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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 74 / No. 1 / October 2010**

Should The United States Government Continue To Act As The World's Police Department?

BY PAUL E. KERSON

Paul E. Kerson

As of this writing, the United States Government keeps 65,000 Marines in Okinawa, Japan, despite the fact that we last fought there in 1945, 65 years ago. There are similar large scale military installations in Germany, where the last fighting occurred also in 1945, 65 years ago. Current plans for disengagement in Iraq call for 50,000 U.S. Troops to remain there indefinitely. Our current United States Navy is larger than the next 12 largest national navies combined. The U.S. Navy patrols all the commercial sea lanes of the world to make certain that international oceanic trade in all manner of goods is not disrupted by other national navies or by pirates.

Further, our Central Intelligence Agency and its numerous subsidiaries actually are stationed all over the world, and regularly arrest people for attacking United States soldiers and/or installations abroad. These individuals are brought to a federal prison in Guantanamo, Cuba, for pre-trial incarceration, or perhaps unlimited incarceration. This activity may or may not be authorized by our current laws, depending on who is interpreting them. Can we continue to treat the world as one big city, and continue to treat our President as the Mayor? Can we continue to treat the federal prison in Guantanamo, Cuba, as a precinct lock-up? And if we do, should we have a U.S. District Court Judge assigned to Guantanamo, together with public defenders appointed under the Criminal Justice Act (CJA)?

Military expenditures are the single largest chunk of our United States Government's budget. That budget continues to operate at a multi-trillion dollar deficit.

Are these facts sustainable?

Should we continue to provide police services for the entire world? Or, in the alternative, should the entire world be paying us to do so?

This is the fundamental question facing every American voter at this time.

There are very good arguments on all sides of this issue.

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Response From Our District Attorney, Hon. Richard A. Brown

Richard A. Brown

Dear Paul,

I have your letter of August 26th enclosing a copy of your proposed Bar Bulletin article.

Early on in my tenure as Queens County's chief law enforcement officer, and in view of the fact that our county is a home to two of our nations busiest airports, we established an Airport Investigations Unit which investigates and prosecutes criminal activity at those locations and interacts with our many federal, state and local law enforcement partners. Following the tragic events of September 11, 2001, we added a Counter Terrorism Unit which, among other things, shares on a daily basis vital information with our colleagues and lends support in coordinating our efforts.

In addition, we have a permanent seat on the Joint Terrorist Task Force and assist in gathering intelligence by conducting targeted debriefings of arrestees from countries that sponsor terrorism. We give particular attention to investigating and prosecuting specific precursor crimes to terrorism including identity theft, money laundering, counterfeit trademarking and the forgery or illegal procurement of identification documents. As a result, we have been able to provide valuable information to both the NYPD's Intelligence Division and the Joint Terrorist Task Force and work collaboratively with them on significant classified investigations.

Our efforts have not only been successful in keeping our county safe and secure but have contributed as well to our national security.

Warm regards.

Sincerely,

RICHARD A. BROWN
DISTRICT ATTORNEY

Domestic Violence And Family Law Legislative Update October 6, 2010

BY JANET FINK, DEPUTY COUNSEL
NEW YORK STATE UNIFIED COURT SYSTEM

The 2010 New York State Legislative session culminated in the passage of several significant measures with respect to legal representation, domestic violence, child welfare, juvenile justice, child support and matrimonial proceedings, all of which have been signed by the Governor.[1] All are summarized below. Texts and supporting memoranda are available on-line at www.nysenate.gov or www.nyassembly.gov or by calling 1 800 342 9860.

I. REPRESENTATION OF CHILDREN AND ADULTS:

1. Change of term "law guardian" to "attorney for the child" [Laws of 2010, ch. 41]: Consistent with the recommendations of the Matrimonial Commission in its report to the Chief Judge in 2006 and Rule 7.2 of the Rules of the Chief Judge, which was promulgated shortly thereafter, this measure, submitted by the Chief Administrative Judge's Family Court Advisory and Rules Committee, replaces all statutory references to "law guardian" with the term "attorney for the child." The use of the term "attorney" more accurately reflects the mandate for client-directed representation except in very limited circumstances, consistent with attorney ethical requirements. The measure amends the Civil Practice Law and Rules, the Domestic Relations Law, the Executive Law, the Judiciary Law, the Family Court Act, the Public Health Law and the Social Services Law to substitute "attorney" or "counsel" for "law guardian." **Effective: April 14, 2010.**

2. Indigent Defense Commission [Laws of 2010, ch. 56; A 9706-c/S 6606-B, Part E]: This measure, part E of the language bill accompanying the Public Protection Budget for Fiscal Year 2010-2011, establishes an Office of Indigent Legal Services within the Executive branch, with responsibility to "monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law." Its full-time director must be nominated by the Governor for a five-year term and reports to an appointed nine-member Indigent Legal Services Board. The director, who may be removed for cause by a 2/3 vote of the Board, must have had at least five years experience in public defense and have a "demonstrated commitment to the provision of quality public defense representation and to the communities served by public defense providers." The Board, chaired *ex officio* by the Chief Judge, must be appointed by the Governor for three-year terms as follows: one each recommended by the President *Pro Tempore* of the Senate and Speaker of the Assembly, one from a list of at least three from the NYS Bar Association, two from a list of at least four from the NYS Association of Counties, one from a list of at least two from the Chief Administrator of the Courts, one who has at least five years public defense experience and one additional attorney. The Board must evaluate existing indigent legal services programs and determine the "type of indigent legal services...to best serve the interests of persons receiving such services," must consult with and advise the Office of Indigent Legal Services, must accept, reject or

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being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th 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.

2010 Fall CLE Seminar & Event Listing

October 2010

Tuesday, October 5	MHL Article 81/Guardianship Training for the Lay Guardian 2:30-5:00 p.m.
Monday, October 11	Columbus Day, Office Closed
Wednesday, October 13	Advanced Criminal Law, Pt 1
Thursday, October 14	Art of Cross Examination, 1:00-2:00 p.m.
Wednesday, October 20	Advanced Criminal Law, Pt 2
Tuesday, October 26	Recent Significant Decisions from our Appellate Courts

November 2010

Tuesday, November 2	Election Day, Office Closed
Tuesday, November 9	Landlord/Tenant Seminar
Wednesday, November 10	Professional Ethics Seminar
Thursday, November 11	Veteran's Day, Office Closed
Thursday, November 25	Thanksgiving Day, Office Closed
Friday, November 26	Thanksgiving Holiday, Office Closed

December 2010

Wednesday, December 1	Insurance Law Seminar
Wednesday, December 8	Holiday Party at Floral Terrace
Friday, December 24	Christmas Eve, Office Closed
Friday, December 31	New Year's Eve, Office Closed

CLE Dates to be Announced
Elder Law
Labor Law

New Members

Elana Ades
Daniel R. Antonelli
Emilio E. Arnau Hortal
George Asllani
Hilary Jayne Bauer
Nelson Raymond Belen
Karen Best
Andrea Blair
Bruce Bronson
Nicole L. Bruszewski
Anadel Canale
Adel A. Chahine
Laura T. Ciaccio
Anne Joy D'Elia
Christy M. DeMelfi
Naresh K. Dewan
Uchenna Emeagwali
Milton H. Florez
Roman Grutman
Gohar Habib
Judie M. Ilus
David Lawrence Jadidian
Alexandria Jean-Pierre
Joseph F. Kasper
Paul Kilminster
Hana Kim
Jeeyoung Kim
Richard Joseph La Rosa
Ivory O. Lai
Ivan Erik Lee
Joseph David Levy
Akram Maged Louis
Arthur Orson Louissaint
Judy Lukose
Natalie Markfield
Maria Teresa Mateo
Aryeh L. May
Douglas Ryan Michaels
Jeffrey R. Miller
Robert P. Miraglia
Janine Alyson Morris
William Ng
Vincent Joseph Nibali
Mahir Sheikh Nisar
Matthew C. Norgard
Vanesa Isabel Pagan
William Pagan
Allen S. Popper
Eric Boucle Pinsonnault
Kristal T. Ragbir
Glenn Reichelscheimer
Patrick James Reilly
Jeremy S. Ribakove
Concetta Maria Rinaldi
Yefim Rubinov
Peter John Ryan
Mohammad Akif Saleem
Eugene Sarchiapone
Ezra Seth Schulman
Joel Serrano
Aravella Simotas
Dennis R. Smith
Kelly B. Snitkin
Daniel E. Strassman
Stacey Strum
Cory Tischbein
Dimitra Tzortzatos
Joseph D. Turano
Sandra Ung
Emily C. Walsh
Jeremy H. Wang
Tara Marie Whelan
William Yeung
William Howard Ziff

Necrology

David E. Bryan, Jr.
Robert M. Jupiter
Joseph Francis Lane
Edward J. Ledogar
Charles F. Rubano
Hon. Mark Spires
Joseph M. Walsh

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help. To learn more, contact QCBA LAC for a confidential conversation. Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

Editor's Message

Dear Fellow QCBA Members:

After only 25 years as Associate Editor (or is it 30?), I was recently appointed Editor of the Queens Bar Bulletin. Actually, I was co-Editor one year in the 1980s with a relatively new Law Secretary named Marty Ritholtz, now Justice Ritholtz.

Our new Queens Bar Bulletin Committee has the most meetings of any Committee in the QCBA. Richard Golden, Stephen Fink, Gary DiLeonardo (a second generation QCBA member) and Manny Herman (a QCBA Golden Jubilarian plus 10) and I meet several times per week at 1 p.m. at the Redwood Deli on (where else?) Queens Blvd. and Union Tpke. on the Forest Hills side, not the Kew Gardens side. (For zip code mavens, this is where the 11375 meets the 11415).

We can be seen at the Redwood discussing all of the articles that are about to appear in the next issue of the Queens Bar Bulletin. When we are not discussing this most pressing issue, we discuss exactly who did what to whom at the Capital of the Known Universe - I refer of course to the Queens County Supreme, Civil and Surrogate's Courts on Sutphin Blvd., the Queens County Family Court on Jamaica Avenue, the Queens County Criminal Court and Supreme Court Criminal Term in Kew Gardens, and the all important Long Island City Courthouse, especially including its garage.

We discuss the law as it was actually promulgated by the late, great lawgiver of all time, the comedian Lenny Bruce: "In the halls of justice, most of the the justice is in the halls."

We aim to make the Queens Bar Bulletin the best it has ever been - to inform and entertain our readers with recent and/or interesting articles about the law as it pertains to the practice of law and the administration of justice in Queens County, the most international municipal entity since ancient Rome.

So, find us at the Redwood, and give us your articles. What we experience in a day at the Capital of the Known Universe does not occur to lawyers in a normal county in a lifetime. Your cases, experiences and ideas are anything but ordinary. Write it down and forward it to us so we can all learn together. Our e-mail addresses appear in the box below.

Sincerely,

Paul E. Kerson
Editor, Queens Bar Bulletin

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PRESIDENT'S MESSAGE

For the Public Good

In October 2009, the American Bar Association established **National Pro Bono Week** to recognize *pro bono* attorneys, recruit volunteers, and raise awareness — among the public, *and* our profession — of the urgent need for *pro bono* assistance to both lower income people, and victims of the economic downturn.

This year's **National Pro Bono Week** promises to be an important event for the Queens County Bar Association, and an opportunity for each of us to re-commit to one of our profession's proudest traditions.

The term *pro bono* (shortened from Latin *'Pro Bono Publico*") means *for the public good* — and, for many years, members of QCBA have given back to the community where we live and practice law by providing *pro bono* services to people in need. And this month, QCBA is celebrating the second anniversary of **National Pro Bono Week** by presenting a three-part series of **free training sessions** to QCBA members who are prospective *pro bono* volunteers.

The first seminar will be held on **October 19, 2010, from 6-9 p.m**. This event, which offers a FREE ethics CLE, will begin with a wine and cheese reception hosted by **Stephen P. Younge**r, President of the New York State Bar Association and the **Hon. Fern Fisher**, Deputy Chief Administrative Judge of New York City courts. (Our thanks also go to Judge Fisher for helping QCBA publicize this event). The seminar will focus on training lawyers to provide *pro bono* legal advice and limited representation for unrepresented litigants in the Queens County, Civil, Family and Supreme Courts.

Chanwoo Lee

The second Seminar, scheduled for **November 4, 2010, from 6-9 p.m**. at the QCBA, will focus on consumer debt.

And on **November 16, 2010,** our third National Pro Bono Week seminar (also held from 6-9 p.m. at QCBA) will focus on uncontested divorce volunteers. I urge each of you to attend this seminar, because of the significant statutory changes in Domestic Relations and Family Law that will take effect on October 12, 2010, regarding No Fault, maintenance, child support and counsel fees.

I also urge you to ***bring a legal colleague to these events***. One of the goals during my year as president of the QCBA is to attract younger attorneys to the QCBA, and these *pro bono* trainings are an excellent way to recruit new members and new volunteers. The series is also a great opportunity for newly admitted attorneys to network, learn new skills, and expand their areas of practice while serving the public. It is a win-win situation for us, as lawyers, and for the community.

Finally, in the spirit of National Pro Bono Week**,** I want to recognize **David Siegal, Kendyl Hanks** and **Jonathan Pressment** of the law firm of **Haynes and Boone, LLP** for their pro bono representation of the five County Bar Associations' lawsuit against New York City. As you know, in May of this year, QCBA, along with the city's other four County Bar Associations, initiated a lawsuit against Mayor Michael Bloomberg, the City of New York and John Feinblatt, the Mayor's Criminal Justice Coordinator, for their unilateral attempt to modify the New York City's Indigent Defense Plan. From the inception of this lawsuit, HB has worked tirelessly to represent the five County Bar Associations — without any payment — because they are committed to ***Pro Bono Publico***.

Can we, as public-spirited lawyers, do less?

Sincerely,

Chanwoo Lee, President
Queens County Bar Association

SAYING "GOODBYE"

BY STEPHEN J. SINGER

Over the many years in which I have been an active participant in the Bar Association I have seen many friends and colleagues come and go, never once contemplating my own leaving. After forty-four years of practice I have decided to call it a day and to venture into a new lifestyle and locale. My wife and I are moving to Florida permanently. We have sold our home here in New York, packed up all of our belongings, advised my law partners of my resignation and we are ready to take advantage of the depressed real estate market on the East Coast of F L A……

Sounds so easy when you say it that simply and that quickly. I am here to tell you that it is not that easy. Saying "Goodbye" to neighbors, even friends, and certainly relatives, is no big deal. Terminating professional relationships seems to be much more difficult. It is not merely the bond between lawyers who perform the same kind of work, suffer the same slings and arrows from their clientele, and who have weathered similar travails during their long years of service, it is realizing that what we do for such a great part of our lives defines in many ways who we are as individuals. We all sound like lawyers even when we are not "on duty," as my wife is fond of reminding me.

And being a criminal defense lawyer has always meant defending not only clients, but your right to even practice that type of law in the eyes of almost everyone else we meet. There is rarely a movie, a novel, a stand-up comedy act, or a sitcom, which doesn't regularly incorporate some form of anti-lawyer joke. Usually, I will admit, it is about our civil law cousins and not my specific area of practice … famous Fortune Cookie saying: "Lawyer is someone who helps you to get what's coming to him" … however, that being said, there have not been too many cocktail parties over the years where at least one person has not asked how I could do what I do for a living.

I never know in advance whether I am prepared to offer the Constitutional right to counsel argument, the biblical obligation to defend one who is accused of a crime, or simply that it is exciting and challenging work. Regardless, most folks never do accept that representing serial rapists, child molesters, con artists, drug dealers and murderers is a profession they can have high regard for. No matter, it has always been great fun to have a career that challenged the mind set of so many other people and often put me at odds with them and I will miss that.

Stephen J. Singer

There is no substitute for the stress and rigors of a high profile murder case; the sleepless nights, the endless preparation and the tension when the Judge says "Will the defendant rise and face the Jury." Depending on how I felt about the person I was defending, I would sometimes stand with him, sometimes not, keeping my eyes lowered and preparing to mark the verdict sheet before me. The extreme highs and lows of criminal trial work are some of the reasons why I have always enjoyed this area of the law. Lawyers who are not litigators will never feel that. Lawyers who are litigators and even those who sometimes win significant civil cases, will never feel that. Being responsible for another person's very existence is huge in every way. And "Yes," I will miss that.

It sounds corny, but what we do as criminal practitioners keeps the system honest, preserves the civil rights of us all and protects the integrity of the Constitution. It has always made me feel different from other lawyers … more proud … perhaps without good reason … feeling as though I knew something that none of the others knew because they had not done what I

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Queens County Bar Association Annual Dinner and Installation

New President: Ms. Chan Woo Lee
May 6, 2010 Terrace on the Park 6:00PM-10:00PM

"Blessed are they who maintain justice, who constantly do what is right."
(Psalm 106:3)

Loving God,

We thank You for the annual gathering of the Queens County Bar Association this evening, especially as they install the new president, Chan Woo Lee, and the other officers and managers unto leadership and service to the over 2,000 members of this organization, who serve the most ethnically diverse population in the world.

And how appropriate and historic it is that Chan Woo becomes the first Asian American, and the 3rd woman president of the association on this day in May, as we celebrate Asian American Heritage Month. We ask that You bless Chan Woo and bless the QCBA through her as she leads with integrity, wisdom, humor, and grace. May the association continue its work of justice and advocacy, as it has done for over 130 years, for all the people who need their expertise, guidance, and representation.

We ask that You will bless the other officers, speakers, honoree, and all the participants gathered here tonight. Let this be a time of wonderful fellowship, strong networking, and a good reminder that we all are a part of a greater community of those seeking justice for the health and well-being of our society.

As we break bread together, bless the meal we are about to eat. And as we partake of the abundance before us, may we realize how fortunate we are and not take this for granted. Help us to realize that You do not bless us only for ourselves, but so that we can bless and serve others.

May our conversations be seasoned with grace, may old and new friendships be forged and strengthened, may a good time be had by all.

We lift up all the members of the Queens County Bar Association and their family and friends, and we ask that we may all act justly, love mercy, and walk humbly with You, our God. (Micah 6:8). We give You all glory, honor, power, and praise, and we pray all these things in Your Name.

Amen.

Rev. Eun Joo Kim
Staff Chaplain at New York Hospital Queens

The Sparrow Leaves The Nest

BY ROBERT E. SPARROW

Robert E. Sparrow

Since 1936, there has been a "Sparrow" walking the halls, and appearing in Court, in the "Halls of Justice" of Queens County and the Metropolitan area. My father, Sidney G. Sparrow, became a legend in his own time – as a skilled, charismatic, popular defense attorney (as well as an artist, poet, athlete, etc.)

Now, after "only" 53 years at the Bar, I too, shall "fade away" (not quite equaling Sid's 65+ years.

Born and raised in Brooklyn, gaining degrees at Columbia College (55') and Law School (57'), I moved to Queens County after my marriage to Marcia in April, 1957 – barely two months before taking the Bar Exam. I enlisted in the army for a tour of 6 months active (a very cold basic training at Fort Dix) and 6 years of active reserve. During that tumultuous time (the Cuban Missile Crisis, the Berlin Wall, and war in Laos presaging Vietnam), we became the parents of Laurie (1960) and David (1964). I had also started practice in 1957, resumed in 1958 after service and a cross country trip of 6 weeks. (In those days, a motel room in South Dakota cost $4.00 a night!)

The practice of law in the late 50's was *very* different! Our offices were on Catalpa Avenue in Ridgewood (opposite the "Felony Court", and in Court Square, Long Island City, near the County Court and Court of Special Sessions, predecessors to Supreme Court Criminal Term and the Criminal Court. We made daily trips from Ridgewood to Long Island City, often triple parking with the help of a well liked and well rewarded minion of the Law.

We handled thousands of cases, ranging from shoplifting and intoxicated driving, to major murder cases (such as People v. Winston Moseley, the killer of Kitty Genovese in 1964, People v. Joseph Baldi, and many bizarre and interesting cases). The Moseley case alone would take a book to describe the unique twists and turns (such as finding .22 Caliber bullets in each of 6 "stab wounds" in an exhumed victim's body; or the relationship that developed in Creedmoor between two separate parents, each acquitted of killing their own children, based on a verdict of insanity).

By 1961, the Courts, consolidated, had moved to Kew Gardens, and we followed that year into the Silver Tower, where we remain to this day.

Through the years, Marcia and I did extensive traveling – to exotic locations such as the Soviet Union, China, India, Alaska, a photo Safari in East Africa, Egypt, Morocco, Iceland, much of Europe, Israel, Australia – New Zealand, South America, Alaska, Antarctica – and, the most beautiful of all, our own United States of America!

In my time I became a Certified Scuba Diver (many a tale to tell), a licensed Pilot, and a nationally ranked Handball player (I played, for years, in National Handball Tournaments).

My son David, a Harvard graduate, is a journalist. He lives in Manhattan with his

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Book Reviews

BY: STEPHEN DAVID FINK, ESQ.

We as attorneys have very little time to enjoy the benefits of reading. Here are two books that should occupy some of your precious free time.

FOR THE THRILL OF IT ALL
by Simon Baatz

This is the story of the Leopold and Loeb trial. So you thought "O.J." was the trial of the century, but maybe not after you read this book.

Nathan Leopold and Richard Loeb were two young men from Chicago who came from wealthy families. For some reason (and that is the real question in the book) they decided to kill a local teenage boy who they had chosen arbitrarily. While they thought they had performed the perfect crime, it all quickly unraveled. They soon confessed to what they had done and faced the death penalty.

It was at that point that the family retained Clarence Darrow who was the most famous lawyer of his day. He put together a fabulous defense team for the defendants. It was not his intent to get them acquitted but rather to save them from the death penalty. Robert Crowe, the cunning, but largely forgotten State Attorney vigorously resisted this effort.

So began a lengthy and exciting hearing (not really a trial) only as to the penalty to be imposed. Darrow believed the he had the right judge for his case, and ultimately he did. This book is filled with discussions of the testimony provided by the most prominent expert witnesses of the day. You will enjoy reading the psychological discussions trying to figure out why these two young men viciously murdered a 14-year old boy.

In the end, Judge John Caverly made his decision based not upon the expert testimony but on the young age of the two defendants. Life imprisonment was the eventual sentence. Although Richard Loeb died in prison, Nathan Leopold was released in March of


Stephen David Fink

1958. Darrow went on to even greater fame in the so-called Scopes "Monkey trial."

Perhaps this was truly the greatest trial of the 20th Century. The book is well written for lawyers and non-lawyers.

CONTEMPT OF COURT:
by Mark Corriden & Leroy Phillips, Jr.

Here is a story you probably did not know but should. I bet you did not know that in the history of the United States Supreme Court there has been only one trial before it. That was the case of ***United States v. Joseph Shipp, et al***, decided May 24, 1909.

In 1906 Chattanooga, Tennessee was, by Southern standards, a relatively liberal city as to race relations. However, the city was still a racially divided one. It was in January of that year that a white woman by the name of Nevada Taylor was allegedly raped on her way home from work. While she did not get a good view of her attacker, there was some indication that the man might have been a "Negro" (that was the "p.c." word at the time).

Investigation by the police and Sheriff Joseph F. Shipp eventually led them to a "Negro" by the name of Ed Johnson. While he had numerous alibi witnesses indicating he was working at a local bar at the time of the rape that did seem to matter. Soon he was charged with the crime which was punishable by death.

Quickly the word of the crime spread through the city. Almost immediately a white lynch mob formed outside the local jail - even though Johnson was not there. Somehow the mob was dispersed. It only took a week or so for the trial to begin. The local Criminal Court Judge (Samuel D. McReynolds) had appointed three white lawyers to represent Johnson. They did what appears to have been their best having had limited resources and only a few days to investigate and prepare. The all white male jury quickly convicted Johnson. This was after one juror had actually stood up during the trial and openly threatened the defendant.

After the conviction, Johnson's attorneys had him waive his right to an appeal. They told Johnson that, unless he did this, the mob would probably lynch him. This way he could die properly at the hands of the State.

It was at that point that two local black attorneys, Noah Parden and his partner, Styles L. Hutchins entered the case. At that time there were not a lot of black lawyers in Chattanooga. The few that were in private practice basically handled only a black clientele. Parden and Hutchins are generally seen as forgotten "heroes" of the Civil Rights movement.

The lawyers immediately brought a writ of habeas corpus in Federal Court. They also secured a stay of the execution. A full hearing was soon held before the Federal Court, but the writ was denied. However, a further stay was granted so that an application could be made to the United States Supreme Court. Parden and Hutchins, with the help of a local Washington, D.C. attorney, made that application to the Supreme Court. Luckily it was Justice John Marshall Harlan who received the request. At the time Justice Harlan was the senior member of what was known as the "Fuller Court." He was famous for his dissent in ***Plessey v. Ferguson*** ("separate but equal"). Justice Harlan signed the stay of execution pending review by the full Court.

The reaction to this back in Chattanooga was outrage by the white community. Just hours later a mob appeared at the jail. Johnson was taken from his cell and lynched. There was virtually no effort by local authorities including Sheriff Shipp to stop the lynching.

Justice Harlan and every member of the Court were incensed. It was decided by the Justices (and then President Theodore Roosevelt's Justice Department) that a hearing would be held as to whether Sheriff Shipp and others (including possible members of the mob) would be held in contempt. The only "trial" ever held in the Supreme Court (actually tried before a "Commissioner") led to the conviction of Sheriff Shipp and several others. He was sentenced to 90 days in jail.

This surprisingly little known episode in American judicial history is worth of your attention.

P.S. Take a few minutes. Did you know that New York State has had two lynchings - one white and one black. On June 2, 1892, Robert Lewis (alias Jackson) was lynched in Port Jervis, Orange County for assaulting a white woman. It is believed that this real event formed the basis for "The Monster" in Stephen Crane's (best known for Red Badge of Courage) Tales of Whilomville.

Books at the Bar

BY HOWARD L. WIEDER

Since the October Term is the first term in the United States Supreme Court's year, it is fitting that I begin the review of books with a marvelous, two volume book, written in riveting style on the nation's highest court by **DAVID G. SAVAGE**, journalist for **The Los Angeles Times**. **MR. SAVAGE** is probably one of the top five analysts and commentators of the Supreme Court. He knows the history of the Court, its decisions, Justices, and his new 2-volume book, published by CQ Press this year is written beautifully.

In my effort to get lawyers to write better, I include three books on film. A good screenwriter tells a compelling story. In my duties as Law Secretary to **JUSTICE CHARLES J. MARKEY**, I spent time reading motion papers, where lawyers spend precious time reminding me of basic law governing the grant or denial of summary judgment, but do not go into the facts in a clear way. A litigator must inform the Court as to what happened. Tell your story in a concise fashion, and preferably one that is well-written. Some lawyers write as though boredom were an emotion. You need to tell the Court of what happened to your client. Convince the Court! Remember that **JUSTICE LOUIS BRANDEIS** of the U.S. Supreme Court [its first Jewish Justice] reserved for himself the writing of the facts of each opinion he wrote, delegating to his law clerks the research and writing of the law. Justice Brandeis well understood that once the reader were to finish reading the factual account, the decision should be almost obvious even before the legal discussion.

JUSTICE LOUIS BRANDEIS also knew that there is no such thing as good writing -- "only good re-writing," he declared! What better way to get lawyers to write better and to describe the narrative of their case in a coherent way than referring them to books on film writing. I discuss three excellent books on film and film-writing.

Howard L. Wieder

GUIDE TO THE U.S. SUPREME COURT [FIFTH EDITION] By DAVID G. SAVAGE

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WRITING DRAMA: A COMPREHENSIVE GUIDE FOR PLAYWRIGHTS AND SCRIPTWRITERS **[June 2005 edition]**
By **Yves Lavandier**
Translated from the French by Bernard Besserglik

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By **Leo Braudy** and **Marshall Cohen**

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HOW TO READ A FILM: MOVIES, MEDIA, and BEYOND [Fourth Edition]
By **James Monaco**

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I. GUIDE TO THE U.S. SUPREME COURT [FIFTH EDITION] By DAVID G. SAVAGE

This brand new edition of *Guide to the U.S. Supreme Court* reflects the substantial changes in the makeup of the High Court and landmark rulings from recent Court terms. No other reference on the Court offers so much detail and insight in such a readable format. Updated through the 2008–2009 term, this classic resource explains everything readers need to know about the Supreme Court, from its origins and how it functions to the people who have shaped it and the impact of its decisions on American life and the path of U.S. constitutional law.

DAVID G. SAVAGE's two-volume work is written engagingly and makes a perfect gift for any lawyer or aspiring lawyer. The beauty of **DAVID G. SAVAGE's** writing is one not need be a lawyer to understand his discussion. He covers the subjects covered by the Court and the leading decisions in each field, and, of course, discusses the Court's history.

Updates include:

The appointments of Chief Justice John G. Roberts, as well as Associate Justices Samuel Alito and Sonia Sotomayor, featuring biographies and background information

A new chapter on the emergence of Second Amendment protections for the Right to Bear Arms

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New information and detail on how cases currently get to the Court, and how the process has changed over time

Expanded content on selecting justices and the confirmation politics of judicial appointments

Landmark decisions and key cases:

District of Columbia v. Heller (2008)—gun rights and the Second Amendment

Boumediene v. Bush (2008)—

Continued On Page 12

Named or Unnamed: A Neat Question

BY ANDREW J. SCHATKIN*

Andrew J. Schatkin

The Civil Rights Statute, 42 U.S.C. Sec. 1983, is one of the most frequently found denizens of the Federal Court System, or rather the United States District Courts and Courts of Appeal. The act and statute was enacted after the Civil War and during Reconstruction to control lawless and brutal Ku Klux Klan activity against recently freed slaves. Since that time, that statute has been extended to two or three significant areas. These areas include police brutality and beatings, where excessive force is used in making an arrest. Further, it includes false arrest cases; and thirdly, it includes prisoner's rights cases, where beatings are inflicted and bodily harm caused to pre-trial detainees and inmates in correctional facilities, or where they are deprived by deliberate indifference of adequate and proper medical care. Often, an arrestee or inmate will not know the names or identities of the person who have caused him great and grievous bodily harm and injury. The inmate or arrestee may file a complaint, not knowing the names of the police officers or corrections officers, and refer to them as "John Doe" defendants.

The question arises therefore, and it is a neat one: is using the term "John Doe" or unnamed defendant a permitted and permissible legal practice? There has been some case law resolving and interpreting this particular issue. This article proposes to review the case law and derive from it an analysis and examination of any rules concerning the use of "John Doe" or the use of an unnamed defendant in Civil Rights actions brought under 42 U.S.C. Sec. 1983.

One of the leading cases analyzing this issue is Wakefield v. Thompson.[1] In Wakefield, plaintiff Timothy Wakefield appealed the District Court's dismissal of his Sec. 1983 action against "John Doe," a correctional officer at the San Quinton Prison. Mr. Wakefield alleged that the "John Doe" officer violated his 8th Amendment rights by refusing to provide him with prescription psychotropic medication upon his release from prison. Plaintiff Wakefield asserted that "John Doe" exhibited deliberate indifference to his serious medical needs (Wakefield suffered from an organic delusional disorder.). According to Wakefield's allegations, he met with a doctor shortly before he was released from San Quinton and the doctor wrote Wakefield a prescription for two weeks worth of Navane to be filled by prison officials and dispensed upon Wakefield's release from prison. On the day of his release, Wakefield asked "John Doe," the officer handling the release procedure, for his two-week supply of Navane and "John Doe" replied that "there wasn't any medication available." Despite Wakefield's protestations concerning his need for the medicine, "Doe" refused even to call the prison medical staff to check on Wakefield's prescription. When Wakefield was released from San Quinton Prison without the medicine to control his mental illness, he suffered a relapse that led to a violent outburst and his subsequent arrest.

The District Court dismissed Wakefield's Civil Rights action, stating that "Doe Defendants" are not favored in the 9th Circuit and accordingly the "Doe Defendants" were dismissed. Wakefield appealed the dismissal in favor of the defendant "John Doe." The court analyzed the case by applying the holding in Gillespie v. Civiletti[2]. The court stated that the District Court's conclusion that dismissal of the "defendant John Doe" was required, under Gillespie, was incorrect, since the Gillespie Court stated, that although there was a general rule that "John Doe" defendants are not favored, where the identity of the defendant is not known prior to the filing of a Complaint, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities or that the Complaint would be dismissed on other grounds. The 9th Circuit also noted that it had concluded in Gillespie that the District Court's dismissal of the Complaint against the "John Doe" defendant was in error. The 9th Circuit is clear in its holding that the use of "John Doe" defendants is fully allowed and permissible as long as, through discovery, the correct identity of the "John Doe" defendant can be found.

The United States Court of Appeals for the 10th Circuit in Roper v. Grayson[3] reached a similar conclusion. In Roper, a pro se detainee brought a Sec. 1983 Civil Rights Action against a detention facility and several other defendants for alleged injuries from forcible administration of insulin to the defendant while he was in

———————Continued On Page 13

You've Come a Long Way -- But You Still Have a Thing or Two to Learn About Venue - Part III

BY PAUL S. GOLDSTEIN

Imagine this simple fact pattern. Peter Plaintiff lives in Queens County, the Defendant, Dan Defendant resides in Queens County and the Plaintiff's counsel has an office in Bronx County. In addition, it should be noted that all of the Defendant's witnesses reside in Queens County and the Plaintiff is the Plaintiff's sole witness. For the convenience of Plaintiff's attorneys, the action is brought to the Supreme Court; Bronx County. At this point we note that the Defendant's attorney wants to have the case tried in the Supreme Court; Queens County. What should the Defendant's attorney do and when should he do it?

Before answering this question, we should digress briefly and recall some rules which govern the issue of venue. They are straight forward and are noted as follows:

Actions against a municipality - the location of the County except the City of New York where venue is the County within the City of New York in which the cause of action arose (CPLR §504). The same rule applies to Public Authorities (CPLR §505)

Actions affection title to real property - County where the property is situated (CPLR §507).

Action to uncover a chattel - County in which any part of the subject of the action is situated at the time of the commencement of the action (CPLR §508).

Venue based upon resident (CPLR §503) which is the subject of this article.

Paul S. Goldstein

Now, back to the question as to what the Defendant should do. It is simple. All that the Defendant need do is serve Plaintiff with a written demand that the action be tried in a County which Defendant specifies as proper. Here is a sample of such a demand.

This notice may be served with the answer - or before the answer is submitted (CPLR §511). What happens next is critical. Unless the Plaintiff consents to the request for change of venue, within five (5) days after such service by the Defendant, the Defendant "...may move to change the place of trial within fifteen (15) days after service of the demand..." (CPLR §511(b)). This motion should be made returnable in the county specified in Defendant's demand for a change of venue. The question of what to do and when to do it have been addressed, but there is more.

What can the Plaintiff do if he believes that the venue is correct? Within five (5) days of receipt of the Defendant's demand for a change of venue, the Plaintiff, to raise an objection to the demand for a change of venue, MUST serve an affidavit showing either that the county specified by the Defendant is improper or that the county designated by the Plaintiff is proper. If the Plaintiff serves a response to the demand for a change in a timely fashion, where should the Defendant then make his motion? If the Plaintiff did not respond to the Demand for a Change of Venue, the Defendant can make the motion in the county specified by the Defendant. If the Plaintiff did respond, then the Defendant must make the motion for a change of venue in the county designated by the Plaintiff (CPLR §511(b)). See the Second Department 2006 decision of *United Jewish Appeal etc. v. Young Men's and Women's Hebrew Association, Inc. Etc. 817 N.Y.S. 2d 352, 30 A.D. 3rd 504 (2nd Dept., 2006).*

The motion for a change of venue is simple and straight forward. The following is a suggested form for such motion:

It is obvious that the rights and remedies as to the issue of venue are fully spelled out in Article 5 of the CPLR. As a practical matter, the first thing that Defendant's counsel should do upon receipt of a complaint is to verify the correctness of the venue selected by the Plaintiff. If counsel for the Defendant is not satisfied with the venue selected by the Plaintiff and believes it to be incorrect, counsel should PROMPTLY move for a change of venue relying upon Article 5 of the CPLR.

**Editor's Note*: Paul S. Goldstein is a Past President (94-95) of the Queens County Bar Association and in private practice.

What Are "The Best Interests Of The Child" Of Artificial Insemination?

BY PAUL E. KERSON

In *Perry v. Schwarzengger*, 2010 WL 3025614 (N.D. Cal. August 4, 2010), U.S. District Judge Vaughn Walker held that California's ban on same-sex marriage violated the 14th Amendment to the U.S. Constitution.

Judge Walker held that California's controversial law, known as Proposition Eight, violated the principles of equal protection and due process.

Judge Walker held that excluding same-sex couples from state sanctioned marriage "exists as an artifact of time when the genders were seen as having distinct roles in society and in marriage...that time has passed."

Or has it?

In the new hit movie, "The Kids are All Right," Mia Wasikowa plays Joni, and Josh Hutcherson plays Laser. Joni and Laser are teenage children conceived by artificial insemination. In one of the most unusual scenes in a movie, Joni calls their Sperm Donor Father, played by Mark Ruffalo. She has never met him before. But she and her brother are intensely curious as to 50% of their biological origins.

Paul E. Kerson

Without giving away the plot, the movie explores a topic that was pure science fiction as recently as two generations ago.

The August 2010 edition of Scientific American estimates that humanity is approximately 195,000 years old. ("When the Sea Saved Humanity", page 55.)

During the first 194,950 of those years, children were conceived by the natural method. It is only in the last 50 years that successful artificial insemination by a Sperm Donor Father has been technologically possible. We are now "blessed" (I use that term loosely) with commercial sperm donor clinics. These clinics enable single mothers, lesbian couples and conventional marriages of heterosexual women and infertile men to have children by this method.

New York Domestic Relations Law (DRL), Section 240, prescribes the statutory standard of the "best interests of the child" in all custody and visitation disputes in Family Court and in the Matrimonial Term of the Supreme Court.

What exactly are the "best interests" of the child conceived by artificial insemination?

This is a cutting edge technological, medical, social, religious, governmental, political, and legal question. How should it be answered?

In custody and visitation disputes involving a child conceived by artificial insemination, should the child's lawyer seek out the Sperm Donor Father? Does this further complicate an already messy situation? However, does failure to contact the Sperm Donor Father harm the "best interests" of the child?

The stunning performances by Mia Wasikowa, Josh Hutcherson and Mark Ruffalo in "The Kids are All Right" would indicate that children of artificial insemination are most interested in knowing their Sperm Donor Father.

As time goes on, artificial insemination will be more and more popular, and more and more of our fellow citizens will have this technology as their origin. Artificial insemination was a work of science fiction less than two generations ago. How shall children who were conceived in this way cope with this fact?

As so often happens, art leads the law. In studying how the writers, directors, and actors of "The Kids are All Right?" dealt with this topic, we can begin to have some insight.

There are two scenes in the movie which are particularly compelling. Upon reaching her 18th birthday, Joni calls the previously anonymous Sperm Donor Father. The Director shows us the facial expression of Joni speaking on her cell phone. The next scene shows the Sperm Donor Father speaking on his cell phone. The look of shock, surprise, and awe on each of their faces is unforgettable.

In another scene in the movie, 15 year old Laser is sitting in the front of his newly found Sperm Donor Father's pick-up truck. Laser asks his Sperm Donor Father why he donated sperm. The Sperm Donor Father replies that he thought he was helping someone who could not have children otherwise and that he "needed the money at the time, $60, which would be $90 today." The horrified look on young Laser's face told us volumes about the emotional impact of sperm donation on the person who is the product of it. "But I would do it again," says the Sperm Donor Father. The look on Laser's face is one of only partial relief. The viewer can see the wheels turning in the young teenager's head - is this what my existence means? Someone who needed $60?

One comes away from the movie with the strong feeling that the law must no longer consider sperm donation as in the same category as blood donation. While donating blood saves lives, donating sperm creates life. This is an entirely different kind of donation. Somehow the law must mature to recognize this fact.

In *Debra H. v. Janice R.*, 14 N.Y. 3d 576 (May 4, 2010), the New York State Court of Appeals concluded that a civil union under Vermont law between two women entitled both women to possible visitation and/or custody of an artificially inseminated child conceived by one of them. The Court of Appeals remanded the case to the New York County Supreme Court "for a best-interest hearing in accordance with this opinion."

However, the Court of Appeals was silent as to whether or not the child's Law Guardian should contact the child's Sperm Donor Father in connection wi-th this

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Estate Tax Planning in the Year of No Estate Tax

BY ANN-MARGARET CARROZZA & HOWARD M. ESTERCES

Contrary to many of our 2009 predictions, the Federal estate tax did, in fact, expire on December 31, 2009. It is scheduled to reappear in 2011 with a reduced exemption of $1.0 million and higher rates. There is a possibility that the 2009 exemption level of $3.5 million will be enacted during 2010 with retroactive applicability to January 1, 2010. However, it isn't clear whether the courts will uphold imposition of an estate tax retroactively; and the provisions of future legislation are uncertain. Given the still fragile state of the economic recovery, the reimposition of some form of Federal estate tax is almost certain.

How then should an estate planner advise clients during this period (however brief) of no Federal estate tax? Should we advise them to wait and see? Hire a food taster? Instead, we can and should get down to the imperative business of reviewing existing documents in order to determine the consequences of a death in the era of repeal. Of particular concern are previously executed estate planning documents.

Way back in the year 2002, the Federal and New York State estate tax thresholds were both $1.0 million. The most basic concern of estate tax planners back then was to prevent the inadvertent loss of this exemption. This occurred under simplistic Wills that left everything outright to a surviving spouse who, in turn, left everything to children. The unlimited marital deduction under the Internal Revenue Code provides that there is no estate tax liability on transfers to a surviving spouse. If for example, a couple had an estate of $1.5 million and the husband died in 2002 with a simple will, his wife received everything free of estate tax. But, because there was no tax liability upon the first death, there was no opportunity to use his exemption. It died with him. Later that year, upon the death of the surviving spouse, the children could only use her exemption of $1.0 million – thus exposing $500,000 to both Federal and New York State estate taxes.

To prevent the loss of the first exemption, estate planners created a so-called Credit Shelter Trust for the first spouse to die which would receive a portion of the estate thereby preventing the over-utilization of the marital deduction.

There were several formulas used to fund this trust. The most common was the following:

I give my Trustee, hereinafter named, the maximum amount that can pass free of Federal estate tax …" Well, for a couple in 2002 with a $2.0 million estate, the result was for $1.0 million to go into the Credit Shelter Trust upon the first death and the surviving spouse kept the remaining $1.0 million. Upon her death, the children received everything free of any estate tax. By 2009, the Federal exemption increased to $3.5 million, but the New York exemption remained at $1.0 million.

Fast forward to the present – Those documents have dramatically different results. Now, the "maximum amount that can pass free of Federal estate tax" is unlimited. Therefore, for someone dying in 2010, all of the first decedent's separate assets will go into the trust. Depending upon how assets are titled, this could leave the surviving spouse with nothing! The survivor could pursue elective share rights, but this is an incomplete and inefficient solution. Moreover, funding the Credit Shelter Trust with more than $1.0 will trigger an immediate New York State estate tax consequence. This is because New York State has a $1.0 million exemption.

Our Surrogates Courts will also be burdened with determining the intent of decedents who die in 2010 with formula provisions in their wills based on a non-existent Federal estate tax. As a New York Assemblywoman, Ann-Margaret Carrozza, one of the authors of this article, introduced legislation to prevent

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OCA & Queens Bar Celebrate New Pro Bono Initiative

BY MARK WELIKY*

You are cordially invited to attend a Wine and Cheese Reception and Free Ethics CLE on Tuesday, October 19th from 6:00 pm to 7:30 pm at the home of the Queens County Bar Association (QCBA)at 90-35 148th Street, Jamaica. This event is to celebrate the launch of a collaboration between QCBA and the New York State Courts Access to Justice Program. This partnership will offer free training seminars to lawyers willing to provide pro bono legal advice and limited scope representation for pro se litigants in Queens County Civil, Family and Supreme Courts. The featured speakers for the event will be Stephen P. Younger, President, New York State Bar Association, the Honorable Fern A. Fisher, Deputy Chief Administrative Judge of NYC Courts and Director, NYS Courts Access to Justice Program and Chanwoo Lee, President, Queens County Bar Association. Come over, lift a glass, schmooze a bit and find out about how you can play your part. Attendees must RSVP in advance to: VLPCivil@courts.state.ny.us

For more info call (718) 291-4500 ext. 225 or send an e-mail to MWeliky@QCBA.org.

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

PHOTO CORNER

Chanwoo Lee with Guest Speaker NYC Comptroller John Liu.tif

Chanwoo Lee with her mom after being installed as President.

Chanwoo Lee with Hon. Cheree Buggs

Council Member Peter Koo presenting City Council Citations to Chanwoo Lee and Guy Vitacco, Jr..

Reverend Eunjoo Kim delivering the invocation.

Gideon Bari, Hilary Gingold and Mark Gottlieb.

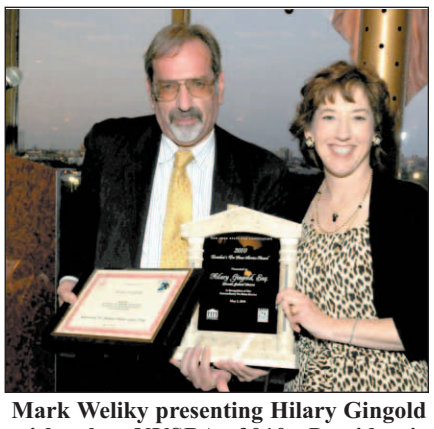
Guy Vitacco, Jr. with his father Guy, Sr. and mother, Loretta.

Guy Vitacco, Jr. presenting Judges Jodi Orlow and Richard Latin with gavels from QCBA.

Hon. Sidney Strauss and Guy Vitacco, Sr. showing his Froessel Award.

Guy Vitacco, Sr. being presented with the Froessel Award from Hon. Sidney Strauss.

Pres-Elect Richard Gutierrez, Vice Pres Joseph Risi, Jr., Treasurer Joseph DeFelice and Secretary Joseph Carola, III being installed.



Mark Weliky presenting Hilary Gingold with the NYSBA 2010 President's ProBono Service Award.

Photos by Walter Karling

PHOTO CORNER

Hon. Martin Ritholtz delivering the benediction.

Installing Officer Hon. Randall Eng with President Chanwoo Lee.

Members of Board being installed.

Master of Ceremonies Hon. Sidney Strauss.

Outgoing President Guy Vitacco, Jr.

Hon. Sid Strauss, Chanwoo Lee and Steve Singer.

Guy Vitacco, Jr. and Chanwoo Lee.

Guest Speaker NYC Comptroller John Liu.

Guy Vitacco with family.

Hon. Seymour Boyers, DA Richard Brown and Chanwoo Lee.

Mona Haas, George Nicholas and Diane Vitacco.

Photos by Walter Karling

Books at the Bar

Continued From Page 6

Guantánamo and habeas corpus

Roper v. Simmons (2005)—on death penalty and juveniles

GUIDE TO THE U.S. SUPREME COURT [FIFTH EDITION] covers the Court's entire history; its operations; its power in relation to other branches of government; major decisions affecting the other branches, the states, individual rights and liberties; and biographies of the justices.

Appendixes provide additional information on the Court such as the Judiciary Acts of 1789 and 1925 and a list of Acts of Congress found by the Court to be unconstitutional. A general name and subject index speeds research, and a case index quickly guides readers to all decisions discussed in the ***GUIDE TO THE U.S. SUPREME COURT***.

Key Features

Covers three new Supreme Court justices and the confirmation process

Demonstrates how cases get to the Court

New content on individual rights

New chapter on the Second Amendment

DAVID G. SAVAGE is a leading observer and commentator of the United States Supreme Court and covers the High Court for **The Los Angeles Times**.

II. WRITING DRAMA: A COMPREHENSIVE GUIDE FOR PLAYWRIGHTS AND SCRIPTWRITERS by Yves Lavandier

If you have the time and money to buy one book to help you write better then I must encourage you to purchase *WRITING DRAMA* by YVES LAVANDIER.

YVES LAVANDIER has written a sharp, engrossing account of how to write drama. It is a book well suited not only for playwrights and screenplay writers, but for lawyers. The book is entertaining. **YVES LAVANDIER** makes his points by citing numerous works from film, and he explains situations for those persons who are not acquainted with his examples.

The English translation of this excellent book is available only at the publisher's web site of **www.clown-enfant.com.** That fact is unfortunate, and it is almost criminal that the book is not sold at **www.amazon.com,** or at the Drama Bookshop in Manhattan or Barnes & Noble. The book costs 38 Euros, and, considering that the Euro has weakened considerably in the last few months, I urge you **to buy it now.**

YVES LAVANDIER writes:

"If the story is well written, it will affect the professional, as much as the amateur, the spectator who knows the rules of drama as much as the spectator who does not [reference omitted]. This is why drama, when it takes the trouble to make itself accessible to all and bases its appeal on what we all have in common, is such a democratic medium. It is also why [actor Charlie] Chaplin - - whose language moreover is so visual - - is the most universal of dramatic artists. He is, as [director] Jean Cocteau put it, the esperanto of laughter."

YVES LAVANDIER, *WRITING DRAMA*, p. 140.

YVES LAVANDIER was born on April 2, 1959. After taking a degree in civil engineering, he studied film at Columbia University in Manhattan between 1983-1985 with renown filmmakers including Milos Forman and Brad Dourif. During these two years he wrote and directed several shorts. He returned to France in 1985, directed a further short (***LE SCORPION***), and embarked on a scriptwriting career mainly for television. He is the creator of an English teaching sitcom called Cousin William. In addition to his career as scriptwriter, he began to teach screenwriting throughout Europe and published a treatise on the subject: Writing Drama. For the occasion he founded his own publishing and production company, **LE CLOWN & L'ENFANT**. Writing Drama is now considered a bible amongst European scriptwriters and playwrights, and **YVES LAVANDIER** is a renown script consultant. In August and September 2000, he shot his first feature film as writer-director. Yves Lavandier is married with four children.

III. FILM THEORY AND CRITICISM by Leo Braudy and Marshall Cohen

Since publication of the first edition in 1974, **LEO BRAUDY** and **MARSHALL COHEN's *FILM THEORY AND CRITICISM*** has been one of the most cited anthologies about film. Now in its seventh edition, this landmark text continues to offer outstanding coverage of more than a century of thought and writing about the movies. Incorporating classic texts by pioneers in film theory including Rudolf Arnheim, Siegfried Kracauer and André Bazin, and cutting-edge essays by such contemporary film scholars as David Bordwell, Tania Modleski, Thomas Schatz and Richard Dyer.

Building upon the wide range of selections and the extensive historical coverage that marked previous editions, this new compilation stretches from the earliest attempts to define the cinema to the most recent efforts to place film in the contexts of psychology, sociology, and philosophy, and to explore issues of gender and race. Reorganized into eight sections, each comprising the major fields of critical controversy and analysis, this new edition features reformulated introductions and biographical headnotes that place the readings in context, making the text more accessible than ever to students, film enthusiasts, and general readers alike.

A wide-ranging critical and historical survey, ***FILM THEORY AND CRITICISM*** remains the leading text for undergraduate courses in film theory. ***FILM THEORY AND CRITICISM*** is also ideal for graduate courses in film theory and criticism. **Leo Braudy** is University Professor and Bing Professor of English at the University of Southern California. Among other books, he is author of *Native Informant: Essays on Film, Fiction, and Popular Culture* (Oxford University Press ["OUP"] 1991), *The Frenzy of Renown: Fame and Its History* (OUP, 1986), and most recently, *From Chivalry to Terrorism: War and the Changing Nature of Masculinity* (2003). **Marshall Cohen** is University Professor Emeritus and Dean Emeritus of the College of Letters, Arts, and Sciences at the University of Southern California. He is co-editor, with Roger Copeland, of *What Is Dance? Readings in Theory and Criticism* (OUP, 1983) and founding editor of *Philosophy and Public Affairs*.

IV. HOW TO READ A FILM: MOVIES, MEDIA, and BEYOND [[Fourth Edition] by James Monaco

Richard Gilman referred to **JAMES MONACO's *HOW TO READ A FILM*** as simply "the best single work of its kind." Film critic Janet Maslin in *The New York Times Book Review* marveled at James Monaco's ability to collect "an enormous amount of useful information and assemble it in an exhilaratingly simple and systematic way."

Now, **JAMES MONACO** offers a special anniversary edition of his classic work, featuring a new preface and several new sections, including an "Essential Library: One Hundred Books About Film and Media You Should Read" and "One Hundred Films You Should See." As in previous editions, Monaco once again looks at film from many vantage points, as both art and craft, sensibility and science, tradition and technology. After examining film's close relation to other narrative media such as the novel, painting, photography, television, and even music, the book discusses the elements necessary to understand how films convey meaning, and, more importantly, how we can best discern all that a film is attempting to communicate. In addition, Monaco stresses the still-evolving digital context of film. One of the new sections looks at the untrustworthy nature of digital images and sound. Monaco's chapter on multimedia brings media criticism into the twenty-first century with a thorough discussion of topics like virtual reality, cyberspace, and the proximity of both to film.

With hundreds of illustrative black-and-white film stills and diagrams, ***HOW TO READ A FILM*** is an indispensable addition to the library of everyone who loves the cinema and wants to understand it better.

JAMES MONACO, an American film critic and author, has written seven books, including *The New Wave: Truffaut, Godard, Chabrol, Rohmer, Rivette* (1976), *How To Read A Film* (1977) and *American Film Now* (1979), and edited four others. He has written for several leading publications, including The New York Times, The Village Voice, and The Christian Science Monitor.

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 Supreme Court, Queens County, Long Island City, New York.

A Note of Gratitude

BY CORRY L. MCFARLAND*

As we are sure you are all aware, the Queens Foreclosure Conference Project, a program of the Queens Volunteer Lawyers Project, Inc., has been working closely with the Queens Supreme Court Office of the Residential Foreclosure Part to assist Queens' residents in danger of losing their homes to foreclosure. Below is a thank you letter to Referee Leonard N. Florio in gratitude of the exemplary work being done by the Residential Foreclosure Part. We wish the Part much continued success in their efforts assisting Queens' homeowners through the foreclosure crisis.

Referee Florio:
These proceedings would lack closure if we
did not express our gratitude.

Your firmness and professionalism have brought
to us this positive end.

You were determined to have documentation to
substantiate verbalizations that we did not qualify.

This was the turning point to our success.

We bless you and wish good things come your way as you
continue to execute your daily duties in your current capacity.

With heartfelt gratitude from:
Jones* and Family
*Redacted

**Corry L. McFarland is the Foreclosure Prevention Coordinator for the Queens Volunteer Lawyers Project*

Named or Unnamed

Continued From Page 7

pre-trial detention. The United States District Court for the District of Colorado granted summary judgment as to all defendants and the detainee appealed.

The 10th Circuit had occasion to analyze the issue of the use of a "John Doe" defendant and concluded that courts have generally recognized the ability of the plaintiff to use unnamed defendants, so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so that process eventually can be served. The Roper court noted that here the plaintiff provided an adequate description to identify the persons involved. The court opined that rather than dismissing these unnamed defendants, the District Court should have ordered their inclusion as named defendants and included them in the summary judgment decision. Roper reiterates the rule set forth in Wakefield, but also adds that some sort of adequate description should be provided.

Munz v. Parr[4] reached a similar conclusion. In Munz, a citizen filed a pro se Civil Rights complaint against police officers and others complaining of alleged improprieties in connection with a search and seizure. The United States District Court for the Northern District of Iowa dismissed the complaint before issuance of service of process, and the plaintiff appealed.

The Munz court had occasion to consider whether the District court erred in dismissing Munz's excessive force claim because the defendant was unnamed. The court held that there were sufficient facts connected with the acts of "John Doe" as to make it likely that officer "Doe" was capable of being identified, and that under these circumstances it was improper for the court to dismiss the claim at such an early juncture. The court noted that "Doe" allegedly grasped the plaintiff's handcuffs by the chain, lifted his arms upward, and inflicted "excruciating pain" to Munz's arms and wrists. The court went on to state that rather than dismissing the claim, the court should have ordered disclosure of "Officer Doe's" identity by other defendants named and served, or permitted the plaintiff to identify the officer through discovery. The court concluded that Munz then should have been permitted to amend his complaint and serve the identified defendant, explaining that dismissal is proper only when it appears that the true identity of the defendant cannot be learned through discovery or through the court's intervention.

Munz adds another sub-rule to this "John Doe" topic by stating that "John Doe" defendants are permitted when there are sufficient facts concerning them so that their identity can be learned through discovery, through the court's intervention, or by requesting other named defendants to disclose the identity of "John Doe."

Maclin v. Paulson[5] follows Roper, Munz, Gillespie, and Wakefield. Maclin was a Civil Rights action brought by a state prisoner against the Chief of Police, Deputy Sheriff, arresting officers, and jail physician. The United States District Court for the Northern District of Indiana dismissed the complaints, and the prisoner appealed.

The Maclin court had occasion to consider the "John Doe" issue and held, citing Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics[6], that the use of fictitious names for defendants has been routinely approved. The court stated that where a party is ignorant of the defendants' true identity, it is unnecessary to name them until their identity can be learned through discovery or through the aid of the trial court. The court went on to state that in this case, since the pro se plaintiff was denied counsel by the District Court, he could hardly be expected to discover the names of the arresting officers through the discovery route. The court advised that the District Judge should have ordered the disclosure of the arresting officers, or else the plaintiff should have been able to obtain their identity through limited discovery.

Most of the case law has followed the Wakefield, et. al. rule as has been analyzed in this article up to this point. For example, in East v. City of Chicago,[7] an Illinois District Court held that the use of unnamed officers was allowable. Similarly, in Johnson v. City of Erie, Pennsylvania,[8] a Pennsylvania District Court held that where the defendants moved to dismiss the complaint as to fictitiously name "Doe" police officer defendants, who allegedly conspired to conceal the circumstances of Mr. Johnson's death during the period that Mr. Johnson's body was on the concrete floor of the police department garage, the Court held that it would follow Scheetz v. Morning Call, Inc., 130 FRD 34 (E.D. Pa. 1990), which held that fictitious names may be used until the plaintiff has had the reasonable opportunity to learn their identities through discovery. The court concluded that it would allow the defendants to stand in for the alleged real parties until discovery permitted the intended defendants to be installed.

Saffron v. Wilson[9] reached a similar conclusion. Saffron was an action seeking damages and declaratory or injunctive relief for alleged deprivation of the plaintiff's constitutional rights resulting from his arrest on January 20, 1973, in the vicinity of Jackson Place and H Street NW in the District of Columbia. Again, the Saffron court followed the line of case law to the effect that "John Doe" defendants, or fictitious parties, should not be dismissed before the plaintiff has had an opportunity to engage in discovery, which could disclose the exact identity of the officers who plaintiff was able to only partially identify at present.

In a similar fashion, in Aviles v. Village of Bedford Park,[10] an Illinois District Court held that fictitious defendants are permissible as long as their true identity can be found during the course of the discovery process.[11]

CONCLUSION

This examination of the case law construing and interpreting the use of fictitiously named defendants, or "John Doe" defendants, reveals a basic rule and two sub-rules: the true identity of the parties should be obtained through and in the course of the discovery process, and if necessary, the court should intervene to determine the actual identity of the unknown named defendant. There is a further sub-rule to the effect that some sort of description of the unknown or fictitiously named defendant should be provided in the complaint.

The use of "John Doe" defendants makes good sense, since a helpless and impoverished pro se defendant may be unable to know who has damaged him. The courts draw a limit on this liberal rule by requiring that the true identity should eventually be found and revealed through the discovery process or the intervention of the court. The Federal Courts have further mandated that some description of the unknown unnamed defendant should be provided in the complaint, so that the true identity can eventually emerge.

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

ENDNOTES

1 177 F.3d 1160 (9th Cir. 1999)

2 629 F.2d 637 (9th Cir. 1980)

3 81 F.3d 124 (10th Cir. 1996)

4 758 F.2d 1254 (8th Cir. 1984)

5 627 F.2d 83 (7th Cir. 1980)

6 404 U.S. 388, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971)

7 719 F.Supp. 683 (N.D. Ill. 1989)

8 834 F.Supp. 873 (W.D. Pa. 1993)

9 70 F.R.D. 51 (U.S. Dist. of Columbia 1979)

10 160 F.R.D. 565 (N.D. Ill. 1995)

11 See also on this Farris v. Moeckel, 664 F.Supp. 881 (D. Del. 1987); Boyd v. Gullett, 64 F.R.D. 169 (D. Maryland 1974); Jones v. St. Tammany Parish Jail, 4 F.Supp.2d 606 (D. E.D. Louisiana 1998).

Should The US Act As World Police?

Continued From Page 1

Our foreign policy for the past 65 years was set forth by President Harry Truman on his first day in office. The incident is recounted by Merle Miller, in his most important book, Plain Speaking - An Oral Biography of Harry S. Truman, Berkley Publishing Corp., New York, NY 1973, Pages 198-199:

" Merle Miller: "Mr. President, can you tell me about the day Franklin Roosevelt died?...

Harry Truman: ...and we all sat around the Cabinet table...and they all wanted to know if there was going to be the United Nations in San Francisco in April as had been planned, and I said it most certainly was. I said it was what Roosevelt had wanted, and it had to take place if we were going to keep the peace. And that's the first decision I made as President of the United States." (emphasis added)

And this has been our foreign policy ever since. We are the nation that is "going to keep the peace."

Harry Truman made that decision on his first day in office. He later went on to order the dropping of the atomic bomb on Japan, which finally ended World War II. Harry Truman never went to college. His career included service as a foot soldier in World War I, a retail clothing merchant in Independence, Missouri, as an elected County Commissioner (called a County Judge in Missouri), as U.S. Senator, and as Vice President. He was hardly prepared to enunciate a foreign policy which would lead the United States to have the largest military in the history of the world and to take on police department functions for the entire world. Nevertheless, that is apparently exactly what happened.

Do we need to stay with this policy? Do we need to continue to pay such a large percentage of our personal incomes to sustain it?

All in all, we must admit that this policy has been an unqualified success. The world has grown and prospered in the past 65 years in a way it never had before. Harry Truman, Missouri shopkeeper, has the world's profound thanks. He may yet be remembered as our greatest President.

This time in world history has been called "Pax Americana." But in establishing "Pax Americana," we have burdened ourselves, our children and our grandchildren with a debt that has never been seen before in the history of the world.

How can these competing considerations be reconciled?

Further, at the current time, we do not face foreign national armies out to conquer our country. There is no Nazi Germany, Imperial Japan, or Soviet Union on the horizon. However, we do face a rag tag band of lunatics who have no national base, and loosely call themselves Al Qaeda. Al Qaeda is variously said to be located in Afghanistan, Iraq (originally false), Yemen and numerous other countries. Some say they have "sleeper cells" right here in the United States.

Can we fight an enemy like this with a conventional Army, Navy and Air Force clad in uniforms designed to fight the National Uniformed Forces of other countries?

Historically, threats like Al Qaeda have been assigned to the Justice Dept. These include the Ku Klux Klan, the Westies, the Aryan Nation, the Bloods, the Crips, the Mafia, the Unabomber, Columbian Drug Lords, Mexican Drug Lords, Timothy McVey, Terry Nichols, Jesse James and the notorious Bonnie & Clyde.

The threat of foreign national armies was assigned to the Defense Dept., formerly known as the War Dept. These included the Army of Great Britain and Canada (1776-1783), the Armies of the American Indians (1776-1890), the Armies of Great Britain and Canada (1809-1815), the Army of Mexico (1845-1846), the Army of the Confederate States of America (1861-1865), the Army and Navy of Spain (1898-1899), the Army of Germany (1914-1917), the Armed Forces of Germany, Japan and Italy (also known as the Axis) (1941-1945), the Army of North Korea (1950-1953), the Army of North Vietnam (1953-1975), the Army of Iraq (1991) and 2002 to date, and an Unclear Enemy in Afghanistan (2001 to date).

Does the current problem merely amount to whether or not the threat is assigned to the Justice Dept. or the Defense Dept.? Is this only Washington D.C. "inside baseball"?

Probably not.

To answer this question, the Queens Bar Bulletin sent a draft of this article in advance to our leading state and local law enforcement officer, Hon. Richard Brown, our District Attorney. We reprint his most informative response adjacent to this article. It appears that in 2010, because of LaGuardia and Kennedy Airports, our Queens County District Attorney's Office and NYPD are just as important to national security as the U.S. Defense Department.

What does this mean for the current gross imbalance between our federal, state and city tax burdens? Readers' responses are invited. These will be published in our next issue.

Sparrow Leaves The Nest

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wife Darcy, and children, Matthew (11) and Isabella (6).

Our daughter Laurie, a Brooklyn Law graduate, was an Assistant District Attorney in the Bronx for 17 years. When she experienced kidney failure, I donated her a kidney in 1990. With my kidney, she made us proud grandparents of Dallas and Cody. Tragically, we lost our Laurie in 2003. After a rocky period for all of us, the boys, with the love of Dad, James Palumbo (known as an excellent criminal lawyer in the city) and Marcia and me, are thriving. 17 year-old Dallas is a High School Senior and looking at colleges, and Cody, 14, has just started Bronx High School for Science (we are exceedingly proud of him).

Well, life has been busy, exciting, uplifting and unbearable at times. We are ready to move on – after a hip replacement this past June, I am calling it a career after 53 years – and hope to remain as vibrant and active as I have been all my life.

I want to thank all my friends of the Bench and the Bar, and Steve, Ken and Maria for their special friendship. And with that, I will say goodbye and good health to you all.

Saying "Goodbye"

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have and possibly could never do so. Even other lawyers sometimes ask how I can do what I do. It never ceases to amaze me. I will miss all those feelings, being a Paladin of sorts when venturing into a new jurisdiction where I am not known, except perhaps by reputation, as though stepping onto a stage. And the acting was one of the most enjoyable sides of it. But it's true, I will miss all of that.

I will certainly miss the Queens County Bar Association and all that it has given me over the years. I could say that I contributed a good deal of time and effort there and that would be fair. But in every measure, I have gained more than I gave. The opportunity to teach, to write, to represent the QCBA on countless Law Day Celebrations, to be Principal for a Day at perhaps fifteen local schools, to appear from the Speaker's Bureau before many varied audiences, to lecture at local law schools, and so much more. These are some of the experiences I have been given which are too wonderful to place a value on. The people I have worked with here, particularly Arthur and the "girls in the office" have meant a great deal to me, personally and professionally. None of this could happen without them. The awards I have received, being President with all of the experiences accompanying that office, judicial screening, assigned counsel plan oversight, the annual trips to Albany and the Court of Appeals … how can I explain the level of satisfaction and pleasure I have received from each and every one of these things. And I would happily do it all again. No one owes more to the Bar Association than I do.

It was not always easy. Going through traffic to Long Island City to speak on Law Day … because no one else wanted to go there … and then, when I finally arrived, speaking to an audience of ten … Court Officers, that is. Preparing a lecture on "How to Start a Law Practice" for St. John's Law School and delivering it to only five students. Going out at night from the Speaker's Bureau to a Parents Without Partners meeting only to find that they were expecting and actually wanted a lawyer to speak about elder care, not crime in the streets. Agreeing to speak for the Bar at legislative hearings and being told my time to speak was at ten a.m., only to wait until 4:30 p.m. when no one was listening anymore or cared what I had to say. Standing for hours in the plaza in front of the Civil Court Building, on Law Day, in the rain, to provide free legal advice to folks who only had questions about their leases.

But it was "all good," as the kids say nowadays, even when I got home at 9:45 at night and had to get up at 5:30 because I was summing up that next morning. And I will miss it.

How do I say "Goodbye" to being who I am? I don't know that I can ever stop being that person, that criminal lawyer, that die hard bar association supporter. I don't even know if I want to. And "Yes," I probably will come back to visit … although I can remember how I felt as an undergrad when alumni returned to campus and tried to relive their times there … they always looked foolish, out of place, stumped for what to say now that they had moved on. Will I come back? I guess there is that magnetic draw that mandates at least one return visit. Will there be more "Saturday Morning" pieces??? We will have to see. But I will miss you all tremendously, and I wish for all of you the pleasure I have had from just being a country lawyer from Queens.

Estate Tax Planning

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spouses from being inadvertently disinherited. The bill, A.9857-a provides that wills, trusts, and beneficiary forms with formula credit shelter provisions executed before 2010 by persons who die in 2010 when the Federal estate tax is not in effect, will be construed based on estate tax laws applicable to decedents who die on December 31, 2009. A similar provision will apply to the generation shipping transfer tax. This bill was signed into law this Summer.

Although the new legislation applies to persons who have not changed their wills and other testamentary documents, the better approach is to review these documents with competent estate planning counsel. Many persons may wish to provide specifically how their wealth will pass if there is no estate tax at death, and to otherwise use one of the alternatives below.

One approach for many older estate plans would be to change the Credit Shelter Trust funding to a disclaimer mechanism. This would provide that all assets pass to the surviving spouse with the exception of whatever amount he or she chooses to disclaim into the trust. The Internal Revenue Code § 2518 allows nine (9) months from the date of death for a disclaimer to be made. This gives us the advantage of making a decision in light of the Federal and New York State tax laws as they exist at that time.

Another possible approach is to provide that amounts of up to $1 million pass to a credit shelter trust, with any balance passing to the spouse. Provisions for a spousal disclaimer to the credit shelter trust would also be included.

Still another possibility might be to leave the entire estate to a QTIP trust, under which only the surviving spouse will be entitled to income for life and to discretionary principal distributions. If estate tax is reinstated retroactively, the executor can elect a marital deduction for part of the trust. The part of the QTIP trust for which a marital deduction is not elected will pass free of estate tax in the survivor's estate.

As a further variation, $1 million might pass to a credit shelter trust and the balance to a QTIP trust for the spouse. If there is a Federal estate tax at death, the executor can elect a marital deduction for all or part of the QTIP. If there is no Federal estate tax at death, the executor might still elect a QTIP marital deduction for New York purposes. The Will might also provide that the part of the QTIP trust for which a marital deduction is not elected is added to the credit shelter trust.

These are some of many possibilities. It is important to discuss how the client wishes to dispose of his estate if there is no estate tax or if there is an estate tax. Both possibilities may be drafted into the will. Attorneys should be aware of a plan's impact on New York estate tax, as well as on modified carry over basis, which is part of estate tax repeal.

Ann Margaret Carrozza, Esq. is an estate planning and elder law attorney with offices in Bayside and Port Jefferson.

Howard M. Esterces, Esq. is Of Counsel to Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, Long Island.

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modify the Office's allocation of funds and grants and make an annual report to the Governor, Legislature and Judiciary.

The measure also amends the State Finance Law to provide that the Indigent Legal Services Fund must be used to fund the Office of Indigent Legal Services, to assist counties and New York City to improve the quality of Article 18-B representation and to assist the State with respect to assigned counsel under Judiciary Law §35. State funds provided to localities may not supplant existing funds and "maintenance of effort" is required. **Effective: June 22, 2010.**

II. CHILD WELFARE MEASURES:

1. Termination of parental rights of incarcerated parents [Laws of 2010, ch. 113]: This measure amends Social Services Law §384-b to add an explicit exception to the presumptive requirement that agencies must file termination of parental rights petitions for children who have spent 15 of the past 22 months in foster care. The exception applies to a parent:

- whose incarceration or participation in a substance abuse treatment program is a "significant factor in why the child is in foster care;" and
- where the parent "maintains a meaningful role in the child's life;" and
- where the agency "has not documented a reason why it would otherwise be appropriate" to file a TPR petition.

The assessment of "meaningful role" in the child's life must be based upon evidence, which may include:

- "expressions or acts manifesting concern for the child, such as letters, telephone calls, visits and other forms of communication with the child;"
- efforts by the parent to work with the agency, foster parent "or other individuals of importance in the child's life," attorneys for the parent and child and agencies providing services to the parent, including correctional, mental health and substance abuse "for the purpose of complying with the service plan and repairing, maintaining or building the parent-child relationship;"
- positive response by the parent to the agency's diligent efforts; and
- whether the parent's continued involvement in the child's life is in the child's best interests.

The agency must obtain input regarding these factors from "individuals and agencies in a reasonable position to help make this assessment" and the court may direct the agency to "undertake further steps to aid in completing its assessment."

With respect to permanent neglect cases, the measure requires the court to consider "particular constraints" caused by the incarceration or residential drug treatment, including, but not limited to, limitations upon family contact and "unavailability of social or rehabilitative services " to aid in developing a meaningful relationship, to plan for the child's future and to maintain contact with the child. Where a parent has failed to inform the agency of his or whereabouts for a period of six months or more (an exception to the requirement that the agency perform diligent efforts), the court may consider "the particular delays or barriers" experienced by parents in prison or treatment centers in keeping agencies apprised of their locations. The agency must obtain from the NYS Office of Children and Family Services and provide to parents in prison or treatment centers information regarding the parents' legal rights and obligations and social or rehabilitative services available in the community, including transitional and family support services. Finally, the statute amends Social Services Law §409-e to authorize use of audio- or video-conferencing technology in order to permit parents in prison or in residential drug treatment to consult in the development and periodic review of family service plans and requires the plans in such cases to "reflect the special circumstances and needs of the child and the family." **Effective: June 15, 2010.**

2. Subsidized kinship guardianship (Laws of 2010, ch. 58, S 6608-b/A 9708-c, Part F): This measure, which is part of the Fiscal Year 2010-2011 New York State budget**,** incorporates and expands upon the Family Court Advisory and Rules Committee's proposal to establish a subsidized kinship guardianship assistance program. Taking advantage of the opportunity to obtain federal Title IV-E funding for guardianships with relatives, pursuant to the *Fostering Connections to Success and Increasing Adoptions Act of 2008* [Public Law 110-351], the measure amends Family Court Act §§1055-b and 1089-a to permit the Family Court to order subsidized kinship guardianship at or after the conclusion of a child protective dispositional hearing or a permanency hearing. This option would be available in child protective cases in which the fact-finding and first permanency hearing have been completed or in voluntary foster care, juvenile delinquency or Persons in Need of Supervision placement cases in which the first permanency hearing has been completed.

As prerequisites, the prospective relative guardian must have entered into a signed guardianship assistance agreement with the local social services department and must have cared for the child as a foster parent for at least six months prior to the application for the agreement. The relative must file a petition under Article 6 of the Family Court Act or Article 17 of the Surrogate's Court Procedure Act with the court presiding over the child protective or permanency proceeding and the Court may consolidate the proceedings. If enumerated findings are made and the guardianship is granted, all orders under the child protective or permanency proceeding, as applicable, would be terminated; no further permanency hearings would be held and no services or supervision would be provided. In addition to the above prerequisites, in order to determine whether this option would further the child's best interests, the Family Court must consider the child's permanency goal and the relationship between the child and relative. The Court must enumerate compelling reasons for finding that neither adoption nor return home would be in the child's best interests and would, therefore, not be appropriate permanency options. The Court must "hold age-appropriate consultation with the child." If the child is fourteen or older, the Court must ascertain the child's preference and if eighteen or older, the child must consent to the guardianship. The guardianship order must provide that the local social services department and child's attorney must "receive notice of, and be made parties to, any subsequent proceeding to vacate or modify the order of guardianship."

The measure adds a new Title 10 of Article 6 of the Social Services Law [SSL §§458-a - 458-f], which sets forth definitions, eligibility requirements and procedures for the new program. "Child" includes youth under 21, whose "custody, care and custody or custody and guardianship have been committed" prior to the child's eighteenth birthday to a social services official pursuant to a child protective, voluntary, juvenile delinquency or Person in Need of Supervision placement or pursuant to a termination of parental rights proceeding. A "prospective relative guardian" must be related to the child and must have cared for him or her as a "fully certified or approved foster parent for six consecutive months prior to applying for guardianship assistance payments." This means, *inter alia*, that the relative and individuals over the age of eighteen in the relative's home must have undergone the required criminal history check pursuant to Social Services Law §378-a. Additionally, individuals aggrieved by a local social services district's failure to act upon an application within thirty days of its filing or failure to make payments or by the amount of such payments may apply to the New York State Office of Children and Family Services for a fair hearing.

In determining whether to approve the prospective relative guardian and enter into a guardianship assistance agreement, the local social services department must determine that neither adoption nor return home would be appropriate permanency options, that the child has a "strong attachment" to the relative, that "age-appropriate" consultation has been held with the child (including ascertaining the position of a child over fourteen and obtaining consent of a child over eighteen) and that the child has been living with the relative as a foster parent for at least six consecutive months. The department is precluded from considering the financial status of the prospective relative guardian. The guardianship assistance agreement includes provision of non-recurring expenses up to $2000 and remains in effect regardless of whether the guardian moves to another state. The monthly payments must be at least 75% but not more than 100% of the applicable foster care board rate. The guardianship subsidy is payable until the child reaches eighteen or, if the child turned sixteen before the guardianship agreement became effective (that is, letters of guardianship were issued), the subsidy is payable until the child reaches twenty-one if the child is enrolled in a secondary or post-secondary school or vocational program, is working at least eighty hours per month or is medically incapable of either school or employment. The child is also eligible for Medicaid assistance if the guardian applies prior to issuance of the letters of guardianship and is eligible for independent living assistance, including education and training vouchers, if the guardianship became effective after the child's sixteenth birthday.

Although the guardianship assistance program does not take effect until April 1, 2011, the New York State Office of Children and Family Services must submit a State plan amendment to the United States Department of Health and Human Services for its approval and make any necessary revisions to its rules and regulations in advance of that date. NYS OCFS must report annually, starting February 1, 2012, to the Governor and Legislature regarding implementation of the program statewide. **Effective: April 1, 2011.**

3. Adoption registry [Laws of 2010, ch. 181]: This New York State Department of Health measure provides that upon receiving a report of a foreign adoption, the NYS Commissioner of Health, rather than a local registrar, must file a birth certificate, provided that there is no other birth certificate other than a birth certificate in the child's country of birth. The birth certificate must be filed upon proof that the parent (not "or the child") resides in New York State at the time of the adoption. Evidence of an IR-4, not simply an IR-3, visa or a successor immigrant visa, suffices. Grandfathering in reports of foreign adoptions made to local registrars, the measure provides that "[a]ny existing certificates of birth data shall continue to be effective" and requires that reports made to local registrars and supporting documentation shall be forwarded by them to the Department of Health. Additionally, by replacing the phrase "each parent" with "either parent," the measure amends the adoption information registry statutes [Public Health Law §§4138-c and 4138-d] to enable information to be released to consenting registrants even if just one, not both, birth parents have signed consents. It further eliminates the ability of a biological sibling to access non-identifying information about an adopted sibling who had not registered and had, therefore, not consented to release of any in formation. **Effective: July 15, 2010.**

4. Restoration of parental rights [Laws of 2010, ch. 343]: Similar to legislation enacted in California in 2005 and Washington in 2007, this Family Court Advisory and Rules Committee measure amends the statutes regarding termination of parental rights to allow the Family Court, in narrowly defined circumstances, to modify dispositional orders committing guardianship and custody of children and to reinstate parental rights. A petition to restore parental rights would be permitted to be filed upon the consent of the petitioner (unless court finds the consent unreasonably withheld), as well as the respondent and child, in the original termination of parental rights proceeding. The termination of parental rights would have to have occurred more than two years prior and the child would be required to be 14 years of age or older, to remain under the jurisdiction of the Family Court and to have a permanency goal other than adoption. The Family Court would be authorized to grant the restoration petition where clear and convincing proof established that it would be in the child's best interests. The Family Court would also have the option, similar to a provision in the Washington statute, to grant the restoration petition provisionally for a period of up to six months, prior to making the restoration permanent. **Effective: Nov. 11, 2010.**

5. Trial discharges of youth in foster care and voluntary re-placements of youth into foster care [Laws of 2010, ch. 342]: This measure, developed by the Family Court Advisory and Rules Committee and Permanent Judicial Commission on Justice for Children, amends the trial discharge provisions of Articles 10 and 10-A of the Family Court Act to explicitly permit the Family Court to extend trial discharges at permanency hearings until youth reach the age of 21; extensions of trial discharges of youth over the age of 18 would require the youth's consent. Additionally, the proposal would create a new Article 10-B of the Family Court Act that would permit youth between the ages of 18 and 21, who have been discharged from foster care within the past 24 months because of their failure to consent to continued care, to make

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motions before the Family Court that would enable them to return voluntarily to foster care. In such cases, the Family Court would be required to find that the youth has no reasonable alternative to foster care, that the youth consents to attend an appropriate educational or vocational program and that such return is in the youth's best interests. The local department of social services would have to consent to the child's reentry unless the Court finds that the consent had been unreasonably withheld. **Effective: Nov. 11, 2010.**

6. Abandoned infants [Laws of 2010, ch. 447]: This measure amends Penal Law §260.00 to provide that a person is not guilty of the Class E felony of criminal abandonment of a child when "(a) with the intent that the child be safe from physical injury and cared for in an appropriate manner; (b) the child is left with an appropriate person, or in a suitable location and the person who leaves the child promptly notifies an appropriate person of the child's location; and (c) the child is not more than thirty days old." A similar amendment is made to Penal Law §260.10, endangering the welfare of a child, a Class A misdemeanor. By repealing the affirmative defenses contained in the *Abandoned Infant Protection Act* [Laws of 2000, ch. 156; Penal Law §§260.03 and 260.15], therefore, these amendments make these factors elements of the crime and also increase the ages of the abandoned children covered from five to thirty days old. **Effective: Aug. 30, 2010.**

7. Adoption by unmarried intimate partners [Laws of 2010, ch. 509]: The measure amends Domestic Relations Law §110 to permit "any two unmarried adult intimate partners" to adopt together and substitutes gender-neutral terms "spouse" and "married couple" for "husband" and "wife." **Effective: Sept. 17, 2010.**

III. JUVENILE JUSTICE AND RELEVANT CRIMINAL LAW MEASURES

1. Sexual contact [Laws of 2010, ch. 193]: This measure amends sections 130.00(3) and 260.31(2) of the Penal Law to remove the marital exemption from the definitions of "sexual contact" and to add "emission of ejaculate by the actor upon any part of the victim, clothed or unclothed." The latter change enables charges to be brought of endangering the welfare of a vulnerable elderly, incompetent or physically disabled person, a Class E felony, as well as sexual abuse in all three degrees (a Class D felony or a Class A or B misdemeanor, respectively), instead of simply the Class B misdemeanor of public lewdness [Penal Law §245.00]. **Effective: Oct. 13, 2010.**

2. Orders of protection for designated witnesses [Laws of 2010, ch. 421]: This measure, similar to a measure proposed by the Family Court Advisory and Rules Committee, adds a new subdivision (1-a) to Family Court Act §352.3 to provide that upon issuance of an adjournment in contemplation of dismissal under Family Court Act §315.3 or a disposition under Family Court Act §352.2, the Family Court may issue an order of protection prohibiting the respondent from intimidating or attempting to intimidate any designated witness specifically named in the order. As a prerequisite, the Court must make a finding that the respondent "did previously, or is likely to in the future, intimidate or attempt to intimidate such witness..." [Note: the new provisions protecting designated witnesses apply as well to temporary orders of protection. Family Court Act §304.2(2) authorizes temporary orders of protection, which may be issued any time after a juvenile is taken into custody or is the subject of an appearance ticket or after a petition has been filed, to contain any of the conditions enumerated in Family Court Act §352.3]. **Effective: Nov. 28, 2010.**

3. School bullying [Laws of 2010, ch. 482]: This measure, known as the *Dignity for All Students Act*, adds a new Article 2 to the Education Law to protect public school students from discrimination and harassment by students and school employees on school property and at school functions on the grounds of "actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex..." Exceptions are provided for actions, including program exclusions, permitted under state or federal law, e.g., for single-gender schools or athletic teams. Harassment is defined as "the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being..." on the basis of, but not limited to, the above grounds. A plain language, age-appropriate version of this policy must be included in all school codes of conduct adopted by local school boards or trustees. The State Education Commissioner is charged with developing model policies, providing grants to school districts, promulgating regulations and establishing a uniform incident reporting mechanism that protects incident reporters from retaliation. Additionally, Education Law §801-a, which requires the Board of Regents to ensure that school curricula include "civility, citizenship and character education," is amended to include "awareness and sensitivity to discrimination or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes." Finally, the measure amends Education Law §2801 to permit school suspensions for violations of the anti-discrimination and anti-harassment provisions of the new Article 2 of the Education Law. **Effective: July 1, 2012 (rules or regulations to be promulgated in advance of that date).**

4. Juvenile Sex Trafficking: *Safe Harbor Act* Amendments [Laws of 2010, ch. 58, Part G]: The NYS budget contained amendments to the *Safe Harbor Act* [Laws of 2008, ch. 569], which, *inter alia*, authorize the Family Court, where an accused or adjudicated juvenile delinquent or PINS may have been a victim of sex trafficking, to release the juvenile prior to disposition to an available short-term safe house and, if the courts finds the juvenile to be a victim of sex trafficking, to place the juvenile as a disposition with the local department of social services to reside in an available long-term safe house. **Effective: April 1, 2010.**

IV. DOMESTIC VIOLENCE MEASURES:

1. Electronic and facsimile transmission of orders of protection for service [Laws of 2010, ch. 261]: This measure amends Family Court Act §153-b and Domestic Relations Law §§240(3-a), 252 to permit orders of protection, temporary orders of protection and "any associated papers that may be served simultaneously" in Family Court and Supreme Court matrimonial proceedings to be transmitted to peace or police officers electronically or by facsimile so that they can provide "expedited service." By making the authorization statewide and permanent, it thus expands upon the temporary authority in Laws of 2007, ch. 330, for the judiciary to establish pilot projects in designated counties for electronic and facsimile transmission of orders to law enforcement. The measure also fully conforms Domestic Relations Law §§240(3-a) and 252 to Family Court Act §153-b to incorporate the presumption of service of temporary orders of protection and orders issued upon default by a police or police officer unless the party requesting the order states on the record that he or she will make alternative arrangements. **Effective: July 30, 2010.**

2. Crime of endangering the welfare of an incompetent or physically disabled person [Laws of 2010, ch. 14]: This measure amends Penal Law §§260.32 and 34 to expand the crimes of endangering the welfare of vulnerable elderly persons in the first and second degrees, Class D and E felonies, respectively, to include "incompetent or physically disabled persons." The definition of "caregiver" in Penal Law §260.31(1) is expanded to include a caregiver for an "incompetent or physically disabled" person. Penal Law §260.31(4) defines "incompetent or physically disabled" person as "an individual who is unable to care for himself or herself because of physical disability, mental disease or defect." **Effective: May 22, 2010.**

3. Special ballots for Victims of Domestic Violence [Laws of 2010, ch. 38]: Expanding upon the statute permitting victims of domestic violence to cast paper ballots at the Board of Elections, rather than having to appear at their local polling stations [Laws of 1996, ch. 702], this statute conforms the definition of those covered by the term "members of the same household or family" in Election Law §11-306 to include those within the "intimate relationship" definition enacted by Laws of 2008, ch. 326. Additionally, the scope of the statute is enlarged to include domestic violence victims who fled their homes to escape emotional harm, in addition to those who fled to escape physical harm to themselves or members of their families or households. **Effective: April 14, 2010.**

4. Confidentiality of Election Records of Domestic Violence Victims [Laws of 2010, ch. 73]: This measure permits a victim of domestic violence to apply in the Supreme Court of the county in which the victim is registered to vote for an order to keep the victim's election registration records confidential. A victim of domestic violence is defined similarly to Family Court Act §812 to encompass a person abused by a "family or household member," which includes a present or former spouse, a person with whom the victim has a child in common, a person to whom the victim is related by consanguinity or affinity or a person in a present or former "intimate relationship" with the victim. Domestic violence is defined to include an act or acts that resulted in actual physical or emotional injury or created a substantial risk of physical or emotional harm to the victim or the victim's child and that involved commission of a violent felony, as defined in Penal Law § 70.02, disorderly conduct, harassment in the first or second degree, aggravated harassment in the second or third degree, stalking in the fourth degree, criminal mischief, menacing in the second or third degree, reckless endangerment, assault in the third degree or an attempted assault. Upon granting of such an order, the records must be kept separate from other records and not be made available for inspection or copying except by election officials when such records are "pertinent and necessary" to their performance of their official duties. **Effective: May 5, 2010.**

5. Strangulation [Laws of 2010, ch.405]: This measure amends the Penal Law, the Criminal Procedure law and the Family Court Act to create new crimes of strangulation and to include the new crimes in the list of family offenses for which criminal and Family Courts exercise concurrent jurisdiction. The new crime has three degrees ranging from criminal obstruction of breathing or blood circulation, a Class A misdemeanor, to criminal strangulation in the first and second degrees, which are, respectively, Class C and D violent felonies. It is a valid affirmative defense if a strangulation procedure was performed for a valid medical or dental purpose. **Effective**: **November 11, 2010.**

6. Orders of Protection: Non-contemporaneous events [Laws of 2010, ch. 341]: Overruling a line of appellate cases, this measure amends the Family Court Act and Domestic Relations Law to provide that an order of protection cannot be denied simply because the events alleged are not "relatively contemporaneous" with the application. **Effective: August 13, 2010 (applies to OP's pending and entered after that date)**

7. Extensions of orders of protection [Laws of 2010, ch. 325]: This bill authorizes the Family Court, upon motion, to extend an order of protection for a "reasonable period" of time upon a showing of good cause (instead of the current standard of "special circumstances") or upon the parties' consent. The fact that abuse hasn't occurred during the pendency of the order may not be a ground to deny the extension. The court must state "a basis for its decision" on the record. **Effective: August 13, 2010 (applies to OP's pending and entered after that date)**

8. Extension of referee and judicial hearing officer authority to hear *ex parte* applications for temporary orders of protection [Laws of 2010, ch. 363]: This measure provides a two-year extension of referee and JHO authority to Sept. 1, 2012 to hear *ex parte* applications for orders of protection statewide at any hour. **Effective: August 13, 2010.**

9. Service of Extensions and Violations of Orders of Protection [Laws of 2010, ch. 446]: This Family Court Advisory and Rules Committee measure amends Family Court Act §153-b to provide litigants with the same options of peace and police officer service for modified orders and for petitions alleging violations of orders of protection as they have for original orders and accompanying pleadings. Consistent with legislation enacted in 2007, as well as requirements of the federal *Violence Against Women Act*, it further clarifies that such service must be

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Best Interests Of The Child

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"best-interest hearing."

Artificial Insemination is such a new phenomenon in human history that it cuts completely across the law and customs of nations, states and organized religions. Following is a sample of views on this topic:

New York Domestic Relations Law (DRL), Section 73, is entitled "Legitimacy of Children Born by Artificial Insemination." Section 73(1) provides that:

"Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes."

Our New York State Legislature has left unanswered whether the "best interests of the child" standard of DRL Section 240 is violated when the Sperm Donor Father remains unknown to the child.

Oregon Revised Statutes. Section 109.239 provides that the Sperm Donor Father "shall have no right, obligation, or interest with respect to a child born as a result of the artificial insemination; and (2) a child born as a result of the artificial insemination shall have no right, obligation, or interest with respect to such donor."

The Oregon State Legislature clearly has not seen "The Kids are All Right."

Connecticut Statutes, Section 45a-773, provides that all artificially inseminated children must be registered with a Connecticut Probate Court.

Connecticut Statutes, Section 45a-775, provides that the donor of sperm or eggs "shall not have any right or interest in any child born as a result" of artificial insemination.

Connecticut Statutes, Section 45a-777, provides that a child conceived through artificial insemination cannot inherit an estate from his Sperm Donor Father.

The Connecticut State Legislature also apparently did not see "The Kids are All Right."

The secular Muslim Nation of Turkey has banned artificial insemination entirely. Further, Turkey has made it a crime for a Turkish woman to be artificially inseminated in a foreign country. See www.pri.org/world/turkey.

Rabbi Elliot N. Dorff, in an article entitled "Artificial Insemination in Jewish Law," summarizes Judaism's view on this topic:

"By and large, rabbis who have ruled on these matters thus far have maintained that for the purposes of this commandment, (be fruitful and multiply), the father is the man who provides the semen. That would make a man who impregnates his wife through artificial insemination the father of his child in Jewish law, and it would also make a semen donor the father of any children born through the use of his semen." See www.myjewishlearning.com/beliefs/issues/

Bioethics/fertility.

The Roman Catholic Church's teaching on artificial insemination has been set forth by Martin L. Cook in the publication of the Jesuit's Markkula Center for Applied Ethics of Santa Clara University. Mr. Cook summarizes the Church's position as follows:

"(The Church) opposed all technological interventions into the process of human reproduction. More specifically, the document condemned artificial insemination and embryo transfer, in vitro fertilization, and surrogate motherhood under all circumstances. It all opposed experimentation on all embryos when such experiments were not of direct therapeutic benefit to the fetus, and amniocentesis (a procedure used to detect fetal defects) when done for the purpose of deciding whether or not to abort the fetus."

See www.scu.edu/ethics/publication/iie/ v1n3/homepage.hdml.

The Rev. Edward Schneider, writing on 'artificial insemination" for the Evangelical Lutheran Church in America, states his view as follows:

"More serious from an ethical standpoint is the moral assessment of the role played by the donor. Though not explicitly dealt with in the ethical considerations discussed above, that discussion does bear implicitly on the donor's responsibility for his actions. The donor clearly exercises his procreative powers apart from any marital bond or commitment. He remains anonymously hidden from both the mother and the child, refusing his responsibility as a father. His function remains that of a sperm salesman, failing to take full responsibility for his biological offspring. Even though it may be argued that he does what he does as an act of love to provide a child for a childless couple, nevertheless love can never oblige one to perform an action which by its nature violates the fundamental unity of the personal and biological dimensions of sexual intercourse within the covenant of marriage." See www.elca.org (What We Believe - Social- Issues/Journal-of-Lutheran-Ethics.)

The science of artificial insemination has placed humanity on the precipice of a brand new world.

The U.S. District Court for the Northern District of California, the New York State Court of Appeals, the Legislatures of New York, Oregon and Connecticut, Rabbi Elliot N. Dorff, the Roman Catholic Church, and Rev. Edward Schneider, cannot provide us with answers, or even any semblance of answers.

The writers, directors, producers and actors of the film "The Kids are All Right" have come closest to asking the right questions in the scenes they so movingly presented between and among two teenagers conceived through artificial insemination in their first meetings with their Sperm Donor Father.

In the Old Testament, King Solomon was asked to decide the custody of a child whose parentage was disputed. His solution has given rise to the phrase "The Wisdom of Solomon." See First Kings, 3:16-28. Each one of our Supreme Court Matrimonial Term Justices and Family Court Judges must act as King Solomon every day as they decide disputed child custody and child visitation cases.

It is hoped that this article will advance the law on this subject and help us to continue our common humanity in light of the science and popularity of artificial insemination.

Marital Quiz

BY GEORGE J. NASHAK JR.*

Question #1 - If a party is a member of the Federal Employees Civil Service Retirement System, should that party's pension for the purposes of equitable distribution be reduced in an amount equivalent to Social Security benefits?

Your answer -

Question #2 - In order to obtain an upward modification of child support from a court order entered on consent of the parties, is it required to demonstrate an unanticipated and unreasonable change in circumstances?

Your answer -

Question #3 - When is it necessary to demonstrate an unanticipated and unreasonable change of circumstances, in order to obtain an increase in child support?

Your answer -

Question #4 - True or false, a family offense must be established by a fair preponderance of the evidence?

Your answer -

George J. Nashak Jr.

Question #5 - Are a physician's office records admissible in evidence as business records under CPLR 4518(a)?

Your answer

Question #6 - True or false, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion and expert proof?

Your answer -

Question #7 - If one spouse transfers marital assets into custodial accounts for the parties' children, without the consent of the other spouse, is the other spouse entitled to an equitable share of the transferred funds?

Your answer -

Question #8 - In calculating child support in accordance with the CSSA, do you deduct FICA taxes from all of the income of the parties?

Your answer -

Question #9 - Can a client waive the rule that in matrimonial cases an attorney must send the client itemized bills at least every 60 days?

Your answer -

Question #10 - Was it error for the Supreme Court to order a parent to pay for the college education of a child who at the time of the order was seven years of age?

Your answer -

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

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available without fee to the litigants. *See* Laws of 2007, ch. 36; 42 U.S.C.A. §3796hh(c)(4). **Effective: August 30, 2010.**

V. CHILD SUPPORT AND MATRIMONIAL MEASURES:

1. *"Low Income Support Obligation and Performance Improvement Act;* " modification of child support orders [NYS OTDA bill; Laws of 2010, ch. 182]:

a. Modifications of child support orders, judgments and stipulations: Incorporating a proposal made by the Family Court Advisory and Rules Committee, this bill, submitted by the New York State Office of Temporary and Disability Assistance, resolves the disparity between public and private child support cases regarding standing to seek child support modification. Under present law, in Title IV-D cases, including both cases of custodial parents on public assistance whose rights are assigned to local departments of social services and custodial parents who have requested child support services, child support petitioners may obtain complete review of child support orders by objecting to the periodic cost of living adjustments [*Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin v. Boyd M. Chamberlin*, 99 N.Y.2d 328 (2003)], in contrast to private litigants, including parents not in receipt of child support services, who must demonstrate an unforeseen change in circumstances, pursuant to *Matter of Boden v. Boden*, 42 N.Y.2d 210, 213 (1977). Unless litigants specifically opt out in an agreement, this measure would afford all litigants standing to apply for a modification by using either of two new standards: the passage of three years or a 15% change in the gross income of either party subsequent to the date of the most recent original or modified order. The substantial change of circumstances threshold would remain as an alternative ground for standing to obtain a modification.

All child support orders must contain a notice of the right to apply for a modification based upon the passage of three years, 15% change in income or substantial change in circumstances.

Finally, in cases where the custodial parent is on public assistance, where a respondent is directed by the Family Court to participate in a work program and such program generates the obligor's child support payments, the Support Collection Unit is barred for one year from filing a petition to modify the child support order.

b. Employer obligations: The measure requires employers to report whether dependent health coverage is available and the date the employee qualifies to receive them.

c. Retroactive child support: The measure provides that retroactive support is payable and enforceable through an income deduction order pursuant to Family Court Act §440.

d. Incarceration of child support obligors: The measure provides that incarceration of a support obligor does not preclude a finding of a substantial change in circumstances that would permit an application to modify a child support order, provided that such incarceration is neither the result of non-payment of a child support order nor an offense against the custodial parent or child who is the subject of the order or judgment.

e. Participation in work programs: Except in cases in which support obligors are in receipt of SSI or Social Security disability assistance, the Court may order support obligors to seek employment, or to participate in available job training, employment counseling or other programs designed to lead to employment.

Effective: Oct. 13, 2010 (90 days after Governor's July 15, 2010 signing; modification provisions applicable to modified orders and written stipulations and agreements entered on or after Oct. 13, 2010), although employer reporting obligation takes effect July 15, 2011 (one year from signing).

2. No-fault divorce [Laws of 2010, ch. 384]: This measure allows a spouse to obtain a divorce unilaterally by adding "irretrievable breakdown" for at least six months as a ground for divorce. All financial, custody and visitation issues must be resolved and incorporated into the divorce judgment prior to the divorce being granted. **Effective: Oct. 12, 2010.**

3. Temporary and final post-marital maintenance [Laws of 2010, ch. 371]: This measure establishes a formula for calculating presumptive guideline amounts for temporary post-marital maintenance, expands the factors to be utilized in determining final orders of maintenance and requires the Law Revision Commission to perform a study to guide further legislation, particularly with respect to final orders of maintenance. It directs the judiciary to promulgate any necessary rules in order to implement the statute. Significantly, the measure only amends the Domestic Relations Law**,** not the Family Court Act, and thus applies on a mandatory basis only in Supreme Court matrimonial proceedings. It may, however, be applied in Family Court proceedings on a discretionary basis in the determination of a "fair and reasonable" maintenance award in accordance with Family Court Act §412**.**

a. Temporary Maintenance Formula and Factors: Perhaps most significant, a new subdivision (5-a) is added to Domestic Relations Law §236B to delineate the formula and factors for temporary maintenance. In order to facilitate implementation, the Office of Court Administration has developed and posted a simple, free fillable work-sheet/affidavit that links to an on-line calculator. The links to the OCA temporary maintenance worksheet and calculator are, respectively: www.nycourts.gov/divorce/TMG-worksheet.pdf and www.nycourts.gov/divorce/calculator.pdf .

First, where the payor's income is up to or including the income cap of $500,000 (adjustable every two years, starting January 31, 2012, based upon Consumer Price Index changes), the guideline amount for temporary maintenance would be the lesser of:

- 30% of the payor's income up to the income cap minus 20% of the payee's income OR
- 40% of the SUM of the payor's income up to the income cap plus the payee's income MINUS the payee's income (i.e., the remainder after deducting the payee's income from 40% of the sum of the payor's income up to the income cap plus the payee's income)

If the presumptive guideline amount would be zero or less, the presumptive temporary maintenance award would be zero. If the presumptive amount would reduce the payor's income below the self-support reserve amount for a single adult, the guideline amount would be the difference between the payor's income and the self-support reserve. Where the payor's income is already below the self-support reserve, a rebuttable presumption of no temporary maintenance would apply. *See* DRL §§236B 5-a (c)(1)(c), 236B 5-a (c)(1)(d), 236B 5-a (c)(3) .

Second, where the payor's income exceeds the income cap (currently $500,000, adjustable every two years as above), the temporary maintenance guideline would be the amount calculated as above for the payor's income up to the income cap, with an additional amount added through consideration of the following 19 enumerated factors:

- length of the marriage,
- substantial difference in the parties' incomes,
- standard of living during the marriage,
- age and health of the parties,
- present and future earning capacity of the parties,
- need of a party to incur educational or training expenses,
- "wasteful dissipation of marital property,"
- transfer or encumbrance of property "in contemplation of of a matrimonial action without fair consideration,"
- "existence and duration or a pre-marital joint household or a pre-divorce separate household,"
- actions by one party against the other that "inhibit a party's earning capacity or ability to obtain meaningful employment," including, but not limited to, domestic violence as defined in Social Services Law §459-a,
- availability and cost of medical insurance for the parties,
- care of children, stepchildren, adult disabled children or stepchildren, elderly parents or in-laws that "inhibit a party's earning capacity or ability to obtain meaningful employment,"
- inability of a party to obtain meaningful employment due to age or absence from the workforce,
- need to pay for "exceptional additional expenses" for the child or children, including, but not limited to, school, child-care or medical expenses,
- tax consequences for each party,
- marital property subject to distribution,
- reduced or lost earning capacity of party seeking temporary maintenance as a result of foregoing or delaying education, training or employment opportunities,
- contributions of party seeking temporary maintenance to the "career or career potential" of the other party, and
- "any other factor which the court shall expressly find to be just and proper."

In all cases, the length of the marriage must be considered in determining the duration of the temporary order. A temporary order automatically terminates upon the earlier of the issuance of a final order or death of either party. Significantly, the Court must set forth the factors considered and reasons for its decision in a written order, a requirement that may not be waived by either of the parties.

b. Variances from the temporary maintenance formula: The Court must award the presumptive guidelines amount unless it finds it to be "unjust or inappropriate" and thereby adjusts it based upon a consideration of all of the above factors except length of the marriage and substantial differences in income of the parties. [Length of the marriage, as noted, is relevant to the duration of the order]. Where deviating from the presumptive guidelines amount, the Court must state the factors and bases for any adjustment in a written order, a non-waivable requirement. Where a party defaults and/or the Court has insufficient information to calculate his or her gross income, the Court must order an amount based upon the greater of the payee's needs or the parties' standard of living prior to commencement of the divorce action.

c. Notice to unrepresented parties; stipulations and agreements; modifications: Where either or both parties are unrepresented, the Court must inform the parties of the presumptive guideline amount prior to entry of a temporary maintenance order. Where, after the effective date of the provision, the parties present a stipulation or agreement for incorporation into an order, the agreement must specify that the parties have been informed of the presumptive amount and that the agreement either reflects it or, if not, the reasons for any variance. A difference between the presumptive guideline amount and the amount ordered prior to the effective date of the statute is not a change of circumstances justifying modification.

d. Final maintenance factors: The measure makes current Domestic Relations Law §236B(6) applicable only to final maintenance awards. It sets no formula for final maintenance but adds the following factors to the existing list of final maintenance considerations:

- need of a party to incur educational or training expenses,
- "existence and duration or a pre-marital joint household or a pre-divorce separate household,"
- actions by one party against the other that "inhibit a party's earning capacity or ability to obtain meaningful employment," including, but not limited to, domestic violence as defined in Social Services Law §459-a.
- care of children, stepchildren, adult disabled children or stepchildren, elderly parents or in-laws that "inhibit a party's earning capacity or ability to obtain meaningful employment,"
- inability of a party to obtain meaningful employment due to age or absence from the workforce,
- need to pay for "exceptional additional expenses" for the child or children, including, but not limited to, school, child-care or medical expenses,
- equitable distribution of marital property, and
- availability and cost of medical insurance for the parties.

e. Law Revision Commission Study: The measure directs the Law Revision Commission to prepare a comprehensive review of the economic consequences of divorce upon the parties and of the effectiveness of maintenance laws in "ensuring that the economic consequences of divorce are fairly and equitably shared by the divorcing couple." The Law Revision Commission's preliminary report and recommendations are due **May 30, 2011** (nine months from the effective date of the statute) and a final report and recommendations are due by **December 31, 2011.**

Effective: temporary and final maintenance provisions effective October 12, 2010 (applicable only to matrimonial actions commenced on or after that date); Law Revision Commission study and court rules provisions effective

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SERVICE DIRECTORY

Marital Quiz

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ANSWERS TO MARITAL QUIZ FROM PAGE 17

Question #1 - If a party is a member of the Federal Employees Civil Service Retirement System, should that party's pension for the purposes of equitable distribution be reduced in an amount equivalent to Social Security benefits?

Answer - Yes, *Wallach v. Wallach* 37 A.D.3d 707; 831 N.Y.S. 2d 210 (2nd Dept. 2007).

Question #2 - In order to obtain an upward modification of child support from a court order entered on consent of the parties, is it required to demonstrate an unanticipated and unreasonable change in circumstances?

Answer - No, the party seeking the increase need only demonstrate a change in circumstances sufficient to warrant a modification. *Matter of Jewett v. Monfoletto* 2010 NY Slip Op 02953 (2nd Dept.).

Question #3 - When is it necessary to demonstrate an unanticipated and unreasonable change of circumstances, in order to obtain an increase in child support?

Answer - When modifying a separation or settlement agreement incorporated, but not merged, into a judgment of divorce. *Matter of Jewett v. Monfoletto* 2010 NY Slip Op 02953 (2nd Dept.).

Question #4 - True or false, a family offense must be established by a fair preponderance of the evidence?

Answer - True, *Matter of Thomas v. Thomas* 2010 NY Slip Op 03137 (2nd Dept.).

Question #5 - Are a physician's office records admissible in evidence as business records under CPLR 4518(a)?

Answer - Yes, Matter of Fortunato v. Murray 2010 NY Slip Op 03122 (2nd Dept.).

Question #6 - True or false, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion and expert proof?

Answer - True, Matter of Fortunato v. Murray 2010 NY Slip Op 03122 (2nd Dept.).

Question #7 - If one spouse transfers marital assets into custodial accounts for the parties' children, without the consent of the other spouse, is the other spouse entitled to an equitable share of the transferred funds?

Answer - Yes, *Beroza v. Hendler* 896 N.Y.S. 2d 144 (2nd Dept. 2010).

Question #8 - In calculating child support in accordance with the CSSA, do you deduct FICA taxes from all of the income of the parties?

Answer - No, just from the income upon which FICA taxes are "actually paid." *Brevilus v. Brevilus* 2010 NY Slip Op 03396 (2nd Dept.).

Question #9 - Can a client waive the rule that in matrimonial cases an attorney must send the client itemized bills at least every 60 days?

Answer - Yes, *Petrosa v. Petrosa* 56 A.D.3d 1296; 870 N.Y.S.2d 178 (4th Dept. 2008).

Question #10 - Was it error for the Supreme Court to order a parent to pay for the college education of a child who at the time of the order was seven years of age?

Answer - Yes, *Bogannam v. Bogannam* 60 A.D.3d 985; 877 N.Y.S.2d 336 (2nd Dept. 2009).

Domestic Violence And Family Law

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August 13, 2010.

4. Counsel and expert fees in matrimonial actions [Laws of 2010, chs. 329 + 415]: This measure establishes a rebuttable presumption that fees for attorneys and experts in matrimonial proceedings shall be paid by the monied spouse. Applications for such fees may be made at any time prior to final judgment, including *pendente lite*. Both parties must file affidavits detailing their arrangements with counsel, including retainers. The court must ensure that the parties are adequately represented, including ordering *pendente lite* payment. The "chapter amendment" (A 11576/ S 8391) advanced the effective date from 120 to 60 days after the Governor signs the bill. **Effective: October 12, 2010 (applies to actions + proceedings commenced on or after effective date).**

5. Pension exemption from automatic orders [Laws of 2010, ch. 32]: On March 30, 2010, a chapter amendment was signed to the automatic order legislation [Laws of 2009, ch. 72], retroactive to September 1, 2009, the effective date of Chapter 72, in order to allow retirees to continue to receive retirement benefits notwithstanding the commencement of a matrimonial action. It amends Domestic Relations Law §236B(2)(b)(2) to exempt transfers of retirement plan assets from the restrictions upon transfers of assets upon the commencement of matrimonial actions where a party is in "pay status," that is, receiving payments from the retirement plan. **Effective: September 1, 2009 [signed March 30, 2010]. Effective: Sept. 1, 2009.**

Five additional bills relevant to Family Court and family law were vetoed by the Governor: Office of the Child Advocate (A 3233-b, Veto Memo #6819)), Revised *Interstate Compact on Juveniles* (S 8279, Veto Memo #6737), penalties for release of sealed records (A 11389, Veto Memo #6787), Department of State address confidentiality program (A 10180, Veto Memo # 6764) and notice of changes in foster care placements (A 8418, Veto Memo #13).

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