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Queens Bar Bulletin

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Immigration Questions

BY: ALLEN E. KAYE


Allen E. Kaye

Immigration Reform Would Boost US Economy

The Center for Trade Policy Studies issued a report which claims that an immigration reform program which included a legalization would save literally billions of dollars over the current policy of enforcement only. In *Restriction or Legalization? Measuring the Economic Benefits of Immigration Reform*, Peter B. Dixon and Maureen T. Rimmer claim that using standard economic analysis tools (most of which are too complicated for mere mortals to understand), legalization is a huge net gain to the U.S. economy over the alternative current policy of immigration restriction and deportation. To this finding I can only say, No Duh!

We have known for more than a decade, since the passage of Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) that enforcement was going to cost the U.S. taxpayer billions of dollars. The alternative option of a workable, immigration law, with a forward looking vision for U.S. families, business and our economy would clearly be a better alternative to the anti-immigration restrictionist model found in IIRAIRA. The question once again becomes, does Congress have the courage to do what is right and pass comprehensive immigration reform and put the vestiges of immigration restrictionism behind us, or not? Or, will it cave under the pressure of a vocal minority of those for him deportation is the only solution?

The Healthcare "Debate" and Immigration Reform

Unless you have had your head buried in the sand for the last thirty days, you are aware that America is having a national "Debate" on healthcare reform. That is if you call a "debate" yelling at each other, accusing the other side of the "debate" of being a Nazi, a socialist, a birther, or a communist. Frankly, the only part of this debate that is not surprising to me is how calm it is compared to the national debate we have experienced in the recent past on immigration enforcement and reform.

We, as advocates for immigrants, whether or not we agree with whatever reform package has been introduced in September by Senator Schumer, or what might ultimately be voted on by Congress, have to understand is that the vehemence, vituperation, passion, and outright hatred we are experiencing right now over the healthcare reform agendas will PALE in comparison to what we will hear during the immigration debate.

Let's not kid ourselves. The groups that oppose immigrants are as strong as ever. Heck, the Know Nothings over at the Center for Immigration Studies even have a "press conference" next week touting their newest anti-immigrant theory about how the entire healthcare crisis in America is caused and increased by immigrants, both legal and illegal. And this from what some in the media believe is a mainstream non-partisan research group! Groups such as Numbers USA,

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An Analysis of the Motion to Set Aside the Verdict: Subsection 21

BY ANDREW J. SCHATKIN*


Andrew J. Schatkin

This article will consider the ground set forth in subsection 2 of CPL Sec. 330.30. That section contains and sets forth three grounds and bases to set aside a Criminal jury verdict. Those three grounds are as follows:

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

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

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

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

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

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The Following Summary of Second Department Decisions in Medical Malpractice Cases Decided Between January 1 to February 15, 2009

Prepared by Brooklyn Bar Association Medical Malpractice Committee Chair John Bonina

Venue - Procedure and Timing of Motion: *Baez v. Marcus*

Defendants moved to change venue from Kings County to New York County, on the grounds that Kings County was an improper venue. The Court denied the motion noting that a demand to change venue based on designation of an improper county must be served with the answer or before the answer is served (CPLR 511(a)). Since the defendants failed to serve a timely demand for change of venue and failed to make a motion for that relief within the statutory 15 day period, they were not entitled as of right to change venue to New York County. Further, defendants failed to meet their initial burden of demonstrating that none of the parties resided in Kings County at the time of commencement of the action.

Statute of Limitations - Continuous Treatment Doctrine: *Gomez v. Katz*

Defendant's motion for Summary Judgment seeking dismissal on statute of limitations grounds denied. The Court held that there were questions of fact as to whether the continuous treatment doctrine applied. The Court held that neither a 24 month gap between office visits, nor a consultation with a different physician, rendered the continuous treatment doctrine inapplicable as a matter of law.

Statute of Limitations - Dental Malpractice - continuous treatment toll applied to dentists' treatment of some teeth, but not others: *Zito v. Jastremski*

Defendant's motion for Summary Judgment on statute of limitations grounds was granted by the Trial Court. This Order was modified on appeal, with the Court holding that plaintiff raised a triable issue of fact as to whether the continuous treatment doctrine operated to toll the statute of limitations as to some teeth.

The Second Department determined that plaintiff was not entitled to the benefit of the continuous treatment doctrine with respect to the claims involving teeth 14 and 15, as there was no treatment for these teeth after November 12, 2001 (2 1/2x years prior to commencement of the action).

However as to teeth 3, 4 and 5, the dental records and

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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.

2009 FALL CLE Seminar & Event Listing

November 2009

Tuesday,	November	3	Election Day - Office Closed
Wednesday,	November	4	Summary Jury Trials & Trial Preparation 4-Part Luncheon Series Trial Preparation - The Plaintiff 1:00 - 2:00 p.m.
Tuesday,	November	10	Summary Jury Trials & Trial Preparation 4-Part Luncheon Series Trial Preparation - The Defendant 1:00 - 2:00 p.m.
Wednesday,	November	11	Veteran's Day - Office Closed
Tuesday,	November	17	Nuts & Bolts of Appellate Practice - Appeal Tech 1:00 - 2:00 p.m.
Tuesday,	November	17	Ethics Seminar 6:00 - 9:00 p.m.
Thursday,	November	19	Landlord & Tenant Update 6:00 - 9:00 p.m.
Thursday,	November	26	Thanksgiving Day - Office Closed
Friday,	November	27	Thanksgiving Holiday - Office Closed
Monday,	November	30	Stated Meeting - Screening Process for Appt to the Criminal & Matrimonial Bench - Mayor's Advisory Committee 7:00 - 8:00 p.m.

December 2009

Tuesday,	December	1	Family Law Seminar 6:00 - 8:00 p.m.
Thursday,	December	3	Labor Law Seminar 6:00 - 9:00 p.m.
Monday,	December	7	Article MHL 81/Guardianship Training Seminar 2:30 - 5:00 p.m.
Thursday,	December	10	Holiday Party at Floral Terrace 6:30 - 10:30 p.m.
Friday,	December	25	Christmas Day, Office Closed

January 2010

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

February 2010

Wednesday,	February	3	Ethics & Real Estate Practice 1:00 - 2:00 p.m.
Wednesday,	February	10	Evidence Seminar 6:00 - 8:00 p.m.
Friday,	February	12	Lincoln's Birthday, Office Closed
Monday,	February	15	President's Day, Office Closed

March 2010

Monday,	March	22	Past Presidents & Golden Jubilarians Night 5:30 - 8:30 p.m.

April 2010

Friday,	April	2	Good Friday, Office Closed
Wednesday,	April	21	Equitable Distribution Update 6:00 - 8:00 p.m.

May 2010

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

CLE Dates to be Announced

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PRESIDENT'S MESSAGE

One of my jobs as President of the Queens County Bar Association is making committee assignments. The backbone of our Association are its committees and those men and women who run the committees better known as the Chair, Co-Chairs and Vice Chair.

These men and women have a big role in our Association. It is the hope of the Association that each committee conduct regular meetings, attend stated meetings, especially Past Presidents and Golden Jubilarian Night in March and Judiciary Night in April of each year. In addition, each committee is asked to have a CLE seminar each year on a current topic in their field.

In addition, it is imperative to get each committee and their members to bring in one or more new members to the Queens County Bar Association. This will make our Association grow and prosper into the future. The Chair, Co-Chair and Vice Chair has a task to do and as in the past, each one of them really perform a very vital role in the Bar Association. So to all the Chairs, Co-Chairs and Vice Chairs, let's keep up the good work.

As always if you have any questions or concerns please contact me. I look forward to seeing you at one of our many activities.

Guy R. Vitacco, Jr.

HON. FERNANDO M. CAMACHO ADMINISTRATIVE JUDGE, CRIMINAL TERM, SUPREME COURT

BY STEPHEN J. SINGER

At first blush, Judge Camacho appears to be about thirty five years old. Blessed with a youthful look and boundless enthusiasm, he has the energy that many of us wish we could enjoy. As the new Administrative Judge of the Criminal Term, the Judge assumed that position without preconditions, bringing with him a willingness to listen, to learn and to make adjustments which were a long time in coming. We asked him to consider changes in court procedures which would benefit both the Bench and the Bar, and unlike others, instead of a six month "study period," the changes were made in short order. It was quite amazing to those of us who were used to being

stalled, stonewalled and just simply ignored. His personal charm, diplomacy and genuine interest in implementing improvements to the system is quickly earning him the respect and acceptance that one would anticipate for an administrator who had held his position for many years. His personal background is scintillatingly interesting and worth telling about as well.

Born and raised in Castro's Cuba made for a difficult time for a family with more moderate political leanings. His father was a prominent surgeon and was eager to emigrate to the U.S. Despite the fact that a first cousin was a high ranking member of the Communist Party, the family was denied permission again and again. The alleged reason being that his father's exceptional medical skills made him indispensable to the "well being of the people of Cuba." It ultimately occurred to the family that all of them could leave as long as the Doctor remained behind and that he would simply work on obtaining his own visa in the meanwhile. Interestingly enough, the younger version of Judge Fernando Camacho was the President of the Young Communist League at age nine, just before leaving to live here.

Hon. Fernando M. Camacho

Without the ability to earn a living in the U.S. and speaking no English, the family bounced around from relative to relative while trying to find a permanent location for themselves. Meanwhile, Dad simply refused to continue to work as a surgeon in Cuba, making him considerably less "indispensable" to the people of that island, so that he was ultimately allowed to join his family here in America. Young Fernando was simply thrown into a regular class in public school … no ESL then … and sat next to a young girl who, fortunately, was bilingual. His father did pass his medical examinations on the first try and eventually became the Chief of Obstetric Anesthesia at Winthrop Hospital in Nassau County.

The Judge particularly enjoyed sports activities as a younger man, and as with most Cubanos, was a serious baseball enthusiast. He attended a private high school and went on to Columbia, ironically, at the same time as President Obama, although the two never met. He was a political science major in college, which was the thing to do for all pre-law candidates of that era. His legal career began in earnest when he became an Assistant District Attorney with the Manhattan District Attorney's office. He was assigned to the long term drug investigations task force, which literally meant investigations which lasted for six months or more concerning major drug gangs. His group focused on acts of extreme violence which shocked the public conscience and brought the attention of law enforcement to the gang which inspired it.

He successfully prosecuted many high profile trials against the leaders of various violent street gangs, most of his cases tried before Judge Leslie Crocker Snyder who volunteered for that dangerous assignment. As was well publicized, she eventually had to receive around the clock protection because of threats from the associates of gang members who were convicted in her court. His path of investigation began with a planned attack on the "Gerry – Curls", a drug gang that controlled an area near 157th Street and Broadway in Manhattan. The gang had shot and killed a neighborhood man who had made a practice of calling the police to complain about their drug activities. The D.A. task force rented an apartment across the street from the gang's headquarters and filmed their drug activities all day and all night. Eventually, they had identified all of the prominent gang members and had film showing them participating in drug sales. Undercover officers were sent in to infiltrate the gang further and obtain additional direct evidence. Over fifty gang members were arrested as a direct result of this effort. The Judge personally prosecuted the top five gang leaders, obtaining convictions in all of their cases. The trial lasted almost six months.

Next in turn, the A.D.A. utilized the same methodology to investigate and successfully prosecute the "Super Kings", the "Wild Cowboys" and the "Young Talented Children" (what an ironic choice of name) gangs. After dealing with one too many murders of innocents, the Judge had had enough. He left public office and entered private law practice for a period of two years. He handled all kinds of legal matters including criminal defense cases. He was tapped for a position as an appointed Criminal Court Judge by Mayor Rudy Giuliani in 1997 and has been a member of the Judiciary ever since.

After four years in the Brooklyn Criminal Court the Judge was transferred to Queens and served as the Deputy Supervising Judge of the Criminal Court. He presided over the Domestic Violence part and organized a special section of the Court to deal with teenagers charged with prostitution related offenses. This was an opportunity for the Judge to intervene in the lives of 16 and 17 year old girls whose lives had been on a fast track towards prison or other ruin. Taking a personal interest in these children, even having them bring their report cards to Court, altered the lives of many. The Judge said that this was the most satisfying aspect of his judicial career to date. Not only turning their lives around, but pairing them with agencies equipped to work with young teens, made the Judge feel that he had truly accomplished something worthwhile. He has had some incredible success stories and the part continues to be in operation today.

In 2008, he was appointed by Governor Patterson to the New York Court of Claims. He served in the Integrated Domestic Violence Part, finding the custody matters the most difficult to reconcile. In May of this year, we were fortunate enough to have Judge Jonathan Lippman appoint Judge Camacho to serve as our Administrative Judge. We look forward to a long and mutually satisfying relationship!

Taking the Pain Out of Foreign Language Documents

BY LILLIAN CLEMENTI

The attorney was frantic. With trial only days away, she had just remembered that she had to stipulate to the other side's translations of key French documents – and the material filled several boxes. "I [messed] up," she said ruefully. "I simply forgot about the French."

With non-English material increasingly prominent in US legal proceedings, this kind of scenario has become more and more common – and not because of incompetence or negligence. For many attorneys, working with documents they cannot read is a headache, and managing foreign-language documents can be a challenge even for a well-organized law firm. The good news is that if you follow four commonsense guidelines – 1) planning ahead; 2) using a professional; 3) setting up a realistic budget; and 4) listening to your translator – you can handle non-English material more effectively, avoid disaster, and get the most for your translation dollar.

Plan ahead

The temptation to set non-English material aside for later is perfectly natural, but – as in the real-life example above – yielding to it can be dangerous.

Solution: inventory foreign-language documents right away, especially if you don't know what you have. Even if you and your team are too busy to deal with them early in the case – and almost everyone is – the right linguist can help. With a few background documents and a quick briefing, an experienced translator can get to work right away, reviewing and analyzing your foreign material while you focus on other priorities.

Planning is equally important for the back end of your case. If you are a litigator, think ahead to depositions. What documents will need to be translated in advance? Will you need to have an interpreter present? Be sure that your team's pretrial checklist gives you plenty of time to stipulate to the other side's translations, prepare your own certified translations, and – if any of your witnesses are uncomfortable testifying in English – book a competent interpreter well in advance. A small up-front investment in planning will save significant time, money and stress later.

A little learning is a dangerous thing.

It's natural to turn to a bilingual colleague when non-English material surfaces. But "knowing some Spanish" doesn't necessarily qualify a paralegal or even an attorney to translate or review foreign-language documents, says Thomas L. West III, owner of Intermark Language Services and former president of the American Translators Association (ATA). "A lawyer I know got a fax from his Latin American subsidiary and gave it to his Spanish-speaking secretary," he recalls. "Three words stood out: celebración, asamblea, and social." "Relax, they're just having a party," she said. It turned out to be an invitation to a shareholders meeting."

Go with a pro

Bottom line: translation errors can be costly – even disastrous – so it pays to work with a professional. But how do you

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Court Notes

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

Jose R. Mendez (May 19, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he neglected his clients' interests in personal injury actions and engaged in fraudulent conduct by making false representations to, and concealing relevant facts from, a court of law.

Mark E. Wolterbeek (May 19, 2009)

By order and opinion of the Supreme Court of New Hampshire dated October 31, 2005, the respondent was disbarred as a result of his conduct in representing a client in a divorce action in 1995. Upon the Grievance Committee's motion for reciprocal discipline, the respondent was disbarred in New York.

Christopher Carnesi (June 23, 2009)

On May 4, 2007, the respondent pleaded guilty in the United States District Court for the Eastern District of New York to conspiracy to commit money laundering, a federal class C felony. On February 8, 2008, he was sentenced to a six-month term of imprisonment, with credit for time already served; a special assessment of $100; and two-years of supervised release. In finding that the federal felony of conspiracy to commit money laundering is "essentially similar" to the New York class E felony of conspiracy to commit money laundering in the second degree, the Appellate Division held that the respondent was automatically disbarred as a result of his conviction pursuant to Judiciary Law § 90(4)(a).

Marise Robergeau, a suspended attorney (June 23, 2009)

The respondent was found guilty, on default, of failing to cooperate with the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts.

Diana J. Szochet

Michael T. Savelli (June 23, 2009)

On August 27, 2008, the respondent pleaded guilty in Supreme Court, Nassau County (Calabrese, J.) to one count of attempted disseminating indecent materials to minors in the first degree, a class E felony. Pursuant to § 90(4)(a) of the Judiciary Law, the respondent was automatically disbarred as a result of his New York felony conviction.

Pericles Tsapongas (June 23, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of grossly overcharging clients for legal services performed in relation to the reduction of tax assessments on properties owned by the clients. Prior to his resignation, the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts was investigating 60 complaints of professional misconduct against the respondent.

John P. Oliver, admitted as John Patrick Oliver, a suspended attorney (June 30, 2009)

On May 1, 2008, the respondent entered a plea of guilty in the County Court, Suffolk County (Hinrichs, J.) to one count of grand larceny in the second degree and one count of scheme to defraud in the first degree. Pursuant to § 90(4)(a) of the Judiciary Law, the respondent was automatically disbarred as a result of his New York felony conviction(s).

Alan Schuchman (June 30, 2009)

By order filed March 6, 2007, the Supreme Court of the State of California accepted the respondent's resignation. Upon a motion for reciprocal discipline pursuant to 22 NYCRR § 691.3, the respondent was disbarred in New York.

Robert L. Shepherd (July 21, 2009)

On September 18, 2008, the respondent pleaded guilty in the United States District Court for the Southern District of Florida to conspiracy to commit an offense against the United States and making materially false statements in a matter within the jurisdiction of the judicial branch of the government, both of which are federal felonies. On December 1, 2008, the respondent was sentenced to 18-months probation; a fine in the sum of $3,000; and an assessment of $100, along with certain enumerated "special conditions." In finding that the respondent's admitted conduct was "essentially similar" to the New York class E felony of offering a false instrument for filing in the first degree, the Appellate Division held that the respondent was automatically disbarred as a result of his conviction pursuant to Judiciary Law § 90(4)(a).

Daniel F. Blizard (July 28, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he neglected a legal matter entrusted to him; handled legal matters without adequate preparation; and failed to timely communicate with his clients and/or respond to their inquiries regarding the status of matters entrusted to him. In addition, the respondent failed to cooperate with the Grievance Committee's investigation by failing to timely respond to multiple lawful demands for answers to complaints and/or additional information.

Robert Tavon, a suspended attorney (August 4, 2009)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct prejudicial to the administration of justice by failing to promptly comply with the lawful demands of the Grievance Committee during its investigation of four complaints of professional misconduct; failing to act competently by engaging in inadequate preparation for and/or neglecting legal matters entrusted to him; permitting someone other that his client to improperly influence his independent professional judgment on behalf of the client; engaging in conduct prejudicial to the administration of justice and/or reflecting adversely on his fitness as a lawyer by failing to timely appear at scheduled appearances on one or more occasions in connection with client matters; engaging in conduct reflecting adversely on his fitness as a lawyer by failing to comply with the requirements of 22 NYCRR § 1400 *et seq* in connection with a custody and visitation matter; engaging in conduct prejudicial to the administration of justice by failing to pay a money judgment entered against him; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and/or conduct prejudicial to the administration of justice by submitting misleading documents to a court; engaging in conduct adversely reflecting on his fitness as a lawyer by failing to file a Retainer and/or Closing Statement with the Office of Court Administration (OCA) as required by 22 NYCRR § 691.20; engaging in conduct prejudicial to the administration of justice by failing to timely re-register as an attorney with OCA as required by Judiciary Law § 468-a; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by making false and misleading statements on a background questionnaire submitted to the Grievance Committee; engaging in the unauthorized practice of law by initiating a legal action at a time when he knew or should have known that his license to practice law had been suspended; engaging in dishonesty, fraud, deceit and misrepresentation by holding himself out as a licensed attorney to a bank official in order to open a bank account, at a time when he knew or should have known that his license to practice law had been suspended; and engaging in conduct reflecting adversely on his fitness as a lawyer based upon his conviction in the village of Bronxville, New York, on or about August 27, 2007, for the crime of aggravated unlicensed operation of a motor vehicle

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

Jan Alex Dash (May 19, 2009)

Following a disciplinary hearing, the respondent was found guilty of commingling funds entrusted to him as a fiduciary, incident to his practice of law, with personal funds; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (by preparing a false closing statement in connection with a real estate transaction, which failed to disclose the disbursement of $2,000 to suspended attorney Edwin Drakes[1]); conduct reflecting adversely on his fitness as a lawyer (by paying $5000 to suspended attorney Edwin Drakes in connection with a real estate transaction where no closing statement was prepared and/or produced); improperly disbursing escrow funds to a suspended attorney (by disbursing the proceeds of a surplus money proceeding to suspended attorney Edwin Drakes); engaging in an impermissible conflict of interest (by simultaneously entering into a brokerage agreement with a client he appeared for, as attorney, in connection with a house sale, absent disclosure of his

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Legal Fees: Contractual and Illusory

BY: THOMAS F. LIOTTI*

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

Abraham Lincoln

Introduction

There should be a course in law school or in life on how to charge legal fees. The prerequisite, of course, is to have a potential, paying client. Some corporate lawyers spend their entire careers doing billable hours for clients that they never meet. In this situation, the client is a corporate entity often with in-house counsel interacting with outside counsel. Some corporate clients stay with the same law firm for decades. Retainer agreements are not needed since a course of dealing spanning lifetimes supersedes that. Instead of retainer agreements, memos are shot back and forth among lawyers or corporate officers explaining or questioning legal fees. This sanitized process in ivory towers does not get down to the "nitty gritty" of tending to clients with more personal needs. This is where practitioners who represent Mr. and Mrs. Jones must learn about the case, explain the legal process to their clients and what services will be provided, at what cost. These are very sensitive discussions where the client's ability to pay for what is needed to properly represent them and the lawyer's desire for fair and reasonable compensation have to be reconciled. Often negotiations then occur where dream cases with optimum resources and legal fees must be pared down to what is affordable and necessary. Practitioners who are charging clients on a case by case basis usually have minimum fees that they charge for a particular type of case. They will then have either flat fees which are also typically the minimum fee or they will apply their hourly rate against the minimum fee and if services are needed above that, then clients will be charged on an hourly basis.

Legal Fees v. Pro Bono Work [1]

Most lawyers even in the pristine, rarified environs of corporate law, devote time to *pro bono* activity. [2] The amount of *pro bono* or volunteer activity for charities and the like is obviously determined in most cases by other clients who are paying the lawyer or the law firm. Depending on overhead, other commitments and family obligations, the more successful practitioners should be in a better position to devote time to *pro bono* work. So, for example, if the legal fees are high enough for the corporate clients, the profit for the firm may be less, but they may be in a better position to do *pro bono* work.

If a corporate law firm is charging $750.00 per hour for partner time to its clients and $250.00 of that is profit, they may be able to use some portion of the profit margin for *pro bono publico* work. How much profit they wish to have versus the amount of their *pro bono publico* work is the question to be decided.

Reduced profit may mean reduced bonuses and other financial curtailments. Reduced profit in difficult financial times such as our current recession may also mean severe cutbacks on *pro bono publico* work. The startling cutbacks of Associates in corporate law firms is an example of that. Associates are being offered half their salaries to take a year off with the hope that by next year, times will change for the better. In the meantime, the overhead for expensive office suites and staff remain. Lawyers have to work more to earn less. Yet, there is a skeleton in our legal closet which must be addressed. Many people cannot afford legal services and are left to represent themselves *pro se*. There is no such thing as civil *Gideon*, but it is desperately needed. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Defining The Scope Of The Work

Defining the scope of the work first requires the attorneys to listen to the facts and then to define the problem. After doing so, the attorneys can then address the strategies that they would deploy [3] and without guarantees, assess the likely outcome or result. Aside from the primary action there may be discussions of parallel proceedings, how the record must be preserved for purposes of interlocutory or other appeals. [4]

The attorneys may choose to discuss what support services, investigators and experts are needed. Clients should be informed of what disbursements and filing fees they are likely to encounter. The better practice is for clients to make a deposit into escrow for disbursements.

Clients must be informed of hourly rates for those working on the case. If they are being charged on an hourly basis, they must be told of the minimum billing period. Clients who are new to the legal process are surprised that they are charged for telephone calls or that the firm has a minimum billing period. It is best to explain that up front and provide for it in the retainer agreement. Most law firms have minimum billing periods of .1 0 hours to .25 hours. It provides for the entry time on time sheets or the computer and the cost of the phone call which is generally not billed separately unless they are long distance calls or conference calls.

Defining The Tasks Of Those Working On The Matter

Somewhere in the body of a retainer, it is advisable to define the roles of those who may be working on the case. [5] It should be emphasized that the client has retained a firm and the firm or a partner in it has the discretion and responsibility to assign those within the firm to work on different aspects of the case. For example, Associates may do legal research, make court appearances, and conduct examinations before trial, hearings and trials. Paralegals may be drafting under the supervision of an Associate or partner. Hourly rates for each employee should be specified.

Retainers That Must Be In Writing

The law requires that certain types of retainers to be in writing and/or filed. [6] See, e.g., 22 NYCRR 1215.1 (written letter of engagement required in all representations); 22 NYCRR 1400.3 (Domestic Relations matters; 22 NYCRR 603.7 (personal injury matters). A failure to file may result in an attorney being unable to recover counsel fees. See, *Fishkin v. Taras*, 54 AD3d 260, 863 NYS2d 153 (1st Dept., 2008); *Flanagan v. Flanagan*, 175 Misc.2d, 668 NYS2d 302 (S.Ct., NY Cty., 1997).

When Clients Run Out Of Money

An interesting case from Nassau County requires that attorneys be clairvoyant, namely that when they are retained they must predict the total amount of legal fees and costs that will be generated in a matrimonial action. See *Klein v. Klein*, 6 Misc.3d 1009(A), 800 N.Y.S.2d 348, 2005 WL 89006 (N.Y. Sup), 2005 N.Y. Slip Op. 50018(u). If lawyers take an up front fee in a heated matrimonial and the client soon runs out of money, then the lawyer seeking to withdraw may not be permitted to do so. Alternatively, the lawyer may be left with a DRL §237 claim for legal fees against the opposing spouse. The lawyer then must assess not only his or her client's ability to pay, but that of the opposing spouse to do so and whether the assets of the marriage that may be subject to equitable distribution are sufficient to cover the legal fees and also provide the client with a measure of recovery. All of this is asking a lot of attorneys and clients, perhaps too much. It also suggests that attorneys representing the non-moneyed spouse in a matrimonial case may come dangerously close to taking cases on a contingency which may then violate the Canons. (See, Rules of Professional Conduct 1.5)

The traditional route to payment in cases where attorneys withdraw has been Judiciary Law §475. That section provides for a lien on the file. But that section has been blunted by legal malpractice claims which no matter how frivolous slow the recovery process for counsel fees and disbursements. See eg, *Nat Keagan Meat & Poultry, Inc. V. Kalter*, 70 AD2d 632, 416 NYS2d 646 (2nd Dept., 1979) [lien awarded pursuant to Judiciary Law 475 necessarily decides that no legal malpractice took place].

Typically a §475 claim would allow the Trial Court to conduct a hearing, determine the amount of the lien and then permit the turnover of an inventoried file to successor counsel or the former client. A frivolous action for legal malpractice may then thwart the §475 lien and hearing. Yet, the Trial Court in the matrimonial is in the best position to determine whether the malpractice action is frivolous or brought for the sole purpose of negating a claim for counsel fees. Trial Courts presiding over the matrimonials do not continue to preside over the §475 claim once a malpractice action has been commenced. Instead, they will deny the §475 application, deferring instead to another Trial Court Judge to determine the viability of the malpractice action and counterclaims therein, presumably including a claim for counsel fees and disbursements in the matrimonial case.

This article strongly suggests that retaliatory legal malpractice actions should be screened by the Trial Court Judge handling the matrimonial and deciding motions to dismiss or for summary judgment in the malpractice action. This would also allow the Trial Court Judge to decide whether the attorney has a viable "but for" defense to the malpractice claim. See, e.g. *Rudolf v. Shayne, Dachs, Stanisi, Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534 (2007).

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THE CULTURE CORNER

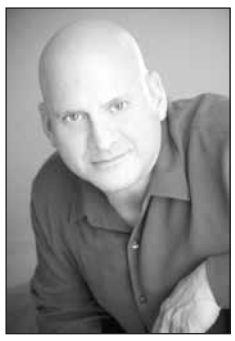
This month's column discusses the new **UNITY STAGE COMPANY** in Sunnyside, Queens, established by **SOFIA LANDON GEIER** and reviews ***LINCOLN, A POETIC OPERA***, the Pearl Theatre's revival of John Millington ("J.M.") Synge's ***THE PLAYBOY OF THE WESTERN WORLD,*** and a new Chinese play ***MY FATE IS NOT IN MY HANDS [Part One]*.**

THE UNITY STAGE COMPANY and SOFIA LANDON GEIER

SOFIA LANDON GEIER is Producing Artistic Director of the **UNITY STAGE COMPANY**, a new non-profit theater in Sunnyside, Queens, New York. Ms. Geier founded **UNITY STAGE COMPANY** to bring together the diverse communities of Western Queens through the enjoyment of the performing arts. Recently incorporated, **UNITY STAGE COMPANY** is following up its successful summer training program for young people -- ***SUMMER STOCK FOR CITY KIDS!*** **-- WITH** ***AFTER-SCHOOL-MUSICAL!,*** providing children in grades K-5 with a sixteen-week rehearsal and performance opportunity. **SOFIA LANDON GEIER** is directing Disney's ***THE ARISTOCATS KIDS***. Woodside's **KATE SCOTT**, a graduate of State University of New York at Purchase with a BFA in Dance Performance and Production, is choreographing the show and **MARTHA (M.J.) GEIER**, a graduate of Professional Performing Arts School and current Marymount Manhattan College student is coaching the eager, young singers. There will be two public performances on Saturday January 30. Visit www.unitystage.org for updates.

UNITY STAGE COMPANY'S *2009 SUMMER STOCK THEATER INTENSIVE* featured young performers ages 16 to 22 in a workshop production of a new musical, ***PRETENTIOUS YOUNG LADIES***, based on Moliere's hilarious one-act. Audiences reveled in the panache of **UNITY STAGE COMPANY'S** production, which transferred the setting of the play from Paris to New Orleans and updated the period from the 1600's to the present day. **SOFIA LANDON GEIER** wrote the book and Woodside talent **TOM ASHTON** composed the witty rock score, including lyrics.

Next up on **UNITY STAGE COMPANY'S** calendar was September's hugely successful ***COMMUNITY VAUDEVILLE NIGHT.*** Local audiences were entertained by NYC comic magician Lee Barrett, well-known tap dancer Rod Ferone, Sunnysider Marina Meyler's haunting vocals to her own guitar accompaniment, and accomplished New York playwright Jeremy Kareken who read an excerpt from one of his upcoming productions. Adam Schultz, a teen Yo-Yoist extraordinaire, brought his fledgling rock band along to play their first public performance. The kids were a big hit. Especially delightful was **OMAR AHMED**, six-year old son of actress Scarlett Ahmed, who won the audience's hearts with his dance tribute to the late "King of Pop," Michael Jackson. The evening was smoothly hosted by gifted actor and stand-up comedian **RAY CHAO**, who serves on the board of directors of **UNITY STAGE COMPANY**. See www.unitystage.org for spring 2010's next Community Vaudeville Night.



Howard L. Wieder

SOFIA LANDON GEIER, a former actor and Drama Desk Best Actress Nominee and veteran scriptwriter for daytime television and commissioned playwright, is looking forward to producing **UNITY STAGE COMPANY'S** first season of professional theatre. First up is ***LOYALTIES,*** considered the finest play of the 1922 London theatre season, by Nobel Prize-winning British playwright John Galsworthy. This crime-thriller and study of prejudice in England following World War 1, will open January 8, 2010 and play for eight performances, closing January 30. ***LOYALTIES*** will be followed in March by a revival of ***THE CRADLE SONG,*** a touching comic gem by Spanish husband and wife playwrights Gregorio and Maria Martinez-Sierra in a translation by John Underhill. **UNITY STAGE COMPANY'S** first season will conclude in June with the 1922 Broadway hit, ***SIX-CYLINDER LOVE***, a surprisingly relevant comedy about America's love affair with the automobile. For information about auditions (all three productions will be Equity Approved Showcases and open to both union and non-union actors) and volunteer opportunities, contact **SOFIA LANDON GEIER AT 917-548-1086.**

Finally, a word of praise. Lawyers who do pro bono deserve a lot of accolades. The newly formed and already successful UNITY STAGE COMPANY received a great deal of help from **MATTHEW VISHNICK, ESQ.**, a QCBA member and partner with his brother **JASON VISHNICK,** in **VISHNICK & VISHNICK** in Holtsville, N.Y. **MATTHEW VISHNICK, ESQ.**, worked pro bono to incorporate the **UNITY STAGE COMPANY.**

THE PLAYBOY OF THE WESTERN WORLD

The **PEARL THEATRE**, known for a revival of the classics, has experienced a facelift. First, it has moved from its former home on Second Avenue and St. Mark's Place in the East Village to West 55th Street. The move to midtown Manhattan gives this well known theater group greater visibility. But the new theater in the City Center Building on West 55th Street is not as hospitable as the former theater with nicer and more comfortable seats and a warmer atmosphere. Second, the Pearl has a new artistic director, **J.R. SULLIVAN**, who hopes to move the Pearl to new repertory. The company is already blessed with a loyal subscriber list and a gifted Resident Acting Company. Unfortunately, its revival to start its new home was boring.

For its inaugural play in its new home, J.R. Sullivan "revived" **J.M. SYNGE'S *THE PLAYBOY OF THE WESTERN WORLD,*** a comedy of the early twentieth century. I put revived within quotation marks because it takes a lot of work to rob this play of any and all interest. When the play opened originally, Irish theatergoers rioted for a week. At that time, the Irish were experiencing a wave of nationalism and bitterly resented what they [mis]perceived to be the putdowns of the Irish in the play. The fact that Synge, the playwright was Anglo-Irish and raised in a Protestant home, did not help. Contrary to the reaction of the play at the play's premiere, this revival is a deadly bore. At the play's conclusion [and I could not stay for the curtain calls based on what I had witnessed], I stormed out of the theatre not to get my shotgun or banners in protest, but to dive into the nearest subway that could get me far away from the vicinity.

The original play had a lot to admire as a comedic celebration of the traditional Irish talent for story-telling. In the play, Christy McMahon, the protagonist, played by **SEAN McNALL**, arrives at a pub in the rural countryside of Ireland to say that he's just killed his father. Rather than be horrified, the assembled patrons revel in the story and hail Christy. Synge's sardonic humor was a commentary of life where evil often ends up getting glorified. Christy, rather than being shunned, ends up being pursued by all the fair maidens of the area, including the Widow Quin, rumored to have killed her first husband under unknown circumstances.

I was amazed that **SEAN McNALL** arrived at the role as a work-in-progress. At the start of the play, his character, hungry and disheveled, bursts into the inn, having spent a long time in a pit. **SEAN McNALL** walked in with a hair not out of place and, when offered bread, gingerly divided it into two pieces, before consuming it. That is not the reaction of a ravenously hungry man. Acting is about truth, not lies. More important, Christy Mahon requires an actor who can seem like a charismatic, handsome con-artist. **SEAN McNALL** gave a performance half of which, at least, lost a lot of the swagger of the outrageous character, and, by poor choice, made him seem earnest.

The production offered two interesting upsides: first, **RACHEL BOTCHAN**, as the Widow Quin, gave a brilliant and heart-tugging performance of a woman suspected by all of murdering her first husband, but who is really in love with Christy, even though her love is not reciprocated by him. The second enjoyable quality of the show was the scene in the final act of the choreography of the inn's patrons as they were viewing from afar the donkey race in which Christy Mahon, to the characters' delight, emerged victorious.

As "revived" by the **PEARL THEATER** and **J.R. SULLIVAN**, all the play's wit had been sapped from it as a vampire would suck the life blood from its victim. I did not even chuckle once. The production was a deadly bore. In the dark following the drowning of the final lights, I fled to the illuminated "Exit" sign.

The play runs through November 22. Performances are on Tuesday, Thursday, Friday, and Saturday at 7:30 P.M., and also on Wednesday, Saturday, and Sunday matinees at 2:30 P.M. Further information can be obtained at www.pearltheatre.org. **THE PEARL THEATRE'S** remaining lineup for the 2009-2010 season are: ***MISALLIANCE*** by Bernard Shaw [Dec. 4, 2009 - Jan. 24, 2010], ***HARD TIMES*** by Charles Dickens [Feb. 5 to March 28, 2010], and ***THE SUBJECT WAS ROSES*** by Frank D. Gilroy [April 9 to May 9, 2010].

MY FATE IS NOT IN MY HANDS [Part One]

It takes a lot of self-confidence for playwrights to insert "[Part One]" in a title. After all, poor critical reception and bad box office may dissuade playwrights from continuing with a Part Two. In this case, however, this original play by **KITSENG CHAO** and **GARY LAU** have hit on something important in writing ***MY FATE IS NOT IN MY HANDS [Part One]***.

The play has a universal theme on the suffering caused by war and the struggles of its survivors who immigrate to new lands. The play is about the suffering of the Chinese people at the hands of a ruthless Japanese military, and how often Chinese persons found themselves exploited by fellow Chinese. As mentioned, one need not be Chinese to appreciate the play. To credit **JUSTICE CHARLES J. MARKEY**, when many years ago, I related to him that persons who caused the most pain to my parents and me were fellow co-religionists, Justice Markey wisely explained to me that persons tend to pick on those of their own ethnicity. As a son of Polish Jewish Holocaust-surviving parents, one can appreciate the horrors related by these Chinese playwrights of the true to life experiences they depict.

The play was brought to life by director **KITSENG CHAO** with the help of energetic actors who accomplished multiple scene changes with rapid fire precision. One of the finest lead performances of this original production was that of **FENTON LI,** who brings a riveting stage presence with his performance. **Mr. LI** plays the son of a war time survivor who has to deal with his father's emotional abandonment and recounts to his daughter, with stirring, yet true [and not over-the-top melodramatic] emotion, his final moments at his dad's deathbed. **FENTON LI** is a graduate of the American Academy of Dramatic Arts, whom many of you will remember played DHH in the successful revival of David Henry Hwang's **"YELLOW FACE"** at the Queens Theatre in the Park last year in a sold-out run that began on November 14, 2008.

In this show, **FENTON LI,** born in China and who speaks English without

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Immigration Questions

Continued From Page 1

FAIR, and the myriad of other Tanton-affiliated anti-immigration groups will ensure that the phones on Capitol Hill shut down and that they scream louder than anyone else. Their solution for our immigration crisis (actually, their solution for ANY crisis), is simply to deport all undocumented **and** legal immigrants, closing the door on the last person to leave.

Rather than close your ears to the current Healthcare debate, listen carefully, see where loudest shouts come from, and then be ready for the same crowd to shout down immigration reform, but do so louder, bolder and with more vehemence. Be ready for the name calling, the anti-American accusations, and the nastiness to be worse than we have ever experienced. Be prepared now to engage in constructive advocacy, but also learn from those supporting healthcare reform. If any reform of either healthcare OR immigration happens in the next six to ten months it will happen ONLY if the supporters are louder (but nicer) and more insistent than the opposers (to coin a phrase).

You now have a history lesson happening before your eyes. Recognize it, learn from it, and whatever you do, don't repeat it.

Thanks to attorney Charles Kuck for allowing us to reprint this article from his Blog.

Bay Area sham marriage broker sentenced to 19 months in prison

SAN FRANCISCO - Kwan Tsoi, also known as Joyce Cai, was sentenced in federal court today to 19 months in prison, and ordered to forfeit $250,000 in proceeds, for arranging fake marriages so her foreign national clients could obtain immigration benefits they did not qualify for.

The prosecution is the result of a joint investigation by U.S. Immigration and Customs Enforcement (ICE) and the Diplomatic Security Service (DSS).

Tsoi admitted in court that for a year, beginning in February 2007, she headed a conspiracy that arranged sham marriages for foreign nationals with U. S. citizens. Tsoi charged her clients, whom she recruited by advertising in Chinese-language newspapers, approximately $30,000 for her services. Tsoi brokered these marriages in the Tenderloin neighborhood of San Francisco, where federal search warrants were served on her business in June 2008.

Tsoi pleaded guilty in April to one count of conspiracy, six counts of marriage fraud and five counts of false statements on immigration documents. As part of her guilty plea, she admitted she brokered nine fake marriages in order to exploit U.S. immigration law. Tsoi also admitted she submitted or assisted in submitting spousal petitions to U.S. Citizenship and Immigration Services requesting her clients be granted lawful permanent residence or "green cards" based on their fraudulent marriages to American citizens.

"Marriage fraud and other forms of immigration benefit fraud undermine the integrity of our nation's legal immigration system and potentially rob deserving immigrants of benefits they rightfully deserve," said Mark Wollman, special agent in charge of the ICE Office of Investigations in San Francisco. "This sentence should send a clear message that ICE is working aggressively to target those who conspire to corrupt our nation's proud immigration tradition for the sole purpose of enriching themselves."

"We take all violations of U.S. immigration laws seriously, but are especially aggressive in identifying and prosecuting those involved in marriage frauds and related scams," U.S. Attorney Joseph P. Russoniello said. "People who attempt to profit from these ruses will be brought to justice. Those who knowingly avail themselves of these ploys will be caught and deported."

Also charged in this investigation were Henry Navarro and Kelly Ecker. Navarro pleaded guilty to one felony count of conspiracy for his role as an "official" witness to one of the fake marriages. Navarro is scheduled to be sentenced by Judge Alsup on Sept. 29, 2009. Ecker pleaded guilty to one misdemeanor count of conspiracy for marrying a Chinese citizen in return for $17,000. Ecker was sentenced July 7, 2009 to two years probation and ordered to give a public speech designed to deter others from participating in similar schemes.

"The investigation is yet another example of the Diplomatic Security Service's vigilance in combating visa and passport fraud," said DSS San Francisco Field Office Special Agent in Charge Patrick Durkin. "We investigate multi-defendant criminal enterprises that broker in false visas, false immigration forms, and other false documents, to keep imposters and criminals out of the country."

Tsoi has been ordered to surrender to begin serving her prison sentence Sept. 30.

Statement by Secretary Napolitano About August 20, 2009 White House Meeting on Comprehensive Immigration Reform

"Today's meeting on comprehensive immigration reform was an important opportunity to hear from stakeholders and build on the significant time I've spent on the Hill meeting with members of Congress on this critical subject. I look forward to working with President Obama, my colleagues in Congress and representatives from law enforcement, business, labor organizations, the interfaith community, advocacy groups and others as we work on this important issue."

Increase the Number of Immigrant Visas

Issue:

Nineteen years ago in 1990 Congress revamped the entire employment-based

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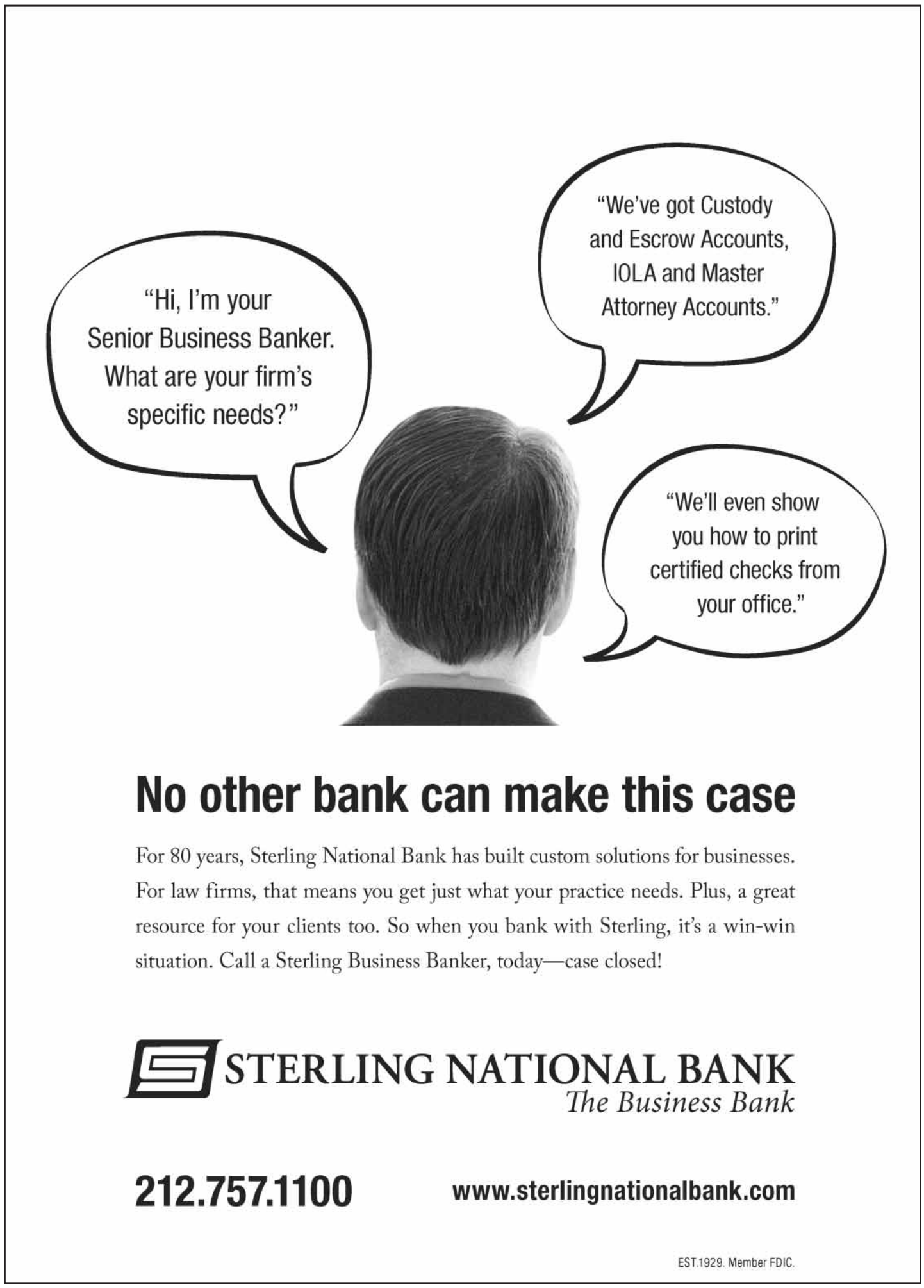

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For those who practice in the specialty of Election Law, you will know that with one minor, picayune mistake, a candidate can be knocked off the ballot. A new, Second Edition of **MODERN ELECTION LAW [2009]** by **JERRY H. GOLDFEDER**, ESQ., published by New York Legal Publishing, www.nylp.com, helps you avoid the pitfalls. **Details are below, following my more detailed review of BADWAY**'s book**.**

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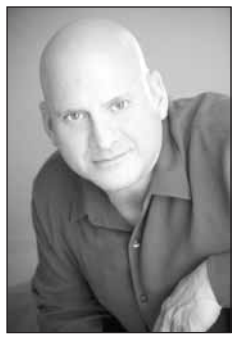
Over 30 years ago, I was privileged to meet the late **LOUIS A. KASS, Esq.**, lawyer, author, and vibrant lecturer, who specialized in teaching a successful course "How to Write for the Bar Examiners." Kass was a devoted lecturer who genuinely cared for young, aspiring lawyers. Striking fear in candidates for the New York Bar was the fact that then, at least circa 1978-1979, half of the dreaded the 2-day exam consisted of writing 12 essays on an assortment of legal subjects.

Every student taking Kass' course got a copy of his "Necessary Elements of Common Legal Actions" [Gould Publications, with copyrights from 1958-1978]. My copy has a 1978 copyright so I must have received one of the last copies of this treasured 62 page booklet]. Kass' pagination on his Table of Contents, strangely or carelessly, was way off, and the cases he cited were very old. The content, however, was invaluable. Kass discussed the most frequently encountered causes of action and some defenses and outlined the essential or "Necessary Elements" of meeting them.


Howard L. Wieder

As a young litigator, I never forgot Louis Kass or his book. His slim, 62-page work became for decades my most consulted reference. Whenever I drafted pleadings, made a substantive motion to dismiss, prepared to take an examination before trial, or fought for or against summary judgment, I always consulted Kass' work. I so much adored his work that I made numerous photocopies of the out-of-print work to give to fellow litigators and made them as gifts to newly-minted lawyers.

For years, I wondered why no one has filled the void for this essential subject matter after Kass' demise. **Now entering the breach, filling the vacuum, and here to stay for decades, I hope, is ERNEST EDWARD BADWAY, Esq.**

The **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** by **ERNEST EDWARD BADWAY, Esq.**, is a single volume, annual paperback and CD. It is a quick starting point for virtually any civil case containing New York civil actions, legal principles, and defenses. The book compiles, outlines, and indexes theories of recovery under New York law. There is nothing like it available to NY practitioners. The **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** lists over 450 causes of action and numerous defenses by dividing them into 16 sections:

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*Trust and Estate Based Causes of Action
*Miscellaneous Defenses

When appropriate, the Cause of Action will reference authorities for defense, including statutes of limitation. The **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** is a quick reference to unfamiliar subjects and a welcome resource for firms without an extensive law library or research budget.

This book is essential for all libraries, for law firms of all sizes, solo practitioners, and government agencies and courts. The **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** should be your starting point in analyzing client problems and preparing pleadings by pinpointing the cause of action and its elements before employing more costly research. It is an inexpensive desk reference for virtually any case that walks in your door!

I particularly appreciated that the book contained a wonderful table of contents, an extensive common word index facilitating a direct review of the potential universe of causes of actions, principles, and defenses, and tables of cases and statutes. The CD, an exact copy of the printed book, contains thousands of links for easy searching and research. Even further, unlike the old cases cited by Kass, Badway makes a point of citing pertinent recent cases throughout the **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES**.

I tested the work for ease of research by searching for particular causes of action and defenses. For example, under what circumstances can a minor disaffirm a contract as a defense? What are all of the elements of an action for constructive trust? The excellent and thorough common word index found in Badway's **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** was excellent.

Every litigator, trial lawyer, and general practitioner in New York, and also judge and law clerk, should have within easy reach these essential works: **ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES** by **ERNEST EDWARD BADWAY, Esq.; BYER'S CIVIL MOTIONS, edited by Howard Leventhal, Esq. [previously reviewed in this column], the CPLR, NEW YORK PRACTICE by Prof. DAVID SIEGEL,** and the most recent edition of the **PATTERN JURY INSTRUCTIONS.**

The newly published 2009 [1st] edition of ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES, accompanied by a handy CD, despite focusing on New York law, should be on litigator's desks throughout the United States because of the excellent way it dissects and lists over 450 causes of action and defenses. **To say that ENCYCLOPEDIA OF NEW YORK CAUSES OF ACTION: ELEMENTS AND DEFENSES is a valuable edition to a lawyer's reference library is an understatement, like saying that lungs are helpful to breathing. The book is indispensable. Ignore it and resist purchasing it - - *at your professional peril*. I shun play of surnames, but the author's name says it all. If you do not purchase this superb volume, you will truly be in a bad way!**

ERNEST EDWARD BADWAY, Esq., is a litigation partner of the prestigious and large law firm of Fox Rothschild, LLP, working out of both the New York City and Rosewood, New Jersey offices. He is an expert in federal securities law, enforcement, and compliance with numerous articles to his credit. He is also an adjunct professor of law at Brooklyn Law School teaching securities fraud enforcement and a speaker at many American Bar Association forums. He is also chosen frequently, based on his expertise, by state court judges in New York as a receiver of properties, a referee, and other fiduciary appointments because of his financial and legal expertise, not to mention his accessibility and friendliness.

GOLDFEDER'S MODERN ELECTION LAW - - 2ND Edition
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In the late 1990s, I worked as a referee in Election Law matters in Supreme Court, Kings County, making rulings over contentious contests. I wished I had this book then. Here are some important reviews of **Goldfeder's Second Edition of MODERN ELECTION LAW**:

"A Light In An Election Law Darkness."
The Daily Politics - NY Daily News, Dec. 4, 2007

"Authoritative guide to New York State's Byzantine election law. Moreover, it's surprisingly accessible, not only to candidates and their supporters, but to political junkies and concerned layman."

The New York Times, Jan. 20, 2008

"If you need to understand New York election law, this book is for you. Goldfeder is a law professor who has specialized in New York election law and he has a gift for explaining it clearly."

———————Continued On Page 14

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PHOTO CORNER

Annual Golf Outing
September 10, 2009

Al Lapinski and Peter Gorycki

David Adler, Scott Kaufman and Hon. Peter Kelly

George Nashak, Paul Pavlides, Ed Rosenthal, Ralph Pliskin and Drew Wasserman

Gerry Chiariello, Chanwoo Lee and Dom Chiariello

Guests at Annual Golf Outing, September 10, 2009

Guy Vitacco, Jr. and Ted Gorycki

Hon. Bernice Siegal, Larry Litwack, Hon. William Viscovich

Hon. Joseph Risi and Joseph Risi, Jr.

Joe Baum and Hon. Joseph Dollard

Photos by Arthur Terranova

PHOTO CORNER

Recent Significant Decisions in our Appellate Courts Tuesday September 15, 2009

Abby Goldstein, Sue Beberfall, Hon. Seymour Boyers, Hon. Stephen Knopf and Randy Unger

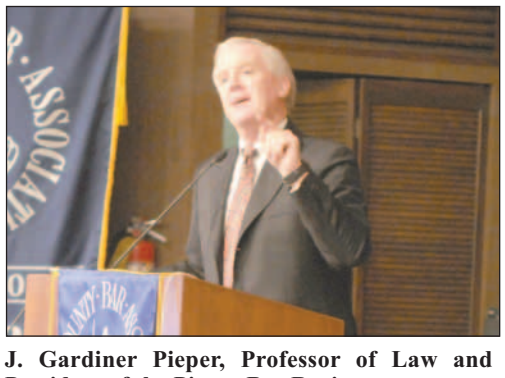
Alan Chevat, Chief Court Attorney, Appellate Division, Second Department

Andrew C. Fine, Director, Appellate Litigation, NYC Legal Aid Society

Bob Bellone, David Wasserman, Ilene Reichman, Al Lapinski, Chawoo Lee and Violet Samuels

Hon. Stephen Knopf, Tom Graham and Bert Herman

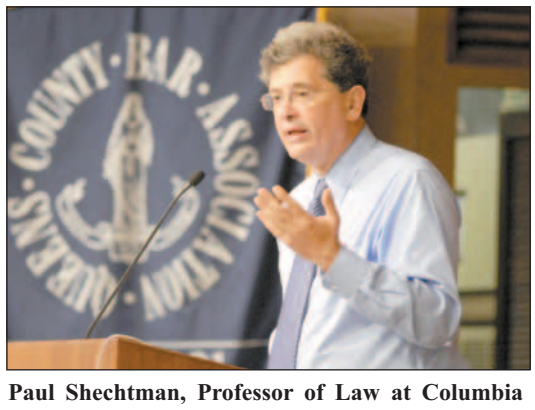
Attendees to Recent Significant Decisions from our Appellate Courts



J. Gardiner Pieper, Professor of Law and President of the Pieper Bar Review

James Galleshaw, Greg McGuiness and Keith Sullivan

Michael A. Simons, newly appointed Dean of St. John's Law School



Paul Shechtman, Professor of Law at Columbia Law School and Criminal Law Practitioner

Spiros A. Tsimbinos, Moderator

Tom Graham, George Nashak, Greg Brown, Paul Pavlides and Joe Baum

Photos by Walter Karling

Court Notes

Continued From Page 4

personal, financial and/or business interests as principal of the brokerage); improperly disbursing funds held by him as a fiduciary, incident to his practice of law, without the client's authorization; and failing to produce required bookkeeping records notwithstanding the Grievance Committee's request for same. He was suspended from the practice of law for a period of five (5) years, commencing June 22, 2009, and continuing until the further order of the Court.

Charles Adam Willinger (June 11, 2009)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest as a result of his failure to cooperate with the Grievance Committee.

Charles J. Diven, admitted as Charles James Diven (June 23, 2009)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct adversely reflecting on his fitness to practice law by failing to properly identify his attorney escrow account, failing to safeguard funds entrusted to him in breach of his fiduciary duty, simultaneously representing parties with differing interests, representing a party against a former client in a substantially related matter, and neglecting legal matters entrusted to him; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by furnishing a fabricated document to the Grievance Committee. He was suspended from the practice of law for a period of five years, commencing July 24, 2009, and continuing until the further order of the Court.

Sheldon M. Krupnick, admitted as Sheldon Martin Krupnick (June 30, 2009)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; engaging in conduct prejudicial to the administration of justice; and engaging in conduct that adversely reflects on his fitness as a lawyer by completing a previously-signed blank deed and notarizing that deed approximately seven years after it had been signed, without the knowledge or consent of the party who signed the deed in blank, and by delivering the then-completed deed to a person the respondent knew was involved in a pending lawsuit regarding the subject matter of the deed. He was suspended from the practice of law for a period of five years, commencing July 30, 2009, and continuing until the further order of the Court.

Stanley E. Gelzinis (July 2, 2009)

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

Daniel D. Tartaglia, admitted as Daniel David Tartaglia, a suspended attorney (July 14, 2009)

Following a disciplinary hearing, the respondent was found guilty of having been convicted of a serious crime, to wit, failing to file a New York State income tax return, which conduct reflects adversely on his honesty, trustworthiness or fitness as a lawyer and is prejudicial to the administration of justice. He was suspended from the practice of law for a period of one year, commencing immediately, and continuing until the further order of the Court.

Mark C. Kaley, admitted as Mark Christopher Kaley (July 21, 2009)

Following a disciplinary hearing, the respondent was found guilty of neglecting a legal matter entrusted to him by failing to file and serve a motion for a default judgment in an action in Supreme Court, Queens County and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, which reflects adversely on his fitness as a lawyer, by creating fictitious court documents and providing them to a client for the purpose of misleading the client about the status and progress of their lawsuit. He was suspended from the practice of law for a period of three years.

Alexander M. Kaplan, admitted as Alexander Michael Kaplan (July 21, 2009)

On February 6, 2009, the respondent was found guilty in the United States District Court for the Southern District of New York, after a jury trial, of conspiracy to commit bank fraud, wire fraud and mail fraud (count one); bank fraud (counts two, three, four, seven, eight and nine); wire fraud (counts five, six and ten through fifteen); and mail fraud (counts sixteen through eighteen), for a total of 18 federal felony counts. He has not yet been sentenced. The respondent was immediately suspended from the practice of law, pending further proceedings, based upon his having been found guilty of a serious crime pursuant to Judiciary Law § 90(4)(f).

Barry R. Feerst, admitted as Barry Roy Feerst (July 22, 2009)

On November 2, 2008, the respondent was sentenced in the United States District Court for the Eastern District of New York to a non-jail sentence for a violation of 18 USC § 371. He was immediately suspended from the practice of law, pending further proceedings, based upon his having been found guilty of a serious crime pursuant to Judiciary Law § 90(4)(f).

Jay M. Lipis, admitted as Jay Merrill Lipis (August 4, 2009)

By order of the Supreme Judicial Court for Suffolk County in the Commonwealth of Massachusetts entered October 10, 2008, and effective 30 days later, the respondent was suspended from the practice of law in Massachusetts for a period of two years. Upon a motion for reciprocal discipline pursuant to 22 NYCRR § 691.3, he was suspended from the practice of law in New York for a period of two years, commencing September 4, 2009, and continuing until the further order of the Court.

Robert I. Oziel, admitted as Robert Israel Oziel (August 4, 2009)

Following a disciplinary hearing, the respondent was found guilty of failing to preserve funds entrusted to him and converting those funds to uses other than those for which they were intended; engaging in conduct that reflects adversely on his fitness as a lawyer by reason of the foregoing; failing to promptly deliver to clients, at their request, funds in his possession that the clients were entitled to receive; engaging in conduct that reflects adversely on his fitness as a lawyer by reason of the foregoing; engaging in conduct involving dishonesty, fraud and deceit by providing a client with false and misleading information as to the status of her legal matter; and engaging in conduct that reflects adversely on his fitness as a lawyer by reason of the foregoing. He was suspended from the practice of law for a period of five years, commencing September 4, 2009, and continuing until the further order of the Court.

William R. Kelly (August 5, 2009)

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

Stafford Henderson Byers (August 11, 2009)

Following a disciplinary hearing, the respondent was found guilty of violating his fiduciary obligations by failing to maintain and preserve funds belonging to another person that were entrusted to him; misappropriating funds belonging to another person that were entrusted to him, by withdrawing funds from his attorney trust account for his personal use; commingling personal funds with funds belonging to another person, by depositing personal funds into his attorney trust account; failing to make accurate entries of all financial transactions connected to his attorney trust account in a ledger or similar record at or near the time of the transactions; and engaging in conduct that reflects adversely on his fitness as a lawyer by reason of the foregoing. In consideration of substantial mitigating factors, the respondent was suspended from the practice of law for a period of one year, commencing September 11, 2009, and continuing until the further order of the Court.

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

Charles H. Reinhardt (May 19, 2009)

Following a disciplinary hearing, the respondent was found guilty of having been convicted of a serious crime involving theft and conduct adversely reflecting on his honesty, trustworthiness and/or fitness as a lawyer as a result of the foregoing. In determining an appropriate measure of discipline to impose, the Court noted that the respondent is 67 years of age; is in the early stages of Alzheimer's disease; and has no prior criminal or disciplinary history.

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

Frederic Grae, admitted as Frederic Reichenbach Grae
May 26, 2009

Cynthia V. Tague, admitted as Cynthia Vanden Heuvel
May 26, 2009

John F. Tague III
May 26, 2009

Vincent F. Siccardi
July 21, 2009

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

Failing to re-register as an attorney with the New York State Office Of Court Administration (4)

Aiding the unauthorized practice of law; allowing a paralegal to use the attorney's notary stamp and sign his or her name; and lacking candor before the Grievance Committee

Improperly withdrawing from a case; neglecting a matrimonial matter; and failing to promptly cooperate with the Grievance Committee

Failing to satisfy a judgment arising out of a fee arbitration award, which was fully litigated

Intentionally deceiving the Monroe County Court by executing and filing RJIs that the attorney knew contained false affirmations and prejudicing the administration of justice by avoiding appearances before judges the attorney believed to be unfavorably disposed to his clients' interests

Neglecting a legal matter and failing to adequately supervise the work of non-lawyers employed by his or her firm

Failing to issue required billing statements in a matrimonial matter and taking a legal fee from the proceeds of sale of the marital residence without reducing such agreement to writing

Issuing escrow checks before determining that corresponding transfers of funds to the escrow account had been made; issuing escrow checks payable to "cash;" and failing to maintain required bookkeeping records

Diana J. Szochet, Assistant Counsel to the State of New York Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts, and Immediate Past President of the Brooklyn Bar Association, has compiled this edition of ROLL CALL. The material herein is reprinted with permission of the Brooklyn Bar Association.

[1] Mr. Drakes has since been disbarred on unrelated charges

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An Analysis of the Motion to Set Aside the Verdict: Subsection 21

Continued From Page 1

overwhelming evidence.

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

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

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

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

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

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

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

There is a rule concerning discussions or conversations among jurors, concerning the case. Thus, in People v. Durling[13], the Court of Appeals held that claims, if true, that members of the jury in a homicide prosecution discussed the case on several occasions before submission in the presence of the general public, expressed views as to the guilt or innocence of the defendant and as to certain witnesses in public places, and prior to rendition of a verdict, and from the jury room, carried on conversations and received communications form prosecution witnesses through open windows, empowered the trial court to grant a new trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

This article has analyzed and sought to indicate the proper interpretation and construction of improper or proper juror conduct within the context of sub-section (2) of Section 330.30 of the Criminal Procedure Law. There are a number of basic rules. First, the trial court is invested with broad discretion on the matter. Second, the juror's alleged misconduct must create a substantial risk of prejudice to the rights of the defendant in some way. The case law sets forth a number of specific rules. For example, the failure to challenge a juror by reason of the want of

Continued On Page 18

Books At The Bar

Continued From Page 9

Ballot Access News, Jan. 1, 2008

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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**. He is also the Principal Law Clerk to Justice Charles J. Markey, of New York State Supreme Court, Queens County, in Long Island City.

The Culture Corner

Continued From Page 6

any accent, shows that he is as gifted in Chinese drama, as he is in English-spoken plays. The play closed on October 25, 2009, with packed audiences. Attendees who understand only English should sit to the middle or the left side of the theater [as you face the stage] to catch the English translated subtitles.

In light of the rapid fire changes between past and present sequences, ***MY FATE IS NOT IN MY HANDS*** would be better-suited for cinematic treatment. Some parts of dialogue, like the repetitive urging for customers to taste the delicious turnip cakes, could be cut or trimmed, especially if this worthy play is brought to film. ***MY FATE IS NOT IN MY HANDS [Part Two]*** is slated to open in May, 2010. Please check out www.4seas.org for further information.

CLASSICAL MUSIC CHOICES and CDs and MUSIC LABELS

The natural attraction, as I urged in an earlier column, for neophytes to classical music, is to go with established labels and artists. I would like to amend that suggestion. Once you have heard the repertoire as performed by masters, do try to experiment. There are new and emerging labels - - such as Bridge, Ivory, Profil, ARS Music, Profil, and Oehms Classics - - just to mention a few, that record the works of very talented artists who do not have the agents and pull to get a major recording label contract. New companies have pulled up the slack of powerhouse record companies as Deutsche Grammophon, Decca, Universal, Chandos, Hyperion, and EMI. Gifted artists who cannot get a major label usually raise the funds from grants and other means to get recorded.

I would not ask you to spend $20 on a CD, especially in these economic times, on a new artist performing on a new label. But the ONLY place in the City of New York where you can try new CDs by very talented, but unknown performers is at **ACADEMY RECORDS** on 12 West 18th Street, between 5th and 6th Avenues, closer to Fifth Avenue, in Manhattan. All the way in the back of the store, in the Budget Section of $3.99, you will find outstanding CDs by talented artists. It is because they are unknown and do not have the means for greater publicity and promotion, that are offered by the established, major labels, that these excellent discs do fetch the price of $20 each. At $3.99 you cannot go wrong. I have not found these labels anywhere else in the City and certainly not at a price of $3.99. Of course, **ACADEMY RECORDS [tel. 212-242-3000]**, open seven days a week, also carries the artists featured on the established labels. See www.academy-records.com.

For lawyers interested in trademark infringement, a major fight is under way on record labels between "Medici Classics," "Medici Arts," and "Medici Masters." One would think that this is an obvious case of trademark infringement, especially victimizing the owner of the earlier mark, **JEROME ROSE**, accomplished and internationally known classical pianist, who helped build Medici Classics. The better funded **NAXOS**, a known distributor of classical music, argued successfully that the plaintiff failed to prove likelihood of confusion. Amazingly, **HON. RICHARD J. HOLWELL**, United States District Judge, SDNY, ruled, on a motion for a preliminary injunction, in favor of defendant **NAXOS**, in *Medici Classics Productions, LLC v. Medici Group LLC*, 590 F Supp 548 [2008], and the memoranda of law at 2009 WL 1635603 and 2009 WL 1635604. More is yet to come as **JUDGE HOLWELL** will soon rule on a defense motion for summary judgment. **STAY TUNED!!!**

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

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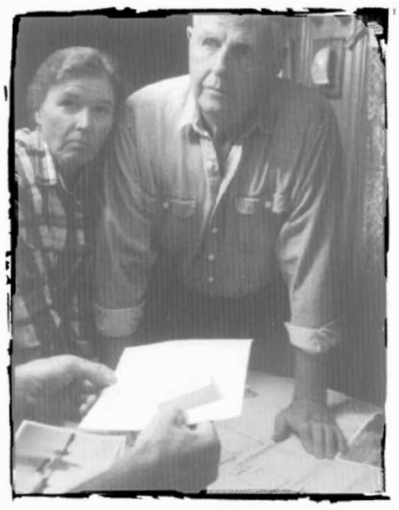

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The Following Summary of Second Department Decisions in Medical Malpractice

Continued From Page 1

defendant's affidavit revealed ongoing appointments and dental work relating to a bridge within the 2 ☐ year statute of limitations. Accordingly, defendant's motion for Summary Judgment on statute of limitations grounds with respect to these teeth was denied.

Statute of Limitations - Continuous Treatment: ***Piro v. Macura***

Defendant's motion of Summary Judgment on statute of limitations grounds denied based on the continuous treatment toll.

Defendant had performed a lap band procedure for obesity on November 12, 2003, and thereafter an umbilical hernia surgery on May 7, 2004. Plaintiff then visited defendant a number of times between May and December 7, 2004, to have the lap band adjusted and for treatment of an infected hernia wound. Defendant expected plaintiff to return within four weeks of the December 7, 2004 visit, but plaintiff did not return until March 29, 2005 at which time defendant examined the hernia wound which was infected and open, and decided not to adjust the lap band until the wound had closed. In the meantime, plaintiff had also seen another surgeon for treatment of the hernia wound.

The action was commenced on June 13, 2007, more than two years and six months after the December 7, 2004 visit, but within the limitations period as to the last visit on March 29, 2005.

Defendant moved to dismiss, claiming that he had last treated plaintiff for the hernia wound on December 7, 2004, and that the sole purpose of the March 29, 2005 visit was to adjust a lap band, which he did not do on that date. Plaintiff in opposition asserted that defendant treated him for the open hernia wound on March 29, 2005 and thus the action was timely pursuant to the continuous treatment doctrine.

The Court denied defendant's motion, noting that plaintiff adduced evidence that defendant's treatment of plaintiff's hernia wound continued until March 29, 2005. The fact that plaintiff had consulted another doctor did not necessarily establish that he had lost his continuing trust and confidence in the defendant, especially since plaintiff continued to visit the defendant thereafter.

Wade v. NYCHHC

This case alleged injury to the infant plaintiff at and around the time of her delivery on October 18, 1991. A prior malpractice suit commenced in 1996 was previously dismissed for failure to serve a Notice of Claim. Thereafter, in 2006, plaintiff commenced another action against NYCHHC seeking recovery for the same injuries.

Initially, the Court noted that since the prior dismissal was not on the merits, it would not have res judicata effect in this matter.

Further, although the Court affirmed dismissal of plaintiff's medical malpractice and loss of services claims on statute of limitations grounds (the infant's claim was commenced well after the ten year limitations period for an infant's medical malpractice claim); the Court held that claims for allegedly inadequate supervision and training of NYCHHC's obstetric personnel sounded in negligence, and thus were timely asserted.

Dental Malpractice - leave to amend to add punitive damages claims denied: ***Kinzer v. Bederman***

Plaintiff's motion for leave to amend the complaint to add a demand for punitive damages was denied, since "punitive damages are recoverable in a dental malpractice action only where the defendant's conduct evinces a high degree of moral culpability or constitutes willful or wanton negligence or recklessness".

Discovery - plaintiff must give authorizations for psychological or psychiatric treatment: ***Corbey v. Allam***

Defendant moved to compel plaintiff to provide authorizations for the release of certain psychological/psychiatric medical records, and plaintiff opposed. The Court noted that although a party may avoid disclosure of such records by abandoning claims of psychological or psychiatric injury, the burden of establishing that there has been no waiver of the privilege is on the party asserting the privilege, the plaintiff in this case. Since plaintiff did not unequivocally abandon her claims of psychological injury, the Court noted that her mental condition remained an issue, and therefore ordered that medical record authorizations be provided.

Summary Judgment: ***Volovar v. Catholic Health System of Long Island Inc.***

Plaintiff sought treatment from defendants for congestive heart failure. During a consultation, defendant recommended that plaintiff undergo valve replacement surgery, but first required that he obtain surgical clearance from a pulmonologist due to an underlying medical condition. There was no evidence that decedent ever obtained surgical clearance from a pulmonologist or that he returned to defendants to schedule surgery. He died less than two months later from cardiac arrest.

The Court granted defendants' Summary Judgment motion, holding that plaintiff failed to raise a triable issue of fact. Plaintiff's two expert affidavits were speculative, as neither expert supported his opinion that defendants provided decedent with inadequate treatment because he lacked medical insurance.

Summary Judgment Granted in Part: ***Swezey v. Montague Rehab and Pain Management* P.C.**

Plaintiff underwent surgery on November 1, 1999 to remove a needle that was lodged in the right ventricle of her heart. She thereafter sued various chiropractors and acupuncturists alleging that they had negligently caused an acupuncture or EMG needle to become lodged in her chest. She also sued a Dr. Garcia, alleging that he had misdiagnosed and mismanaged her medical complaints.

Defendant Garcia's motion for Summary Judgment was denied, as plaintiff raised a triable issue of fact by submitting the affidavit of an expert who opined that Garcia departed from good and accepted medical practice in his treatment of plaintiff, and that the departure was a proximate cause of plaintiff's damages.

The Second Department, however, granted the Summary Judgment motions of the acupuncture defendants, on the grounds that they had submitted evidentiary proof that the needles used during plaintiff's acupuncture was composed of stainless steel and were approximately 0.22 to 0.25 millimeters in diameter, smaller than the needle which was removed from plaintiff's heart. In support of their motion, the acupuncture defendants submitted an affidavit from a metallurgical engineer who tested the needle removed from plaintiff's heart and concluded it was not an acupuncture needle. Plaintiff's expert affidavit in opposition was conclusory, lacked factual support, and failed to address the results of the scientific testing performed by defendant's expert.

Summary Judgment Granted - plaintiff's expert affidavit failed to address causation: ***Murray v. Hirsch***

In this delayed diagnosis of prostate cancer case, defendant's motion for Summary Judgment was denied at the trial level. Second Department reversed, noting that plaintiff's expert "completely failed to address the issue of how defendant's departure was a proximate cause of plaintiff's injuries".

CPLR 4401 - judgment at the close of plaintiff's case - new trial ordered: ***Antoniato v. Long Island Jewish Medical Center***

Following a cervical discectomy, plaintiff developed a serious infection that was later determined to have originated at the C4-C5 level in her cervical spine. Plaintiffs presented evidence showing that the only instrument that penetrated C4-C5 was a spinal needle that was used to identify the exact area where surgery was to take place. Deposition testimony of the defendant surgeon read to the jury at trial, indicated that in general the spinal needle would be "obviously...quite sterile" while in its packaging. In later letters, the surgeon wrote that the infection presumably resulted from the spinal needle being contaminated.

Plaintiff's expert testified that defendants departed from good and accepted medical practice by using a contaminated needle during the surgery. However, the expert admitted that he did not know how the contamination occurred, and that there was no evidence that a surgeon or nurse in the operating room knowingly contaminated the needle or knowingly used the contaminated needle. Based upon this testimony, the Second Department reversed the Trial Court's dismissal at the close of plaintiff's case, and ordered a new trial, as it could be reasonably inferred that the defendants deviated from accepted medical practice by allowing the spinal needle to become contaminated and using that needle, which caused plaintiff's injuries. The Second Department also reversed the Trial Court's ruling to the effect that plaintiff had failed to establish a prima facie case pursuant to the doctrine of res ipsa loquitur.

CPLR 4404(a) - new trial granted - verdict against the weight of the evidence: ***Lader v. Sherman***

The jury's finding that defendant departed from accepted medical practice in performing surgery on plaintiff's left leg, but that the departure was not a proximate cause of plaintiff's injuries, was against the weight of the evidence since the issues were so inextricably interwoven as to make it logically impossible to find a departure without also finding proximate cause.

Plaintiff's Verdict Sustained - damages reduced from $2,500,000.00 to $1,750,000.00: ***Novick v. Godec***

It was within the province of the jury to determine the credibility of plaintiff's expert's testimony as well as the credibility of defendants who testified on their own behalf. The evidence here was legally sufficient to support the jury's findings that the defendant departed from accepted standards of medical practice and that such deviations were a proximate cause of plaintiff's injuries. However, the Court reduced the award for past pain and suffering from $1,000,000.00 to $750,000.00, and reduced the award for future pain and suffering from $1,500,000.00 to $1,000,000.00. The Second Department decision does not address the nature and extent of plaintiff's injuries.

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find the right language services provider? The ATA offers free, searchable online databases of its member translators and translation agencies at www.atanet.org. With the Advanced Search function, you can tailor your search to the language pair and subject area you need, and even specify geographical distances for in-person review.

Getting the right people is important: some "bilingual" reviewers are a waste of money at any price. Marjon van den Bosch, a professional linguist with extensive experience in document review, recalls several litigation matters involving thousands of pages of Dutch. "A staffing agency was tasked with finding competent Dutch-speaking reviewers," she recalls. "But in each case it filled out the team with amateur bilinguals recruited from social networking sites and temp attorneys who had taken German in high school. Google Translate was their tool du jour." Solution: if your linguists will come from a staffing or translation agency, ask for specifics on its recruiting standards and the credentials of the people who will handle your documents.

Bang for the buck

Quality translation does not come cheap, but you can save time and money by thinking through your needs. To draft a reasonable budget, ask a few key questions up front.

Does all of your foreign language material really need to be translated? A few hours of review time from the right translator or a pass through the right computer translation software can help you identify the documents that matter most. Irrelevant documents can be weeded out, and less important material can be gisted or summarized in a few lines or paragraphs – saving time, translation costs, and document-handling headaches over the life of your case.

If you are managing a large litigation, it is critical to determine how much non-English material you have, and in how many languages. Using a Unicode-compliant review platform to work with electronic documents such as e-mail messages and Microsoft® Word documents is one solid answer, says e-discovery expert Conrad Jacoby, founder of efficientEDD. "One of the biggest challenges for a litigation team is simply knowing what they have," he notes. "Fortunately, Unicode – a computing industry standard that allows computers to encode and display most of the world's writing systems – has made it dramatically easier to find unexpected foreign-language documents and treat them appropriately during processing or review."

Size matters

Once you know what you have, you can develop a cost-effective strategy for review based on volume. "If I have 200 documents in a given language, I'll likely have a linguist do a document-by-document review," says Jacoby. "If I have 5000, I'll have the linguist work with review software and use his or her language and subject matter expertise to help winnow the material. A competent reviewer can tell very quickly if something is completely irrelevant or needs further attention."

Scalpel or bludgeon?

How accurate do your translations need to be? Fast and relatively inexpensive, computer translation is often useful for brute-force gisting and first-pass review, but you will almost certainly need specialized human review and translation for your most important documents. "At best, computer translation will only be about 80% accurate," says Joe Kanka, Vice President of Corporate Development for eTera Consulting, a litigation support firm based in Washington, DC, "so we want a professional translator at the table from day one. That, to us, is absolutely critical."

And 80% accuracy looks a lot less impressive when you realize that you don't know which 20% of your translation is inaccurate. For sensitive documents, a qualified human linguist is usually the best solution. "Once the material has been winnowed down," says Jacoby, "a qualified translator or native speaker with the right subject knowledge will almost certainly do a better job analyzing non-English material than a monoglot reviewer working from computer translations."

Listening for added value

A good translator should also be able to connect the dots, seeing each new document as part of a larger whole. Your documents tell a story, and if you are willing to listen, experienced linguists can help you piece it together.

Too few legal teams take advantage of this added value. To tap into it, simply provide translators and foreign-language reviewers with the background documents your attorneys and reviewers are using, and keep related English-language documents with foreign material when sending it out for translation. If you are working with more than one linguist, make sure that everyone on the team is sharing background and terminology. Stay focused on the big picture, and insist that your translators do the same.

Strong relationships

Strong relationships and institutional memory generally help a law firm serve its clients more effectively, and the same is true for translation providers. In the Case of the Last-Minute Stipulations, the frantic attorney called a translator who had worked on the litigation for several years. She quickly proposed a damage-control strategy, and translators, paralegals and attorney were able to work together to complete the review in time for trial.

Surprises are inevitable in legal work, but thinking critically about your timeline and budget and working closely with qualified linguists can make your project run more smoothly. Veteran patent translator and ATA President-Elect Nicholas Hartmann have seen this first-hand. "Ideally, the law firm, its client, and the translator work together, forming an effective partnership that enables all of us to keep our customers, earn their respect, and enhance our professional reputations."

About the Author:

A working linguist with more than 15 years of translation experience, Lillian Clementi provides translation, editing, and document review for Lingua Legal. An associate member of the American Bar Association, Lillian is also an active member of the American Translators Association (ATA) and has served as president for its Washington D.C. Chapter and is the coordinator of ATA's School Outreach Program. Lillian is certified by the ATA for French to English. She also holds a German to English translation certificate from New York University; an M.A. in French from George Mason University; and a B.A. in French from Loyola University.

For more information on the use of this article and for interview requests please contact me at the e-mail or number below. I look forward to hearing from you soon.

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Legal Fees: Contractual and Illusory

Continued From Page 5

This would then be given *res judicata* effect, thereby reducing or eliminating a substantial number of client suits against their former lawyers because they do not wish to pay them.

Minimum v. Non-Refundable Fees

In the New York Court of Appeals case of *Matter of Edward M. Cooperman*, 82 N.Y.2d 745 (1994), non-refundable fees were outlawed in New York. Federal cases have been decided on similar grounds. See, *Wong v. Michael Kennedy, P.C.*, 853 F.Supp. 73 (EDNY, 1994) and *Gala Enterprises, Inc. V. Hewlett Packard Co.*, 970 F.Supp. 212 (SDNY, 1997). While *Cooperman* decided some issues, it left many others in the dark. So, where an attorney has been paid a fee and done no work, he or she must return the whole fee or a substantial part of it. What is unclear is an attorney's entitlement to all or a substantial portion of a minimum fee. A minimum fee is that which the attorney charges up front. It is the fee which the attorney charges for undertaking the representation of a client in a particular case.

A question posed immediately after *Cooperman* to a former Grievance Committee counsel illustrates the point.

Question: "If a well known, experienced lawyer has a minimum retainer of $100,000.00 and after making a single phone call, gets the charges dismissed, has he earned his fee and may he keep it?"

Answer: "I would say yes, that he has earned it."

Now that, of course, is one lawyer's opinion, but clearly there are lawyers with knowledge, experience and contacts who can achieve results that others cannot. Some clients are aware of that. They may be willing to pay for it. Why should they not be allowed to do so? The answer is that they can, but there are some ungrateful clients out there and once a lawyer has worked his magic, they want their money back. This can be the source of fee disputes and ethical concerns.

The Court of Appeals has given us some insight as to when a fee is earned, but not enough. [7] When an attorney charges a minimum fee he or she may have done so because of the risks involved. There may be a concern by the attorney that the action is frivolous; that sanctions may be imposed; that the lawyer might be sued by adversaries or his own client and there may even be the threat of physical danger. [8]

In addition to these risk factors which are difficult to quantify and should be given a multiplier effect, there are other factors that are also inchoate. These amorphous factors may include the difficulty of the case; the number of lawyers previously involved in the case who asked to be relieved; and the number who turned the case down. The fact that an attorney has undertaken a case under such circumstances, perhaps partially on a contingency, because he or she believes that litigants should have access to the courts, "a day in court" so to speak, is a public service which should be considered. The lawyer may have taken on an unpopular cause for no fee or at a reduced fee. These factors and many more determine the reasonableness of a fee and whether an attorney has earned it. When attorneys endeavor to be good citizens and engage in public service endeavors, they should not be penalized for doing so.

Whether a minimum fee has been earned in the context of *Cooperman* may also be measured by other factors such as whether the attorney has turned down other cases to represent the client; the overhead and costs involved in opening a file; interviews with the client and family members and preliminary research; conferences among lawyers in the firm; memos to the file and whether the client is high maintenance or litigious, expecting multiple daily phone calls to be returned each day. Attorneys who take on difficult cases and clients should receive extra compensation for doing so. An attorney who takes on a case involving an abused spouse or a client with a serious mental disorder should receive some extra credit or compensation. Some of these factors were considered in *Cooperman,* and others were not.

For those lawyers with volume practices, low end fee or flat fee cases such as Vehicle and Traffic Law cases, minimum fee issues are less of a concern to them. On more sophisticated or complicated cases the factors to determine in weighing whether an attorney has earned the fee simply by taking it are more complex. For example, in *Cooperman*, the lawyer had done little or no work for the $15,000 flat fees he received. The former clients claimed that they had a change of heart shortly after retaining him and wanted their money back so that they could retain other counsel. But what if the former client has ample money to retain other counsel or has a history of jumping from lawyer to lawyer?

The point here is that lawyers who take on cases for a minimum fee should not be penalized for doing so. But for the fees paid, they would not undertake these cases. While minimum fees may be objected to by non-practicing attorneys such as the academics involved in the *Cooperman* case, the reality is that lawyers will not be involved in certain cases in the absence of a minimum fee. A lawyer who takes on a big case for a substantial flat fee may not even keep track of his hours so how can any court determine that the fee is not earned? At some point courts become involved in reading tea leaves in determining whether a minimum fee or any other has been earned. If the lawyers and judges have little or no practical experience in these types of cases, then their determinations as to what is earned or what may be excessive are speculative at best.

The legal profession is sometimes consumer oriented to a fault. Like no other profession or business, we police ourselves often ignoring the freedom to contract as provided for in our Constitutions; the plain language of retainers and *caveat emptor*. In penalizing ourselves we have gone to extremes without a full understanding of the business decisions involved and when a fee is earned.

Other Risks Encountered By Attorneys In Setting And Accepting Fees

An attorney entering a complex case faces many other problems in determining the fees to be charged and particularly, how much should be paid up front. Attorneys are acutely aware that they may seize the moment by capitalizing on the immediate troubles faced by a prospective client such as the public announcement of criminal charges being made or even a bad decision that is viewed by some as a turning point in the case. The mental weakness of the client, their desire to pay to make the problem go away, must be balanced against the priority of the ethical responsibility of attorneys to not take advantage of the client's vulnerability. Nonetheless, the attorney must be realistic about the cost of representation, keeping in mind that merely adequate or nominal representation may not be enough to win. [9] The client wants to know what it will cost to win or what it will cost to at least take the best shot at it. The client has to financially survive during the pendency of the case. The mortgage must be paid and food must be put on the table. Taking into account these and other factors, attorneys may have to accept more or less in the way of minimum fees. These are additional and substantial calculated risks undertaken by the attorney.

Figured into the complex quadratic equation of setting fees is the method of payment and what the attorney must do to guard against the receipt of monies illegally obtained or money laundering. CPLR 8301-8303-a. Naturally, the receipt of ill-gotten gains may result in forfeiture of fees paid or even prosecution of the attorney on a great variety of charges. CPLR §1311 and 28 U.S.C. §2461.

All of this and more leads to effective assistance of counsel issues, possible violations of the Sixth Amendment and legal malpractice concerns. In setting the legal fees, attorneys must also insure that there is enough money for expert fees, investigators and the presentation of demonstrative evidence.

A permutation of this problem occurs when an attorney is asked to represent a foreign client. If the client has been labeled a fugitive, a terrorist or a so-called "Drug King Pin" prior to being retained, attorneys are presently obliged to first check to see if the client's name is listed on the federal registry. Attorneys are then obligated to secure a special license from the Department of the Treasury prior to their representation. They must receive approval for monies paid; deposit the monies into a special account and provide an accounting of all monies expended. Naturally, the regulations while posing some legitimate national security concerns, also pose First Amendment privacy issues; Sixth Amendment, effective assistance of counsel and freedom of contract issues. [10]

Conclusion

These are a few of the dilemmas not addressed in *Cooperman* or its progeny which are faced by attorneys in setting fees, especially up front and minimum fees. The cognition of attorneys on these points, their researching of the law to insure compliance with ethical standards, may prevent some of the disastrous consequences that can occur when these issues are not foreseen by counsel. Clearly though, courts and grievance committees must come to understand that many of these issues have not been fully explained or contemplated by them. Until they are, then the good faith of attorneys in attempting to comply with the law and the practical problems faced by them in doing so, should be given more favorable consideration.

*Thomas F. Liotti is an attorney with offices in Garden City, New York.

[1] On August 13, 2009, the Pro Bono Publico Bar Association, Inc., a not-for-profit, New York corporation was founded. Its purpose will be to provide free legal services to the poor; to document those services and provide low cost CLE to the lawyers who provide them.

[1] See Peter Eikenberry, More Examples of "How To Be A Lawyer", Federal Bar Council Quarterly, June, July, August, 2009 issue (Vol. XVI, No. 4) at 7.

"Recently, I attended the memorial service for my 47 year old friend, Brooks Burdette, a litigation partner at Schulte Roth & Zabel. There I learned that Schulte lawyers had expended a total of over 8,200 hours in litigating as co-counsel to the Lawyers Committee for Civil Rights Under Law on behalf of Katrina victims.

"The victims were being evicted from temporary housing in which they lived following the loss of their homes to the hurricane. The litigation was successful in preventing tens of thousands of them from being evicted. Recently, I also read a press item noting that Schulte Roth & Zabel was among the top 10 firms in profitability, whether in N.Y. or the U.S., I do not recall.

"As a result of what I learned at the service for Brooks, I called up Bill Zabel's secretary. I asked to interview him on why a firm with such a track record of economic success was willing to make such a significant commitment to litigation without any economic reward for the firm.

"As I sat in the firm's reception area waiting for Bill, I picked up the firm brochure, turned to the public service section and noted that the firm had expended over 15,000 hours towards not-for-pay legal commitments in 2008.

"Projects included a class action suit to achieve adequate legal representation for indigent litigants in New York State and representation of individual immigrants in asylum cases.

"I calculated that at an estimated blended hourly rate of at least $300, Schulte expended over $4.5 million in legal time for non-billable public service projects in the last calendar year."

[3] See Thomas F. Liotti, The Art of Avoiding Criminal Prosecutions, The Attorney of Nassau County, August, 1994 at 6, 8 and 15. Also published in the New York State Bar Journal, February, 1995 at 49. Also, January 25, 2001, New York State Bar Association, Criminal Justice Section, Annual Meeting CLE, Avoiding Prosecution And Disposing Of Criminal Cases Without Trial. Co-panelists were Herald Price Fahringer, Esq., Howard Stave, Esq., Robert G. Morvillo, Esq., and Hon. William L. Murphy.

[4] See Thomas F. Liotti, and Drummond Smith, Appellate Review and the Preservation of Error, Nassau Lawyer, January, 2007 at 9 & 27.

[5] See Thomas F. Liotti and Peter B. Skelos, Precision Is The Key To Criminal [Law] Retainers, The Nassau Lawyer, November, 1987 at 1 and 12.

[6] See *Philips v. Philips* (Nassau County Supreme Court, Justice R. Bruce Cozzens). New York Law Journal, Sept. 1, 1998 at 1 and 25. In a pending matrimonial action, plaintiff's outgoing attorney sought a charging lien for his services rendered. At the time of signing a retainer, plaintiff was in prison. His brother, who had power of attorney, signed a retainer agreement and a statement of client's rights and responsibilities. Attorney argued that this sufficiently complied with 22 NYCRR §1400.2. The court held that, absent strict compliance, the lien must be denied. It said the attorney had the additional duty to personally provide a copy of the statement to the prospective client before a retainer was signed. See also, A. Anthony Miller, Failure To File Retainer Fatal to Fee Claim, The Attorney of Nassau County, September, 1998 at 5.

[7] See Non-refundable Fee Ban Seen As Unclear, Yet Alarming, BNA Criminal Practice Manual, April 13, 1994 at 173 & 176.

[8] See Thomas F. Liotti, Judge Mojo: The True Story of One Attorney's Fight against Judicial Terrorism published through iUniverse. The book may be ordered through www.iuniverse.com and www.bn.com for $25.95 U.S. The book has been described by Ronald Kuby, Esq., media talk show host, commentator and renowned civil rights attorney as "a fascinating and frightening book that chronicles the brave struggle of a prominent civil rights attorney to fight back against a terrorist in black robes. Judge Mojo provides a terrifying look at what happens when the Judge is angry, armed and psychotic. A must-read for every law student and every student of the law."

[9] See *Jenkins v. Coombe*, 821 F. 2d 158 (1987) and *Lopez v. Scully*, 58 F.3d 38 (2d Cir.1995).

[10] Thomas F. Liotti and Drummond C. Smith, Representing A Foreign Client? Better Check The SDN List First, Nassau Lawyer, July/August, 2009 at 18 and 19.

An Analysis of the Motion to Set Aside the Verdict: Subsection 21

Continued From Page 13

knowledge as to the cause is not a ground for this Motion. There is a rule that improper communication with the jury can be a ground for the granting of this Motion. There is a sub-rule concerning discussions or conversations among jurors concerning the case. There are rules concerning written communication by or with jurors, and when a juror examines exhibits. There is varying law concerning juror's experimentation, as well as law concerning of improper juror conduct in the course of Voir Dire. In general, there is a rule that a juror's acquaintance with the defendant is not a basis for granting this Motion, and, as well, there is a rule that a jury verdict cannot be impeached by probes into the jury's deliberative process. There are rules concerning the juror's use of extraneous information such as can constitute improper conduct, and a rule where a juror does independent research. There is a case law concerning the use of alcohol and drugs by jurors, and a rule about jurors reporting defendant's bad conduct or prior conviction to other jurors. There are sub-rules concerning juror access to law books and concerning the juror's use of news reports. There is a sub-rule concerning juror note-taking, and there is a general rule concerning where jurors show overt prejudice or bias. Finally, there is a rule concerning separation of the jury as the ground for the granting of this Motion.

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

* Andrew J. Schatkin practices law in Jericho, New York and is the author of over 150 law journal articles and has contributed to five books. He is listed in Who's Who in America.

ENDNOTES

1 The case law cited in this article has its source in the annotations of McKinney's Consolidated Laws, Sec. 330.30, Volume 11A, West Publishing Company.

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

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

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

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

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

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

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

5 Id.

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

7 See also on this rule, People v. Brown, 48 NYS2d 388, 423 NYS2d 461 (1979); People v. Johnson, 110 NY 134, 17 NE 684 (1888); People v. Leonard, 252 AD2d 740, 677 NYS2d 639 (3rd Dept. 1998); People v. Stanley, 212 AD2d 983, 624 NYS2d 313 (4th Dept. 1995); People v. Edgerton, 115 AD2d 257, 495 NYS2d 858 (4th Dept. 1985); People v. Rodriguez, 183 Misc. 2d 867, 705 NYS2d 485 (S. Ct. Kings Co. 1999); People v. Phillips, Id.; People v. Catalanotte, 67 Misc.2d 351, 324 NYS2d 106 (S. Ct. Kings Co. 1971); People v. Kraus, 147 Misc. 906, 265 NYS 294 (Ct. of Gen. Sess. NY Co. 1933); People v. Smith, 187 NYS 836 (S. Ct. Chenango Co. 1921).

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

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

10 91 NY2d 838, 666 NYS2d 1020 (1997)

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

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

13 303 NY 382 (1952)

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

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

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

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

18 3 NY3d 234, 785 NYS2d 405 (2004)

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

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

21 100 NY2d 30, 760 NYS2d 74 (2003)

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

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

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

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

26 Id.

27 61 NY2d 1008, 475 NYS2d 371 (1984)

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

29 Id.

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

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

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

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

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

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

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

37 164 NY 459, 58 NE 668 (1900)

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

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

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

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

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

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

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

45 262 NY 256 (1933)

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

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

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

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Immigration Questions

Continued From Page 7

immigrant visa system. Most significantly, it substantially increased the number of employment-based immigrant visas available each year. Concerned in part that highly skilled and educated foreign nationals were emigrating to Canada and Europe due to long waits and immigrant visa unavailability in the United States, Congress sought to attract this new wave of the best and the brightest. At the time, it took approximately two years to obtain an employment-based immigrant visa. Today, the dearth of employment-based immigrant visas today is far more pronounced. Highly-skilled and educated foreign nationals from around the world, especially from India and China, must wait at least four and perhaps six or even ten years to complete the processing of their "green card" application. As with H-1B visas, visa backlogs of five and more years to accord the world's most valued and needed workers the right to live permanently in the United States makes no sense and adversely impacts the country's economy, as well as countless foreign nationals and their employers.

On the family immigration side, waits in some categories are now ten to fifteen years. For some people, ameliorating long visa waits only will be accomplished by winning the annual green card lottery.

Solution:

Increase employment-based visa allocation from 140,000 per year to 290,000 to better reflect the needs of U.S. employers; treat spouses and children of lawful permanent residents as immediate relatives - since they are for all other purposes (tax, health insurance, etc.) - and not subject to the annual numerical limitations.

Thanks to Immigrants List for allowing us to reprint this material.

Military Accessions Vital To National Interest (MAVNI)

RECRUITMENT PILOT

The Secretary of Defense authorized the military services to recruit certain legal aliens whose skills are considered to be vital to the national interest. Those holding critical skills – physicians, nurses, and certain experts in language with associated cultural backgrounds – would be eligible. To determine its value in enhancing military readiness, the limited pilot program will recruit up to 1,000 people, and will continue for a period of up to 12 months.

ELIGIBILITY

1. The applicant must be in one of the following categories at time of enlistment
   a. asylee, refugee, Temporary Protected Status (TPS), or
   b. nonimmigrant categories E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U, or V
2. The applicant must have been in valid status in one of those categories for at least two years immediately prior to the enlistment date, but it does not have to be the same category as the one held on the date of enlistment; and
3. An applicant who may be eligible on the basis of a nonimmigrant category at time of enlistment (see 1b above) must not have had any single absence from the United States of more than 90 days during the two year period immediately preceding the date of enlistment.

Health Care Professionals

- Applicants must fill medical specialties where the service has a shortfall
- Applicants must meet all qualification criteria required for their medical specialty, and the criteria for foreign-trained DoD medical personnel recruited under other authorities
- Applicants must demonstrate proficiency in English
- Applicants must commit to at least 3 years of active duty, or six years in the Selected Reserve Enlisted Individuals with Special Language and Culture Backgrounds
- Applicants must possess specific language and culture capabilities in a language critical to DoD
- Applicants must demonstrate a language proficiency
- Applicants must meet all existing enlistment eligibility criteria
- Applicants must enlist for at least 4 years of active duty

(Services may add additional requirements)

-MORE LANGUAGES

- Albanian
- Amharic
- Arabic
- Azerbaijani
- Bengali
- Burmese
- Cambodian-Khmer
- Chinese
- Czech
- Hausa
- Hindi
- Hungarian
- Igbo
- Indonesian
- Korean
- Kurdish
- Lao
- Malay
- Malayalam
- Moro
- Nepalese
- Persian [Dari & Farsi]
- Polish
- Punjabi
- Pushtu (aka Pashto)
- Russian
- Sindhi
- Sinhalese
- Somali
- Swahili
- Tamil
- Turkish
- Turkmen
- Urdu
- Yoruba

BACKGROUND

Non-citizens have served in the military since the Revolutionary War. The Lodge Act of 1950 permitted non-citizen Eastern Europeans to enlist between 1950 and 1959. Additionally, the United States officially began recruiting Filipino nationals into the Navy in the late 1940s, when it signed the Military Bases Agreement of 1947 allowing U.S. military bases in the Philippines. In total, over 35,000 Filipinos enlisted in the Navy through the program between 1952 and 1991.

Today, about 29,000 non-citizens serve in uniform, and about 8,000 legal permanent resident aliens (green card holders) enlist each year. Law ensures that the sacrifice of non-citizens during a time of national need is met with an opportunity for early citizenship, to recognize their contribution and sacrifice. In fact, today's service members are eligible for expedited citizenship under a July 2002 Executive Order and the military services have worked closely with the U.S. Citizenship and Immigration Services (USCIS) to streamline citizenship processing for service members. Since Sept. 11, 2001, nearly 43,000 members of the Armed Forces have attained their citizenship while serving this nation.

AILA Encouraged by Positive White House Meeting on Immigration Reform

Washington, DC – At a meeting today hosted by DHS Secretary Janet Napolitano, and attended by some 130 immigrant advocates, business and labor leaders, and law enforcement representatives, President Barack Obama confirmed his commitment to fair and reasonable immigration reform. The America Immigration Lawyers Association (AILA) applauds this positive message and looks forward to the President's and the Secretary's leadership on this issue in the days ahead.

"I was pleased to hear of the Secretary's intention to step up her leadership on immigration reform," said Crystal Williams, AILA's Acting Co-Executive Director, who participated in the meeting on behalf of AILA. "There cannot be effective enforcement of immigration laws until those laws are reformed to realistically address the needs of families, workers, and American business, and to promote our long-cherished values of fairness and due process."

The time is now to, once and for all, fix our broken immigration system. The Administration's commitment to this challenge is very much welcomed.

Tips for I-131 Reentry Permits and Refugee Travel Documents

How far ahead should I file an I-131 for a second or subsequent reentry permit or refugee travel document?

8 CFR Part 223.2 states that an application for a reentry permit or refugee travel document shall be denied if the previously issued travel document is still valid (unless evidence is provided that it was lost), however, the NSC has informed AILA that it allows the filing of a new reentry permit or refugee travel document even while the previously issued travel document is still valid. If the new application is filed with 30 days or less remaining on the old travel document, NSC will not issue a RFE requesting a copy of the previously issued travel document. Applications filed more than 30 days before the expiration of the travel document will be issued a RFE asking for the VALID travel document before the new travel document is issued. NSC has expressed that practitioners submitting the new I-131 up to 60 days ahead of the expiration of the old travel document would also allow time for receipting of the application and issuance of the ASC appointment before adjudications.

Example: An applicant wants to travel overseas. The applicant would submit the I-131 application, however, there are still 30 days left on the still valid travel document that was issued approximately two years ago (reentry permit). The applicant would not need to submit the travel document with the new application. This would allow the applicant to travel on the old document while the new application is being processed. If the applicant has more than 30 days left on their old reentry permit the applicant could still file an application, however, before NSC could adjudicate the application the officer would need to do a "Request for Evidence" letter and ask for the still valid document (this would not be done for anything less than 30 days).

I received only one year validity on the reentry permit; shouldn't it be two years?

8 CFR 223.1(2) "Extended Absences" states that a reentry permit issued to a person who, since become a legal permanent resident, or during the last 5 years, whichever is less, has been outside the U.S. for more than 4 years in the aggregate will be limited to one year validity. There are exceptions where a two-year validity can be issued, and those are separately listed out in the regulations. On page 2 under Part 5 of the I-131 application, it states, "Since becoming a permanent resident of the United States (or during the past five years, whichever is less) how much total time have you spent outside the United States?" If the applicant marked/checked, "more than four years," then he or she will only be given one year.

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