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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 72 / No. 2 / November 2008**

Winning Oral Argument: Do's And Don'ts

BY: HON. GERALD LEBOVITS*

Hon. Gerald Lebovits

Lawyers are society's best speakers. The speaker's goal is to communicate. Communication skills are essential for all lawyers, not just litigators. For litigators, oral argument – together with the preparation, research, and writing that leads to the argument – is the ultimate, formal way to communicate. Except, perhaps, when arguing before a jury, nowhere more than at oral argument, whether before a trial judge or an appellate panel, is communicating effectively so essential. Effective oral argument is rewarding. Consistent with the rewards of oral argument are the difficulties and challenges. The challenge of oral argument explains why lawyers are paid to communicate. The challenge also explains why the lawyer who speaks well – why lawyers who argue fact and law persuasively – can win for the client while at the same time benefitting society and the administration of justice.

Real oral argument before a trial judge or appellate panel differs from a law-student's Moot Court argument. Students work with a fact pattern. Lawyers work with a record they help shape or which was developed at trial. Students argue distinct points of law professors or their intramural Moot Court competition director created for them. Most student issues are academic, constitutional questions of first impression designed to be argued before the highest state appellate court or the United States Supreme Court. Lawyers take diffuse points and creatively weave them into issues. Mostly the issues are bread-and butter problems, sometimes with twists and turns but rarely of first-time constitutional dimension.

Students are graded or receive pass-fail academic credit to represent imaginary clients. Lawyers have real clients, and with real clients come real pressures. Students have abundant time to prepare and practice. Lawyers must balance their time based on many factors; lawyers in the real world sometimes have to wing it. Students are scored by Moot Court judges who critique to encourage them and enhance their skills. Lawyers' performance is never scored by student criteria, and judges almost never critique or encourage: except by example, judges judge, not teach. Students almost always work in teams; Moot Court competitions are designed to have two issues, one for each student speaker. Lawyers work in teams when they write their briefs; they rarely argue orally in teams.

The biggest difference between Moot Court and real-life advocacy, however, is not in any of the above factors: The biggest difference is that law-school Moot Court stresses style while real-life advocacy stresses substance. Moot Court graders are told never to grade on the merits; grading on the merits would be unfair because students do not pick which side they argue. In real life, all that counts is the merits. Real judges do not decide which litigant wins on the basis of which side has the better lawyer. The lawyer's goal in real life, therefore, is to tell the judge, "I'm just a country lawyer who can never do justice to the merits of my client's case." In Moot Court, the students must suggest to the judge, "I've been assigned to represent the worst pretend client, but don't you agree that I'm doing a super-great job in this lousy case?"

Flowing from the difference between style and substance is that some believe that law school Moot Court winners are witty, charming, and gentle boy and girl scouts, whereas winning litigators are Rambo lawyers who intimidate and crush. The reality is that winning litigators aggressively fight for their clients with undivided loyalty and pursue litigation as a marshal art, but they fight under the rules, and with integrity, because a good reputation and professionalism persuades. Professionalism for winning litigators means understating: It is the honest understatement, never exaggeration or bluster that persuades.

Beyond fighting for the client and doing so with professionalism are some specific ways to increase the chances of winning when speaking to judges, whether before a trial judge or an appellate panel, and some ways to increase the chances of losing. Here are some dos and don'ts of oral argument.

Ten Oral Argument Dos

Start strong. Begin with a roadmap in which you introduce yourself, your client, and the issues you will argue. You must state what relief you seek and, quickly, why you should obtain that relief. It is ineffective to begin with or dwell on history and givens, why the case is so simple or interesting, or why it is such an honor to appear before the court.

Argue issues. Law school trains people to think like lawyers. Thinking like a lawyer means explaining in simple, clear understandable English why you are right. The uninitiated will explain things by telling a story, perhaps in narrative form, and hope that the listener will figure it out. The novice will be better than the uninitiated and will talk about cases and statutes. The expert will first give the rule and then support the rule with authority and apply the authority to fact, understanding that what persuades is the rule and its application, not what this or that case said about such and such.

Limit your issues. Less is more, in oral argument as in everything else. Winning requires the guts to argue only those points that are likely to succeed. That means arguing only the strongest two or three, maximum four, issues, unless you are dealing with a real issue of first impression or a critically

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QCBA Celebrates Opening of New Tech Center and Pro Bono Office

BY MARK WELIKY

On the evening of September 22nd Queens Bar members celebrated the opening of QCBA's new Tech Center and new offices for our pro bono program, the Queens Volunteer Lawyers Project (QVLP). These new facilities are part of the newly renovated law library on the second floor of the Association building. Members were treated to a wine and cheese reception and a tour of the new facilities. Members of the judiciary, a number of QCBA past presidents and QCBA members were in attendance.

The newly revamped Tech Center has three new computer work stations which have access to Westlaw and the internet. A new laser printer is networked to the

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THE DOCKET . . .

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

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

2008 FALL CLE Seminar & Event Listing

November 2008	
Monday, November 17	Stated Meeting - New Foreclosure Law
Tuesday, November 18	How Consumers Find Attorneys Online - 1:00 - 2:00 pm
Wednesday, November 19	Landlord & Tenant Seminar
Thursday, November 20	Civil & Criminal Practice in the Federal Court Seminar
December 2008	
Thursday, December 4	Holiday Party
Wednesday, December 10	Insurance Law Seminar
Monday, December 15	Foreclosure Intervention Seminar with NYSBA
January 2009	
Tuesday, January 20	Article MHL 81/Guardianship Training - 2:30 - 5:00 pm
February 2009	
Monday, February 23	Stated Meeting - Small Firm & Solo Practitioners
March 2009	
Monday, March 23	Past Presidents & Golden Jubilarians Night - **TENTATIVE**
April 2009	
Wednesday, April 1	Equitable Distribution Update
Monday, April 20	Judiciary Night - **TENTATIVE**
May 2009	
Thursday, May 7	Annual Dinner & Installation of Officers

CLE Dates to be Announced
Elder Law • Labor Law • Real Property Law • Taxation Law

Queens County Bar Association

90-35 148th Street, Jamaica, New York 11435
• Tel 718-291-4500 • Fax 718-657-1789

NEW FORECLOSURE LAW

Monday, November 17, 2008
5:30 - 8:45 P.M.

PROGRAM
Queens County has been described as the mortgage foreclosure epicenter. Thousands of pro se defendants are involved in mortgage foreclosure proceedings, and the number is expected to only increase. A new law provides that some of these borrowers are entitled to a pre-foreclosure settlement court conference. Attorney Volunteers are needed to provide limited assistance to homeowners at the conferences.

MODERATOR **JOHN R. DIETZ, ESQ.,** *QCBA Past President*

GUEST SPEAKERS
TRACY CATAPANO-FOX, ESQ., *Principal Law Clerk for Administrative Judge Jeremy S. Weinstein*
SAMUEL B. FREED, ESQ., *Chair, Real Property Committee*
PAUL LEWIS, ESQ., *Chief of Staff to the Chief Administrative Judge of the State of New York*
APRIL A. NEWBAUER, ESQ., *Queens Legal Aid Society*

COCKTAILS & BUFFET DINNER - $30.00 5:30 p.m. to 7:00 p.m.
PROGRAM - FREE 7:00 p.m. to 8:45 p.m.

Accreditation: The Queens County Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Continuing Legal Education Provider in the State of New York for the period of October 8, 2007 through October 7, 2010.

FREE PARKING: Available on a First Serve Basis at 148-15 89th Avenue between 148th & 150th Streets.

To Reserve for the **Stated Meeting: Monday, November 17, 2008**
Fax or Mail to: Queens County Bar Association, 90-35 148 Street, Jamaica, NY 11435 Fax: 718-657-1789

I will be attending:
____ DINNER ($30): 5:30 - 7:00 PM ___ PROGRAM (FREE): 7:00 - 8:45 PM
Pay by: ___ Check ___ MC ___ Visa ___AMEX ___Disc
Authorized Signature_____
Card #: _____
Exp. Date _____/___/_____ Amount: $ _____
Name:_____
Address:_____
_____
Tel. No.: _____
Fax No.: _____
PRE-REGISTRATION IS GREATLY APPRECIATED!

Leslie S. Nizin

EDITOR'S MESSAGE

This is the time of year that we begin to reflect on the things that we are thankful for. I wish to thank the many members of the Bar Association and the staff of the Bar Association for their contributions in making our bar bulletin a great success. On behalf of the Bar Association may I wish you and your families a Happy Thanksgiving.

Les Nizin

Lawyers Assistance Committee

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

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

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

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

Lawyers Assistance Committee
Confidential Helpline
718-307-7828

Publisher:
Long Islander Newspapers, LLC. under the auspices of Queens County Bar Association. Queens Bar Bulletin is published monthly from October to May.

The Queens County Bar Association, Advertising Offices, Long Islander Newspapers, 149 Main Street, Huntington, New York (631) 427-7000

Send letters and editorial copy to: Queens Bar Bulletin, 90-35 148th Street, Jamaica, New York 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: 0048-6302) is published monthly except June, July, August and September by Long Islander Newspapers, LLC., 149 Main Street, Huntington, NY 11743, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, 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.

President's Message

The wisdom in Robert Burns' oft quoted, The best laid schemes o' mice an' men, gang aft a-gley (often go astray)..." has visited me as president of the Queens County Bar Association. While laboring hard to lay out an ambitious agenda that I presumed would consume my time for my year in office, an unfortunate crisis has come to the fore, with Queens County as New York State's epicenter of this calamity.

The number of foreclosures in Queens County, flowing from the financial tsunami, are voluminous. In fact, the numbers are so great that the Office of Court Administration has seen fit to designate the courts in Queens County to test the OCA's prototype to deal with these foreclosures, as mandated in special legislation recently passed by the State Legislature.

Impossible as it may seem to imagine anything good at all emerging from this crises, let me suggest that we have seen an extraordinary effort at marshaling resources by several segments of the legal community in Queens County.

Steven Orlow

A meeting initiated by Judge Kaye and Judge Pfau, has resulted so far in follow-up meetings and consultations among a variety of Queens legal community groups in an effort to understand, and then deal with, the foreclosure crisis and its devastating effect on our fellow Queens residents who face the loss of their homes.

The office of our Queens Administrative Judge Jeremy Weinstein, Queens Legal Aid Society, Queens Legal Services and of course, your Queens County Bar Association have begun coordinating efforts which should, by now, have become apparent to much of our membership. Local ethnic and specialized bar associations in our County have also expressed interest in having their membership participate in our efforts. This may hopefully prove to be one of the finest demonstrations of the Queens legal communities' dedication to the highest ideals of our profession, in stepping forward and doing what we can to alleviate the suffering and anguish visited upon our neighbors and fellow Queens residents.

The clarion call has gone out to our membership and to the Queens legal community at large. This is an opportunity to demonstrate the very best that we, as attorneys, can offer our fellow citizens.

For those of you interested in joining with many of your colleagues in participating in various aspects of the foreclosure program we are establishing, please contact Janice Ruiz of our staff (718-291-4500 x222) and someone will be in touch with you shortly thereafter. In the event you read this article before November 17th, why don't you drop in to our Stated Meeting dealing with this topic – and receive 2 CLE credits, for free, while you are at it.

Changing Times In The Family Court

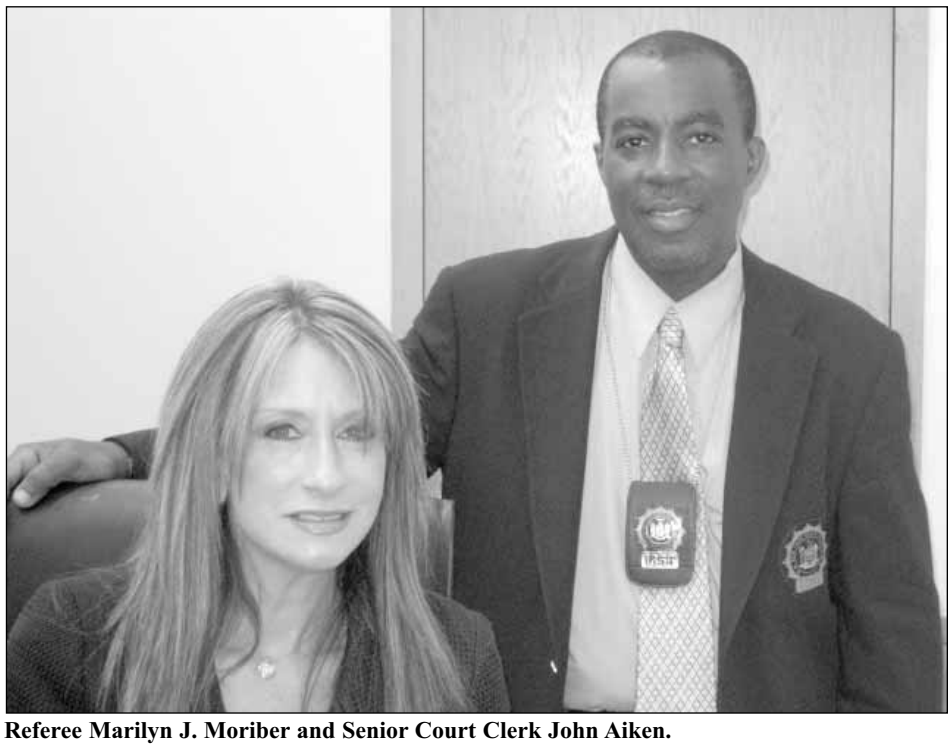
BY MERYL KOVIT

In the spring of 1989, at a family dinner in the month of June celebrating Shavuot, the giving of the Ten Commandments to Moses at Mount Sinai, in between requests by the assembled to pass another blueberry blintz with some sour cream, I proudly announced to my then eighty-seven year old grandfather that I had a job. I told him "I'm an attorney at the Queens County Family Court."

My grandfather silently looked at me. He appeared to be confused. I tried again – I told my grandfather that I worked in a Court for *mishpacha* – I hoped that the word for family in his more familiar Yiddish might help him to understand. No luck. My husband tried raising his voice to say Family Court in a louder tone to accommodate hearing aid issues. This too just brought the same confused glare. Finally, my grandfather ventured to explain his confusion. He looked at us and began very slowly in his version of perfect English: I can hear you, I can understand you, but I don't know what you are talking about, "Why do families need a Court?"

Culture is always a matter of perspective and one's perspective on the culture of the Family Court is no different. The administrators of the court system, working to meet the needs of the community served by the Family Court, and without the ability to consult my grandfather, - he died in 2000 - determined in recent times that not only do families need a Court, they need a Court that is available to provide vital services to families during regular business hours and during the early hours of the evening. Night Court commenced in Queens Family Court in March of 2005. Referee Marilyn J. Moriber, who has sat in Night Court since its inception, (authorized by C.P.L.R. 43 to operate a court), presided that first night and has presided over Night Court every night thereafter.

Night Court is held in the grand ceremonial courtroom on the first floor of the Family Court on Jamaica Avenue, across from downtown Jamaica's historic King Manor Museum. Every night, Referee Moriber's trusted Senior Court Clerk, John Aiken, is at her side, ready willing and able to listen, and along with the Referee, to do whatever is necessary to try to solve the multitude of problems brought to them by the many families in Queens County



Referee Marilyn J. Moriber and Senior Court Clerk John Aiken.

needing the services of the Family Court after 5:00 p.m. Night Court is in session on Tuesday, Wednesday, and Thursday evenings commencing at 5:00 p.m. and concluding at 9:00 p.m.

The petition room, also on the first floor of the courthouse, accepts Night Court petition filings on these same evenings from 5:00 p.m. until 8:15 p.m. under the watchful supervision of Judy LaRose, Assistant Deputy Chief Clerk in charge of the petition room. She is also a regular presence every night and a vital part of the Night Court team.

Security for Night Court is, of course, as it is in day court - - a team effort. Everyone on the team takes their walking orders from Night Court Captain Patrick Kelly. Under Captain Kelly's supervision all of the activities of the night court occur on the first floor of the Family Court building. The grand escalators located in the central atrium of the building, just outside the grand ceremonial courtroom, are not in operation after 5:00 p.m.to restrict litigants within the building to the first floor. The many Court Officers needed to secure the building in the evening hours rotate on a daily basis, as do the many language interpreters needed to assist staff and litigants at every stage from the filing of a petition to the appearance before Referee Moriber. The petition room staff remains the same each evening.

John Aiken, the Referee's clerk, has been with Referee Moriber in Night Court since the first night of the Court's operation. He is a Senior Clerk who has been in the court system for thirteen years. His knowledge and background in the Family Court make him invaluable to the Referee and the entire Night Court operation. Night court is a pioneering team effort. The team works due to the respect and kind demeanor displayed from the top by the Night Court dynamic duo of Referee Moriber and Senior Court Clerk John Aiken. The often light hearted interplay between these two helps to keep the Night Court staff relaxed, respectful and ready to serve the often high stress litigants that arrive in need of their service.

Night Court tackles many of the same pressing social issues as the Family Court usually does during regular daytime hours –namely, petitions are accepted for orders of protection, violations of orders of protection, guardianships, visitation and custody. The most typical evening case is reflective of the reason that evening hours are needed by the community. Referee Moriber explained that "it is usually a request by a woman allegedly the victim of domestic violence," and according to Referee Moriber, "you see more physically abused individuals at night. It seems almost safer and more discreet to come to Court at night rather than be seen entering the Court during the day."

When the Court commenced evening hours, Judge Joseph M. Lauria, who was instrumental in getting this initiative underway during his term as the Administrative Judge for the Family Court of the City of New York, emphasized that the role of Night Court was to meet the needs of the community. With that in mind, the Administration for Children's Services (ACS) became a regular fixture in the Night Court scene to assist with the urgent needs of the children who were often the subjects of the petitions brought before Night Court.

Night Court litigants can also file petitions for child support and spousal support in the evening and be provided with a return date to come back to the Court during daytime hours to be heard with both sides present. Safe Horizons, (a not for profit organization that assists individuals with problems related to domestic violence) always has a liaison from the organization present at Night Court.

The majority of litigants seen at Night Court do appear pro se; however, the occasional member of the private bar does accompany a client to file a petition in the evening. There are many benefits to client and to counsel. The clients, with or without counsel, are able to accomplish the first important Court date without missing any time from their jobs. Also, the Night Court team can generally get a litigant and their attorney in and out of the Family Court in just over one hour. Any regular practitioner in the Family Court can confirm that this is a major improvement over regular Court hours when the time required would usually be much greater. Private counsel are regularly represented in Night Court by way of the members of the 18B panel who volunteer to be present each evening to be available for assignment if an adult litigant or child needs the assistance of counsel.

The enormous volume of the regular Court calendar often runs past five o'clock. Depending on the day, some of that overflow may end up before Referee Moriber on any given Tuesday, Wednesday or Thursday. The hours of availability of the Court have truly expanded in all respects.

Referee Moriber says that "as the Night

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Article 730 Mental Disease or Defect Excluding Fitness to Proceed: Part III

BY ANDREW J. SCHATKIN

In two previous articles, analyzing the statutory scheme of CPL 730, which is divided into seven sections, and which is entitled overall Article 730/Mental Disease or Defect Excluding Fitness to Proceed, I analyzed the first two sections, i.e. Section 730.10, entitled "Fitness to Proceed; Definitions" and Section 730.20 entitled "Fitness to Proceed; Generally". This article, following those two articles, will analyze Section 730.30 denominated, "Fitness to Proceed; Order of Examination".

That Section sets up the basis whereby a defendant may be declared an incapacitated person. Subdivision 1 states that the court where a Criminal action is pending must issue an Order of Examination, when it is of the view that the defendant may be an incapacitated person. Subdivision 2 states that when the examination report submitted to the court showed that each psychiatrist is of the opinion that the defendant is not an incapacitated person, the court may on its own Motion conduct a hearing to determine the issue of capacity, and must do so upon Motion by the defendant or by the District Attorney. Subdivision 3 states that when the examination report submitted to the court show that each psychiatric examiner believes the defendant to be a incapacitated person, the court may, on its own Motion, conduct a Hearing to determine the issue of capacity. Finally, subdivision 4, in pertinent part, states when the examination submitted to the court show the psychiatrists are not unanimous in their opinion as to whether the defendant is an incapacitated person, or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.[1]

Andrew J. Schatkin

This article will first consider the purpose of this specific statutory subsection. The leading case is People v. Greene[2]. In that case, the trial court held that the legislative intent, when providing the procedure, for determining mental competency of the accused to defendant criminal charges, was to allow the court complete discretion, irrespective of the findings of the official examiners, to determine whether the accused is capable of proceeding to trial, and therefore, where the court was of the opinion that the accused was incapable of understanding the charge against him, the proceedings, or making his defense, the accused would be committed to the state hospital, until sufficiently recovered so that criminal proceedings might be resumed despite the hospital examiner's report contrary to the court's opinion.

The next issue to be considered in this article is the matter of the burden of proof. The weight of the case law is that the People have the burden of proving the defendant's competence by a fair preponderance of the evidence. Thus, in People v. Breeden[3], the Appellate Court held that the People's burden of proving the defendant's competency at the hearing to determine the defendant's fitness to proceed to trial was met through testimony of psychiatrists at the facility, in which the defendant was confined for five months prior to the hearing, despite opinions of defendant's expert witnesses who concedingly had less exposure to the defendant's behavior, as the opinion of the psychiatrists who had more extensive opportunity to observe the defendant were of more value.[4]

It should be added that in general it is the law that the issue of mental competency may be raised on Appeal, despite the absence of objection at the trial level.[5]

The next topic to be considered here is the matter of the determination of fitness. In general, it is the law that it has been the court's discretion to order an examination as to the defendant's competence or sanity.[6]

The next issue to be considered here are what factors the court must consider in ordering an examination. People v. Franco[7] is exemplary. In that case, the Appellate Court held that the defendant, who did not display any erratic or unusual behavior and who clearly answered questions of the court and clerk was oriented as to the time and the place, had an understanding of the proceedings, and was competent to stand trial. Similarly, in People v. Marmolejos[8], the court held that the defendant was fit to stand trial, reasoning that the defendant did not exhibit any delusional thinking during trial, gave testimony in a rational and concise fashion, cooperated with counsel, and concedingly understood the role of his counsel, and other participants at trial, and qualified experts found defendant fit to proceed.

People v. Picozzi[9], the Appellate Court analyzed what factors the court should consider on the issue of competency to stand trial. The Appellate Division held that the factors are whether the defendant is oriented as to the time and place; is able to proceed, recall, and relate; has an understanding of the process of trial, and the roles of judge, jury, prosecutor, and defense attorney; can establish a working relationship with his attorney; has sufficient intelligence and judgment to listen to

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MARITAL QUIZ

George J.
Nashak Jr.

BY GEORGE J. NASHAK JR.

Question #1 -
What are Tier I benefits of the Railroad Retirement System?
Your answer -

Question #2 -
Are Tier I benefits subject to Equitable Distribution?
Your answer -

Question #3 -
Is a former spouse of a railroad employee entitled to Tier I benefits of their own?
Your answer -

Question #4 -
What are Tier II benefits of the Railroad Retirement System?
Your answer -

Question #5 -
Are Tier II benefits subject to Equitable Distribution?
Your answer -

Question # 6 -
Do Social Security benefits for a child reduce the parental obligation of support?
Your Answer -

Question #7 -
Is it proper for the Family Court to dismiss a petition for visitation because it was not filed in the county in which the children reside?
Your answer -

Questions #8 -
If an action for divorce is discontinued and the parties continue to live separate and apart for a number of years before a second action for divorce is commenced, is the court permitted to fix the valuation date for marital assets as of the date the first action was filed?
Your answer -

Question #9 -
Is the Supreme Court permitted to appoint an 18B attorney in Custody proceedings?
Your answer -

Question #10 -
When a spouse, during a second marriage, incurs education loans for the education of a child of a prior marriage, is this marital debt to be shared by the parties in a divorce proceeding of the second marriage?
Your answer -

Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a partner in the firm of Ramo Nashak & Brown.

Answers Appear On Page 6

Profile of.... Steven S. Orlow

BY LESTER SHICK*

William Langland, famed 14th century English poet, wrote in his allegorical epic, "Piers Plowman," "Like father, like son, every good tree maketh good fruits." This being said, Steven Orlow, new President of the Queens County Bar Association, has produced two fine sons whom together comprise the law firm of Orlow, Orlow & Orlow (Orlowlaw.com).

Steve was born in Manhattan and his family moved to the borough of Queens when Steve was six years old. His dad worked in the retail and wholesale end of the jewelry and handbag industry. Steve attended Queens College, graduating in 1965, with a Bachelor of Arts Degree and went on to Cornell Law School, receiving his Juris Doctor degree in 1968. He was admitted to the New York Bar in 1969.

Steve's first job was working as an Assistant District Attorney in Kings County. He worked under the auspices of the then District Attorney, Eugene Gold. He prosecuted numerous narcotic cases. After three years, he became counsel to the Queens Borough President, Donald Manes. He worked there from 1972-1980. Steve coordinated the rehabilitation of the Carlton Apartments in Kew Garden Hills. The development had 250 units that were in total disrepair.

In 1975, Steve was approached by his Rabbi and other members of his community with the idea of establishing the first Eruv, a thin monofilament line strung from light pole to light pole to symbolically extend a Jew's private domain to everything within the loop. It would enable orthodox Jews to carry keys and push strollers on the Sabbath without violating Halacha or Jewish law. The Eruv was created for the Kew Garden Hills neighborhood.

Steve has been a member of the Brandeis Association Board for over twenty years. He is also a member of the New York State Trial Lawyers Association. He is a past president of the Young Israel of Queens Valley. Steve has been active in a variety of charitable organizations, including being the founding and current president of the One Israel Fund. This organization has been in existence for 15 years. Its primary concern is the well being and physical safety of the Jewish residents residing in the areas of Judea and Sumaria in Israel. He is also a board member of the Orthodox Union. This entity is the main umbrella organization comprising the union of Orthodox congregations in America. He has been a tireless fundraiser for the groups over the years.

Steve and his lovely wife, Susan, have been married for thirty-eight years. They first met not in New York, but on a tour to the Gaza Strip. His two sons, Brian and Adam, joined the law firm over ten years ago. The firm specializes in personal injury cases. Steve and his wife are also blessed with a daughter, Miriam, who is a speech therapist for the Board of Education. In addition, they have five beautiful grandchildren.

Steve Orlow is a man who embodies the characteristics of loyalty and commitment. He has always taken a "hands on" approach to everything he gets involved in. The County Bar Association has made a wise choice in its selection of their new President.

Steven S. Orlow

ANSWERS TO MARITAL QUIZ ON PAGE 5

Question #1 -
What are Tier I benefits of the Railroad Retirement System?
Answer: Tier I benefits are similar to Social Security benefits.

Question #2 -
Are Tier I benefits subject to Equitable Distribution?
Answer: No

Question #3 -
Is a former spouse of a railroad employee entitled to Tier I benefits of their own?
Answer: Yes, if he or she meets the following requirements.

1. Both the participant and alternate payee are 62 years of age.
2. The parties' marriage lasted at least 10 consecutive years.
3. The alternate payee did not remarry.
4. The participant has retired and begun receiving a railroad retirement or disability.

Question #4 -
What are Tier II benefits of the Railroad Retirement System?
Answer: Tier II benefits represents the pension portion of the benefit.

Question #5 -
Are Tier II benefits subject to Equitable Distribution?
Answer: Yes, these benefits are valued and distributed like any other pension benefit.

Question # 6 -
Do Social Security benefits for a child reduce the parental obligation of support?
Answer: No, *Luongo v. Luongo* 50 A.D.3d 858, 856 N.Y.S.2d 636 (2nd Dept. 2008).

Question #7 -
Is it proper for the Family Court to dismiss a petition for visitation because it was not filed in the county in which the children reside?
Answer: No, the proper procedure under Family Court Act 174 is to transfer the proceeding to the proper county. *Cruz v. Cruz 48 A.D.3d 804, 853 N.Y.S.2d 569 (2nd Dept. 2008)*

Questions #8 -
If an action for divorce is discontinued and the parties continue to live separate and apart for a number of years before a second action for divorce is commenced, is the court permitted to fix the valuation date for marital assets as of the date the first action was filed?
Answer: No, *Mesholam v. Mesholam* 11 N.Y.3d 24, 862 N.Y.S. 2d 453 (Ct. of Appeals 2008).

Question #9 -
Is the Supreme Court permitted to appoint an 18B attorney in Custody proceedings?
Answer: Yes, Judiciary Law §35 (8).

Question #10 -
When a spouse, during a second marriage, incurs education loans for the education of a child of a prior marriage, is this marital debt to be shared by the parties in a divorce proceeding of the second marriage?
Answer: No, *Kilkenny* v. *Kilkenny* 2008 NY Slip Op. 6964 (2nd Dept., 2008).

The first five questions and answers were derived from an email newsletter of Pension Appraisers, Inc. Pension Appraisers. Inc. has given permission for the use of their material in this Marital Quiz. If you would like to receive their email newsletter, free of charge, your request should be emailed to "penapp@pensionappraisers.com."

Sex Offender Management And Treatment Act

BY PETER DUNNE*

On March 14, 2007, Governor Elliot Spitzer signed into law the Sex Offender Management and Treatment Act[1] which went into effect April 13, 2007. This law will have enormous consequences in the prosecution and defense of sex offenders.

This article will examine the major points of the law, review the legal basis and constitutional issues of the act, and finally, describe difficulties for practitioners in representing sex offenders.

First, and most importantly, the law establishes a new sex offender civil commitment procedure under the Mental Hygiene Law.

In addition, it creates a new felony sex offense entitled "sexually motivated felony", introduces new sentencing requirements, enhances some post release supervision periods, and designates certain Class D and E felonies and "violent" felonies.

According to the legislative history, the primary purpose of the legislation is "to enhance public safety by allowing the State to continue managing sex offenders upon expiration of their criminal sentences, either by civilly confining the most dangerous recidivistic sex offenders, or by permitting strict and intensive parole supervision of offenders who pose a lesser risk of harm."

The civil commitment procedure outlined by the act is the most revolutionary aspect of the act.

The act applies to all persons who have been convicted and sentenced to state prison for all felonies contained in Penal Law section 130 as well as some specifically delineated felonies, such as Incest, Patronizing a prostitute, as well as any attempt to commit these crimes which is a felony, as well as the newly created class of crimes called sexually motivated crimes.[2]

It applies retroactively to all persons convicted of one of these felonies who are still serving a sentence as of April 13, 2007, and includes state prison inmates, persons serving parole, persons under conditional release, and those under post release supervision.[3] It applies to Juvenile offenders, but not to anyone adjudicated a youthful offender.

It also applies to defendants found not guilty by reason of mental disease or defect, and to those found incompetent to stand trial pursuant to C.P.L. 730.[4]

However, the Act only applies to a detained sex offender who suffers from a mental abnormality.

The Act defines mental abnormality as "a congenital or acquired condition, disease, or disorder that affects the emotional, cognitive or volitional capacity in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."[5]

The act establishes three decision making stages before a petition to civilly commit a defendant is filed by the Attorney General.

First, the act authorizes the Commissioner of Mental Health to establish a "multi-disciplinary staff" to initially screen all sex offenders to determine whether the defendant is subject to further evaluation.[6] Although this group is authorized to "review" and assess relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments, or other records and reports, including records and reports provided by the District Attorney of the County where the person was convicted", there are no guidelines within the act which guide this decision, other than the broad definition of "mental abnormality".

Second, the Act authorizes the commissioner of Mental Health to establish a case review panel consisting of 15 members, who will sit in groups of three to review each case submitted by the multi-disciplinary team.[7] The panel will determine whether the defendant is a "sex offender requiring civil management".[8] The panel is charged with examining the same records as the multi-disciplinary staff of the first stage. In addition, the panel may "arrange" a psychiatric examination of the defendant.[9]

The defendant is to be notified when his case is referred to this panel, and the panel will notify the defendant of its decision.[10]

If the panel decides that the defendant is a "sex offender requiring civil management" it will notify the Attorney General in writing within 45 days of the anticipated release of the defendant.[11]

One of the unusual aspects of the law involves the numerous time frames of the commitment procedure. Unlike C.P.L. 30.30, for example, which mandates a speedy trial, under penalty of dismissal, many of the time frames of the law are not mandatory. The law specifically states, for example, "failure to [notify the Attorney General in writing within 45 days] shall not affect the validity of such notice. . . ."[12]

The last stage of review is by the Attorney General. Upon receiving a case from the case review panel in the second stage, the Attorney General must decide whether to file a petition to initiate civil commitment. Presumably, in addition to a review of all the records and reports previously reviewed, the Act also directs the Attorney General to consider "information about the continuing supervision to which the [defendant] will be subject as a result of the criminal conviction, and shall take such supervision into account. . . ."[13]

This provision presumably refers to any post release supervision or parole of the defendant. This presents an unusual situation. This language seems to indicate that persons convicted of less serious crimes and who have received shorter periods of post release supervision would be more likely to be subject to a petition and civil confinement than persons who have been convicted of more serious crimes and received longer periods of post release supervision.

Within 30 days of receipt of the case review panel's recommendation, the Attorney General may file a civil management petition in Supreme Court of County Court where the defendant is located. The petition must allege "facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management."[14] The petition must be served on the respondent, and it triggers the respondent's right to counsel.[15]

The Attorney General is directed to file the petition in the county of the respondent's incarceration. Within 10 days, the respondent has the option to move to change the venue to the county where the conviction took place.[16] The Court is directed by the Act to grant removal unless the Attorney General shows "good cause" for retaining the case in the county of incarceration.[17]

Within 30 days of filing, the court must conduct a probable cause hearing. Certified psychiatric reports are admissible without testimony from the examiner, and the respondent may not relitigate the underlying offense.[18]

Within 60 days after the probable cause determination, the respondent must be tried before a jury of twelve. The respondent may waive a jury trial and choose a bench trial. During the trial, commission of the underlying sex crime shall be deemed established and cannot be relitigated. Plea minutes and prior trial testimony are all admissible.[19]

The burden of proof is on the Attorney General to prove by clear and convincing evidence that the respondent suffers from a mental abnormality.[20] The verdict must be unanimous in the case of a jury trial. The Court must charge the jury that commission of the sex offense cannot be the sole basis of the finding that the respondent suffers from a mental abnormality.

If there is a unanimous verdict that the respondent does not suffer from a mental abnormality, the court must issue a discharge order and dismiss the petition. If there is not a unanimous verdict, the respondent must be retried within 60 days.[21]

If there is a unanimous verdict that the respondent does suffer from a mental abnormality, the jury will be discharged and the trial will move on to a second stage to determine the appropriate "post-sentence treatment".[22]

This phase is for the Court alone. The question is whether the respondent is a "dangerous sex offender requiring confinement" or a sex offender requiring strict and intensive supervision.

If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong disposition to commit sex offenses and such an inability to control behavior that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court will find the respondent to be a dangerous sex offender requiring confinement.[23]

The only other choice is to find that the respondent is a sex offender requiring strict and intensive supervision. No other choice is given to the court once the jury has unanimously determined that the respondent suffers from a mental abnormality.[24]

Commitments to a secure facility are indefinite. Annual reviews are authorized by the Act.[25]

For years, New York has had a mechanism in place which authorized the civil commitment of individuals who represented a danger to himself or herself or others.[26] Briefly, under this section of the

Continued On Page 16

PHOTO CORNER

Recent Significant Decisions from our Appellate Courts - Monday, September 22, 2008

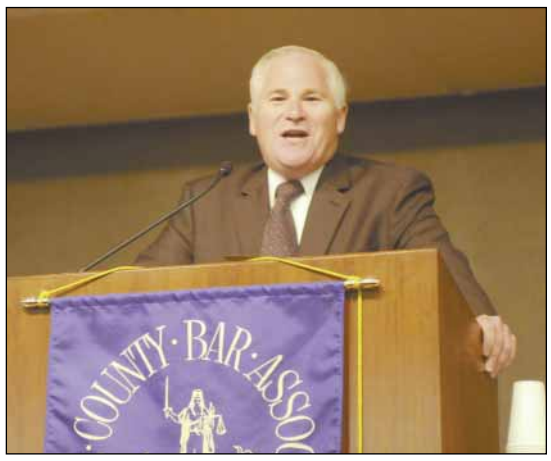
Alan Chevat - Chief Ct Atty, Appellate Divsion, 2nd Dept.

Andrew Fine - Director, Ct of Appeals Litigation, Legal Aid Society.

Christina Fernandez, Carmen Velasquez, Hon. Diccia Pineda-Kirwan, Hon. Carmen Beauchamp Ciparick, Hon. Sheri Roman, Hon. Bernice Siegal and Hon. Jeffrey Lebowitz.

Daphne Loukides, Matt Hunter, Hon. Jeffrey Lebowitz and Steven Orlow.

Ed Rosenthal, Jim Pieret, Chanwoo Lee and Timothy Rountree.



Hon. Alan Scheinkman - Justice of the NYS Supreme Court, White Plains.

Hon. Carmen Beauchamp Ciparick, Arthur Terranova and Hon. Bernice Siegal.

Hon. Joseph Bellacosa and Hon. Carmen Beauchamp Ciparick.

Hon. Lee Mayersohn and Spiros Tsimbinos.

Hon. Sheri Roman, Ed Rosenthal, Jim Pieret and Hon. William Viscovich.

John Castellano - Chief of Appeals, Queens DA's Office.

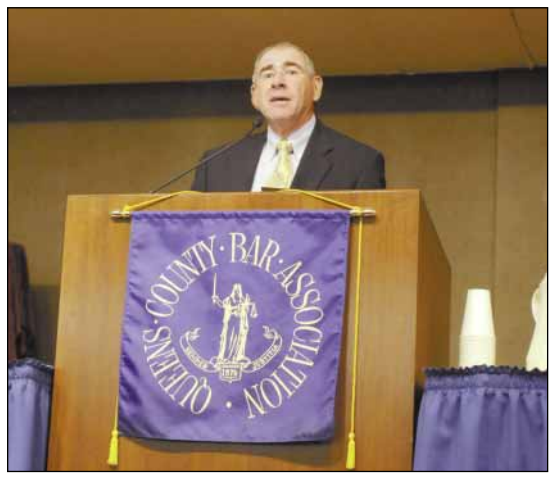
Photos by Walter Karling

PHOTO CORNER

Recent Significant Decisions from our Appellate Courts - Monday, September 22, 2008

Judge Bellacosa speaking about when he worked with Chief Judge Kaye.

Judge Ciparick speaking about working with Chief Judge Kaye.



Spiros A. Tsimbinos, Moderator.

Spiros Tsimbinos, Hon. Fred Santucci and Hon. James Golia.

Spiros Tsimbinos, Hon. Joseph Bellacosa, Arthur Terranova and Hon. Fred Santucci.

Steven Orlow, Gary Miret and Carmen Velasquez.

Steven Orlow, Andrew Fine, John Castellano, Alan Chevat, Hon. Alan Scheinkman and Spiros Tsimbinos.

Steven Orlow, Hon. Joseph Bellacosa, Hon. Carmen Beauchamp Ciparick and Spiros Tsimbinos.

Susan Beberfall, Hon. Sheri Roman, Hon. Carmen Beauchamp Ciparick, Arthur Terranova and Hon. Bernice Siegal.

Photos by Walter Karling

THE CULTURE CORNER

BY HOWARD L. WIEDER

The grass is always greener, as the saying goes. I spend most of my year dreaming of vacations to my friends' home in Provence and the Cote d'Azur. My friends there, on the other hand, say they are deadly bored by the lack of the stuff to do or see. The mountains and sea are breathtakingly beautiful, they say, but they yearn for the cultural variety of New York City.

I understood City's cultural wealth, too, as a result of my commitment in accepting a role in **Queens County Bar Association member RONALD B. HELLMAN's forthcoming production of "YELLOW FACE."** Since the play has been in rehearsal from late September and concludes its run on November 23, I sigh and become wistful as I review the web sites of various culture venues and see the performances by many artists, opera singers, dance companies, and classical pianists whom I badly wanted to hear and see perform and will be forced to miss because of my engagement. I do not regret my commitment, because I am learning and growing creatively, and know that I am contributing with the ensemble to a top-notch entertainment product. I have thus come to understand the sacrifices made by a performer**.**

At any rate, please let me help you navigate the superabundant cultural variety of New York City during the month of November.

THE METROPOLITAN OPERA

Before my own rehearsal schedule got intense, I was fortunate to see several blockbuster operas at the Met, including **LUCIA di LAMMERMOOR** by Gaetano Donizetti, **SALOME** by Richard Strauss, and **DOCTOR ATOMIC** by John Adams.

Howard L. Wieder

Last season, I was spellbound by Natalie Dessay's performance in the title role of **LUCIA di LAMMERMOOR.** In October, I saw and heard German coloratura **DIANA DAMRAU** give a mesmerizing performance and thrilling vocal account with a brilliant supporting cast. It was the finest **LUCIA** I have heard. Also brilliant were **SEAN PANNIKAR** as Arturo, whose performance last year in Manon Lescaut I featured in my March 2008 column, Polish tenor **PIOTR BECZALA** as Edgardo, Lucia's true love, and Russian baritone **VLADIMIR STOYANOV** as Lord Enrico Ashton, as Lucia's overbearing, destructive, and manipulative brother. **STOYANOV** has a wonderful baritone voice, and his acting skills will hopefully improve since a control-freak can be portrayed with greater depth than the constant banging on a table. The first-rate cast was undeterred by a major, mechanical failure of the set in the third and final act that prevented the proper set from being placed. In January, 2009, another all-star cast comes in to the Met Opera to perform **LUCIA**. Don't miss it. Check www.metopera.com for details.

Composer John Adams was rightly brought on stage for curtain calls following the performance of his modern opera **DOCTOR ATOMIC**, based on the characters and events involved in the testing of the atomic bomb. His music showed depth and variety, including pulsating, driving passages that were evocative of the film scores of action-adventure movies. Adams's score was graced by Alan Gilbert, the much awaited new maestro of the New York Philharmonic. You may recall that I was the ONLY reviewer who correctly forecast Gilbert's selection, and I did so months in advance. What a pleasure to see Gilbert's merit, passion, and competence rewarded!

I was also privileged to hear and see one of my favorites, Finnish soprano **KARITA MATTILA**, perform Salome. The one-act opera was presented in contemporary setting, with Mattila dancing the dance of the seven veils, down to total nudity – no body stocking for her – and her obsession for John the Baptist, who paid with his head for spurning her sexual advances.

On Mondays to Thursdays, 150 Rush tickets are available, meaning that you need to be among the first 75 persons on line. Check www.metopera.com for details.

THE QUEENS THEATRE IN THE PARK

During November 14-23, 2008, **"YELLOW FACE,"** a play that gave Tony Award-winning Chinese American playwright **DAVID HENRY HWANG** his third Obie Award and made him a finalist, for the third time, for the Pulitzer Prize, will be performed at the **QUEENS THEATRE IN THE PARK** at Flushing Meadows-Corona Park. The play in Act I is a hilarious comedy about racial identity, before proceeding to the deeper, more serious, and absorbing second act.

Racial identity, the willingness to sacrifice when one is comfortable, succumbing to the lure of resting on one's laurels, the anonymity involved in hit-and-run journalism are among the many themes probed by Hwang in his masterful play.

My roles in the play as the **ANNOUNCER/NAME WITHHELD ON ADVICE OF COUNSEL**, permit a certain objectivity. My one scene in the play is with one member of the cast. So during rehearsals, I often sit and observe the rest of the ensemble. The talent of the seven other cast members is so high that there isn't one who couldn't be in a Broadway production or film. I am in constant awe of their talent and of the creative juices of the director, **SOFIA LANDON GEIER**, an accomplished actress, writer, drama professor, and drama coach.

FENTON LI, as the title character of DHH, brings great energy to the role, since he is involved in nearly every scene. Petite **JADE JUSTAD** commands the stage with an electric charisma, in her portrayals of Leah and other characters. **ANASTASIA MORSUCCI** is versatile in her multiple roles. The range of Anastasia's accents and impersonations is amazing. She, like Jade, has an exciting on-stage presence. Anastasia has quit all other jobs to become a full-time actress.

Petite **JADE JUSTAD,** playing Leah and prominent civil rights attorney **MARGARET FUNG**, **Esq.**, has a riveting physical presence and commands the stage with an electric charisma, in her portrayals of Leah and other characters. **ANASTASIA MORSUCCI** is versatile, in her multiple roles as Julia Dahlman and Dorothy Hwang, among others. The range of Anastasia's accents and impersonations is amazing. She, like Jade, has an exciting on-stage presence. Anastasia has quit all other jobs to become a full-time actress.

Tom Ashton

TOM ASHTON is an actor-musician living in Woodside, Queens. He first appeared on stage at 5 years old in a community theatre production of *South Pacific* on eastern Long Island, where he grew up. He spent years performing in summer stock musicals and, upon graduation from Niagara University, he moved to New York City to pursue a career in music. As singer-songwriter-guitarist with the band Early Edison, he recorded three full-length CDs and several EPs working with Grammy Award-winning producer Pat Dillett (David Byrne, They Might Be Giants) and Tony Maimone (Pere Ubu, Bob Mould).

The band survived a short-lived deal with Sony Music. Tom has gone on to write songs that have appeared in several films and TV shows including "A View From The Top" (Gwyneth Paltrow), "My Boss's Daughter" (Ashton Kutcher), "Dickie Roberts: Former Child Star" (David Spade), and "Tru Calling" (Eliza

Continued On Page 14

Innovative New York Lawyers Use Online Video To Get New Clients

BY GERRY OGINSKI, ESQ.

As the internet has taken hold and more lawyers have recognized the benefits of marketing online, one marketing tool is defining the standard of advertising on the web. Online videos. It is the newest, hottest tool available for lawyers to communicate their message on the web. Admittedly, attorney videos are one-way communication, but they offer significant advantages over every other advertising medium.

Most attorneys have failed to understand the true value of video and how it can improve their chances of a potential client calling them over their competitor. Legal marketing experts agree that the sooner you start to see the value of video marketing, the sooner you'll see the results. Legal marketing expert Larry Bodine (www.lawmarketing.com) recently commented that putting video on your website is "...a great opportunity to present how you look, how you talk, what you're like, and make yourself more attractive to clients. It's a great business-getting technique." The key to encouraging a website visitor to call you, is with video. Static websites and fancy graphics just do not cut it any more, and fail to distinguish yourself from your competitor. Tom Foster, CEO of Foster Web Marketing (www.foster-webmarketing. com) says "If you get in early by putting video on your website, you can take advantage of good search placement on the video search engines."

If you thought that internet video was for the MTV crowd, you'd be wrong. If you thought that video for your website was only for geeky techno-lawyers, you'd be wrong too. If you thought that putting a video of yourself online was useless, you'd definitely be wrong. In fact, Google thinks you're so wrong that they recently paid one billion dollars to buy a video sharing site called YouTube. To give you an idea about the reach that internet video has, consider a ten minute video clip by comedian and ventriloquist Jeff Dunham; his video has been viewed over 60 million times. Most attorney videos are viewed in the hundreds of times, but it shows the potential that video has. Plus, if done correctly, does not cost you anything more if it is watched 100 times or 100,000 times.

Pre-historic times

In the pre-internet age, lawyer advertising was limited to television, radio, yellow pages, billboards, newspapers and magazines. Since the 1970's when the Supreme Court of the United States decided that lawyers could advertise (Bates v. State Bar of Arizona), the general public has been bombarded with lawyer ads. Every jurisdiction in every state has their own peculiar set of ethical rules regarding what lawyers can and cannot say in their advertisements. Cheesy lawyer advertisements have been the bane of late-night talk shows and comedy shows for decades.

Lawyers trying to get a foothold into their particular market often looked upon lawyer advertising as a necessary evil. Many felt it was beneath them to advertise. Not many lawyers wanted to be in the same category as a salesman looking to pitch his latest slicer and dicer. Traditional advertising is costly. Lawyers often complained that the cost to advertise in each medium were prohibitive. The ads themselves were not able to be viewed repeatedly for the same cost, and unless a potential client was looking for an attorney at that moment, they would likely ignore the daily messages they were inundated with.

The new millennia – The Internet

With the dawn of the internet, attorneys began to develop web sites as an ancillary way to "get their name" into the public eye. Many New York lawyers felt, and still do, that they'd rather busy themselves practicing law, rather than marketing their services. The common thinking was "Hire a marketing person to do all that advertising for us." The problem was that most marketing people had no experience with developing web sites for lawyers. Many did not know what a website could be used for and how it could be advantageous to a law firm. The early lawyer web sites consisted of only a few pages and held little information besides your law firm name, and the type of law that you practiced. It gave no real information and did nothing to distinguish you from your competitor down the street. It was analogous to a downed pilot in a war movie who was obligated to give only his name, rank and serial number. Those bland websites did little to encourage a potential client to call.

With the advent of interesting and focused lawyer websites, it is simply not enough anymore to have static websites with fancy graphics and photos. How does your website with nice pictures of tall buildings and cityscapes and mean-looking lawyers with their arms folded across their chests, like the Knights of King Arthur's Court preparing for battle, differentiate you from your colleagues? The reality is that your website is probably not very different from your main competitors. Maybe your website uses different colors; maybe you have a different template and design; maybe your font is different. Put aside the design and focus on the substance. What is it that you are trying to tell a prospective client who is searching for an attorney online? What information do you offer that your competitor does not? How can a prospective client make an intelligent choice about whether to pick up the phone and call you instead of the biggest law firm on the block? Does your website distinguish you and your firm from every other law firm practicing in your specialty? If it does, you have a distinct advantage. If it doesn't, you need to look critically at what you are doing in order to improve your online presence.

Google – Why You Need To Know How It Works

Today's internet has exploded with creative and useful ways to educate and inform millions of viewers. A "Google search" has made it commonplace to search for anything and anybody with a click of a button. Google has cornered the market on creating the easiest and arguably most powerful search tool on the internet today. Why is this important for lawyers looking to market their services and their law firm? It's not only important, it's vital for a lawyer to understand how Google searches work. Only by understanding the concepts of how a search engine works, can a law firm take advantage of it with video marketing.

Typically, a potential client will do a Google search if they are looking for an attorney online. Obviously there are many search engines, but Google's popularity cannot and should not be ignored. The results that pop up on Google will likely determine if your website will be clicked on. If you are on page 10 of a Google search result, it is unlikely your website will be found. The same reasoning applies if you had a full page ad in the yellow pages and were at page 30. The yellow pages representative always managed to explain that even if you were at page 30, "just one client" would be enough to pay for your ad. Unfortunately, the yellow pages rep never explained why a potential client would call your firm, 30 pages from the front, instead of the other 29 lawyers in front of you. However, if your website comes up on page one of Google, there is a good chance that a website viewer will click on your site. Unfortunately, with all the competition today, that alone does not get a potential viewer to call you.

Once a viewer actually clicks on your site, what do they find? Is the website static and filled with fancy graphics or flash media that does nothing to differentiate your site from all the others? What information do you provide that will cause a viewer to want to pick up the phone and ask you questions? The answer according to Gerry Oginski, a medical malpractice and personal injury attorney in Great Neck, is video. Oginski has created over 100 educational video tips on medical malpractice and personal injury law in New York. He posts them on his website, and uploads them to video sharing sites such as YouTube, Google Video, Yahoo and AOL.

Benefits of Video For The Practicing Attorney

Millions of viewers go online every day to watch video clips about every topic imaginable. From 'how-to' videos where you can learn to build a house, to bizarre videos of no-talent singers pretending to be Tom Cruise in their dining room. From sports to politics to technology, there's a video online to steal a few moments of your time.

Video allows the attorney not only to convey their marketing message, but allows viewers to see, hear, and determine whether the lawyer inspires confidence and knows what he is talking about. Video allows for more than a 30 second commercial that screams at you. Online video gives lawyers the opportunity to explain to viewers how they are different from every other lawyer who is competing with them.

Video Is The Key To Show You Are Different

How does video distinguish you from everyone else? By creating a personal bond with your viewer. Admittedly, it's a one-way conversation, but it allows the viewer to see you, hear you, and judge for themselves whether you sound confident and intelligent enough to want to call you.

So far, the biggest users of online video for law firms have been personal injury and medical malpractice lawyers. These attorneys have gotten in on the ground floor and are just now learning how to optimize their videos so that the major search engines identify the videos and improve their search engine ranking for their website. That's the golden key that every attorney who advertises online appears to strive for. To be able to say that "Out of 4 million websites, Google thinks my site is #1 in their organic search rankings," is indeed, a feat to strive for and emulate.

Why a Potential Client Would Call You

If a potential client is searching for a lawyer online, what would make them choose one lawyer over another with the same credentials? You each have a website. You each have similar experience. You each charge basically the same for similar services. So, how are you different, and how can you communicate that to a nameless, faceless visitor to your website?

A video that tells a visitor who you are and welcomes them, has already gained brownie points. What should you talk about? If you talk about how great you are and how amazing your credentials are, does the viewer really care? Or is the viewer more interested in how you can solve their pressing legal problem? If you can answer their unasked question through a video, not only will you have scored all the points, you can bet that person will call you and not your colleague down the street.

Generating Half The Calls To His Office

Oginski says "These educational videos together with my informative website have caused my phone to ring. In fact, they generate half of all the calls to my office." He explains that this is a dramatic increase from the previous year when he only had his website online.

Virginia Personal Injury Trial Lawyer Ben Glass, who teaches marketing to lawyers all over the country says that after viewing Oginski's website and the videos he created, agrees that "It's no longer good enough to just have a message that you 'shout' out to consumers via the Yellow Pages, TV, Radio or the Internet. The informational videos that Gerry Oginski has created uses cutting-edge marketing ideas and combines them with the latest technology in order to 'start a conversation' with potential clients. That's the key to getting a website visitor to call."

What happens to those lawyers who choose not to use online video? Oginski believes that "those lawyers will lose the chance to get excellent placement on the video search engines. Those same lawyers lose the ability to improve their search engine rankings, because video clearly helps improve their website rankings. Lawyers who fail to create useful videos lose the opportunity to connect with their website visitors and distinguish themselves from all the other lawyers out there competing for the same business. Those lawyers lose the advantage of letting a viewer get to know them and trust them before they ever walk into their office."

Gerry Oginski is an experienced medical malpractice & personal injury trial lawyer practicing law in New York since 1988. He has created, produced and uploaded over 100 educational videos online about New York medical malpractice, wrongful death and personal injury law. Gerry's popular website (http://www.oginski-law.com) consistently comes up #1 in the organic search results when you do a Google search for "New York Medical Malpractice Lawyer." Gerry's video blog can be seen at http://medical-malpracticetutorial.blogspot.com.

Court Notes

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

Sergey Khaitov (May 20, 2008)
On September 9, 2005, the respondent pleaded guilty in the Supreme Court, Queens County, to Grand Larceny in the second degree, a class C felony. Thereafter, the respondent failed to comply with the requirement of Judiciary Law §90(4)(c) regarding notification of his conviction to the Appellate Division within 30 days. As a result of his plea of guilty to a New York State felony, the respondent was automatically disbarred as of September 9, 2005, pursuant to Judiciary Law §90(4)(a)

Ida D'Angelo (June 10, 2008)
On March 29, 2007, the respondent pleaded guilty in the Supreme Court, Kings County (Gerges, J.) to one count of Falsifying Business Records in the first degree, a class E, felony. As a result of her plea of guilty to a New York State felony, the respondent was automatically disbarred as of March 29, 2007, pursuant to Judiciary Law §90(4)(a)

Mario F. Rolla (June 10, 2008)
The respondent tendered a resignation in light of his plea of guilty in the United States District Court for the Northern District of New York (Hurd, J.) on March 9, 2007, to an information charging him with conspiracy to violate the Clean Air Act in connection with his having entered into a contract or contracts to remove asbestos without taking appropriate steps to insure that the work would be performed in accordance with federal requirements.

Robert A. Shuster, a suspended attorney (June 10, 2008)
On August 17, 2007, the respondent pleaded guilty in the County Court, Nassau County (Ruskin, J.) to one count of Grand Larceny in the second degree, a class C felony. As a result of his plea of guilty to a New York State felony, the respondent was automatically disbarred as of August 17, 2007, pursuant to Judiciary Law §90(4)(a).

Diana J. Szochet

Michele M. Monopoli (June 17, 2008)
The respondent tendered a resignation wherein she acknowledged that she could not successfully defend herself on the merits against charges predicated upon a violation of Disciplinary Rule 1-102(A)(4) [dishonesty, fraud, deceit or misrepresentation] of the Lawyer's Code of Professional Responsibility [22 NYCRR §1200.3(a)(4)].

Gregory E. Ronan, admitted as Gregory Edward Ronan (June 17, 2008)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges predicated upon two fraud judgments entered against him.

Gary S. Shaw, admitted Gary Stuart Shaw (June 17, 2008)
On September 25, 2007, the respondent pleaded guilty in Supreme Court, Kings County (Gerges, J.) to one count of Falsifying Business Records in the First Degree, a class E felony. By virtue of his felony conviction, the respondent was automatically disbarred as of September 25, 2007, pursuant to Judiciary Law §90(4).

Roger L. Cohen, admitted as Roger Lee Cohen (July 29, 2008)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges predicated upon his mishandling of client funds.

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

Seth Muraskin (June 5, 2008)
Pursuant to 22 NYCRR §691.13, the respondent was suspended from the practice of law until further order of the court due to a mental and/or emotional infirmity.

Vincent Siccardi (June 10, 2008)
Following a disciplinary hearing, the respondent was found guilty of neglecting three legal matters entrusted to him. He was suspended from the practice of law for a period of six months, commencing July 10, 2008, with leave to apply for reinstatement upon the expiration of said period.

Cheryl K. Brodsky, admitted as Cheryl Kim Brodsky (June 17, 2008)
The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that she was guilty of professional misconduct immediately threatening the public interest as a result of her failure to comply with lawful demands of the Grievance Committee.

The Following Attorneys Were Publicly Censured By Order Of The Appellate Division, Second Judicial Department:

Michael A. Cintron, admitted as Michael Anthony Cintron (May 20, 2008)
Following a disciplinary hearing, the respondent was found guilty of failing to cooperate with the legitimate investigation of complaints of professional misconduct conducted by the Grievance Committee and failing to comply with the Committee's lawful demands, as well as failing to re-register as an attorney with the New York State Office of Court Administration (OCA).

Mark Easton (May 20, 2008)
Following a disciplinary hearing, the respondent was found guilty of neglecting legal matters entrusted to him by failing to timely and/or diligently pursue such matters, and conduct involving dishonesty, fraud, deceit or misrepresentation, by misleading his clients as to the status of the legal matters entrusted to him.

Jeffrey A. Irving (June 10, 2008)
On May 24, 2004, the respondent pleaded *nolo contendere* in the Vermont District Court, Unit 1, Windham Circuit, to three misdemeanor counts of shoplifting. As a result of the foregoing, the respondent was found guilty, following a disciplinary hearing, of engaging in illegal conduct adversely reflecting on his honesty, trustworthiness, or fitness as a lawyer in violation of DR 1-102(A)(3); engaging in conduct adversely reflecting on his fitness as a lawyer in violation of DR 1-102(A)(7); and professional misconduct as a result of his conviction of a "serious crime" involving theft within the meaning of Judiciary Law §90(4)(d) and 22 NYCRR §691.7.

Edward C. Klein, admitted as Edward Carl Klein (June 10, 2008)
On or about June 6, 2006, the respondent pleaded guilty in the District Court, Nassau County, First District, to attempted reckless endangerment in the second degree, a class B misdemeanor; disorderly conduct by creating a hazardous or physically offensive condition by an act which serves no legitimate purpose, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof, a violation; and harassment in the second degree by striking, shoving, kicking, or otherwise subjecting another person to physical contact, or attempting or threaten-

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Friends, Romans and Brethren, Lend Me Your Ear

It has come to the attention of the Queens County Bar Association's Academy of Law that on a fairly regular basis we have members who have failed to meet the mandatory continuing legal education requirements. Can you believe that? As you know, the Rules of Chief Administrator of the Courts of this State require the biennial registration of all attorneys, and this means you. It also means that you have two (2) years within which you are required, as an attorney admitted to the New York Bar for more than two (2) years to complete twenty-four (24) credit hours of continuing legal education (at least four (4) of which must be in the Ethics and Professionalism category). You received your attorney registration, you do not have the twenty-four (24) credits, your time is running out and you ask - What am I to do?

Lend me your ear. The Queens County Bar Association will come to your rescue. You do not have the time to obtain the credits needed, and the time remaining is insufficient. The Knight in Shining Tapes will come to your rescue! Not only does our Association run a large and varied number of seminars, but we are fortunate to have a well stocked library of the tapes of our seminars. Each tape carries with it a certain number of qualified CLE credits.

So, at the end of the day, purchase a tape and lend your ear to it and your problem will be solved. To obtain the tape call our Association, 718-291-4500, or visit the website, qcba.org, where you can select the tape or tapes which you may need. There is a fee for each tape purchased, but in the end, it is well worth it by virtue of the information acquired and the CLE credits earned. Formats available for the tapes are CDs, DVDs and VHS.

PAUL S. GOLDSTEIN *Member of the Academy of Lawand former President of the Queens County Bar Association*

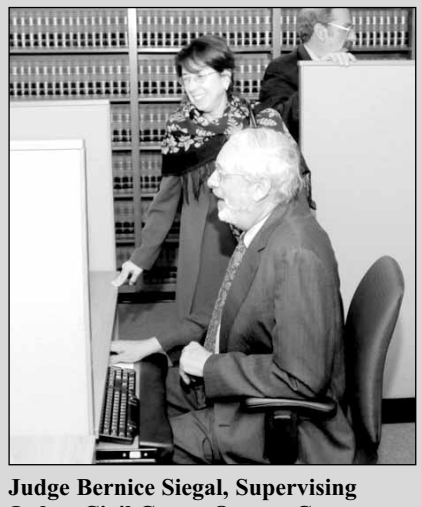
QCBA Celebrates Opening of New Tech Center and Pro Bono Office

Continued From Page 1

computers and there is a copying machine available for library and Tech Center use. The law library now has wall to wall carpeting, is fully air-conditioned and the Tech Center has new seating as well. The law library also has free Wi-Fi access.

The new office of the Queens Volunteer Lawyers Project, allows several staff members to work simultaneously at new work stations with networked computers and telephones. This will greatly increase the efficiency of the program and increase the number of pro bono clients who can be assisted.

All QCBA members are urged to stop by and view the newly refurbished facilities when they are at the Association for a seminar or meeting. We would also like to thank those whose monetary contributions to QVLP helped to make these improvements become a reality.



Judge Bernice Siegal, Supervising Judge, Civil Court, Queens County, checking out a new tech center computer with Past President Steven Wimpfheimer.

Mark Weliky is the Pro Bono Coordinator for the Queens County Bar Association

Winning Oral Argument: Do's And Don'ts

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important case in which you must preserve the record for appeal or further appeal. Throwing in the kitchen sink or wasting time arguing contentious or irrelevant points distract the person you are trying to persuade and make that person believe that no argument you have is strong.

Argue your best issues first. The human mind expects speakers to begin with their strongest points and then to support these points with their best legal authority and their best applicable facts. Beginning with weaker points will tell the listener that your weak point is your strong point. You might even get derailed or run out of time and never reach your best issue. Vary from that format only to begin with a threshold argument like statute of limitations or when you must present issues in the order presented by the factors laid out in a statute or seminal case. If two issues are of equal winning weight, begin with the issue that will give your client the greater relief. Do not begin with rebutting the other side's points. You need to communicate that you are right because you are right, much more than you are right because the other side is wrong.

Apply fact to law. The judges might know the law, but they do not know your facts, and law without context is meaningless: Everything depends on the facts. When applying facts do not simply raise facts or even argue them: Apply them to the issue you argue.

Introduce; then amplify. Tell the court at every turn what you will argue. For example, "There are three reasons: First,...; second,...; and third... ." Then argue each in turn. That provides organization to speaker and listener alike, and it offers necessary, persuasive repetition.

Answer; then explain. You need to make it easy for the court to rule for you. One way to do that is answer with a yes or no, and then to explain why. Beginning the answer with a narration without first answering the question will frustrate the judge and possibly lead to confusion. The goal is to help the judge, not to speak for the sake of talking or preach for the sake of self-importance. Your client's rights are at stake – not your ego.

Make eye contact. Looking at the judge means not reading. It lets you know whether you are answering the judge's question, whether you are having a conversation, and whether the judge is listening. Looking at the judge – and before an appellate panel looking at all the judges without darting your eyes – forces the judge to look at you, and therefore to focus and engage, not bored or distracted. Besides, reading often means reading your brief, and reading your brief means wasting the opportunity to address the concerns the court might have after it has read your brief. This rule requires you to take to the podium only those things that are essential to your argument.

Be confident but restrained. Speak slowly, loudly (without yelling), and clearly. Maintain good posture; do not distract by slouching, leaning on the podium, or moving your body and hands; you want the court to listen to you, not watch you move around. Do not bang on the podium or make noises that a microphone will amplify. Be politely assertive, not comical or tentative. Argue emotional facts without arguing emotionally. Keep passion in check; be even-tempered. Project assuredness, but do not personally vouch for the validity of the argument or the honesty of the client. Stay within the four corners of the record.

Rely on visuals. A technique that always works well before a trial court and especially a jury, and sometimes also before an appellate court, is to use visual aids: Blow-ups of crucial evidence, diagrams, and charts. It is trite but true: A picture is worth a thousand words.

Ten Oral Argument Don'ts

Do not characterize or mischaracterize. The best argument focuses on issues, law, fact, equity, and public policy. The worst argument focuses on lawyers' making things personal. It will not help the court rule for you to attack, use biased modifiers, or impute motives. Stay away from the adverbial excesses like "clearly" and "obviously." Do not miscite the record or misinterpret a statute or case.

Do not debate. Effective lawyering means communicating by addressing the court's concerns. Answer questions in a respectful manner. You never know why a judge is asking a question. A judge might ask you tough questions, not because the judge disagrees with you, but, perhaps, because the judge is speaking to colleagues through you, because the judge wants to rule for you and needs to fill in a gap, because the judge wants to understand your point and learn, or, frankly, because the judge is mean, temperamental, and cantankerous. Stand your ground and concede what you should but only if and when you should, all without challenging the probing or even abusive judge. Never argue with a judge; if you are forced, say you respectfully disagree and move on.

Do not self-edit or worry. Many people correct themselves after they begin a sentence. It is better to fumble a bit than to repeat or start over. Starting over means making it obvious that you are nervous; if you are nervous, the judge will become uncomfortable and become distracted. Live in the moment; do not think about anything but where you are at that moment: That is the secret to the actor's success in remembering lines. In terms of style, it does not matter if you stumble from time to time. If you smile and are likable, pleasant, and honest, you will communicate, and the court will remember your point. If you do not know an answer, return to your theme, and you will always get the answer right while adding spontaneity and interest to what you are saying.

Do not cross-talk. Talk to the judge. Only the court can rule for you. Talking to opposing counsel, addressing points to opposing counsel ("I would ask the respondent... ."), and talking over the judge will score no points.

Do not over-cite or over-quote. Oral argument supplements the written brief or memorandum of law. Citing in detail interrupts the flow of argument and is boring. So is quoting anything more than a short part of a seminal case, statute, or contractual provision.

Do not ignore the other side. The effective advocate will know the other side's case. Do not stop after you have presented your side. Contradict, albeit with decorum, the other side's legal, factual, and policy arguments. Especially when you represent the non-movant or appellee, respond to what your opponent argued. Do not stick to a script.

Do not ignore your time. Keep your eye on the clock. End on a high note, even if you have a few remaining moments left to speak. When your time is up, ask the presiding judge to finish your thought or answer the question briefly, and then sit down. Do not give a canned conclusion.

Do not interrupt your adversary. Being civil and professional means not rolling your eyes, talking, or shuffling papers when your opponent speaks. Civility and professionalism also means not nodding your head if a judge asks a question with which you agree.

Do not forget policy and equity. To rule for you, a judge wants to know that doing so will help the good administration of justice, that a wrong will be righted, that evildoers will receive their just rewards, that the rule you propose will be fair and easy to follow in the next case. Law and fact trump policy and equity but should be stressed nonetheless, especially when the court has the discretion to weigh and balance factors and interests.

Do not expand. To help the court rule for you, you need to have a conversation in which you welcome the court's interruptions but in which you answer the court's questions concisely. Do not ramble. Get to the point, and make it count.

Conclusion

Oral argument is difficult but exhilarating. Oral argument affects cases. Cases, and not just close ones, are won and lost at oral argument. The advocate uses oral argument to correct misunderstandings, reinforce points, limit issues, rebut the opponent's arguments, and address concerns. Oral argument is an opportunity, never to be taken lightly, and always to be taken advantage of.

Editor's Note: Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University in Queens, New York, where he teaches trial and appellate advocacy.

Court Notes

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ing to do the same, with the intent to harass, annoy, or alarm that person, a violation. As a result of the foregoing, the respondent was found guilty, following a disciplinary hearing, of engaging in illegal conduct that adversely reflects on his honesty, trustworthiness, or fitness as a lawyer in violation of DR 1-102(A)(3) and engaging in conduct adversely reflecting on his fitness as a lawyer in violation of DR 1-102(A)(7).

Arthur Shtaynberg (June 10, 2008)

On or about September 5, 2006, the respondent entered a plea of guilty in the Supreme Court, Queens County (Cooperman, J.) to a violation of Judiciary Law §482 - Employment by Attorney of Person to Aid, Assist or Abet in the Solicitation of Business or the Procurement Through Solicitation of a Retainer to Perform Legal Service – a class A misdemeanor. Following a disciplinary hearing, the respondent was found guilty of having been convicted of a serious crime.

Michael S. Kimm (July 1, 2008)

By order of The Supreme Court of New Jersey dated June 19, 2007, the respondent was publicly censured in that state for bringing a proceeding knowing or reasonably believing that it was frivolous, which conduct was prejudicial to the administration of justice. Based upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was publicly censured in New York.

The Following Disbarred or Suspended Attorneys Were Reinstated to The Practice Of Law By Order Of The Appellate Division, Second Judicial Department:

Paul Leff, admitted as Paul Arden Leff, a disbarred attorney
(June 10, 2008)

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

Failing to timely re-register as an attorney with OCA (5)

Neglecting a legal matter and attempting to settle a potential malpractice claim without properly advising the client, in writing, to obtain the advice of independent counsel

Abandoning a client matter and/or improperly withdrawing from the client's case

Improperly permitting the lawyer's father, a disbarred attorney, to maintain a presence in the lawyer's law office and have contact with clients

Failing to clearly state the scope of representation in a retainer agreement, resulting in a misunderstanding with a client; failing to follow-up on the status of a motion; failing to consult with the client regarding a motion to reopen the client's file and then attempting to charge the client a significant fee above and beyond the fee contemplated in the original retainer; and disparaging the client's credibility before a tribunal

Engaging in an impermissible conflict of interest (2)

Improperly asserting a lien

Neglecting a legal matter; failing to promptly tender funds due the client; failing to timely re-register as an attorney with OCA; and failing to cooperate with the Grievance Committee

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

The Culture Corner

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Dushku).

Several years ago, **TOM ASHTON** was asked to write a song for an advertising campaign for 1-800-OK-CABLE. Appearing as the principal character in the commercial with his band, he found himself bitten by the acting bug again after a long hiatus. In the past three years, Tom has worked extensively in independent film including a lead role in the feature "Semblance," directed by fellow Queens resident and Hunter College film professor, Gustavo Mercado. These films, and his appearances in several other short films, have received screenings at film festivals nationwide. **TOM ASHTON** worked earlier this year with **YELLOW FACE**'s director, Sofia Landon Geier, in a staged reading of Murray Schisgal's "Luv."

Musically, **TOM ASHTON** is presently writing and recording new material for a project he hopes to bring to the screen. He is also writing music for the sketch comedy group, The Imponderables, winners of the Canadian Comedy Award for Best Sketch Troupe.

Other members of the cast deserve recognition for playing multiple roles in **"YELLOW FACE." SCARLETT AHMED** (playing Stuart Ostrow, Fritz Friedman, an FBI Interrogator, and others) is originally from Olean, New York. The range of **SCARLETT AHMED's** comedic talent in **YELLOW FACE** is breathtaking! Scarlett studied acting at Cornell University and The National Shakespeare Conservatory. Specializing in great ladies, villainesses, and brainy eccentrics, over the years, her roles have included Madame Desmermortes in Ring Round the Moon (directed by Mary Lou Rosato), one of the Six Women With Brain Death or Expiring Minds Want to Know (TheaterWorks, Sarasota), and Marian in Pentecost (Henry Street Settlement, NYC).

SCARLETT AHMED has been in two productions of Shakespeare's Cymbeline (first as the wicked Queen, then as Princess Imogen) and keeps getting cast as the evil sister-in-law in Chekhov's Three Sisters. After a hiatus from acting to start a family, she recently returned to the stage, playing opposite her son Omar in the Free Synagogue of Flushing Community Theatre Group's production of Peter Pan (she was Mrs. Darling, he was Tootles). She started a new job at the New York State Department of Labor this past summer, just in time for the downturn in the markets and the flood of unemployed Wall Street professionals. Her hobbies include travel (especially to Bangladesh, her husband's homeland) and talking about all the things you are not supposed to discuss in polite company (politics, religion, money, death, the ingredients in hot dogs, etc.). Although I believe that Scarlett has the gifts for a starring role in a sit-com, of interest to **QUEENS BAR BULLETIN** readers, **SCARLETT AHMED** will begin law school next fall.

RAY CHAO comes from Chicago where he studied and performed improv with some of the country's most talented and respected improvisers. Since moving to NY last year, he has been improvising with several fine groups including ComedySportz NY, Friday Night Face Off, and 4Squares. Ray also writes and performs sketch comedy and stand-up. New York has also provided him with many other challenging acting opportunities in theatre, film and television. He is particularly thankful for the part in **"YELLOW FACE,"** playing banker Henry Y. Hwang, the playwright's father. Ray says the part gives him the "the rare chance to portray a complex, funny, and realistic Asian."

JENNIFER GEGAN, playing a variety of roles, including the owner of a sleazy porn shop, was last seen as Virginia in "Roulette." She just finished training with Terry Schreiber Studios and has studied with Austin Pendleton at HB Studios. In addition to commercial and film work, she has been seen in various theatrical roles including a summer stock production of "The Odd Couple."

Tickets for "YELLOW FACE" are $22 with an advance purchase, and $25 at the door [if any are available, by then]. The theater's capacity, however, is strictly limited to 90 seats. Tickets may be purchased by sending checks directly to: **THE OUTRAGEOUS FORTUNE COMPANY, 42-24 Douglaston Parkway, Douglaston, NY 11363, tel. 718-428-2500, ext. 20.** Performances are: November 14 [8 P.M.], Nov. 15 [8 P.M.], and Nov. 16 [Sunday, 3 P.M.], and a Thursday night performance on November 20, [at 8 P.M.], Nov. 22 [8 P.M.], and Nov. 23 [Sunday, 3 P.M.]. The performance on November 21 [8 P.M.] was sold out weeks ago, and some of the other performances are nearing that stage as the time that this column was submitted to press.

Audience-generated Question-and-Answer sessions will follow the performances of Nov. 16 [moderated by **MARGARET FUNG**, **ESQ**., the Executive Director of the Asian American Legal Defense and Education Fund], Nov. 21 [moderated by **MR. HELLMAN, THE PRODUCER**], Nov. 22 [moderated by **GRACE MENG, ESQ**., who is the Democratic Party's candidate for the Assembly from Flushing, Queens], and Nov. 23 [moderated by **HONORABLE DOROTHY CHIN-BRANDT**, a Justice of Queens Supreme Court].

Free parking is available at the theater. Free shuttle trolleys will be running from the #7 train at Shea Stadium/Willet's Point to the theatre, running one hour before and after all performances. The **QUEENS THEATRE IN THE PARK** is located in the heart of Flushing Meadow's World's Fair Park and can be found at Exit 9P from Long Island and Exit 9E from Manhattan.

THE AMATO OPERA

I try to go to the **AMATO OPERA,** on the Bowery, in the East Village, in Manhattan, as often as I can to see developing operatic talent**.** I make it a point to go to **AMATO OPERA**, which gives valuable career opportunities to aspiring opera singers, whenever talented and beautiful **JORDAN C. WENTWORTH** is performing there. I delighted seeing her performances last season as Norina in "Don Pasquale" and Musetta in "La Boheme."

JORDAN C. WENTWORTH has a wonderful voice, and her acting skills make the stories all the more absorbing. So my heart sank a lot when I learned initially that she would be performing the principal role of Violetta in Verdi's "La Traviata" on the night of Nov. 15, when I will be performing in **YELLOW FACE**. As fortune would have it, Jordan's appearance was changed to Friday night, November 7 - - a night that I have no rehearsal and thus have got my tickets to see and hear **JORDAN WENTWORTH's** enormous talent. Violetta now provides Jordan with a meaty, dramatic heroine role in this popular tragedy by Giuseppe Verdi.

The role of Violetta, in my opinion, is one of the most vocally and physically challenging female roles in opera. Violetta is not a prostitute, but a kept woman. She finally finds her true love, only to find it shattered by her lover's father, too self-absorbed in appearances, and illness. Whether you see **JORDAN C. WENTWORTH** play Violetta on November 7 or another gifted opera singer and actress perform the role, go and see it at **THE AMATO OPERA.**

If you love "La Traviata," as I do, since it is one of the most popular operas ever, you will also be delighted to see it during November at THE METROPOLITAN OPERA in Franco Zeffirelli's opulent production. The Met Opera's production stars **ANJA HARTEROS** as Violetta and **MASSIMO GIORDANO** as her lover. La Traviata's last performance at the Met Opera for the season is on Thursday, November 20. Check the calendar at www.MetOpera.com.

JORDAN C. WENTWORTH was recently a featured guest on "The Morning Show with Mike and Juliette." Her performances include roles and solo engagements with the Liceu di Opera of Barcelona, Amato Opera of New York, Austin Civic Opera, Benaroya Hall and Civic Light Opera of Seattle, and the Bellingham Theatre Guild. Her recent roles have included, "Rosina" in The Barber of Seville, "Musetta" in La Boheme, "Ophelia" in Hamlet, "Adele" in Die Fledermaus, "Norina" in Don Pasquale, "Susana" in Marriage of Figaro, "Adina" in Elixir of Love, "Juliette" in Il Capuletti e I Montecchi, "Zerlina" in Don Giovanni, "High Priestess" in Aida, "Madame Heartmelt" in The Impressario, "Frasquita" in Carmen, "Frou Frou" in The Merry Widow, "Siebel" in Faust, "Hansel" in Hansel and Gretel, "Pappagena" in The Magic Flute, "Flora" in La Traviata, "Najade" in Ariadne Auf Naxos, "Sarah" in Mudhoney, "Kate" in Madame Butterfly, "Luisa" in The Fantasticks, "Meg" in Brigadoon, "Chava" in Fiddler on the Roof, and "Virginia" in The Pajama Game.

JORDAN C. WENTWORTH has also been teaching voice for 20 years, 8 years full-time in New York. She studied with the legendary tenor Juan Oncina and his wife, the late Tatiana Menotti (coloratura) in Barcelona. She currently studies with Judith Natalucci.

Jordan C. Wentworth

How many opera performers do you know who are also composers? JORDAN WENTWORTH's opera "Day Boy and Night Girl," based on the popular fantasy, will soon be given a special preview at Manhattan's Upper West Side's prestigious Symphony Space. See www.symphonyspace.org. **JORDAN WENTWORTH** has also composed seven film scores.

Jordan's husband, **DAVID WENTWORTH**, incidentally, is a noted and gifted photographer in great demand. His extraordinary creative genius of portraits, events, nature landscapes, and stills has been often exhibited and is available at www.davidwentworthphotography.com.

HOWARD L. WIEDER is the writer of both "THE CULTURE CORNER" and the "BOOKS AT THE BAR" columns, appearing regularly in THE QUEENS BAR BULLETIN, and is JUSTICE CHARLES J. MARKEY'S PRINCIPAL LAW CLERK.

Service Directory

Changing Times In The Family Court

Continued From Page 3

Court referee I am in the unique position of being able to immediately provide a petitioner in need of services with not only an attorney, but also with assistance from ACS and Safe Horizons." She finds that she is able to call upon agencies such as ACS and Safe Horizons to invest more time in each individual case during Night Court than during regular court hours. ACS, Safe Horizons and interpreters are more readily available to provide important services to the litigants during Night Court hours. There is always a Spanish language interpreter available in Night Court and, since many of the Spanish language interpreters usually speak a third language, Night Court has the enhanced ability to sometimes provide interpretation in languages other than Spanish.

Cases heard in Night Court are given a return date to return during the daytime. The visitation, custody and guardianship cases are returnable to Referee Moriber, sitting as Part 49, on the third floor of Family Court during the daytime. The family offense petitions are returned to the CVO part located in the ceremonial courtroom on the first floor during the day to be heard by Referee Jane McGrady.

Referee Moriber says that she draws on her sixteen years of experience with the Queens District Attorney which bestowed upon her "a continuous desire to serve the public in a way that can better the community." The Referee said that "it is incumbent upon me to help anyone who comes to Court and to answer any questions they might have about the court process, without offering legal advice. If the litigant is eligible, I will assign an 18B attorney to the litigant in order to further provide legal assistance."

There are no plans to open the Queens Family Court for filing on weekend days, however, Family Court Juvenile Delinquency matters have recently begun to be heard on weekends in Manhattan pursuant to a new Court initiative announced in May, 2008 by Mayor Bloomberg. According to the Mayor, this was a first for New York State. The Mayor explained in announcing the new program that seven day per week juvenile processing, a standard already in place for those sixteen years and older in the Criminal Court, was intended to reduce detention time for youth under the age of sixteen who could safely be released to the community and might otherwise be detained for up to forty-eight hours or longer. The new program was planned so as to provide high risk youth with access to weekend processing and the availability of a Judge who would determine whether detention is warranted. The program began on May 31st, 2008.

Mayor Bloomberg said in May that "it's not enough to be tough on crime; we also have to be smart about crime". He explained that "the fifteen year old who snatches a video game from another youth on a Friday night should not be detained all weekend long when a seventeen year old who does the same thing would see a Judge within twenty-four hours. We already have weekend arraignment for adults; the kids we still have a chance to save are entitled to at least at much."

A Mayoral spokesperson, explained in a press release in May, 2008, that the nearly 12,000 kids processed by the New York City delinquency system each year are often youth who are disconnected from school or family and may face an uncertain future. When there is an encounter with the juvenile justice system, this can lead to further alienation. Part of the goal of adding Week-End Court processing is to send young people home where they can best receive the support they need to get them on a more positive path.

The juveniles arrested on a weekend day are processed by Judges who currently arraign adults on a regular basis. The intake of the juvenile's case occurs in a separate courtroom from any adult arraignment. The Family Courts, in all five boroughs, remain closed on the weekend. The intake of the juvenile cases is held in Manhattan Criminal Court at 100 Centre Street. An average of eight juveniles entered detention each weekend day prior to the start of the weekend processing in May.

Steven Banks, Attorney in Chief of the Legal Aid Society said of the process in May, "This is a landmark day for children to ensure that they will be treated fairly in the juvenile justice system and promptly brought before a Judge when they are accused of misconduct."

Maybe Charles Dickens would cheer these words but my grandfather would still just be confused. My grandmother, on the other hand, worked much harder than my grandfather to try and comprehend the new world of New York City that they came to call home after fleeing the pogroms in Eastern Europe in the early part of the last century. She used to watch soap operas in an effort to understand "the Americans" and to learn English. General Hospital was her favorite.

In the 1960's she expressed concerns about "the Americans" using machines to wash their dishes. She traced what she saw as the decline of American society directly to the advent of the "dishwasher machine". My grandmother said that, with the coming of this machine, multiple generations of women ceased to convene in unisex gatherings after family dinners to talk about men - - what was wrong with them and how to fix them; and, as well, to address what was wrong with the children and, of course, how to fix them too – all the while sharing the activity of washing dishes by hand. My grandmother figured the best way to fix problems in relationships was to talk to others about the problems, glean their experience, and try to put it to work for you – and then come back with more questions, hopefully more insight, and, of course, be prepared to wash more dishes.

When you get right down to basics, my grandmother's problem solving plan is in place in every Court, everyday. Each day the various Courts open their doors to welcome litigants and provide them with a forum in which they can come and discuss their various problems in an environment where Court staff and professionals are ready, willing and able to offer help – all this and nobody has to wash any dishes.

Sex Offender Management And Treatment Act

Continued From Page 7

Mental Health law, a court is authorized to civilly commit a person when the court is "informed. . .that a person is apparently mentally ill and is conducting himself or herself in a manner. . .which is likely to result in serious harm to himself or herself or others."[27]

Such a finding triggers a series of psychiatric evaluations and judicial reviews revolving around a finding that the person is "in need of involuntary care and treatment", in that he or she is a person who "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare", and around a finding that the person at liberty would "likely result in serious harm" which is "a substantial risk of physical harm to the person. . .or a substantial risk of physical harm to other persons. . . ."[28]

The Sex Offender Management and Treatment Act is an outgrowth of this procedure.

One difference between the two sections is in the definition of the mental condition which is the predicate for indefinite detention.

There are two obvious constitutional issues presented by the act, First, does the act deprive the respondent of due process by its definition of "mental abnormality"?

Second, does the act present an issue of double jeopardy? After all, the respondent is being detained, following the expiration of the individual's sentence, for among other reasons, for the very act for which he or she was serving the sentence.

Both of these issues were rejected by the United States Supreme Court is *Kansas v. Hendricks*,[29] in a sharply divided 5-4 opinion. The state of Kansas enacted a civil commitment procedure for sex offenders which was basically similar to the New York Act. The Kansas Supreme Court struck down the law because of the Act's definition of "mental abnormality". It held that the Act's definition of "mental abnormality" did not satisfy what it perceived to be the U.S. Supreme Court's mental illness requirement in the civil commitment context.[30] The U.S. Supreme Court had previously generally approved involuntary civil commitment procedures for mentally ill persons.[31] However, it was always with the following caveat. "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify involuntary commitment".[32] The finding of dangerousness was usually coupled with a finding of mental illness.

In Hendricks, the Court dismissed the difference and essentially held that for the purposes of civil commitment the terms were synonymous.[33]

With regard to the double jeopardy claim, the Court held that there was no issue because this was a civil proceeding and not a criminal one. The primary purpose of the act, according to the Court, was not punitive or retributive, but rather, its primary aim was to provide treatment for individuals suffering from a mental abnormality.[34]

The Court of Appeals will certainly review this Act in the future. There is one striking difference, which the Court may notice, between the New York Law and the Kansas law, which passed constitutional muster. The difference is in the burden of proof. In the Kansas law, the state had to prove beyond a reasonable doubt that the respondent suffered from a "mental abnormality".[35] Under the New York law, the burden of proof is by "clear and convincing evidence."[36] Whether this difference is significant is an interesting question.

As of this date, there has only been one reported case of the act being used. *In the Matter of Douglas Junco*[37], in Washington County, a probable cause hearing was held, and the Court found that there was probable cause to hold a trial. There has been no report that such a trial was held or what the determination was.

As of now, the act has put an incredibly difficult burden of the practitioner in the defense of an individual charged with a sex crime. Specifically, defense counsel has absolutely no idea what the likelihood of a petition being filed against a client. How often the Attorney General will invoke the act is not known. Therefore, the possibility is real that every eligible sex offender who is sentenced to state prison may be civilly committed prior to the expiration of his or her sentence. There is no rational basis at this time to give advice.

A promise not to file a petition as part of a plea bargain would be unenforceable. The Attorney General would not be part of the plea agreement, and would not be bound by it. Similarly, the act does not anticipate that a recommendation by a Criminal Term Justice would have any effect.

At this point, all a practitioner can do is to make the client aware of the act and inform him or her of the consequences of a plea.

On November 16, 2007, the United States District Court in the Southern District of New York, granted a preliminary injunction with respect to two portions of the act. *Mental Hygeine Legal Service v. Spitzer*, 07 Civ. 2935. The Court held that Section 10.06(k) which mandates involuntary civil detention pending the commitment trial, based on a finding at the probable cause hearing that the individual may have a mental abnormality, without a finding of current dangerousness raises serious due process concerns and will likely be held to be unconstitutional.

The Court also held that Section 10.07(d) which authorizes civil commitment based on a showing by clear and convincing evidence that the person committed the sexual offense with which they were charged, but found incompetent to stand trial and never convicted of any offense. The Court found that the clear and convincing burden of proof does not afford the protections that due process requires in determining whether these incompetent persons are in fact offenders within the meaning of the Act.

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[1]Mental Hygiene Law Article 10.
[2]MHL 10.03 (p).
[3]MHL 10.03 (g).
[4]MHL 10.03 (g)(2),(3).
[5]MHL 10.03 (I).
[6]MHL 10.05 (d).
[7]MHL 10.05 (a).
[8]MHL 10.05 (g).
[9]MHL 10.05 (e).
[10]MHL 10.05 (f), (g).
[11]MHL 10.05 (g).
[12]Similar language also accompanies the time frame for the Attorney General to file a petition, MHL 10.06 (a), and for the probable cause hearing, MHL 10.06 (h),
[13]MHL 10.06 (a).
[14]MHL 10.06 (a).
[15]MHL 10.06 (c).
[16]Interestingly, this is the only time frame with an explicit penalty provision. "If the respondent does not timely file a notice of removal. . .then the proceeding shall continue where the petition was filed." MHL 10.06 (b).
[17]MHL 10.06 (b).
[18]MHL 10.06 (j).
[19]MHL 10.07.
[20]MHL 10.07 (d).
[21]MHL 10.07 (e).
[22]MHL 10.07 (f).
[23]Id.
[24]Id.
[25]MHL 10.09 (b).
[26]See, generally, MHL Section 9.
[27]MHL 9.43.
[28]MHL 9.01.
[29]521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501.
[30]*In Re Hendricks*, 259 Kan. 246, 261, 912 P.2d 129, 138.
[31]*Foucha v. Louisiana*, 504 U.S. 71, 1186 S.Ct. 1780, 118 L.Ed.2d 437; *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323.
[32]*Hendricks*, at 358, S.Ct. at 2080, L.Ed.2d at 513.
[33]*Id*., at 360, S.Ct. at 2081, L.Ed.2d at 514.
[34]*Id*., at 362, S.Ct. at 2087, L. Ed.2d at 515.
[35]*Id*., at 353, S.Ct. at 2077, L.Ed.2d at 509.
[36]MHL 10.07 (d).
[37]16 Misc.3d 327, 836 N.Y.S.2d 856.

Article 730 Mental Disease or Defect Excluding Fitness to Proceed: Part III

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the advice of counsel and based on that advice, appreciate, without necessarily adopting, the fact that one course of conduct may be more beneficial to him than another; and is sufficiently stable to withstand the stresses of trial without suffering serious prolonged or permanent breakdown.[10]

The next area to be considered here is what constitutes, under this statute, sufficient psychiatric evidence. There are a plethora of cases concerning this issue. For example, in People v. Wolf[11], the Appellate Division held that the finding that the defendant was competent to stand trial was supported by the evidence, not withstanding the defendant's contention that he had been overly medicated with psychoactive drugs, the court held that the psychiatrist designated to evaluate the defendant found him fit to stand trial, and the defendant's own doctor stated that the defendant was oriented as to time and place, understood the trial process, and was capable of remembering. Again, in People v. Mulholland[12], the Appellate Division held that the evidence adequately established that the defendant was competent at the time he plead guilty. The court noted that the psychiatrist, who had originally examined the defendant, testified as to tests that were performed on the defendant to determine competency and that based on those tests he found the defendant was competent.[13]

ENDNOTES

[1]730.30 Fitness to proceed; order of examination

At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person.

When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefore by the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.

When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity and it must conduct such hearing upon motion therefore by the defendant or by the district attorney.

When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

[2]203 Misc. 191, 116 NYS2d 561 (1952)
[3]115 AD2d 484, 495 NYS2d 715 (1985)
[4]See also, People v. Wright, 105 AD2d 1088, 482 NYS2d 591 (1984); People v. Lopez, 126 Misc.2d 1072, 484 NYS2d 974 (1985); People v. Claron, 103 MIsc.2d 841, 427 NYS2d 146 (1980); People v. Miller, 84 Misc.2d 310, 276 NYS2d 393 (1975); People v. Vega, 73 Misc.2d 857, 342 NYS2d 693 (1973)
[5]See on this, People v. Armlin, 37 NY2d 167, 371 NYS2d 691, 332 NE2d 870 (1975); People v. Sinatra, 89 AD2d 913, 453 NYS2d 729 (1982); People v. Clancy, 39 AD2d 538, 331 NYS2d 49 (1972)
[6]See People v. Falu, 37 AD2d 1025, 325 NYS2d 798 (1971); and People v. De Francesco, 20 Misc.2d 854, 193 NYS2d 963 (1959).
[7]120 AD2d 609, 502 NYS2d 82 (1986)
[8]197 AD2d 394, 602 NYS2d 141 (1st Dept. 1993)
[9]106 AD2d 413, 482 NYS2d 335 (1984)
[10]See also, People v. Gensler, 132 AD2d 941, 518 NYS2d 271 (1987); People v. Jackson, 88 AD2d 604, 449 NYS2d 759 (1982); People v. Angelillo, 105 Misc.2d 338, 432 NYS2d 127 (1980); People v. Wood, 214 NYS2d 950 (1961)
[11]176 AD2d 1070, 575 NYS2d 726 (1991)
[12]145 AD2d 736, 535 NYS2d 265 (1988)
[13]See also, People v. Christopher, 65 NY2d 417, 492 NYS2d 566, 482 NE2d 45 (1985); People v. Robustelli, 189 AD2d 668, 592 NYS2d 704 (1st Dept. 1993); People v. Bey, 167 AD2d 868, 562 NYS2d 896 (1990)