Queens BAR BULLETIN

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Spring Brings Hope

By Clifford M. Welden

One year ago this week I sat in a packed TAP courtroom on the second floor of the Sutphin Boulevard courthouse waiting for my three cases to be called. The Supreme Court regulars were all grouped together in the last few rows by the window where we have been assembling for the last 30 years and the talk was about how crazy it was for us to all be packed in together and when the Office of Court Administration was going to cut back on the number of cases on the daily calendar. Social distancing was unheard of. Masks were unheard of. It was for all practical purposes business as usual and many were nervous as the pandemic spread across the state. Every night we watched the news and learned of horror stories regarding how this virus was suddenly taking lives and there was no indication from senior court officials that they intended to change procedures.

On April 8th the Daily News ran a story with pictures taken in the Brooklyn TAP courtroom on March 12th that showed us that what we were experiencing in Queens was much the same there. Judges were being told to conduct business as usual and that they were just following orders from above. Those orders resulted in the deaths of several judges and one of them was in that courtroom that day in Brooklyn. Judge Baynes had been assigned to Queens for a short time and many of us appeared before him. He was a nice man and a good judge. One of the Queens regulars entered a hospital around the 13th and did not return home for 200 days. On the 16th we finally got the word that OCA was going to suspend in-person court operations and we collectively breathed a sigh of relief as many of our members began to work from home.

A year later and the vaccine has rolled out to those 60 years of age and older and those with underlying comorbidities. In the courts OCA has gone to great lengths to redesign a legal system in New York that incorporates the virtual platforms. Many of us have learned to conduct depositions and attend court appearances on our laptops and the consensus among most is that they are getting more work done in less time. Our Queens Judges under the leadership of Judge Zayas and Judge Grays have been great ambassadors in supporting these directives and have gone out of their way to inform us of changes as they are rolled out. Both Administrative Judges have appeared in meetings with our committee chairs who then have been relaying these changes to you. It has been nice to see old friends on these virtual motion calendar calls and at our monthly committee meetings and virtual cle seminars.

On March 22nd we will begin the second stage of in person appearances in both the criminal and civil courts when jurors return to the building. We have been told that they will be looking for attorneys to volunteer to begin these trials. Juror notices have been mailed out and they will be asked to serve their community. They will not be tested as they enter the buildings. They will be asked several questions and will have their temperature taken. They will not be asked if they live at home with family members who the CDC would consider to be `at risk' individuals. This is done in an effort to move cases that are the oldest in the courts. We are told that there will be enough vaccine for everyone in the country by June. To that end on March 1st we wrote to Governor Cuomo and Chief Judge asking that the jury rollout be delayed until a larger percentage of our jury pool is vaccinated. I also asked that they deem our Judges and court personnel as essential workers so that they can receive their vaccinations now so that when in-person appearances return the vaccine will be fully effective. I have not heard back from either of them.

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QUEENS COUNTY BAR ASSOCIATION

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 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

FEBRUARY 2021

Tuesday, February 2	CLE: Remote Depositions-Reflections on What Works & What Does Not - 1:00 pm
Wednesday, February 10	Elder Law Committee Mtg - 2:30 pm
Friday, February 12	Lincoln's Birthday - Office Closed
Monday, February 15	President's Day - Office Closed
Tuesday, February 16	Academy of Law Comm Mtg - 1:00 pm

MARCH 2021

Tuesday, March 16	Academy of Law Comm Mtg
Monday, March, 22	Celebrating Women in the Law Past and Present - 1:00 pm
Wednesday, March 24	CLE: Discovery

Upcoming Seminars
Guardianship Training

New Members

Christina Anziano
Patrick D. Conway
Luciane S. de Andrade
Alexander Davis
Giuseppe G. LoBrutto
Lionel Lumas
Daniel A. Rudolf
Ahlam Rafita
Johanna Sanders

Spring Has Arrived

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Bar Business:

The search for the Executive Director returned close to 100 inquiries and the search committee is going to begin interviewing several candidates beginning March 16th. Filling Arthur Terranova's shoes will not be an easy but we feel that there are several solid candidates who may work out well with the Bar during this transitional period in the practice of law and our association. Our diversity committee will be holding the inaugural "Celebration of Diversity in the Courts" on March 18th at 6pm featuring several of our sitting judges. The 24th brings the Criminal Courts Committee CLE on Discovery issues. Moving into April we will have the first of a two-part Equitable Distribution Update on the 15th sponsored by our new partner HFM Valuations and Consulting Services. The Second update will be on April 22nd and is sponsored by East Coast Appraisal which is a longtime partner of the Bar association. Strategically placed between these two Equitable Distribution presentations on April 19th will be the Annual Judiciary, Past Presidents and Golden Jubilarian Night where we will honor those who have given so much to our Queens County legal community. On February 15th the Gestational Surrogacy Law became effective in New York. Gestational surrogacy is when an embryo is created by in vitro fertilization, where an egg is fertilized by sperm in a test tube or outside the body, and is implanted in a paid surrogate who will then deliver the baby. Gestational surrogacy was banned for many years and originally stemmed from the "Baby M" case in New Jersey where a surrogate named Mary Beth Whitehead agreed to carry a child for $10,000.00. After the baby was born the surrogate refused to sign away her parental rights. A court ruled that such a contract was illegal and awarded custody to her and visitation rights. The subsequent ban in New York created problems for couples with fertility issues and LGBTQ couples. Board members Josh Katz and Deborah Garibaldi will lead the discussion on the ramifications of the recently passed law which provides women acting as surrogates with legal and health protections and protects intended parents and egg donors. It will touch upon the criteria for surrogacy agreements and the Surrogate's Bill of Rights.

For safety's sake we have put off our Annual Dinner in May but we will have it later in the year during the month of October when it is expected that most will have been able to obtain the Covid vaccination. A virtual instillation is planned for June 1 that will suffice until we can meet together as one group. We are also going forward with September golf outing at Garden City Country Club on Stewart Avenue. David Cohen the long-time chair of this event has confirmed that the club is ready to abide by all safety guidelines and is looking forward to welcoming us back once again.

Please stay safe, enjoy the upcoming holidays and I hope to see you in one of our presentations.

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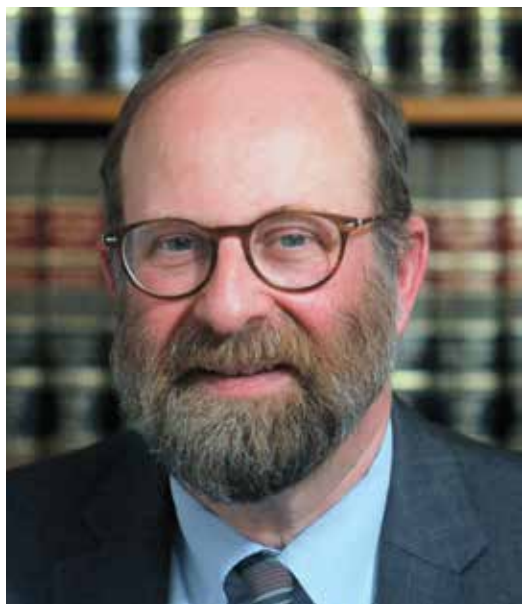

Editor's Note

Meet our New Government and Spiritual Home — ICANN

By Paul E. Kerson

The Roman Empire fell. Or did it? They had no separation of church and state. Yet the Roman Catholic (universal) Church continues around the world.

The British Empire fell. Or did it? The United Kingdom and British Commonwealth countries also do not have separation of church and state. Yet the Anglican Church continues around the world.

The Kingdom of Israel fell multiple times. The current State of Israel also does not have separation of synagogue and state. Yet Jewish communities continue around the world despite a sad history of oppression, destruction and death.

The current United States Federal Government in Washington, DC reached the peak of its military power relative to the rest of the world in 1945. Its embassies reached around the globe, and still do today.

Its Department of Defense (DOD) wanted a new system of guidance to link its computers to guide its most powerful atomic weapons. DOD's Advanced Research Projects Agency (ARPA) was born in 1958.

Computers were then in their infancy. They took up entire rooms, and were monumentally slow by today's standards. A search that today takes fractions of a second then took all day.

Ten years later, in 1968, DOD's ARPA decided to fund the computer scientists at the University of California, Los Angeles (UCLA), Stanford University's Stanford Research Institute (SRI), the University of California, Santa Barbara (UCSB) and the University of Utah.

The idea was to try to electronically link the UCLA, SRI, UCSB, and Utah computers so the computers themselves could exchange information, thus cutting down the time it took to search in each computer by using underutilized time in the other three linked computers among all four.

UCLA's Prof. Leonard Kleinrock, Charley Kline, SRI's Bill Duvall, Steve Crocker and Vint Cerf were the pioneers. On Oct. 29, 1969, Charley tried to type "Login" but only got to L-O before the whole thing crashed. They worked out the bugs. Soon after, SRI's Doug Engelbart introduced the mouse, hypertext and graphics.

The Internet was born. It linked only four massive computers in four universities in California and Utah. It was initially called ARPANET, after the DOD agency that funded it.

To work out the inevitable conflicts and turf wars, Steve Crocker came up with a method. Any necessary corrections required a "Request for Comment" to be circulated among all four university computer science departments. Then the problem noted would be talked out until a solution was reached. See Jeff Ball, The Tangled Web We Weave — Inside the Shadow System that Shapes the Internet, Melville House Publishing, Brooklyn, NY and London, 2020, pages 13-15, 23-24.

Tim Berners-Lee of the Computer Science Departments of Oxford University in England and the Massachusetts Institute of Technology (MIT) in Boston figured out a way to extend ARPANET from military and theoretical uses to ordinary consumer uses in 1989. He called this the World Wide Web (WWW). See Ball, pages 33, 46 and Google, Wikipedia, Tim Berners-Lee.

By 1970, what is today known as the INTERNET had but 10 computers linked. By 1977, it was 100. By 1985, 1000. There were 10,000 linked computers by 1987, and 100,000 by 1990. This expansion reached one million by 1993. Today, in 2021, half the world's population has personal computers or cell phones linked to the INTERNET, estimated at 25 to 30 BILLION, or four devices per person. See Ball, page 34.

Since March 2020, our world has been gripped by the Covid-19 pandemic. More and more of Life Itself has migrated to the Internet: Court conferences by Microsoft Teams; Bar Association, church, synagogue and mosque services and family gatherings by Zoom. Even before Covid-19, bank and credit card transactions went on-line; cash has become a rarity.

So who or what governs the Internet, that unfathomable world-wide 25-30 BILLION interconnected Everything Invention of Leonard Kleinrock, Charley Kline, Bill Duvall, Steve Crocker, Vint Cerf, Doug Engelbart and Tim Berners-Lee?

The answer is: ICANN, the Internet Corporation for Assigned Names and Numbers, a California not-for-profit corporation headquartered in Los Angeles, not far from UCLA, where the whole Brand New Internet World started. Jon Postel, who worked on the first ARPANET, was instrumental in founding ICANN in 1998, just 23 years ago. Pioneer Vint Cerf was the first Chair. Fellow visionary Steve Crocker succeeded him.

Since 2016, the Chief Executive Officer of ICANN is Goran Marby, a Swedish regulator. Marby denies being the Most Important Person in the world today. The 303 page By-Laws of ICANN, adopted pursuant to the California State law governing non-profit public benefit corporations, is now our world's set of guiding principles governing the bulk of our court proceedings, religious services, family events and commercial transactions.

Morby admits, however, that the Internet does not have an Off button. It is always there, for every purpose unto heaven. See Ball, page 64-65, 84-85.

The 303 page By-Laws of ICANN are now just as important to our world as the United States Constitution or the United Nations Charter.

Guess who is a Member of ICANN's Governmental Advisory Committee (GAC)?

1. The Holy See, (the Pope, Vatican City),
2. The United Kingdom, including the Queen of England and Defender of the Faith
3. The State of Israel
4. The United States Federal Government
5. The People's Republic of China
6. The Russian Federation
7. 103 additional members of The United Nations,
8. The European Commission,
9. The Cook Islands,
10. Niue
11. Taiwan
12. Hong Kong
13. Montserrat
14. The African Union Commission

ICANN'S GAC Observers include the following:

1. African Telecommunications Union
2. Asia-Pacific Telecommunity
3. Caribbean Telecommunications Union
4. Commonwealth Telecommunications Organization
5. Council of Europe
6. Economic Commission for Africa
7. European Broadcasting Union
8. European Organization of Nuclear Research
9. European Space Agency
10. International Labour Office
11. International Telecommunications Union
12. International Criminal Police Organization (INTERPOL)
13. International Red Cross and Red Crescent Movement
14. Latin American Association of Telecom Regulatory Agencies
15. League of Arab States
16. New Partnership for Africa's Development
17. The Organization for Islamic Cooperation
18. The Organization of American States

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Meet our New Government and Spiritual Home — ICANN

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19. The Organisation Internationale de la Francophonie
20. Pacific Islands Forum
21. Secretariat of the Pacific Community
22. Inter-American Telecommunication Commission
23. International Criminal Court
24. United Nations Educational Scientific and Cultural Organization (UNESCO)
25. Universal Postal Union
26. World Bank
27. World Health Organization
28. World Meteorological Organization
29. World Trade Organization, See Google, Wikipedia, ICANN

In short, THE WHOLE WORLD, including its former Empires and colonies, whether or not triumphant or defeated.

The ICANN By-laws, Article 1, states its Mission, Commitments, and Core Values: "to ensure the stable and secure operation of the Internet's unique indentifier systems"

And the method by which ICANN accomplishes the ongoing conflict over who gets what Internet address? Why they use the original "Request for Comment" method of exactly four computers at UCLA, SCI, UCSB and the University of Utah in 1969.

Big money and fundamental values ride on these decisions. Who got .Amazon? Why was .sucks not assigned initially despite multi-million dollar pressure to do so? Why did Catalonia, the restive province of Spain seeking independence, get .cat and not the cat lovers of the world? See Ball, page 73, Google, .sucks, and Google, Catalonia.

ICANN has established a Uniform Domain Name Dispute Resolution Policy Arbitration procedure (UDRP). The ICANN Arbitrators' written decisions are available on Westlaw, just as if they were in the New York Supplement, Federal Supplement, Federal Reporter or Supreme Court Reporter. If you want an internet domain name from ICANN, you must agree to submit any disputes about it to ICANN's UDRP Arbitrators. See Google, Wikipedia, Uniform Domain-Name Dispute Resolution Policy.

Wait a minute, hold on, you say. This is contrary to everything I know about how the judicial system is structured. When did a California State non-profit corporation get the right to supervise judicial decision-making about the world's most important resource, the Internet, which controls every aspect of our lives now, and can never get turned off?

Isn't the United States Federal Government in charge of this sort of thing? What happened to Article III of the United States Constitution concerning the Federal judiciary?

Originally, DOD was in charge as the funder of the original ARPANET at UCLA, SRI, UCSB and the University of Utah in 1969. DOD handed this off to the U.S. Department of Commerce (DOC), which signed a Memorandum of Understanding (MOU) with ICANN in 1998. This MOU has been amended numerous times since then.

Where is the Government of China in all of this? The 2017 Opinion and Order of Judge Edgardo Ramos of the U.S. District Court for the Southern District of New York in Wiecan Meng v. Xinhuanet Co., Ltd., 2017 WL 3175609 (S.D.N.Y. 2017) gives the answer.

Apparently, one of the Communist China's main publishers, China Xinhua News Agency d/b/a Xinhuanet Co. Ltd., had set up shop in Times Square, New York City, right down the block from the headquarters of The New York Times at 620 Eighth Avenue. They owned 31 local channels and released daily global news in many languages.

Defendant had registered its Internet domain name with ICANN in Los Angeles, Plaintiff, a Chinese resident of Great Neck, NY, registered his similar domain name with Name.com, Inc. Plaintiff also published daily website articles and a hardcopy magazine. Defendant filed a complaint with ICANN's Beijing affiliate pursuant to ICANN's Rules for Uniform Name Dispute Resolution policy. The Arbitrator ruled in favor of Defendant.

The U.S. District Court held that plaintiff's complaint did not make out a case for unfair and deceptive competition under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sections 41-58.

So, China may not allow free speech in its own country, but it does not hesitate to come to our Capital of Free Speech at Times Square, and try to shut down one of its dissidents who had the good sense to emigrate to Great Neck, NY.

But then again, Arbitration is a preferred method of resolving commercial disputes. I have heard our judges tell me that dozens of times. And through a California non-profit corporation, ICANN, we managed to export that idea to Beijing.

The Roman and British Empires did not have world-wide court systems. American Federal Courts do not reach the whole world. In the United Nations' International Court of Justice in The Hague, Netherlands, only nation-states can be litigants. But California's ICANN has managed to establish a world-wide mandatory court system for every individual and company with a domain name. Given current trends, that will soon be every individual soul and group of souls on this earth.

So, as Bud Abbott and Lou Costello of Paterson, New Jersey would say, "Who's on first?"

I'd say we all are, the whole planet.

This series of highly unlikely events shows that a significant part of our United States Federal Government has been moved from Washington, DC into a California State non-profit public benefit corporation with worldwide power, ICANN. These developments show that it is not China that will ever supplant Washington's power — it is California that has already done that.

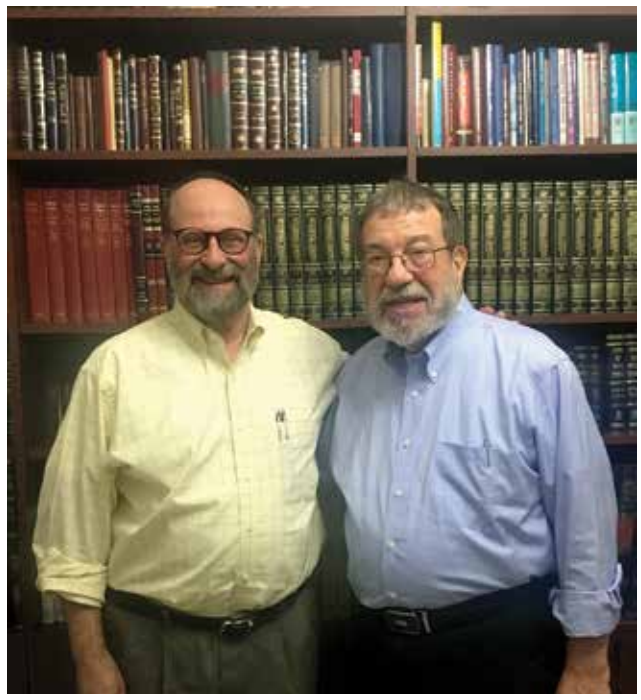
Here is where we are today: ICANN represents a tectonic shift in the meaning of national government. California, operating through its non-profit corporation, ICANN, is similar to Hong Kong and Taiwan. All three now act internationally, despite a larger national government that claims to be on top.

Colleges and Law Schools — time to revamp the curriculum and teach ICANN's California State Bylaws as equally significant as the United States Constitution and the United Nations Charter. Or did you think the Internet was a joke?

Try turning it off.

"He shall judge between the nations and shall settle the arguments for many peoples; they shall beat their swords into plowshares and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war more." Isaiah 2:3-4 (from the Old Testament, the Hebrew Bible)

Really? "He shall judge between the nations, and shall settle the arguments for many peoples" — Did He mean the ICANN Arbitrators, the ones whose decisions are now all on Westlaw — the Arbitrators agreed to by the Holy See, the Defender of the Faith of the Anglican Church, the State of Israel, the United States Federal Government, the People's Republic of China and its two independent provinces Taiwan and Hong Kong, the Russian Federation and everybody else too?



QBB Editor Paul Kerson and Former QBB Editor and Retired Queens County Supreme Court Justice Martin Ritholtz in Jerusalem, Dec. 2019

They all agreed on ICANN's set of Arbitrators?

And the Pentagon, seeking better "guidance" for atomic doomsday weapons started all this?

The Prophet Isaiah called this, sometime between 740 BCE and 686 BCE. See Google, Wikipedia, Isaiah.

I am not making this up. No one person could. I just saw it first.

Former Editor's Note on Editor's Note

Sitting here in Jerusalem, I was tickled pink to receive a phone call from Paul regarding something that he wrote for the Bulletin In effect, he was seeking my opinion as to the proper translation of Isaiah 2:4, which he quotes in the Note. At the end of our animated discussion regarding the substance of his novel thesis regarding the Internet, and ICANN in particular, he asked me to write a few words.

Paul sums up his Note by writing: "I am not making this up. No person could I just saw it." In truth, my dear friend, Paul, like Isaiah, is a visionary. To paraphrase Isaiah 11:2, a Divine Spirit rests upon him- a spirit of wisdom and understanding, a spirit of counsel and strength, a spirit of knowledge....When he visited me here in Jerusalem on Chanuka, December 2019, he revealed to me his vision of a metropolitan railway which would unite middle eastern countries as a means of promoting peace in the region. He eventually sent me the article, which you can surely obtain from him, and which envisioned the Abraham Accords initiative.

There's not much more that I can add. Just, appreciate that Paul's latest note on ICANN, is another testament to his uncanny perspective on our present, and on our future.

The SB-1 Returning Resident Visa- 1 year out is all it takes!

Once an individual is granted permanent residence they are allowed to travel in and out of the U.S. without any problem as long as they are not relinquishing permanent residence or residing abroad which may indicate abandoning Lawful Permanent Residence. Permanent residents who wish to reenter the U.S need to present their green card and passport from their country of citizenship to reenter, as long as the duration of the trip is less than 6 months. Within 6 months, people are generally considered to have taken a vacation or short trip abroad and are returning home to the US.

If the trip is longer than 6 months but shorter than 1 year, the person is considered to be seeking readmission and may be asked questions regarding the trip to see whether or not they have abandoned their residence while abroad. If the duration of the trip is more than one year, and the applicant knew before departing that they would be out of the United States for more than one year, then they may consider applying for a Re-entry permit which will allow them to stay out of the United States for up to two years with the ability to reenter multiple times if needed or just one time within the two year period. However, there are some people, who get caught outside the US and just cannot return before the 1 year is completed. These people generally had no idea that they would need to be out as long as they are or cannot help it to return with one year. Technically speaking, being outside the US for one year or more effectively abandons once green card status.

A permanent resident of the U.S. remained outside of the U.S. for more than one year without obtaining a reentry permit can either go through the entire green card process all over again or they may apply for a returning resident visa also known as a SB-1 visa. With an SB-1 Visa, issued by a consular post, the individual will be able to retain their residence and return to the United States as a Permanent Residence without interruption. To apply for SB-1 visa a returning resident must show proof of the resident's continued unbroken ties to the U.S. and that the trip was extended as a result of events beyond their control. Some examples for reasons why an extended stay abroad was necessary are: illness, death, pregnancy, or permission was not granted to leave the foreign country.

A permanent resident who wants to enter the U.S. after staying abroad for an extended period of time can be eligible for a SB-1 visa if:

• At the time of departure from the U.S. the individual was a lawful permanent resident;

• When leaving the U.S., the individual did not leave with the intention of not coming back;

• When an individual returns to the U.S. after an extended stay abroad, the extended stay was due to circumstances beyond their control and for which they are not responsible for; and

• The individual is eligible for the SB-1 visa in all other aspects.

There are a few individuals who do not need the SB-1 visa even if they have been outside of the U.S for more than two years. They are spouses and children of a member of the U.S. Armed Forces or civilian employees of the U.S. government stationed abroad. If an individual falls within those two categories, then they may use their Permanent Resident Card to enter the U.S. even if it expired.

The processing time for the SB-1 is usually quite quick and decision is given at interview. More recently, in a "covid world", additional steps are required by consular posts which can be done before interview or after interview if the SB-1 is granted. Namely, a new DS-260 and new Police Clearance Certificates, and Possibly a new Immigration Medical. If an individual's application for the SB-1 visa is denied, then they will not be allowed to enter the U.S. again without another valid visa.

AND DEV B. VISWANATH, ESQ.

The Practice Page

Putting Reply Papers In Perspective

Reply papers are usually not the central focus of attorneys engaged in motion practice. The reason is obvious — that the parties' main evidence and arguments have already been placed before the court in the initial moving papers and opposition. This is not to say that reply papers do not have a valuable purpose. They can, and sometimes motions cannot be won without them.

Summary judgment motions have a special rule for replies. As is well known, the proponent of summary judgment on a cause of action or defense must tender evidence in admissible form establishing its prima facie entitlement to judgment as a matter of law. All of the qualifying evidence must be contained in the initial moving papers. The mission of the opposing party is to raise a question of fact requiring trial. Reply papers cannot be used to establish, for the first time, the party's prima facie burden of proof, as any failure to establish it cannot be cured by later reply submissions. Reply papers are intended to voice a rebuttal to new issues raised in the opposition papers that immediately precede them, and should present new matter only to the extent of addressing the opponent's evidence or arguments.

Parties opposing summary judgment, absent the filing of their own cross-motion, do not have the benefit of a sur-reply under the provisions of CPLR 2214. However, the courts have discretion to permit a sur-reply that addresses an issue or evidence raised by the movant for the first time in reply, under circumstances where the court finds it provident to do so. Arguments raised by the movant in favor of summary judgment for the first time in reply, while technically improper, may still be considered by the court if it then permits the opposing party a sur-reply to address them and which cures the defect.

An opponent of summary judgment who makes a cross-motion for summary judgment is entitled under CPLR 2215 to submit a reply in further support of its cross-motion, but once again, all proof needed to meet the prima facie burden of proof must be tendered in the original cross-moving papers.

Reply papers may also be used to correct technical imperfections with the initial moving papers, regardless of the relief being sought. For instance, if a deposition transcript is submitted without a signature page and would be inadmissible, the signature page may be provided in reply to cure the defect. Similarly, where a certificate of conformity is needed for the admissibility of an out-of-state affidavit in support of the initial motion, any defect with the certificate can be rectified in reply. Where a foreign language witness submits an affidavit without a corresponding one from a translator, that defect may be cured with a translator's affidavit in reply. If the pleadings are not attached to the moving papers as required by CPLR 3212(b) for summary judgment, and the opposing party argues for the denial of the motion on that basis, the moving party may cure the defect by attaching the pleadings in reply. In other words, as long as the prima facie evidence is submitted in the substance of the initial papers, admissibility or other technical defects may be corrected in the reply.

Attorneys should be mindful of the time frames within which reply papers are due, as set forth in CPLR 2214(b) for motions and CPLR 2215 for cross-motions, which vary according to how the initial moving papers are served upon the opponent party.

BY HON. MARK C. DILLON
APPELLATE DIVISION, 2ND DEPT.

The Next Wave of Presumptive ADR, "ODR" Online Dispute Resolution, is here

In September 2020 the New York Court system issued a press release rolling out new tools to facilitate the expanded use of mediation as a form of Alternative Dispute Resolution (ADR). The tools, offered online, include a statewide mediator directory, a statewide mediator application and a post-mediation survey. It now appears that the 2020 press release foreshadowed an even greater push towards the use of online dispute resolution means.

On January 27, 2021 the New York Court system issued a press release announcing the launch, in Manhattan's Civil Court, of an online dispute resolution (ODR) pilot program for eligible small claims matters. Cases filed both in person and online, via an ODR link made available on the Civil Court's website, will be screened for eligibility, with eligible cases referred to the ODR platform. This platform uses various ODR methods such as double-blind bidding and guiding algorithms to lead parties towards settlement. Opportunities for direct negotiation and mediation will also be available. If the parties reach an agreement the platform offers an opportunity to electronically sign a settlement agreement and to deliver that document to the Civil Court's dashboard. The case will be marked settled on the court's calendar. The platform also boasts an educational component.

Online Dispute Resolution, although vast, is not a separate discipline from that of ADR. It is instead an interdisciplinary field which, in its most simple definition, is a form of ADR that uses technology to facilitate dispute resolution between parties. This definition helps to conceptualize ODR, but it does not encompass all that ODR is, and not everyone using the expression has the same thing in mind. Given the court's advancement into ADR through ODR, attorneys, again, need to become versed in this discipline as well. Some insight into ODR and its many variants is offered here.

Given the virtual world that the courts have been plunged into due to the pandemic, most envision ODR as replicating the conventional forms of mediation and arbitration online through platforms such as Microsoft Teams. That is to say having a human mediator or arbitrator present in one of the "Brady Bunch" like boxes on your Teams meeting screen, while supplementing communication and information production via email exchanges. Essentially conducting what would have traditionally been done in-person to an online, virtual venue, mimicking the methods courts have been using to conduct bench trials, arraignments, calendar calls, hearings and conferences. There is a familiarity here since the online process mirrors that of the live or offline process.

This is, in fact, how ODR got its start in the late-1990s, early 2000s as a response to disputes arising from the expansion of eCommerce. However, once a process moves online its nature begins to change, and it starts to lose that familiarity. Technology, dubbed "the fourth party" in ODR processes, alters the interaction between the parties, and introduces new possibilities for helping them reach resolution. Technology based ODR has two methods: automated and assisted.

Automated ODR involves systems in which the technology takes over the negotiation. Blind-bidding services offered by companies such as Smartsettle and Cybersettle are an example of this. In blind-bidding, parties submit offers for settlement via a computer program. The offers are not revealed to the opposing party. The program determines if the offers are within a proximity range set ahead of time by the software or the parties, also known as the ZOPA (zone of possible agreement), and if they are, the dispute can be resolved by splitting the difference between the offers or accepting a package within that ZOPA. If the offers are not within the ZOPA, they are not disclosed, and the program ushers the users forward in the offer-making process. This negotiation can continue for a set number of rounds or indefinitely depending on the system. Here, ODR becomes an exchange of proposals culminating in a matched offer, a spilt difference, or an impasse. These programs work best for cases that involve single, uncomplicated issues focused on damages rather than liability.

Evolving from blind-bidding were more advanced ODR models in which the software assists in the negotiation and plays a role closer to that of a human mediator. The leading example in assisted ODR is Square Trade, which expanded on the types of disputes these platforms could serve. Instead of only asking for offers, these systems provide the parties with an opportunity to file and describe their claims by selecting from various pull-down menus and completing open-text boxes. Generic and standardized forms help to categorize disputes, focus grievances, and tailor resolutions. Algorithms using information provided by these menus, boxes and forms then suggest solutions that the user can rank. This information is emailed to the other party who participates in the same exercise. The "conversation" is shaped by the software and occurs via chat features resulting in a type of "mediated negotiation" with technology serving as the mediator. Resolution is expected through this process, but if an agreement is not reached the program offers the opportunity to engage in a process more akin to online virtual mediation. Other companies have expanded further on this model; one even boasting of a "Fairness Engine" consisting of various modules geared specifically toward dispute diagnosis, negotiation, mediation and arbitration.

As the nature of technology is to develop, ODR platforms will surely continue to grow in their approach and offerings for online dispute resolution. Some have even suggested that artificial intelligence will make an entrance, replacing humans with avatars or holograms that are programmed to facilitate dispute resolution and problem solving. Nevertheless, we are not there yet and a discussion as to whether ODR presently and its eventual progression to its fully realized potential is beneficial or detrimental is left for another time. Of importance now, is that much like the implementation of Presumptive ADR, the court is moving forward with ODR and attorneys need to adjust and be ready for it.

BY JUDGE CLAUDIA LANZETTA

Supreme Court Committee Update:

The resumption of a limited amount of jury trials, Compliance conferences and a comment on the premature filing of a note of issue

A lot has happened in the New Year in the Supreme Court, Queens County. Compliance conferences have resumed in full force, with virtual appearances, if necessary. Toward the end of February, OCA announced the resumption of limited jury trials. This article will summarize these developments.

After OCA announced a statewide resumption of a limited amount of jury trials, Justice Marguerite Grays, the Administrative Judge of Supreme Court, Queens County, 11th Judicial District, Civil Term, reached out to members of the Supreme Court Committee to schedule a meeting to discuss the plans. That meeting was held on February 26, 2021. We were advised that the model for trials they are using is similar to the one they used last Fall before the trials were terminated statewide due to the spike in Covid cases. It should be noted that QCBA has come out against the early resumption of jury trials and a letter was sent out by QCBA president Clifford Welden in that regard. As of now, there are no plans to resume in person jury trials Civil Court, Queens County.

Here is a summary of the plans;

The Court is looking to hold 2 to 3 trials at one time. They will be using the third floor courtroom in Long Island City which is a large courtroom with lots of space. (For those who have never been there, it is one of the most beautiful courtrooms in the metropolitan area.) They will also be using courtroom 25 in Jamaica, which is the Trial Scheduling Part room, which is also a very large. They may also schedule a third case as backup in case one of the two settles, but it is unclear at this time if that will be done.

The Court will start designating cases that were assigned for trial immediately before the pandemic, and which had already been assigned to an IAS judge. After that, it is unclear how they will select cases for trial from the ever growing backlog of cases due to the pandemic.

In particular, they are looking for summary jury trials and very short liability trials, if possible in order to reduce the time and general exposure for everyone. If there is a summary jury trial agreed to by the parties where an evidentiary hearing has been held, likely those parties will be contacted to appear for trial. They will also schedule evidentiary hearings on any agreed to matter, and likely schedule those for subsequent trial as well.

They will entertain Covid health-related applications for the attorneys and their clients. They strongly indicated that they would consider all health related applications, but gave no firm guarantee of an adjournment; but would likely consider all of the circumstances and will try to accommodate such requests. IF YOU, YOUR CLIENT, OR A WITNESS HAS A HEALTH RELATED APPLICATION, IT IS INCUMBENT ON YOU TO RAISE THIS WITH THE COURT IMMEDIATELY UPON BEING NOTIFIED OF A TRIAL DATE. Do not expect the court to make such an inquiry. Silence is effectively consent to proceed.

They will gladly take volunteers who are ready to try their cases as opposed to forcing people to try the cases. Both sides volunteering should consent to the limited trial or summary jury trial. In this regard, they would also consider short liability trials if the parties stipulate that that the damages trial will be adjourned into the future when full-blown jury trials can hopefully resume. Both parties would have to consent. We would suggest that any such agreement would include a waiver of pre-trial interest upon the liability verdict and instead set interest to run from the date of the damages verdict. This might entice a reluctant defense attorney to proceed even if it takes a considerable amount of time to reach damages.

Should there be a health issue with a witness or a client, the Court will consider remote appearances utilizing a TV screen in front of a jury and have that witness/party testify remotely. This must be done on consent of the parties. Otherwise this will not be allowed.

Wearing masks by all participants in the process, including jurors, witnesses, attorneys and court personnel, will be a requirement for trying cases under the current circumstances with no exceptions.

They will allow windows to be opened in the two courtrooms mentioned. It would be our strong recommendation that anybody who does a trial consider requesting, or insisting that the windows be opened to enhance airflow.

Jurors will be summoned to the normal place for civil trials in the Civil Court building on Sutphin Boulevard, first floor juror assembly area. They will be bringing in a limited number of jurors compared to normal to accommodate spacing requirements. We do not think that these jurors will be pre- screened regarding their comfort level with the current Covid environment, and they may have to be questioned by the parties about this in jury selection. The Court will be using overflow areas to accommodate the jurors during the trial, likely other courtrooms. When the parties first appear for trial, jury selection in Long Island City is unlikely. Jury selection may occur on the same day in Jamaica.

This is where we stand as of now regarding jury trials. All of this could change depending on an increase or decrease in the number of COVID cases and we will advise of same when we hear.

Summary bench trials will continue if agreed upon by the parties. Over time they may be allowed to be tried in person asthings improve, but for now assume it will be a virtual experience. Parties are encouraged to use this forum if it works for their needs.

Compliance conferences re-started on January 11, 2021. The form is available on the 11th Judicial District website along with instructions. The forms are to be filled out and e mailed to the compliance conference part for all non-matrimonial, non-commercial and non-medical malpractice cases.

Attorneys need to virtually collaborate on these forms and return them to the compliance conference Part. When the link is clicked the form downloads in your web browser (Edge, Chrome, Safari or other browser) to a fillable form. It is recommended that you adjust your computers to download the document in an Adobe PDF form so it retains its "fillable" characteristics. Currently there is only room for 4 parties and the court is working on additioins to same. If the parties cannot agree to the discovery there is a place on page 7 to request a conference. When the form is completed by all counsel, do not upload via NYSCEF but e-mail it to the Compliance Part at: cscp@nycourts.gov . The finalized order signed by the court will be filed on NYSCEF. If the Parties do not email a completed form, the court will likely send a form order instructing the parties to file one by a given date.

As to any parties' failure to comply with the terms of the compliance conference order, the form indicates that the aggrieved party should seek "prompt relief" or it may be waived. Although there is no codification of time indicated as to what the definition of "prompt relief" is, the court gave us guidance as to about 10 days. These forms were drafted in accordance with the new uniform rules which require parties to confer with each other on discovery disputes so be guided accordingly. It is suggested that all attorneys follow the form and read the Instructions carefully. For the second Complaince conference the court may or may not schedule a virtual conference via Microsoft Teams. Justice Lancman and Justice Catapano-Fox are managing the compliance part.

As to cases previously "stayed" in the compliance part Pre or Post note of issue, by Justice Healy or Justice Esposito, there are several possibilities. Where discovery is complete ask for a conference or a stipulation to lift the stay and declare discovery complete. The court may still hold a virtual conference. Where the case was stayed Pre-note of issue email the compliance part and request a conference. The court will lift the stay and likely issue a discovery order. If the case was stayed post note of issue, a conference should be requested and the court will supervise discovery and deal with the issues. The main goal for these stayed case is to get them moving along to a resolution.

There is also a certification order for parties to certify that all discovery is complete. It is strongly recommended that parties start using this form to avoid unnecessary motion practice. It is unclear if there is a requirement that this form be used in all cases or only those where there is no Note of issue filing deadline. We are seeking guidance on this.

Finally, a word about filing a note of issue when discovery is not complete or improperly stating discovery is complete on the Note of Issue. While this has been case law for many years in the Second Department, Queens County Civil Term spent many years ignoring the case law and pushing cases along even if there was outstanding discovery. When Justice George Silver be-

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Supreme Court Committee Update:

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came the acting Administrative judge he said that he was discontinuing the policy. What the policy is currently remains unclear. We have seen the courts vacate a note of issues in some cases.

A recent case is illustrative of the problems of filing a note of issue prematurely or with false certification as to completed discovery.

In Andujar v Boyle, 190 A.D.3d 902, __N.Y.S.3d___, (2nd Dept. 2021), the Second Department addressed some of these issues. In Andujar, the case involved a motor vehicle accident. The Supreme Court in Westchester had a 45 day deadline to file a summary judgment motion after the filing of the note of issue. At some point the plaintiff did file a note of issue, but failed to indicate if physical exams were completed. At some point thereafter, a court attorney referee advised the plaintiff that the note of issue was not properly filed. A second note of issue was filed about 15 days later. The plaintiff then moved for summary judgment more than 45 days after the first filing. [Plaintiff was moving to declare that she had a serious Injury pursuant to Insurance law 5102], and the Supreme Court ruled it was untimely based upon the earlier note of issue filing. The court commented as follows in affirming for different reasons than the untimeliness [Physical examinations had not been held];

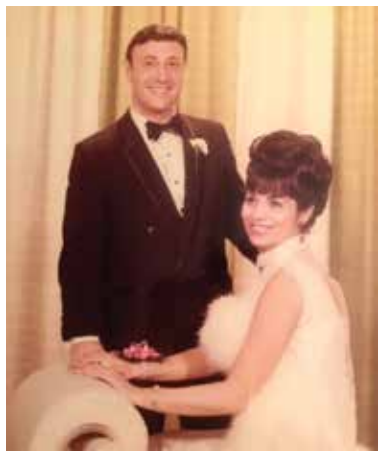
" 'Pursuant to Uniform Rules for Trial Courts, a note of issue must be accompanied by a certificate of readiness, which must state that there are no outstanding requests for discovery and the case is ready for trial' " (McKiernan v. Vaccaro, 168 A.D.3d 827, 829, 91 N.Y.S.3d 478, quoting Slovney v. Nasso, 153 A.D.3d 962, 962, 61 N.Y.S.3d 568; see 22 NYCRR 202.21[a], [b]; Furrukh v. Forest Hills Hosp., 107 A.D.3d 668, 669, 966 N.Y.S.2d 497). Here, the certificate of readiness filed with the first note of issue on February 19, 2019, failed to indicate whether physical examinations were completed and whether medical reports were exchanged. As the first certificate of readiness failed to materially comply with the requirements of 22 NYCRR 202.21, this note of issue was a nullity (see McKiernan v. Vaccaro, 168 A.D.3d at 829, 91 N.Y.S.3d 478; Slovney v. Nasso, 153 A.D.3d at 962, 61 N.Y.S.3d 568; Furrukh v. Forest Hills Hosp., 107 A.D.3d at 669, 966 N.Y.S.2d 497). As that note of issue was a nullity, the plaintiff's time to move for summary judgment began to run when the new note of issue was filed on March 6, 2019. Thus, the plaintiff's motion for summary judgment was timely.

We recommend that all be guided accordingly as there are pitfalls to an improper filing of a note of issue.

The Supreme Court committee continues to monitor developments in the courts in Queens and we will advise the members of the QCBA. Of any new developments. Stay well and safe and we hope that all of those who want to can get vaccinated soon.

BY MICHAEL D. ABNERI ESQ

Bernard Lee Broome (1932 - 2021)



Our father, Bernard L. Broome, Esq., a member of the Queens County Bar Association for nearly 50 years, passed away on February 19th, 2021. He was born in 1932 in Brooklyn, NY. He graduated from Brooklyn Law School in 1953. He was a trial attorney and a member of the Queens County Bar Association, New York State Bar Association and New York State Trial Lawyers Association.

He was a Korean war veteran.

He was a loving son, brother, husband, father, uncle and grandfather. He was an incredibly kind, generous, altruistic and fun loving person. A good and loyal friend, who was an incredible story teller and was quite funny.

He made an enormous difference in a positive way in so many people's lives.

He relished and savored the joy that life can be.

He was an upbeat and positive person, always seeing the good in people and situations. The glass was always full

We will miss and remember him dearly.

BY NEIL M. BROOME AND ROBIN KIER

Editor's Note: Neil M. Broome and Robin Kier are Bernard Broome's children.

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QUEENS COUNTY BAR ASSOCIATION

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