Throughout the two years we litigated this case, we were in continual contact with our adversaries, Mr. Reasonable and Ms. Peacemaker. We were finally able to convince them that the Co-op Board's Complaint should be dropped.

Lesson: The lesson in all of this is as follows: Living together in crowded apartment houses is never an easy task. When there is a commercial landlord, he or she rules as if he or she were an Absolute Monarch. However, once a Co-op Board or Condominium Board has been established, we now have democracy between neighbors. A Cooperative or Condominium apartment house is much more like a suburban village or town then it is like a rental building in the City of New York. In suburban villages and towns, there are politics and personalities and elections and the democratic way of life prevails.

Despite the experience of this type of case as listed above, Co-op and Condominium Boards are a much better way to live than the rental apartment buildings where owner is King or Queen. On a Co-op Board or a Condominium Board members are elected to pass rules much like legislation that governs the lives of their neighbors.

Chief Judge Kaye has instructed us in Levandusky v. One Fifth Ave. Apartment Corp., cited above, that a Co-op Board or a Condominium association "is a quasi-government – a little democratic sub society of necessity." For this piece of judicial philosophy, Judge Kaye quoted from an opinion of the Florida District Court of Appeals, Hidden Harbour Estates v. Norman cited above. Chief Judge Kaye went on to instruct us that a Co-op Board or Condominium Association is "like a municipal government, such governing Boards are responsible for running the day-to day affairs of the cooperative and to that end, have broad powers …"

This is all worthwhile remembering when approaching a case of this type. The lawyer involved on either side is not dealing with the ordinary business corporation whatsoever at all. Even though the New York Business Corporation Law (BCL) may technically govern, one is now deep in the subject of local politics.

In New York City terms, dealing with the Co-op Board is much more similar to dealing with a Community Board or with the New York City Council itself. However, because New York City is so large and contains five counties within it, the distance between a citizen and his or her local government is very far indeed. A New York City resident views the City Council as similar to the State Legislature or the United States Congress itself.

Not so inside of a Cooperative apartment house Board or Condominium Association. With Co-op and Condominium Boards, we are dealing with a very similar situation as to a suburban Village Board or Town Board. The politics of who supports whom and why must be taken into consideration. There are factions that are similar to political parties on a Co-op Board or Condominium Board that must be dealt with.

The entire mindset in a Co-op Board or Condominium conflict situation must be different. In rental apartment houses, a fight between neighbors and/or with the superintendent and/or with the landlord may wind up in the police station. On a Co-op Board, it is we members of the Bar and our Court system who must resolve the dispute. As wise lawyers have always said: "The more lawyers you have, the less police officers you need." This is never more true than in the Co-op Board or Condominium Board case. Upon reflection, it is clear that the Court system is a far better place to resolve disputes between neighbors than the police station.

BY PAUL E. KERSON
EDITOR

IMMIGRATION QUESTIONS

Allen E. Kaye

Joseph DeFelice

Green Cards Through Investment

For foreign investors looking for freedom and flexibility to live and work in the United States in a way accommodating to their lifestyles, the EB-5 investor category can provide an excellent opportunity to accomplish this goal through the obtaining of Green Cards (Lawful permanent resident status).

There are two EB-5 programs, The Regular program where the foreign investor makes his own investment and will be responsible for directly creating 10 full time jobs himself and a Regional Center program which is under the control of a Regional Center and which usually rely upon an economist's projection to prove that the mere fact of the investor's investment, standing alone, is sufficient to establish that the 10 jobs have been indirectly created, thus making much simpler the difficult problem of proving that one has created 10 full time jobs. Both have three basic requirements:

1. Investment in a new commercial enterprise;

2. Investment of $900,000 to $1,800,000 (depending on the location of the business) into the business, and;

3. Creation of employment for at least 10 full-time U.S. workers

The investment may consist of the contribution of various forms of capital, including cash, equipment, inventory, property, or other tangible equivalents. The general requirement is that one invest $1,800,000 but one may be able to invest $900,000 if the business is in a "targeted" employment area where the rate of unemployment is 150 % per cent of the national average rate or a rural area, as designated by the U.S. Office of Management and Budget.

As noted above, the distinguishing characteristic of the Regional Center program is that it permits an investor to satisfy the job creation requirement "indirectly" by allowing an investor to prove through economic projection that their investment will ultimately create 10 additional jobs without needing to prove that the job were actually created.

The EB-5 program requires at a minimum that the investor be actively involved in the management of the company, but that requirement can be satisfied simply by making him a limited partner, with all the rights of such under the "Uniform Limited Partnership Act."

Regardless of how he invests, the investor is not required to live at the place of investment. He or she can live wherever he or she wishes in the United States.

Regional Center programs frequently involves purchasing low-yielding industrial properties with invested funds and converting them into mortgage free higher-value commercial properties. Various programs may feature a hotel, office space, retail shops, farms or storage space. Investors participate as limited partners of a limited partnership but are seldom paid a return of over 1% per year regardless of how profitable the business the investors finance turn out to be. If all goes well the investor will be repaid his investment after 5-6 years, assuming that by that time he has completed his 2 years of "conditional residence".

The procedure for filing an EB-5 Investor Green Card petition is relatively straightforward when a Regional Center program is used. The investor must present evidence that traces the funds through bank transfers and other documentation, from the investor directly to the enterprise. The money can be acquired through income as documented by tax returns or other records, or in the form of a loan or gift. A parent could make a gift to a son or daughter who could then invest the funds. Alternatively, the money can be acquired through a mortgage on one's home. However, currently it is the position of the USCIS that any loan must be 100% secured by investor's assets (not including the investment upon which he is seeking EB-5 status). This requirement has been challenged successfully in federal court, but the USCIS continues to adhere to it.

After the investor completes a thorough business and financial due diligence analysis of the viability of the Regional Center business opportunity, the investment is made, and a petition is filed by him with the USCIS. Currently the USCIS estimates that it is taking 32-49 months to adjudicate a petition to classify one as an EB-5 investor. Even then, unfortunately, one is not assured of being able to take the next step in the permanent residency process. Rather, one must first check the Visa Bulletin which is posted each month by the Department of State on the internet. Only if the Visa Bulletin indicates a "C" for the EB-5 category and the investor's country of chargeability , or a date which is LATER than the date the investor's I-526 was properly filed with the USCIS (called his "priority date") may the investor take the next step in his case as described below. Otherwise he will be stuck until the visa cut-off becomes later than his priority date.

Currently (as of February 2020) the visa cut-off date for EB-5 for most "countries of chargeability "is "C". However, investors whose country of chargeability are China, India and Vietnam have visa cut off dates of December 1, 2014, September 1, 2018 and December 15, 2016, respectively. Those investors with a priority date of those dates or later are stuck until those visas cut off dates become later than their priority date.

Country of chargeability is generally determined by one country of birth, not citizenship. However, if one is married, one may use one's spouse's country of chargeability. Also, if you were born in country in which neither of your parents were resident, you may use either parent's country of chargeability.

If the investor is already in the United States when his petition is approved AND his priority date is earlier than the applicable visa cut-off date (or it is "C"), he then applies for U.S. permanent residency ("Green Card") by filing Form I-485. Processing times for such applications vary widely depending on the investor's place of residence, with investors in New York facing a waiting period of 17 to 30 months. If the investor resides abroad, an application for an immigrant visa in filed in the investor's place of (lawful) residence, with decisions in these overseas cases taking an average of about 12 months. Upon adjustment of status or admission to the U.S. with an immigrant visa one becomes a conditional permanent resident. One will then shortly receive a Resident Alien card in the mail conferring one all the rights of U.S. permanent residency, including the ability to petition for sons and daughters or spouses, but valid for only 2 years.

One's existing spouse and minor children also receive condition permanent residency with the investor. However, if the child turns 21 while the case is pending then he or she may not be eligible to get permanent residency with his or her parent. Unfortunately, due to the unpredictable movement of the visa cut off dates, it is often quite difficult to predict whether older children will ultimately be able to immigrate at the same time as their parents, particularly if the parents were (both) born in India, China and Vietnam. Such situations must be carefully analyzed on a case by case basis. Also, all children lose their right to immigrate with their parents if they marry before immigrating to the U.S.

Between 21 and 24 months after the conditional permanent residency has been approved, the investor must reconfirm that the investment has been made and is still in place and that the employment requirement has been fulfilled or maintained. A Form I-829, application to remove the conditional status, is then filed with the USCIS allowing the two-year card to be extended.

Once the condition has been removed, a full Green Card is valid as long as the investor resides in the United States (but subject to a routine renewal process every 10 years just as any Green Card is). One may liquidate one's investment once the form I-829 is filed.

In summary, freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities, priority standing within the immigration process, and an accelerated path to Green Card status are important factors which make the EB-5 Green Card Regional Center category an ideal investment vehicle for investors who wish to live and work in the United States.

As with other Immigrant Visas, applicants need to take into account U.S. and foreign tax and business and personal planning considerations.

BY ALLEN E. KAYE AND JOSEPH DEFELICE

Allen E. Kaye and Joseph DeFelice are Co-Chairs of the Immigration and Naturalization Committee of the Queens County Bar Association.

New York's Bail Legislation Explained

CONTINUED FROM PAGE 1

Violent felony designations include murder, manslaughter in the first degree and aggravated manslaughter, kidnapping, robbery and burglary in the first degrees, rape in the first and second degrees, strangulation in the first and second degrees, assault in the first and second degrees arson in the second degree and terrorism. Not surprisingly, all felonies designated as violent are bail qualifying offenses.

Among the issues precipitated by this legislation is that dangerous people will be summarily released. Perhaps so, but such release is not solely attributable to the new law. New York's bail law has never permitted consideration of whether a person charged with a crime poses a danger to the community or risk of re-offending (see Criminal Procedure Law § 510.30). CPL 510.30 does not, in either its original or amended form, include danger as a factor in bail determinations. Understandably, this causes one pause. Indeed, it seems strange and is counterintuitive. It is also rare. In fact, of the fifty states, only New York, Arkansas and Pennsylvania preclude its consideration. Of the reasons offered, the most prevalent is that it has disparate racial and socio-economic application. Another is that it is tantamount to preventive detention—incarceration prior conviction to eliminate the risk of re-offending. Preventative detention, in its purest form, is a constitutional anathema. Bail, as it were, is intended solely to insure a person's return to court not indiscriminately incarcerate to prevent recidivism.

Even in conjunction with other factors, authority governing bail decisions does not permit consideration of a person's danger or risk of re-offending. Rather, bail determinations have been and continue to be exclusively based on the likelihood a person charged with a crime will return to court. Factors to be considered in making such determinations include the nature of the charges, a person's record of criminal convictions, record of failing to return to court, financial ability to post bail, violation of family orders of protection, prior possession or use of firearms, and overall activities and history. Whether or not societal threat should be a factor to consider in bail decisions is a continued source of debate. But unless and until the legislature acts to include it in CPL 510.30, bail determinations must be based solely on the likelihood of returning to court. As such, imposition of bail is not necessarily a foregone conclusion even for qualifying offenses.

That said, the new legislation has yielded several perplexing results. In the realm of prior felony convictions, persons charged with a felony after having previously been convicted of a felony within the past ten years plus any time spent in jail. Predicate felons, as they are classified, are exposed to a mandatory state prison term, which means they would not be eligible for a non-incarceratory sentence such as probation. If both the previous and charged felonies are designated as violent, state prison exposure is significantly enhanced. And, two prior violent felony convictions within 10 years renders a person subject to life in prison as a mandatory persistent felon. Misdemeanors, however, have no predicate designation and never serve as a basis for sentence enhancement. For instance, 76 prior misdemeanor convictions would have little or no effect on another misdemeanor conviction. Still, this legislation provides neither an exemption nor the discretion to consider bail for predicate, violent predicate or mandatory persistent felons when charged with non-qualifying offenses.

Other abnormalities include robbery in the second degree (aided by another) and burglary in the second degree (dwelling), both of which are non-qualifying offenses for bail despite being designated as violent felonies. Strangely, though, an attempt of these crimes is a qualifying offense (emphasis supplied). Making a terroristic threat, also a violent felony offense, is specifically exempted from being a qualified offense. Drug offenses, possession, sale and trafficking, even involving substantial quantities, are non-qualifying offenses. And, inexplicably, bail is now prohibited even for the crime of bail jumping, an offense charged for failing to return to court.

The legislation does, however, permit the imposition of bail for certain non-violent felonies as qualifying offenses. Such crimes include manslaughter in the second degree, criminal sexual act in the third degree, aggravated criminal contempt, criminal contempt in the first degree, incest third degree, luring a child, tampering with a witness in the first, second and third degrees, intimidating a victim or witness in the first, second and third degrees. Bail qualifying misdemeanor offenses include sexual abuse in the second and third degrees, sexual misconduct, forcible touching and criminal contempt in the second degree for violating family orders of protection.

The advent of this legislation has certainly sparked public debate. But having a meaningful conversation about it is impossible without fully and properly understanding the law and the changes it brings.

Judge David J. Kirschner is a Judge of the Queens County Criminal Court.

QUEENS COUNTY BAR ASSOCIATION
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BREAKIN' UP IS HARD TO DO:

BASICS OF BUSINESS DISSOLUTION

Thursday, April 23, 2020 6:00 pm - 8:00 pm

Light Dinner Sponsored by: FARRELLFRITZ ATTORNEYS

MODERATOR: SAMUEL B. FREED, ESQ., *Co-Chair, Real Property Committee*

SPEAKERS:

MATTHEW D. DONOVAN, ESQ.
Commercial Litigation; Business Divorce
PARTNER, FARRELL FRITZ, P.C.
New York City

FRANKLIN C. MCROBERTS, ESQ.
Commercial Litigation; Business Divorce
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Held at: QCBA

TOPICS:

- Common Business Divorce Issues and Owner Grievances
- Business Forms and Governing Law
- Partnership Withdrawal
- Dissolution Proceedings under BCL and LLCL
- Other Common Proceedings
- Other Remedies / Relief

COST: $ 70.00 – Members *(Students-Free)* **$ 120.00 –** Non-Members ***DVD will be available***

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The Criminal Court Committee presents

Discovery and Speedy Trial Law

Tuesday, March 10, 2020 1:00 pm – 2:00 pm

HELD AT:
Queens Criminal Courthouse, 8th Floor Conference Rm
125-01 Queens Blvd, Kew Gardens, NY 11415

MODERATOR:
GARY F. MIRET ESQ., *Co-Chair, Criminal Law Committee*

PRESENTER:
CHRISTOPHER WHITEHAIR, ESQ., *Supervising Attorney*
Queens Defenders (FORMERLY Queens Law Associates)

TOPIC:
Discussion on Discovery and 30:30 consequences in Queens Criminal Court.

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HELD AT:
Queens Criminal Courthouse

Cost for those that pre-register and pre-pay at least one day before the CLE:
$ 35.00 – Members; (**Free –** Students)
$ 85.00 – Non-Members;
+ $10 for walk in/ day of registration

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Materials will be sent via email.

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Professional Ethics Committee presents

ANNUAL ETHICS UPDATE 2020

A Review of Key Cases and Ethics Opinions

Wednesday, March 11, 2020 5:30 pm - 9:15 pm

SPONSORED BY:
JUDICIAL TITLE

MODERATOR: RICHARD MICHAEL GUTIERREZ, *Chair, Professional Ethics Committee*

PRESENTERS:

ANDREA E. BONINA, ESQ.
Andrea E. Bonina is the managing partner in the firm Bonina and Bonina, P.C. where she concentrates almost exclusively on significant plaintiff's personal injury cases. Ms. Bonina is a frequent lecturer on litigation and practice management topics for mandatory continuing legal education, and she has presented lectures on ethics and work/life balance to multiple bar associations throughout the state. She chairs the Brooklyn Bar Association Audit Committee and is an arbitrator in the Part 137 fee dispute program. Ms. Bonina is the current Chair for the State of New York Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts.

CLIFFORD S. ROBERT, ESQ.
Clifford S. Robert is the principal of Robert & Robert, PLLC, where he concentrates in the area of trials and litigation in both state and federal court involving a variety of commercial disputes, business dissolutions, shareholder disputes, business torts, insurance coverage, civil litigation, corporate governance, derivative actions and matters involving serious and catastrophic injury. Mr. Robert lectures widely on ethics and professional responsibility matters and is a member of the Board of Directors of the New York State Academy of Trial Lawyers.

MICHAEL S. ROSS, ESQ.
Michael S. Ross is the principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York and also served as an Assistant District Attorney in Kings County. Mr. Ross has been an Adjunct Professor at the Benjamin N. Cardozo School of Law for forty years, and has taught a variety courses in Criminal and Civil Litigation; Appellate Advocacy; Judicial Administration; and Professional Responsibility. Mr. Ross currently teaches Litigation Ethics at Cardozo Law School and, for the last fourteen years, he has taught Professional Responsibility at Brooklyn Law School. Mr. Ross has lectured widely on ethics-related topics to organizations such as the American Bar Association, the Appellate Divisions of the First, Second and Third Judicial Departments, the Association of the Bar of the City of New York, the National Institute of Trial Advocacy, the New York State Bar Association and the New York State Academy of Trial Lawyers.

CLE Credit:
4.0 in Ethics
Transitional Course – Valid for All Attorneys
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HELD AT: QCBA
Light Refreshments will be available from 4:30pm to 5:30pm & during break.
FREE PARKING: Available on a first serve basis at 148-15 89th Ave between 148th & 150th Sts.

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PROGRAM: This comprehensive four credit program will address recent developments concerning a broad range of ethics-related issues including attorney-client privilege and confidentiality obligations; conflicts of interests; attorney fees and third-party funding agreements; attorney sanctions and misconduct issues; ethics and the criminal law practitioner; and social media implications for attorneys.

RSVP: Ethics Update 3/11/2020 **MAIL:** QCBA, 90-35 148th St, Jamaica, NY 11435 **FAX:** 718-657-1789 **EMAIL:** CLE@QCBA.ORG

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Marie-Eleana First, President

Civil Court Committee and Supreme Court Committee presents

MEET THE NEW SUPERVISING JUDGE OF THE CIVIL COURT, QUEENS COUNTY

Hon. Tracy Catapano-Fox

Wednesday, March 18, 2020 1:00 PM - 2:00 PM

Light Lunch Will Be Available After 12:00 PM

SPONSORED BY: NAM NATIONAL ARBITRATION AND MEDIATION

MODERATOR: Hamid M. Siddiqui, Esq.
Chair, Civil Court Committee

PROGRAM: How to Practice in The Civil Court, Queens County

MEMBER: $ 35.00 *(Free – Student Members)*
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+ $15 for walk in/ day of registration.

HELD AT: QCBA, 90-35 148th St, Jamaica NY 11435.
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Marie-Eleana First, President

MARCH MANIA
HAPPY HOUR & MIXER

HOSTED BY:
Law School Liaison Committee
Young Lawyers Committee
Professional Development Committee
Bar Panels Committee
Family Court Committee

Thursday, March 26, 2020
6:00 pm - 9:00 pm

Austin's Ale House
8270 Austin St, Kew Gardens, NY 11415
$20 members / $30 non-members
Includes appetizers and drinks
Registration & payment must be received by March 25th

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QUEENS COUNTY BAR ASSOCIATION

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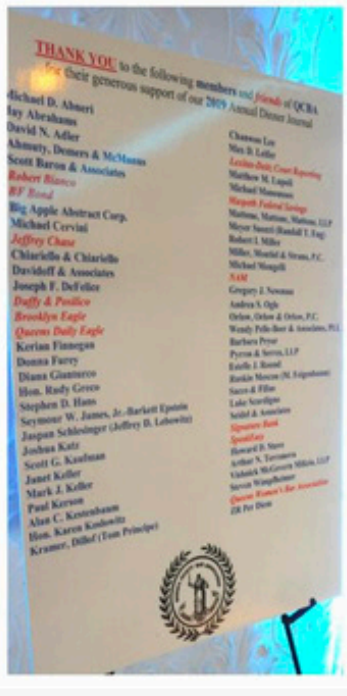
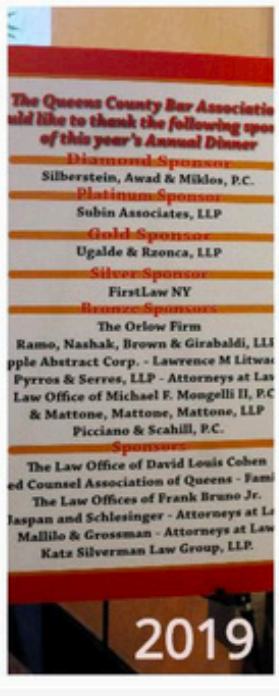
Judiciary, Past Presidents & Golden Jubilarian 2020

Tuesday, March 31st

Time: 5:30 pm
Location: Queens County Bar Association





143rd Annual Dinner and Installation of Officers & Managers

Thursday, May 7th

Time: 6:00 pm
Location: Terrace on the Park

THE PRACTICE PAGE

New Statutory Law On Standing

A statutory amendment to the Real Property Actions and Proceedings Law (RPAPL) has nullified a significant body of case law throughout the State on New York on the issue of standing. The amendment adds to the RPAPL an entirely new section, 1302-a. Until this new statutory section, standing in any action was an affirmative defense that needed to be raised in an answer or a motion to dismiss, otherwise it was waived. The new RPAPL 1302-a provides that in qualifying residential foreclosure actions, a defendant's failure to raise standing as a defense in a responsive pleading does not constitute a waiver. Some observations:

First, the amendment was not placed within the CPLR that would govern all actions generally, but only in the RPAPL. RPAPL 1302-a applies only to foreclosure actions involving "home loans" as defined by RPAPL 1304(6), but not to any other foreclosure or non-foreclosure actions. The amendment therefore creates an odd dichotomy, that the failure to raise standing does not waive the defense in "home loan" foreclosure actions, but it is waived in all other litigations. The procedural rules of standing therefore now vary depending on the nature of the litigation.

Second, the definition of "home loan" in RPAPL 1304(6) was to scheduled to change as of January 14, 2020, as its predecessor definition was subject to a sunset. However, the sunset provision that was to take effect on January 14, 2020 has itself been repealed by the state legislature. Therefore, the version of RPAPL 1304(6) that was to take effect on January 14, 2020, including its definition of a "home loan," will never take effect, and the incumbent version that has been in effect continues as the controlling definitional statute.

Third, since the law became effective on the date it was signed, it applies not only to future foreclosure actions, but to actions already pending in the courts. A change in the law is a recognized basis for motions to renew under CPLR 2221(e), so defendants in pending cases who have lost standing arguments, on account of waiver, may now move to renew those earlier applications. Some dispositions may be delayed.

Fourth. If a foreclosure defendant files a motion to dismiss on grounds other than standing, and is unsuccessful, a logical construction of the new statute is that the defendant may then include standing as an affirmative defense in the answer that follows. The affirmative defense would be of relevance to any later motion for summary judgment under CPLR 3212 or at trial.

Fifth, RPAPL 1302-a provides that the standing defense is waived if the action has already resulted in a foreclosure sale, except when the judgment was rendered on the default of the defendant. Defendants may therefore seek to vacate their defaults, even after the property has been foreclosed upon and sold. The vacatur of defaults generally requires a two-pronged showing, that the moving party has a reasonable excuse for not having timely appeared in the action, and a potentially meritorious defense. Under RPAPL 1302-a, an alleged lack of standing may now be used as the meritorious defense, which nullifies statewide case law that held to the contrary.

Finally, because of the new statute, some homeowner counsels may seek leave to amend their clients' answers to add standing as an affirmative defense. Trial courts should still have discretion to grant or deny such motions, which shall be freely granted under CPLR 3025, but which may be denied if the late assertion causes undue prejudice to an adversary party or if the proposed amendment is patently devoid of merit. RPAPL 1302-a permits the later assertion of the defense, but says nothing about its merits. There is nothing procedurally "wrong" with courts finding the defense devoid of merit, or unduly prejudicial, when determining the motions.

HON. MARK C. DILLON

Justice Mark C. Dillon is a Justice of the Appellate Division, Second Department.

Immigration Updates 2020

Since President Trump took office there have many changes in the way United States Citizenship and Immigration Services (USCIS) operates and to the practice of immigration law as a whole. This year brings many more changes to immigration specifically as it relates to employment visas, DACA holders, and immigrants in the U.S. under Temporary Protective Status (TPS).

Receiving approval for an H-1B and L-1 visa without getting a Request for Evidence (RFE) has been difficult, and it does not seem like it will get easier any time soon. In March, USCIS will begin an electronic registration system for employers who wish to obtain H-1B visas for their employees. This system will require petitioning companies to submit information on the company and professionals they want to apply for in the H-1B lottery for the following fiscal year. There is a $10 fee for each employer during registration.

The new electronic registration system is expected to cause some confusion and possibly hysteria because this is the first year of implementation and most, including some in government don't really understand the process and how it will work in practical terms. Congress has mandated a cap of 65,000 for the number of H-1B visas that may be granted every year, but there is also an addition to the H-1B cap for beneficiaries who have a U.S. master's degree or higher with 20,000 more visas available to them. There is one exception that applies to the 65,000 cap, 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 program for individuals from Chile and Singapore. For any of those visas not used for H1B1s they are added to the general H1B general cap. However, in practice because H1B1 visas can be used throughout the year, and the announcement for H1bs comes usually within the first three months after the April first filing date, these extra visas unused rarely get utilized and are ultimately lost.

As it relates to employment visas USCIS plans to announce a new rule that defines what qualifies as a "specialty occupation" and what "employment" and "employer-employee relationship" means.

In March 2020 a proposed rule is set to come out which will change an existing regulation that gives permission for many spouses of H-1B visa holders, who have permanent resident applications pending or approved but waiting for visas numbers to become available to have employment authorization documents and be allowed to work.

In additional the Trump administration is proposing to add more restrictions on international students. They are looking into revising the Optional Practical Training program and instead establishing a set maximum period of authorized stay for students as opposed to the current "duration of status." There has already been a 10% decrease in the number of international students who enrolled into schools here in the U.S. between the 2018-2019 academic year and if the new restrictions go into effect that percentage is likely to increase.

Applicants applying for citizenship and other immigration benefits should be prepared for significant fee increases. There has also been a new rule and definition of what qualifies as "Good Moral Character". Potential citizenship applicants should seriously consider consulting a qualified immigration attorney if they have any doubts on eligibility.

In addition, the wait time for an immigrant visa interview continues to increase, depending on which embassy an applicant must go to for their interview there may be a wait of several months until the next available interview date. However, DACA applications are being processed quicker and some applicants receive decisions within four weeks.

This year brings lots of changes and speculation, but with the right observations and some strategic planning, US immigration and visa applications are viable options for individuals seeking to come and stay.

DEV BANAD VISWANATH, ESQ.

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☐ **I wish to update my Membership Information and/or Committee listing (reverse side).**

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2019-2020

QUEENS COUNTY BAR ASSOCIATION

LAWYER REFFERAL SERVICE

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First *Middle* *Last*

Firm Name: _____ Practice consists of: ___Trial work ___Office work

Address: _____

Telephone number(s): _____ E-Mail: _____

Date of Admission to the NYS Bar_____ Admission to Other Jurisdictions_____

List two attorneys or judges (*none of whom are my present partners and associates*) who have knowledge of professional work and ability:

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Languages other than English that you speak fluently:_____ or Office offers translation:_____

I will accept cases in the area(s) checked below (limit to five). I consider myself competent in such areas. Please indicate any specialties or exclusions within area of law.

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Date of Application: Signature of Applicant