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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

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Guardian & Elder Law: New and Noteworthy

BY JOHN R. DIETZ, ESQ.

John Dietz

There is much that is new and noteworthy in Guardianship and Elder Law. The Courts, including the Court of Appeals, have rendered an array of interesting decisions. The legislature has been active in making new laws. And of course at the beginning of each new year the administrative agencies are busy promulgating program changes. What follows is a selective survey of some of the recent Court decisions, new laws, and administrative changes.

Supplemental Needs Trusts: In Matter of Abraham XX, 165, the Court of Appeals addressed the question as to whether the State can recover its remainder interest in an amount equal to the total medical assistance paid or whether the State is limited to the amount expended from the trust's effective date to the recipient's death. Unfortunately, the Court decided the case in favor of the State.

The facts are familiar. Abraham XX suffered an injury at birth. His institutional care was paid for by Medicaid. A personal injury suit was brought on behalf of Abraham XX. The matter settled and the Medicaid lien at the time, $1.7 million, was paid in full. After years of litigation the sum of $2.17 million was retroactively placed into a Supplemental Needs Trust (SNT). There was an 18 month gap, however, from the time of verdict and the date the trust was funded. Abraham died on June 11, 2003. Medicaid sought reimbursement for payments made during the gap. Abraham's mother argued the State was only entitled to recovery of Medicaid payments made after the SNT was funded. During the gap the payments were "correctly paid" and not subject to recovery.

The Court rejected the mother's argument. The Court held that when an SNT is established pursuant to Social Services Law 366(2)(b)(2)(iii)(A) "the beneficiary explicitly provides the State with a right to recover the total Medicaid paid on behalf of the individual. There is no temporal limitation. The sole, though substantial, stated limitation on the State's recovery is the existence of remaining assets in the trust upon the beneficiary's death".

Are SNT's as valuable a planning tool now as before the Court's decision? There are many advocates who contend that disabled individuals, their families, and attorneys, must now give a hard critical look at the SNT, Medicaid, and other options before routinely creating and funding this popular legal tool.

MHL §81.29: MHL §81.29 (d) has been amended in connections with the authority of the Courts to vitiate wills and codicils of an Incapacitated Person. In Matter of Ruby S., N.Y.L.J., Feb. 11, 2002, Justice Thomas, Supreme Court, Queens County, took the then extraordinary step of voiding the Last Will & Testament of an Incapacitated Person. The decision was both decried and hailed. The decision seemed logical and fair. Why was it necessary to wait until the death of the Incapacitated Person, sometimes many years later, to challenge the validity of a will? Especially, when one considers that the Incapacitated Person may still be alive, the witnesses available, and the events fresh in everyone's minds.

On appeal Justice Thomas' decision was left intact. The Appellate Division deflected any decision on the grounds that the appellant, who was the nominated executor and the attorney drafter, lacked standing. Two months later, however, In the Matter of Lillian A., 307 A.D.2d 921, 762 N.Y.S.2d 899 (2d Dept 2003), the Court stated that the Supreme Court did not have authority to revoke a last will and testament, citing to *MHL § 81.29(d)*.

The legislature has now put the issue to rest. The Court has no authority to invalidate a will or codicil, according to the amended MHL 81.29 (d). While the Supreme Court may amend, modify or revoke any previously executed power of attorney, power of appointment, health care proxy, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the person was incapacitated or if

Continued On Page 13

Check inside this month's edition of the

Queens Bar Bulletin

for an update to the

2009 Queens County Bar Association Annual Directory

CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

David H. Rosen, Esq.

This article continues from Part I, which was published in the February 2009 issue of the Queens Bar Bulletin.

The two-judge dissent, while agreeing that "good cause" is not shown here merely by the merit of the underlying application and lack of prejudice to the adversary, was unwilling to adopt the strict attitude of the majority. In particular, the dissent pointed out that the *Brill* and *Miceli* decisions simply ruled out late summary judgment motions: the would-be movant was not ultimately deprived of his day in court. Here, the effect of a strict construction was to deprive the plaintiff wife of an "enormous money judgment granted. . .against an opponent who had thrown every possible obstacle in her path".

In reversing, the Court of Appeals did not address the Appellate Division's application of *Brill* and its progeny to Rule 202.48. Rather, it held the rule inapplicable under the facts. The plaintiff wife was entitled to the money judgment as a result of the original 1966 decision, which specifically directed the entry of a money judgment "without further order." Thus, no settlement was required and Rule 202.48 was inapplicable[34]. The point was reiterated in the 1996 judgment and again in the decision on the 2000 motion. There was thus no time limit on the entry of the money judgment, and no need for the 2000 motion for leave to enter the money judgment. That Supreme Court had "unaccountably" added a direction to "settle judgment" as a money judgment the wife was entitled to without a further order did not change the result.

With the result reached by the Appellate Division having been reversed, but its rationale not having been addressed, it remains an open question whether or not Rule 202.48 will remain subject to the strict construction of time limits set forth in the original *Farkas* decision. The prudent approach is to assume that it will be, and to take great care to submit or settle orders and judgments in a timely fashion. It must not be assumed that the court will excuse late submissions merely because there has been no change in circumstances or prejudice to the adversary.

In *Wilson v Galicia Contr. & Restoration Corp.*,[35] the Court of Appeals illustrated, yet again, that a defendant whose answer has been stricken for a willful failure to disclose is in the same position as if he

Continued On Page 14

INSIDE THIS ISSUE

THE DOCKET . . .

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

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

2009 SPRING CLE Seminar & Event Listing

March 2009

Wednesday, March 4	Court Evaluator Training
Thursday, March 12	How to Obtain Court Appointments
Wednesday, March 18	CPLR & Evidence Update
Monday, March 23	Past Presidents & Golden Jubilarians Night

April 2009

Wednesday, April 1	Equitable Distribution Update
Thursday, April 2	Ethics Seminar
Monday, April 6	MHL Article 81 Guardianship Training
Tuesday, April 21	Judiciary Night
Wednesday, April 22	Selection of a Jury
Thursday, April 23	Basic Criminal Law Seminar – Part 1
Wednesday, April 22	No Fault Arbitration 2009
Thursday, April 30	Basic Criminal Law Seminar – Part 2

May 2009

Thursday, May 7	Annual Dinner & Installation of Officers
Thursday, May 14	Lawyers Assistance Seminar
Tuesday, May 19	Bankruptcy Seminar
Wednesday, May 20	All You Might Want to Know About LLC's
Thursday, May 21	Wine & Cheese - TENTATIVE

CLE Dates to be Announced

Elder Law
Juvenile Justice Law
Labor Law
Real Property Law
Surrogate's Law
Taxation Law

NEW MEMBERS

Jeffrey Lawrence Davis
Manuel Fabian
Usman Ahmed Farooqui
Mark Friedman
Jennifer Garcia
Chanjoo Moon
Helene C. Praeger
Teresa Principe
Jonathan Rice
Juan San Pedro
Joseph Francis Sensale
Olga Someras

NECROLOGY

George C. Godfrey, Jr.

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

QUEENS COUNTY BAR ASSOCIATION SCHOLARSHIP FUND

Dear Members:

The Queens County Bar Association's Scholarship fund was created to offer financial assistance to law students who are residents of Queens County or attend law school in Queens County.

The recipients of the QCBA Scholarship are carefully chosen based on academic achievement, community service and financial need.

Your tax deductible donation will help to support and recognize those law students who provide community service to the residents of Queens County. It also enhances the good name of our Association.

As President of the Queens County Bar Association, I urge you to support this valuable community-based program.

Sincerely,

STEVEN S. ORLOW
President

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PRESIDENT'S MESSAGE

A "CULTURE OF CIVILITY"

Arguably, aside from an actual battlefield, the legal field, and in particular, the courtroom is the most inherently adversarial arena in our society. Would it not behoove us, as participants in that scene, to endeavor to minimize in every way possible contributing factors to the stress in that environment?

The courtroom and the litigation accompanying it is, indeed, a forum that by its very nature invites strain, tension and even anxiety. The sources of this are almost endless. Waiting idly for hours while work pressures build in your office, appearing before jurists who seem unreasonable in their demands (each of hundreds of jurists setting forth different requirements), clerks that are convinced that you, the attorney, are an annoyance and the fact they assist you is a gift from them to you, court officers who belittle and insult the attorneys in a courtroom by their courtroom demeanor and, perhaps most distressing of all, the utter lack of consideration often exhibited by some attorneys for their colleagues by the cavalier attitude they seem to demonstrate through tardy appearances and the failure to exert an effort to communicate.

Steven Orlow

To have the inherent stresses of the litigation process aggravated by what amounts to extraneous exasperating annoyances is unnecessary. Just as the Bar Association is endeavoring to streamline court procedures and bring the courthouse into the 21st century so, too, we should undertake a concerted effort to improve the courthouse "quality of life" for the litigating attorney by striving to create a "Culture of Civility" in our courts.

As for civility between attorneys, we must all contribute to that goal. First, act in good faith and then, make the assumption that your opposing attorney is acting in good faith as well. And communicate! You will be late for an appearance, you can only make "second call", let the other attorneys know. You will appear on a discovery motion, call your "adversary" and make an effort to work out details that may curtail the time necessary to be in court. If you have to run to another part, leave your cell number on the posted calendar, or with your adversary, so both your adversary and the judge need not be kept waiting and guessing when you will return.

As the Administration of Law/Judicial Relations Committee of the Bar Association has endeavored in the past, with more success than not, to affect and alter the distressing proclivities of certain judges that are brought to the Committee's attention by attorneys, so too this committee will endeavor to deal with situations involving attorneys, clerks or court officers that are brought to its attention. The committee will take action – but the true key is that situations requiring attention MUST be brought to the Committee's attention – and it is only you that can do that! Have a judge that is a problem, tell us. A fellow attorney that is obnoxious, let us know. A clerk or court officer that skipped those days in kindergarten when manners were taught, don't keep it a secret.

There is so much we can do if we put our minds to it. Also rest assured that your Bar Association is both eager and ready to do its part as well.

New York State Bar Association Honors Dr. Parveen Chopra With The Distinguished Haywood Burns Memorial Award

The New York State Bar Association (NYSBA), with over 76,000 members, is the largest voluntary association of attorneys in the United States founded in 1876. This year has decided to confer Dr. Parveen Chopra with the Prestigious Haywood Burns Memorial Award for his outstanding work in civil and Human Rights. Of major significance, Dr. Chopra is the first South Asian honored in the history of the One Hundred Thirty Three year old organization.

The award was presented by the Committee on Civil Rights Chair Fernando Bohorquez Esq. (Baker Hosteler llp) at the New York Marriott Marquis in Manhattan, as part of the Association's 132nd Annual Meeting. Every year only one person is chosen for this award based on outstanding contributions of an American Civil rights leader who had significantly impacted civil rights in America. Previous award winners of the Award include Honorable United States Federal Judge Cornelius V. Blackshear; Honorable Justice Ellen M. Yacknin; Honorable Pam Badoria Jackman Brown.

Dr. Chopra has a long history of community service including previously serving as the first Asian Commissioner of Human Rights for 20 years and the first Indian American appointed to Public Office on the Eastern Seaboard of the United States. He also served as Commissioner of Planning in Nassau County for six years improving the quality of life of 1.3 million Americans. He currently serves on the Board of the Bhartya Vidhya Bhavan, UNYFCE, and the NYCLU in Nassau. He has previously been honored with Awards of distinction from the One Hundred Black Men USA, Martin Luther King Jr. Award and the highly distinguished Ellis Island Medal of Honor a distinction he shares with former Presidents, several noble laureates and other distinguished Americans. His contributions to American life have been considered as outstanding and also recognized by the US Congress and Senate. Dr. Chopra has been a life time educator and Professor in Graduate Schools of Business and holds a PhD, MBA, LLB and 4 other Masters degrees.

W. Haywood Burns, was a longtime civil rights advocate who worked with the Rev. Dr. Martin Luther King Jr., He graduated from Harvard College with honors and from Yale University Law School in 1966. Mr. Burns joined the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, and later became law clerk to Judge Constance Baker Motley of United States District Court. From there, he became counsel to the NAACP Legal Defense and Education Fund Inc and where he served as general counsel to Martin Luther King Jr.'s Poor People's Campaign in 1968.

Five leaders who shared their views on Dr. Chopra's community activism included NYSBA Chairperson of Civil Rights Mr. Fernando Bohorquez who said Dr. Chopra has a long standing in Asian community and American public life in human rights and civil rights in America. His work with so many diverse organizations in protecting the rights of common man is very admirable. Padam Shri Dr. P. Jayaraman emphasized Dr. Chopra's work as President of the Federation of Indian Associations, as National Secretary of National Federation of Indian Associations in organizing India Day Parade, functions in various cities of America, liason with the White House and many American leaders and particularly with the Bhavan USA where he is a great asset. Rev. Reginald Tuggle, a national African American leader said that Dr. Chopra's work for the Dr. Martin Luther King Executive Committee where he serves as a treasurer has helped it tremendously in raising enormous amounts of scholarship funds and also realizing Dr. King's dreams in rooting out discrimination through Human Rights Commission, Civil Liberties Board and several national organizations. Rabbi Perl who was Commissioner of Human Rights, National Executive Director of National Coalition for Furtherance of Jewish Education and Chhabad of Mineola, New York mentioned in his speech that under Dr. Chopra's leadership the Commission investigated cases of discrimination and made determinations based on race, religion, sex, age, national origin, physical handicap and helped countless people to get their jobs back or appropriate settlements in regards to compensation and pension benefits. Under his leadership of the Commission they set up policies to fight discrimination in housing as well as public conveniences. Dr. Chopra lead the team to prepare rules of procedure for discrimination in housing to be followed by the judges and also lead the team to interview and select Housing Court Judges that will reduce discrimination even further in these areas in the future. Mr. Giri Chhabra, President of Hindu Center in New York said his leadership to Indian-American community and particularly to Hindu Center for the last few years has been exemplary and outstanding.

Mr. Samir Chopra, Mrs. Usha Chopra, Fernando Bohroquez (NYSBA Chair of Civil Rights), Dr. Parveen Chopra (2009 Haywood Burns Memorial Honoree)

Dignitaries who attended the function included Honorable Judge Frank Schellace of Supreme Court; Hon. Judge Sharon Stern Gertsman of Supreme Court, Hon. Thomas Levin, Hon. Judge Elizabeth Dalal Pessala from Long Island, Hon. Judge Helena Heath-Roland from Albany City Court, Hon. Senator Toby Stavisky, Hon. Senator Hiram Monserrate, Hon. Assemblyman Andrew Hevesi, Hon. Assemblywoman Nettie Mayersohn, Hon. Assemblywoman Vivian Cook, Hon. Assemblyman Michael Den Dekker, Hon. Assemblyman Mark Weprin, Hon. Assemblyman Jose Peralta, Hon. Assemblywoman Meng, Hon. Councilman and Chair of Finance David Weprin from New York City, Hon. Councilman John Liu, Hon. Councilwoman Gail Bewer, Hon. Councilman Thomas White, Hon. Councilwoman Leslie Gross from Town of North Hempstead, Mr. Steven Richman – General Counsel NYC Board of Elections, Ms. Nara Rampilla – Special Counsel to the United Nations, Hon. Padam Shree Dr. P. Jayaraman founder of Bhartiya Vidya Bhavan USA, Dr. A.M. Gondane Deputy Council General in New York, Rev. Reginald Tuggle African American leader of Council of Churches, Mr. Julius Pearse founder President of Dr. Martin Luther King Foundation, Rabbi Anchelle Perl a national Jewish leader who has his own national radio and television programs, Rabbi Moses Birnbaum of Kew Gardens synagogue, Mr. Tony Patino chairperson of Coalition of Association of Hispanic Americans, Ms. Petsy Chen President of Taiwanese Center, Mr. Giri Chhabra President Hindu Center and Temple, Mr. Kailash Sharma President of Nargis Dutt Memorial Foundation, Brahma Kumari Anjani from Global Harmony House, Mr. Darshan Bagga chairperson of Sikh Forum and Senior representatives from the United States Attorney's Office in Manhattan, Queens and Kings County as well as District Attorney's Offices from New York City, Long Island, Albany, Buffalo and other cities.

"Investigation" of Banks' Usage of H-1B Visas Gets It Wrong

BY ALLEN E. KAYE

The Associated Press continues to run poorly researched pieces on H-1B visas and the Banks receiving "bailout" money from the Federal Government. The articles leave the false impression that as the Banks were taking bailout money, they were simultaneously firing U.S. workers and hiring "cheap" foreign labor. The AP articles are based on faulty interpretations of publicly available data, and totally ignore the strong labor market protections required to bring H-1B professionals to the U.S.

The faulty and inflammatory AP articles are now being used by Senators Sanders and Grassley to push an amendment onto the pending economic stimulus bill that would bar banks and other financial institutions that accept funding under the "TARP" legislation from hiring a single foreign professional under the H-1B program.

Allen E. Kaye

Let's set the record straight. The AP article refers to the number of "labor condition applications" (LCAs) filed by certain banks over the past 5 years. The LCA applications are a precursor to an actual petition for an H-1B worker. Multiple LCAs are usually filed for each employee due to heavy regulatory requirements, such as the need to file LCAs for different geographic locations to comply with wage rules, and many LCAs never turn into actual petitions. The reporters neglected to understand, or to examine, the actual petitions for H-1B professionals that were granted under the program in any given fiscal year. Had they looked at the available data, they would have found figures that undercut their allegations.

It is not possible to get a clear idea of numbers of H-1B visas by looking at LCAs. One must look at petitions filed with the U.S. Citizenship and Immigration Services, which is what the National Foundation for American Policy (NFAP) did. In fact, according to the NFAP, the largest financial institution in the country, in terms of employees, actually received a grand total of 155 approved petitions for new H-1B professionals in 2007, out of a total workforce of 387,000! Bank of America received approved petitions for 66 new H-1B professionals in a total workforce of 210,000. In another recent study, the NFAP found that for every H-1B professional hired, a company will increase its overall workforce by 5 workers.

Existing law carefully protects wages by requiring that companies pay the higher of the wage paid by their competitors for comparable positions or the wage the company itself pays to other comparable workers. These protections are enforced by the Department of Labor and non-compliance includes heavy penalties, including complete bars from petitioning for any foreign worker. To further show the current strength of the H-1B program, the monies used to enforce these law comes from the H-1B employers, who pay government fees of $2,320 each time they file an H-1B, including $500 earmarked specifically for enforcement of the law!

A recent edition of the New York Times includes a business section article that points out how foreign companies with U.S. subsidiaries and U.S. companies with international operations are absolutely critical to the stimulus plan working. A senior manager of Sanyo's solar division says that America is positive about solar energy, "but it doesn't have enough production capacity to cover its demand." These are the very companies that need to be able to target talent in the international market to make their U.S. operations grow and prosper.

U.S. economic recovery and growth depends on the U.S. remaining competitive in a globalized economy with a globalized work force. These are the facts that Congress needs to consider as it crafts new legislation. What is needed is a proper, well-documented study on H-1B visa numbers and usage, and an agreement on the appropriate amount of H-1B visas needed to meet real and legitimate need, in the context of employment rate rise or fall. Legislation based on faulty and inflammatory allegations will only cripple our economy, undermine our nation's global competitiveness, and demagogue an issue rather than deal with real solutions that serve the national interest.

Matthew Lupoli - 2009 Sheeger Award Winner

BY MARK WELIKY*

The Queens County Family Court

Queens Family Court can be a difficult place to carry on your law practice. At least the current courthouse (pictured above) is a lot nicer venue since the court was moved from Parsons Boulevard. The old courthouse was originally the main branch of the Queensborough Public Library and should never have been a courthouse in the first place! Although family law can be a challenging arena some of our members still find time within their practice to volunteer for pro bono assignments for these cases.

One such volunteer lawyer is Matthew M. Lupoli. Matthew has been selected to be the recipient of the Floyd Alan Sheeger Award for 2009. This award presented by the Queens County Bar Association (QCBA) and the Queens Volunteer Lawyers Project (QVLP) is in recognition of outstanding pro bono service by a Queens family law practitioner. Floyd Sheeger was himself one of our most exceptional pro bono volunteer lawyers in Queens Family Court until his untimely death in late 2004. This award is presented to lawyers who carry on his tradition of service to those least able to cope with the serious issues that low-income persons may be facing with family law situations.

Matthew, a Flushing solo practitioner with a focus on family and elder law, is a graduate of Fordham Law School, a member of the QCBA since 1974 and a member of the QVLP pro bono panel since its inception in 1991. He is being honored for his continuing service to the pro bono program and for the numerous cases for which he has provided pro bono representation over these many years. Over the years he has served on several QCBA committees, including Judiciary, Family Law, Appellate Practice and the Elderly and Disabled committee. He is a past president of the Queens County Columbian Lawyers and a member of the Flushing Lawyer's Association and of the Long Island City Lawyers Club. Mr. Lupoli recently joined with many of his QCBA colleagues in volunteering for our new foreclosure prevention initiative. Past recipients of the Sheeger Award are QCBA members Michael M. Cohen and Regina Alberty. We salute Matthew and congratulate him for this honor and thank all of our pro bono volunteers for their service to our association and to the community of Queens County.

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

New Rules of Professional Conduct

Effective April 1, 2009, a new "Rules of Professional Conduct" will replace the existing Disciplinary Rules in New York.

In February 2008, the New York State Bar Association submitted to the Administrative Board of the Courts a five-year study that included a proposed new ethics code. An internal committee appointed by the Administrative Board carefully analyzed the State Bar's proposed rules over a period of several months before issuing its recommendations to the Board. The Board in turn approved most of the State Bar's proposals, though in some instances it retained the language of existing Disciplinary Rules in whole or in part. The Board also approved the State Bar's recommended transition to the ABA Model Rules format. The Rules were formally reviewed and adopted by the Justices of the four Appellate Divisions last week.

Highlights of significant ethics changes contained in the new Rules of Professional Conduct are set forth below:

Adoption of ABA Model Rules Format

• This standardized format, used in 47 other states, is organized according to a lawyer's role as litigator, counselor, negotiator, etc., and will facilitate a lawyer's ability to assess specific ethical issues in context. It has generated a national body of ethics law that will ease ethical research and guidance by New York lawyers as well as out-of-state lawyers seeking to research and follow New York's rules.

Scope of Representation and Allocation of Authority Between Client and Lawyer (Rule 1.2)

• Rule 1.2 codifies a lawyer's obligation to abide by a client's decisions regarding the objectives of representation, including whether to settle a civil matter or to enter a plea, waive a jury trial or testify in a criminal matter.

Fees and Division of Fees (Rule 1.5)

• Rule 1.5(b) requires a lawyer to communicate fees and expenses to the client before or within a reasonable time after commencement of representation, thereby extending the current letter of engagement rule (22 NYCRR 1215), without the necessity of a writing, to all matters currently excepted under that rule.

Confidentiality of Information (Rule 1.6) and Conduct Before a Tribunal (Rule 3.3)

• Rule 1.6(a)(2) permits disclosure of confidential client information impliedly authorized to advance the client's best interests when it is reasonable or customary.

• Rule 1.6(b) permits a lawyer to reveal or use confidential client information necessary to "prevent reasonably certain death or substantial bodily harm."

• Rule 1.6(b)(4) permits a lawyer to reveal confidential information to the extent necessary to secure legal advice about compliance with ethical rules or other laws.

• Rule 3.3 requires a lawyer to correct a false statement of material fact or law previously made to the tribunal by the lawyer or the client and to take necessary remedial measures, including disclosure of confidential client information.

• Rule 3.3 requires a lawyer who knows that a person intends to, is or has engaged in criminal or fraudulent conduct related to the proceeding to take reasonable remedial measures, including disclosure of confidential client information.

Current Clients: Specific Conflict of Interest Rules (Rule 1.8)

• Rule 1.8(c) prohibits a lawyer from soliciting any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or from preparing on a client's behalf an instrument giving a gift to the lawyer or a person related to the lawyer, unless the lawyer or recipient of the gift is related to the client and a reasonable lawyer would find the transaction fair and reasonable.

• In a business transaction between lawyer and client, Rule 1.8(a) requires the lawyer to advise the client in writing to seek the advice of independent counsel and to give the client a reasonable opportunity to do so; and the client must give informed written consent that addresses the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction.

Special Conflicts of Interest for Former and Current Government Officers and Employees (Rule 1.11)

• Rule 1.11 governs the lawyer's obligations based on conflicts presented when a lawyer moves from government to private employment and vice versa, and provides that such conflicts may be waived by the government entity upon informed consent.

Duties to Prospective Clients (Rule 1.18)

• Rule 1.18 governs a lawyer's duties to a prospective client when that person and the lawyer ultimately do not form an attorney-client relationship. It applies the same duty of confidentiality owed to former clients. However, a lawyer or law firm may nonetheless oppose a former prospective client if the lawyer's current client and former prospective client give informed written consent, or the law firm may do so if certain conditions are met, including timely screening of the disqualified lawyer and prompt written notice to the former prospective client.

• The protections of Rule 1.18 are expressly denied to a prospective client who communicates with a lawyer in order to disqualify the lawyer from handling a materially adverse representation in the same or a substantially related matter.

Voluntary Pro Bono Service (Rule 6.1)

• Though not enforceable through the disciplinary process, Rule 6.1 reaffirms a lawyer's responsibilities to provide at least 20 hours of pro bono legal services each year to poor persons, and to contribute financially to organizations that provide legal services to poor persons.

Other Noteworthy Developments

• Rule1.3 (Diligence) mandates that a lawyer "shall not neglect" a legal matter and obliges a lawyer to "act with diligence and promptness" in representing a client.

• Rule 1.4 (Communication) codifies a lawyer's duty to communicate effectively with the client, including keeping the client reasonably informed about the status of the matter promptly complying with a reasonable request for information.

• Rule 1.12 applies conflicts rules to arbitrators and mediators, other third-party neutrals and law clerks.

• Rule 1.14 provides guidance to a lawyer whose client has diminished capacity. It allows the lawyer to take action to protect the client from substantial physical and financial harm, and permits disclosure of confidential client information to the extent reasonably necessary to protect the client's interests.

• Rule 2.4 deals with lawyers serving as third-party neutrals, such as arbitrators and mediators, and sets forth their obligations with respect to unrepresented parties.

• Rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding or cause needless expense.

• Rule 3.9 requires a lawyer to alert legislators and administrative agencies as to when the lawyer is speaking as a paid advocate rather than a public citizen.

• Rule 4.3 sets forth a lawyer's obligations when dealing, on behalf of a client, with a person who is not represented by counsel.

• Rule 6.4 sets forth a lawyer's duties when participating in law reform activities that may affect the interests of the lawyer's clients.

• Rule 8.2 expands the prohibition against false statements of fact regarding "qualifications" of judges or judicial candidates to include false statements about "conduct or integrity."

The new Rules of Professional Conduct are available at www.nycourts.gov/rules/jointappellate/.

Report of the Queens County Bar Association Speakers Bureau Committee:

Maura Nicolosi spoke at a meeting of the AVIVA Chapter of Jewish Women International at the North Hills Branch of the Public Library at 54-07 Marathon Pkwy., Little Neck, on a legal topic of interest, to the group. Ms. Frida Wolf of Kew Gardens was the chair of that committee.

Former President of the Queens County Bar Association Stephen Singer received high praise, compliments for the program he ran at the St. John's Law School. The subject he spoke on and instructed was concerning criminal case interviews, and discussions at an attorney's office with the prospective client. The program was conducted by Ms. Jeanne Bayles at the law school.

The Honorable Justice of the Supreme Court Queens County Daniel Lewis was the judge at a moot court competition between students of the Duke Ellington Class of the Edward Kennedy School 166-01 116th Avenue, Jamaica, New York. Judge Lewis was also guiding and helping provide direction to the students to present their arguments in the moot court. Karen McGregor was in charge of the class at the Ellington Kennedy School.

Maura Nicolosi, undertook a program at the Jewish Women's International North Hollis Branch of the Public Library on Marathon Pkwy., in Little Neck, on the topic of Elder Law, Wills & Estates. Myra Feldman of Douglaston was the chair of that committee meeting.

Jason Stern did a fine job of addressing the Friendship Club of the Samuel Field Y on Little Neck Parkway in Little Neck on accidents, negligence law, and general legal topics of interest, the chair of that event was Barbara Aiken of Bayside, Queens.

Respectfully Submitted,

GUY R. VITACCO, SR.
CHAIR SPEAKERS' BUREAU

THE CULTURE CORNER

BY HOWARD L. WIEDER

THE 92ND STREET Y continues its phenomenal Spring 2009 program. The **MET OPERA** has tickets left for Cycle 1 of Wagner's *RING*, so please do not wait for the last minute to order your tickets, since Cycles 2 and 3 are already sold out. Also, The Met Opera's production of **IL TROVATORE** runs through mid-May with two all star casts. Both **THE 92ND STREET Y** and the **MET OPERA, even in his hard economy, deserve and merit your patronage, since they constantly present programs and productions of excellence.**

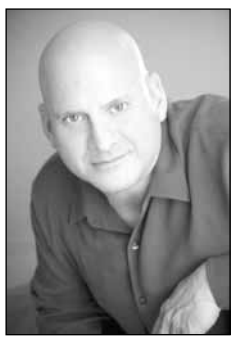
THE 92ND STREET Y PRESENTS

Shai Wosner will make his 92nd Street Y debut in the final concert of the **Masters of the Keyboard** series, **Saturday, March 14, 2009.** This talented young pianist will perform **Schumann's** *Nachtstücke* (*Nightpieces*) and ***Carnaval,* as well as Claude Debussy's** popular, contemplative, and adventurous ***Préludes*, Book 1**. Despite the chronological distance between these two composers, Mr. Wosner draws perceptive parallels between their piano works, making this performance an example of the Y's unique ability to present concerts that are both musically rich and intellectually stimulating.

Shai Wosner performs a wide-ranging repertoire, from Mozart and Beethoven to Ligeti and composers of his own generation. In recent seasons, Wosner has appeared with numerous major orchestras in North America and Europe, including re-engagements with the Los Angeles Philharmonic, the Philadelphia Orchestra, the symphony orchestras of Chicago, Baltimore, San Francisco and Atlanta; Staatskapelle Berlin, the Gothenburg Symphony, the Barcelona Symphony, the Frankfurt Radio Symphony, and Orchestre National de Belgique, among others. In 2006 he debuted with the Vienna Philharmonic during the 250th anniversary celebrations of Mozart's birth, in Salzburg. As a chamber musician, he has collaborated with numerous esteemed artists including Pinchas Zukerman, Lynn Darrell, Who-Lang. Lin, and Christian Tetzlaff.

Tickets are $48/$38 ($25 for ages 35 and younger) *and may be purchased by calling 212.415.5500, visiting* **www.92Y.org/concerts**, *or at the box office. The* ***92nd Street Y*** *is located at 1395 Lexington Avenue at 92nd Street.*

The **92nd Street Y's Distinguished Artists in Recital** series continues **Sunday, March 15,** when **violinist NIKOLAJ ZNAIDER** performs an afternoon of chamber music **with musicians from the New York Philharmonic** and his regular recital partner**, pianist Saleem Abboud Ashkar.** This concert **continues the 92nd Street Y's partnership with the New York Philharmonic**, which gives audiences the opportunity to hear these preeminent orchestral players in a chamber music setting with guest soloists from around the world.



Howard L. Wieder

The program begins with **Felix Mendelssohn's** popular **Piano Trio No. 1 in D minor, Op. 49**, the work that prompted Schumann to state that "Mendelssohn is the Mozart of the nineteenth century, the most illuminating of musicians." The second piece, **Johann Sebastian Bach's Sonata for Violin & Harpsichord No. 4 in C minor, BWV 1017**, which will be performed with piano, is one of six duo sonatas written with fully realized parts for both instruments. The afternoon's final work, **Mendelssohn's String Octet in E-flat Major, Op. 20**, was written when the composer was only 16 years old and premiered at one of his family's famous Sunday musicales.

Born in Denmark to Polish-Israeli parents, **NIKOLAJ ZNAIDER** studied with the eminent Russian pedagogue Boris Kushnir, and has already worked with many of the world's top ensembles and soloists. Drawing from an eclectic background, his playing has been heralded in the *Strad* as "extraordinarily intelligent, soulful and impassioned, yet without a hint of indulgence." In January 2008, Znaider made his recital debut at the Vienna Musikverein to much critical acclaim, and *Die Presse* wrote, **"for many, the 32-year-old is already today the best violinist of the world."**

A keen recitalist and chamber musician, Znaider has shared the stage with today's foremost artists, including Daniel Barenboim, Leif Ove Andsnes, Yuri Bashmet, Yefim Bronfman, Lynn Darrell, Lang Lang, and Pinchas Zukerman. Also passionate about musical education, Znaider is **Founder and Artistic Director of the Nordic Music Academy**, an annual summer school that aims to foster conscious and focused musical development based on quality and commitment. Znaider is an exclusive RCA RED SEAL/BMG SONY MASTERWORKS recording artist, and **his most recent project, a recording of the complete Mozart Piano Trios with Barenboim and Kyril Zlotnikov**, has just been released on EMI Classics.

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The Zukerman ChamberPlayers' final 92nd Street Y concert of the season, on Sunday, March 22, welcomes world-renowned **pianist YEFIM BRONFMAN**, a long-time friend of both Pinchas Zukerman and the Y**. Joined by double bassist Joel Quarrington,** the ensemble's performance features **an up-close and personal look at the two electrifying chamber works featured on the May 2008 Sony Classical recording** by the Zukerman ChamberPlayers and Bronfman: **Mozart's Quartet for Piano and Strings in E-flat Major, K. 493**, and **Schubert's** popular **"Trout" Quintet**.

A prodigious talent recognized worldwide for his artistry, **PINCHAS ZUKERMAN** has been an inspiration to young musicians throughout his adult life. In a continuing effort to motivate future generations of musicians through education and outreach, the renowned artist teamed up with four protégés to form the **Zukerman ChamberPlayers** during the 2002–03 season.

Yefim Bronfman was born in Tashkent in the Soviet Union in 1958. After immigrating to Israel with his family in 1973, he made his international debut two years later with Zubin Mehta and the Montreal Symphony. He made his New York Philharmonic debut in May 1978, his Washington recital debut in March 1981 at the Kennedy Center, and **his New York recital debut in January 1982 at the 92nd Street Y**. In addition to acclaimed solo, orchestral, and recording careers, Bronfman is a devoted chamber music performer who has collaborated with the Emerson, Cleveland, Guarneri, and Juilliard String Quartets, as well as the Chamber Music Society of Lincoln Center. He has also played chamber music with Yo-Yo Ma, Joshua Bell, Lynn Darrell, Shlomo Mintz, Jean-Pierre Rampal, Pinchas Zukerman, and many other artists.

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Musica Sacra, one of New York's most distinguished professional choruses, presents the final concert of their season on **March 20, 2009** in the **Rose Theater, Home of Jazz at Lincoln Center**. Under the leadership of music director **Kent Tritle**, the evening's program celebrates the confluence of well-established artists and the next generation of musical talent. Highly-regarded pianist **Margo Garrett** pairs with the **Sorel Organization's** *Medallion in Collaborative Piano* **winner Sunglee Victoria Choi** to accompany the chorus in performing **Brahms's rarely heard piano four-hands version of** *Ein Deutsches Requiem,* featuring soprano **Leslie Fagan** and Lindemann Young Artist baritone **John Michael Moore**. Ms. Garrett and Ms. Choi will also collaborate in **Schubert's** *Fantasia* **in F minor**, while Ms. Choi will accompany Mr. Moore for **Mahler's** *Lieder eines fahrenden Gesellen*.

Founded in 1964, **Musica Sacra is the longest continuously performing professional chorus in New York City**. In a city rich with cultural life and activity, Musica Sacra stands out as one of the few outstanding presenters of choral music dedicated to communicating art through the profound human experience and connectedness of ensemble singing. In addition to its acknowledged affinity for Baroque music, Musica Sacra has performed in all styles, from the chant of Hildegard to commissioned works and first performances of leading contemporary composers, such as Diamond, Britten, Khatchaturian, Convery, and Rorem. They have recorded on RCA, BMG, and Deutsche Grammophon.

Tickets are $25-$110 and are available at ***www.MusicaSacraNY.com/tickets*** *or by calling CenterCharge at 212-721-6500 (TTY 212-957-1709).*

The 92nd Street Y's **Art of the Guitar** series **celebrates the 50th anniversary of Los Romero**, **"the royal family of the guitar."** The group marking this amazing milestone with an entire year of concerts across the globe, and will make **its only New York appearance of the season at the Y on Saturday, March 21, 2009**.

These **three generations of master guitarists** are a musical phenomenon, known for taking audiences on journeys exploring the genre's most beautiful, challenging and thrilling works. At the Y, **Pepe**, **Celin**, **Celino**, and **Lito** will celebrate the ensemble's 50th anniversary, and have chosen highlights of its career: **Tomás Bretón's Prelude to** *La Verbena de la Paloma*, **Gaspar Sanz's** *Suite española*, **Joaquín Rodrigo's** *Tonadilla*, **Jeronímo Giménez's** *La boda de Luís Alonso*, **Georges Bizet's** *Carmen* **Suite, Selections**

———————Continued On Page 7

The Culture Corner

Continued From Page 6

from Heitor Villa-Lobos's Five Preludes for Guitar, selections from Enrique Granados *Danza españolas*, **Francisco Tárrega's** *Jota aragonesa*, **and two works by Pepe Romero:** *Farrucas de Sabicas* **and** *De Cádiz a la Habana*. The concert is preceded by a 7 pm talk with Art of the Guitar's artistic director Benjamin Verdery.

In addition, **on Sunday, March 22 at 11:30am, as part of the 92nd Street Y's Guitar Institute, Los Romero will offer a guitar master class**.

Grandfather **Celedonio Romero originally founded Los Romero with his sons Celin, Pepe, and Angel**. Celedonio began his solo career in Franco's Spain, and as each of his sons reached the age of two or three they began guitar lessons with their father. All three made their debuts in Spain by the age of seven. In 1957, while the boys were still in their teens, the family emigrated to the United States and "The Romeros" entered the world's stage as its first guitar quartet. The ensemble added its third generation when Celin's son, Celino, replaced Angel in 1990. Angel's son Lito joined the quartet upon the death of his grandfather in 1996.

Spanish composer Joaquín Rodrigo says: **"The Romeros have developed the technique of the guitar by turning what is difficult into something easy. They are, without a doubt, the grand masters of the guitar."**

Los Romero has performed hundreds of concerts all over the world, inspiring enthusiastic praise from both critics and audiences. The ensemble has also worked to enrich the guitar quartet repertoire, premiering works by distinguished composers including Joaquín Rodrigo, Federico Moreno Torroba, Morton Gould, Francisco de Madina, Lorenzo Palomo and others. Los Romero has appeared on numerous television programs including the *Today* and *Tonight* shows, as well as numerous PBS specials, including *Evening at Pops*.

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With the **Great Ensembles** series, the **92nd Street Y** continues its tradition of giving international ensembles the opportunity to perform for New York audiences. The series' next concert, on **March 28, 2009**, features **the Nash Ensemble of London**, recognized as one of the UK's most talented and adventurous chamber ensembles. Following **its critically acclaimed New York debut at the 92nd Street Y in 2007**, the Nash Ensemble was promptly re-invited back to give New York audiences another taste of its electrifying music making.

The first work of the Nash Ensemble's March program, **Wolfgang Amadeus Mozart**'s **Trio for Piano, Clarinet & Viola, K. 498**, is rumored to have been written while the composer was participating in a game of skittles (a type of bowling). The next piece, the **Quintet for Clarinet, Horn, Piano & Strings,** is an early work by one of Britain's most popular and accomplished composers, **Ralph Vaughan Williams**. The third work, the **Suite from** *L'histoire du Soldat* **for Clarinet, Violin & Piano**, was arranged by **Igor Stravinsky** based on his popular theatrical work about a soldier who trades his fiddle to the devil for a book that predicts the economy's future. The Nash completes the program with the second of **Antonín Dvorák**'s two piano quartets, the **Quartet for Piano and St rings in E-flat Major, Op. 87**.

Presenting works ranging from Haydn to the avant-garde, **the Nash Ensemble is acclaimed for its bold programming and virtuosic performances**. It is a major contributor towards the recognition and promotion of contemporary composers: **by the end of this season the group will have performed over 260 premieres, of which 145 have been specially commissioned**. The Nash has received many accolades, including two Royal Philharmonic Society Awards in the chamber music category. **An impressive collection of recordings illustrates the same varied and colorful combination of classical masterpieces, little-known and neglected gems, and important contemporary works.** The Ensemble's British Composers series for Hyperion Records has received much acclaim: the recent CD of chamber works by Coleridge-Taylor was nominated for a *BBC Music Magazine* Award and was Editor's Choice in the November '07 edition of *Gramophone*. The Ensemble's most recent CD releases include Beethoven's string quintets, Mozart's piano quartets, Brahms's string sextets and Piano Quartets Nos. 1 and 3, and chamber works by Saint-Saëns. Future recordings will include Mozart's string quintets, Brahms's Piano Quartet No. 2 and Clarinet Trio, and chamber works by David Matthews.

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On **April 4, 2009**, pianist **Tania Stavreva** will make her **New York Recital Debut in Carnegie's Weill Recital Hall**, a performance highlighted by the **United States Premiere of Israeli composer Gil Shohat's** *Sparks from the Beyond*. The afternoon's program will showcase Ms. Stavreva's specialization in 20th- and 21st-century music through a diverse selection of composers, including **Alberto Ginastera, Alexander Scriabin, Carl Vine, Claude Debussy,** and **Alexander Vladigerov**. Ms. Stavreva is the recent winner of Artists International Presentations annual performance competition, which awards its recipients with a New York City recital debut.

Bulgarian-born pianist **Tania Stavreva** has established herself as a gifted young artist in the standard repertoire, as well as a devoted student of 20th- and 21st-century works. Ms. Stavreva is a graduate of Bulgaria's "Dobrin Petkov" School for gifted young musicians, where she studied with renowned pedagogue Rositsa Ivancheva for thirteen years. She went on to earn her Bachelor's Degree from Boston Conservatory, where she was a student of Michael Lewin and the winner of the 2005 Chamber Music Honors Competition, the 2006 Lee Piano Scholarship and the 2007 Piano Honors Competition. She is one of the first pianists of her generation to perform contemporary classical music at such rock venues as Webster Hall in New York and Paradise Rock Club in Boston. Ms. Stavreva has appeared with the Boston Conservatory Symphony Orchestra and Sinfonia Perugina under conductors Bruce Hangen and Enrico Marconi. She is a regular participant at numerous summer festivals, including Boston's New Music Festival, Pianofest in the Hamptons, Music Fest Perugia and Varna Summer International Music Festival in Bulgaria.

Central to Tania Stavreva's recital is the United States Premiere of Israeli composer Gil Shohat's *Sparks from the Beyond,* which won Mr. Shohat the **1997 Arthur Rubinstein Composition Competition**. Both at home and abroad, Gil Shohat is one of the most important and influential personalities of Israeli classical music. He is the composer of nine large-scale symphonies, ten concertos for various instruments, three operas, various oratorios, cantatas, solo vocal pieces, and dozens of chamber and piano pieces, as well as the performer of more than 80 concerts a year worldwide, both as a conductor and pianist. Divided into seven short movements, ***Sparks from the Beyond*** **is inspired by the philosophies and symbolism of Kabbalah**, the mystical teachings of Judaism. In the same way that Kabbalah seeks to explain the relationship between an infinite and eternal Creator with the mortal universe, each 'spark' aims to illustrate the nature of some of life's most universal and esoteric concepts in an attempt to achieve spiritual realization: Infinity, Existence, Motion, Material, Faith, Beauty, and Love.

In addition to presenting the US Premiere of *Sparks from the Beyond*, Ms. Stavreva will perform a variety of fundamental 20th- and 21st-century repertoire: **Alberto Ginastera's Piano Sonata No. 1, Op. 22**, **Alexander Scriabin's** *Vers la Flamme*, Australian composer **Carl Vine's Sonata No. 1**, a selection from both the first and second books of **Claude Debussy's** *Préludes*, individual masterpieces that represent the pinnacle of Debussy's keyboard art; and **Alexander Vladigerov's** *Variations on a Bulgarian Folk Song* **"Dilmano Dilbero."**

Tickets are $25 General Admission, and $20 for students and senior citizens with valid identification. Tickets are on sale at Weill Recital Hall (57th Street & 7th Avenue)

MET OPERA'S *RING* CYCLE

Don't miss your final opportunity to see Otto Schenk's landmark production of the world's greatest theatrical journey, Wagner's *Ring* cycle, Cycles 2 and 3 are sold out, but tickets are still available for Cycle 1; this Saturday matinee series, featuring James Morris, Johan Botha, Waltraud Meier, and Christine Brewer, is conducted by James Levine. See www.metopera.com.**Performance dates for Cycle 1:**

March 28 - - *DAS RHEINGOLD* (Saturday, 1:00 P.M.)April 11 - - *DIE WALKÜRE* (Saturday, 12:00 P.M.)April 18 - - *SIEGFRIED* (Saturday, 12:00 P.M.)April 25 - - *GÖTTERDÄMMERUNG* (Saturday, 12:00 P.M.)

THE MET OPERA'S New Production of Verdi's *Il Trovatore*,with two all-star casts, runs through May 8

A cast of internationally most acclaimed Verdi singers is showcased in the Met's new production of the Italian master's melodic tour de force, ***IL TROVATORE***, opened February 16. Renowned director **David McVicar** makes his Met debut, and **Gianandrea Noseda** conducts a cast that includes **Marcelo Álvarez** in his first Met performances of the heroic title role, and three singers who are celebrated interpreters of their parts: **Sondra Radvanovsky** as Leonora, **Dolora Zajick** as Azucena, and **Dmitri Hvorostovsky** as Count di Luna. **Kwangchul Youn** makes his Met role debut as Ferrando. In later per-

Continued On Page 8

The Culture Corner

Continued From Page 7

formances, **Marco Berti** is Manrico; **Hasmik Papian** is Leonora; **Luciana D'Intino** is Azucena, **Zeljko Lucic** is di Luna, and **Burak Bilgili** is Ferrando, conducted by **Riccardo Frizza**. Performances run through May 8.

When this staging premiered in Chicago, *The Globe and Mail* said it was "packed with drama-ripping good theater." McVicar's new production, featuring sets by Charles Edwards and costumes by Brigitte Reiffenstuel in their Met debuts, is inspired by the work of Francisco Goya – particularly his famous prints "The Disasters of War," with their haunting depictions of that time, and his nightmarish "Black Paintings." The sets are designed on a turntable to minimize scene change breaks. Jennifer Tipton returns to the Met to create the lighting design. This *Il Trovatore* is a co-production with the San Francisco Opera, where it will open in September, and the Lyric Opera of Chicago.

In addition to repertory from his native Russia, the exceptionally gifted, charismatic, and handsome **DMITRI HVOROSTOVSKY,** playing the evil and vindictive Count di Luna, has made a specialty of Verdi's lyric baritone roles, with his Met repertoire including Renato in *Un Ballo in Maschera*, which he sang last season, Germont in *La Traviata*, and Rodrigo in *Don Carlo*. He made his Met debut in *The Queen of Spades*, in 1995, and has also performed the Russian parts of Andrei Bolkonsky in the Met premiere of *War and Peace*, and the title role of *Eugene Onegin*, which was transmitted as part of *The Met: Live in HD* in 2007. He has also sung the title role of Mozart's *Don Giovanni*, Belcore in *L'Elisir d'Amore*, and Valentin in *Faust* at the Met, as well as the song cycles, Mahler's *Lieder eines fahrenden Gesellen* and Ravel's *Don Quichotte à Dulcinée* with the MET Orchestra, conducted by James Levine. This season he appears in *Simon Boccanegra* at the San Francisco Opera and in *Il Trovatore* at the Royal Opera House, Covent Garden, and in concerts worldwide, including a tour with pianist Evgeny Kissin.

Tenor **MARCELO ÁLVAREZ** makes his Met role debut as Manrico in the new *Il Trovatore*. Next season, he adds the role of Cavaradossi to his company repertoire, when he sings in the new production premiere of *Tosca* on Opening Night, opposite Karita Mattila in the title role. Manrico is the Argentinean tenor's third major Verdi role at the Met; he made his debut as Alfredo in Franco Zeffirelli's new production of *La Traviata* in 1998 and has also sung the Duke in *Rigoletto*. His diverse Met repertoire also includes Don José in *Carmen*, which he performed last season, Edgardo in *Lucia di Lammermoor*, Des Grieux in *Manon*, Rodolfo in *La Bohème*, and the Italian Singer in *Der Rosenkavalier*. He has sung Don José with many companies, including the Royal Opera, Covent Garden, and the Théâtre du Capitole in Toulouse; Alfredo at the Zurich Opera, and Cavaradossi in *Tosca* at the Royal Opera House, Covent Garden. Later this season he sings Maurizio in *Adriana Lecouvreur* at Turin's Teatro Regio.

SONDRA RADVANOVSKY has sung some of Verdi's most demanding soprano roles at the Met, including Elvira in *Ernani*, Elena in *I Vespri Siciliani*, Elisabeth in *Don Carlo*, the title role in *Luisa Miller*, and Leonora in *Il Trovatore*, which she first sang here in 1999. Radvanovksy is a graduate of the Met's Lindemann Young Artist Development Program, and her repertoire with the company also includes Musetta in *La Bohème*, Donna Anna in *Don Giovanni*, and Roxane in Alfano's *Cyrano de Bergerac*, a role she sang in the work's United States premiere in 2005. Though she focuses on Verdi, this season the American soprano earned raves for her performance in the title role of Puccini's *Suor Angelica* at the Los Angeles Opera and for her Washington National Opera debut in the title role of Donizetti's *Lucrezia Borgia*.

As Azucena, **DOLORA ZAJICK** "ruled the stage more like a force of nature than a mezzo-soprano playing a part," the *Chicago Tribune* critic wrote in 2006. The American singer has a large repertoire, and is especially renowned for the dramatic Verdi parts. Azucena was the role of her Met debut in 1988; she last sang it here in 2001. She is equally well-known as Amneris in *Aida* (a role she has sung an astonishing 62 times at the Met and which she returns to sing next season), Eboli in *Don Carlo*, and Ulrica in *Un Ballo in Maschera*. Last season, she returned to the role of Adalgisa in *Norma*, which she had sung at the production's premiere in 2001. Zajick appeared in the Met premiere of *Rusalka* (1993) and the world premiere of *An American Tragedy* (2005). Among her performances elsewhere this season were *Don Carlo* at La Scala's opening night and *Cavalleria Rusticana* at the Houston Grand Opera and Chicago's Lyric Opera.

KWANGCHUL YOUN makes his role debut as Ferrando, capping a busy season at the Met, where he has already appeared as the Commendatore in *Don Giovanni* and King Marke in *Tristan und Isolde*. The Korean bass made his Met debut in 2004 as Sarastro in *Die Zauberflöte* and has also sung Ramfis in *Aida*, Hermann in *Tannhäuser*, and the Old Hebrew in *Samson et Dalila* with the company. Earlier this season he sang Méphistophélès in a new production of *Faust* at the Vienna State Opera.

Conductor **GIANANDREA NOSEDA** made his Met debut in 2002 conducting Prokofiev's *War and Peace* and returned to lead Verdi's *La Forza del Destino* in 2006 and *Un Ballo in Maschera* last season. The Italian conductor holds the titles of music director of Turin's Teatro Regio, chief conductor of the BBC Philharmonic, and artistic director of the Stresa Festival on Lake Maggiore . After winning Spain's Cadaqués Orchestra International Conducting Competition in 1994, he became the orchestra's principal conductor. Three years later, he became the first foreigner to be named principal guest conductor of the Mariinsky Theatre (Kirov Opera) in St. Petersburg, where he has led, among many other operas, the company's first-ever performance of *La Sonnambula*. This season the maestro conducts *Thaïs* and *The Queen of Spades* at the Teatro Regio and later this year will lead performances with the Israel Philharmonic, the Swedish Radio Orchestra, and the Finnish Radio Symphony Orchestra.

Italian tenor **MARCO BERTI** makes his Met role debut as Manrico, following his appearances last season in another Verdi role, Radamès in *Aida*. He made his company debut in 2004 as Pinkerton and later sang Don José in *Carmen*. Elsewhere this season, his schedule includes Cavaradossi in *Tosca* and Riccardo in *Un Ballo in Maschera* at the Vienna State Opera, Don José at the Bavarian State Opera and Bilbao Opera, and Dick Johnson in *La Fanciulla del West* in Seville . In September, Berti opens the San Francisco Opera season in this production of *Il Trovatore*.

HASMIK PAPIAN adds the role of Leonora in *Il Trovatore* to her Met repertoire this season. She made her company debut in 1999 in the title role of *Aida*, a role she repeats in the 2009-10 season, and last season sang two of the most challenging roles in the soprano repertory: the title role of Bellini's *Norma* and Lady Macbeth in Verdi's *Macbeth*. This season she stars in *La Forza del Destino* at the Vienna State Opera, sings Norma with the Monte Carlo Opera, and in her debut at the Dallas Opera takes on the bel canto role of Elizabeth in *Roberto Devereux*.

"It was hard to resist such robust and dramatic singing," *The New York Times* critic wrote in 2005, when Italian mezzo-soprano **LUCIANA D'INTINO** made her Met debut as Eboli in *Don Carlo*. With Azucena, she adds a third Verdi role to her Met repertoire, which also includes Amneris in *Aida*. D'Intino has appeared with such major companies as the Royal Opera, Covent Garden, and Parma 's Teatro Regio. This season both La Scala and the Vienna State Opera hear her Amneris, and she also brings her Azucena to the Zurich Opera.

When **_ELJKO LU_I_** played the title role in last season's new production of *Macbeth*, which was transmitted worldwide as part of *The Met: Live in HD*, the *New York Times* praised his "affecting performance of an intimidating role," as well as his "elegant legato and burnished sound." The Serbian-born baritone adds the role of Count di Luna to his Met repertory this season, and next season returns for his first performances with the company of Michele in Puccini's *Il Tabarro*. He made his Met debut in 2006 as Barnaba in *La Gioconda*. Elsewhere this season, he appears in *Macbeth, La Traviata*, and *Luisa Miller* with the Bavarian State Opera; *Don Carlo* at the Frankfurt Opera, and *Rigoletto* at Madrid's Teatro Real.

BURAK BILGILI made his Met debut in 2004 as Leporello in *Don Giovanni*. The young Turkish bass made his professional operatic debut at La Scala as Alfonso in Donizetti's *Lucrezia Borgia* in the 2002-03 season. He has since sung with leading opera companies in Europe and America.

Conductor **RICCARDO FRIZZA** made his Met debut last month with *Rigoletto*, winning praise from *The New York Times* for the "lively and full-bodied" performance he drew from the orchestra. After adding *Il Trovatore* to his Met repertory with this production, he returns next season to conduct the new production of Rossini's rarely performed *Armida*, starring Renée Fleming in the title role.

DAVID MCVICAR makes his Metropolitan Opera debut directing *Il Trovatore*. Last month, he staged *Siegfried* at the Opéra du Rhin in Strasbourg, the third production in a projected full cycle of *Der Ring des Nibelungen* there. Among his numerous acclaimed opera productions are *Rigoletto* (Olivier Award nomination), *Le Nozze di Figaro*, *Faust,* and *Die Zauberflöte* at Covent Garden (all televised); *The Rape of Lucretia* (Olivier Award nomination) with the Aldeburgh Festival; *La Clemenza di Tito* (Olivier Award Nominations), and *Tosca* with English National Opera. McVicar won the South Bank Show Award for his production of *Giulio Cesare* at the Glyndebourne Festival in 2005. Known for his innovative and sometimes controversial style, he has staged opera throughout the world.

IL TROVATORE is being heard by millions of people around the world this season on the radio and via the internet, through distribution platforms the Met has established with various media partners. The Metropolitan Opera Radio on SIRIUS channel 78 and XM Radio channel 79 is broadcasting performances on March 16 and the final live broadcast of the season, May 8. The February 16 premiere will also be available via RealNetworks internet streaming at the Met's web site, **www.metopera.org**.

Under the leadership of **General Manager Peter Gelb** and **MUSIC DIRECTOR JAMES LEVINE**, the Met has a series of bold initiatives underway that are designed to broaden its audience and revitalize the company's repertory. The Met has made a commitment to presenting modern masterpieces alongside the classic repertory, with highly theatrical productions featuring the greatest opera stars in the world.

Building on its 77-year-old radio broadcast history – currently heard over the Toll Brothers-Metropolitan Opera International Radio Network – the Met now uses advanced media distribution platforms and state-of-the-art technology to attract new audiences and reach millions of opera fans around the world.

The Emmy Award-winning ***The Met: Live in HD*** series reached more than 935,000 people in the 2007-08 season, more than the number of people who saw performances in the opera house. These performances began airing on PBS in March 2008, and nine of these HD performances are now available on DVD.

Live in HD in Schools, the Met's new program offering free opera transmissions to New York City schools in partnership with the New York City Department of Education and the Metropolitan Opera Guild, reached more than 7,000 public school students and teachers during the 2007-08 season. This season, ***Live in HD in Schools*** expands to reach schools in 18 cities and communities nationwide.

Continuing its innovative use of electronic media to reach a global audience, the Metropolitan Opera introduces ***Met Player***, a new subscription service that will make its extensive video and audio catalog of full-length performances available to the public for the first time online, and in exceptional, state-of-the-art quality. The new service currently offers almost 200 historic audio recordings and 50 full-length opera videos will be available, including over a dozen of the company's acclaimed ***The Met: Live in HD*** transmissions, known for their extraordinary sound and picture quality. New content, including HD productions and archival broadcasts, will be added monthly.

Metropolitan Opera Radio on SIRIUS XM Radio is a subscription-based audio entertainment service broadcasting both an unprecedented number of live performances each week throughout the Met's entire season, as well as rare historical performances, newly restored and remastered, spanning the Met's 77-year broadcast history.

In addition to providing audio recordings through the new *Met on Rhapsody* on-demand service, the Met also presents free live audio streaming of performances on its website once every week during the opera season with support from RealNetworks®.

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

Pretrial Advocacy: An Ethical Checklist

BY GERALD LEBOVITS AND JOSEPH CAPASSO*

This article continues from Part I, which was published in the February 2009 issue of the Queens Bar Bulletin.

C. Ethical Considerations During the Discovery Stage of Litigation.

Ethical situations arise during discovery. Although attorneys have numerous procedural tools to aid in gathering information, attorneys must be vigilant not to abuse these tools. An ethical checklist reminds attorneys of their duty to supplement or correct information provided during discovery and to refrain from tactics designed to delay litigation or harass opposing litigants or third parties.

Attorneys must not abuse procedural tools.

The use of interrogatories during discovery presents attorneys with ethical questions. C.P.L.R. 3132 and F.R.C.P. Rule 33(a) dictate that only a party to a civil action may promulgate an interrogatory to another party to that same action. To get information from a non-party, the attorney must use other discovery tools. These rules influence plaintiff's counsel to determine who should be named as defendants.

ABA Model Rule 3.1 dictates that attorneys must refrain from naming a person as a defendant merely to benefit from discovery procedural tools. Comment 1 to ABA Model Rule 3.1 provides that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Naming a person as a defendant to gain information about the case through interrogatories is one example of an abusive use of legal procedure. Although the Model Rules note that the law establishes the limits within which an advocate may proceed, the law is often unclear. To determine the proper scope of advocacy, attorneys must be wary of the potential for abuse. A related idea is the use of a lawsuit to obtain information for non-litigation purposes. The attorney has an ethical duty to refrain from such conduct, as directed by ABA Model Rule 3.1.

Attorneys must supplement or correct information provided during discovery.

Attorneys engaged in civil discovery must be familiar with F.R.C.P. Rule 26(e) and C.P.L.R. 3101(h), which require attorneys to supplement discovery documents and disclosure when they learn new information. A party is required to supplement or correct a Rule 26(a) disclosure to include information acquired after the disclosure was made if the court so orders it or "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[32] In New York, C.P.L.R. 3101(h) requires a party to "amend or supplement" information provided through disclosure after "obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading."

Attorneys must also be familiar with F.R.C.P. Rule 26(g)(1). This Rule provides that an attorney's signature on a Rule 26(a) disclosure certifies that the disclosure is "complete and correct as of the time it is made."[33] Rule 26(g)(2)(A) provides that an attorney's signature on a discovery request, response, or objection certifies that the discovery document is "consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[34] The requirements Rule 26(g) imposes on discovery papers parallel the Rule 11 requirements imposed on pleadings, motions, and other papers.

N.Y. Rule of Professional Conduct 3.3(a)(3) addresses the situation in which an attorney learns that a client has materially misled a party or the court by offering false evidence. The Rule provides that a lawyer shall not knowingly "offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[35] ABA Model Rule 3.3(a)(3) adds that a "lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false."

Gerald Lebovits

Joseph Capasso

If an attorney has offered material evidence believing it was true but later learns

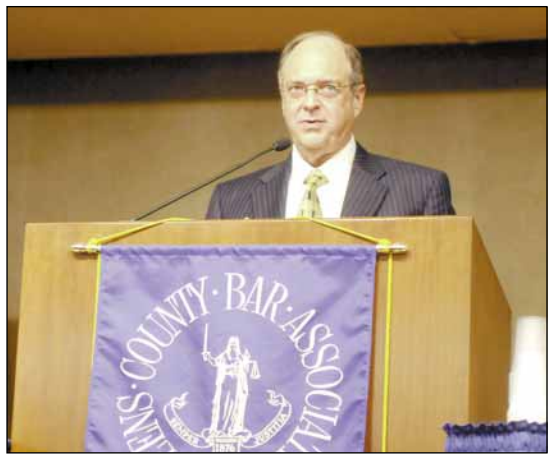
Continued On Page 17

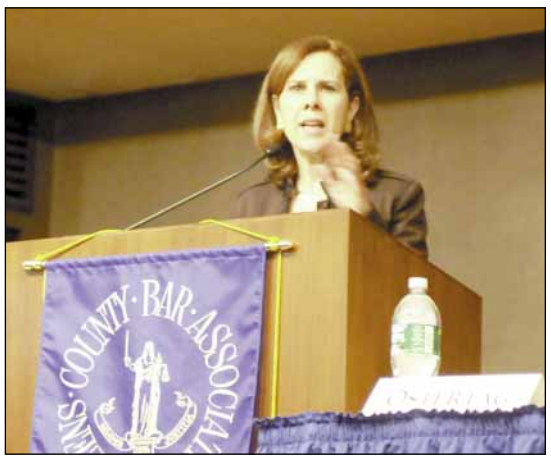
PHOTO CORNER

Solo and Small Firm Practitioners Meeting
Monday, February 23, 2009


Hon. Rudolph Greco, Moderator for the program.


Program Committee Chair, Joseph Carola


QCBA President, Steven Orlow


Barbara Zahler-Gringer, Assistant Counsel to Hon. Ann Pfau.


David Cohen giving his view on an issue.


Ed Rosenthal making a point regarding the discussion.


Hon. Jeremy Weinstein, Administrative Judge, Queens County.


Barbara Zahler-Gringer giving feedback to an attendee.


Richard Lazarus giving his thoughts on the topic at hand.


Jeff Boyar stating a point.


Jim Pieret at open forum presenting suggestions from the audience.

Kenneth Kanfer responding to a question from the audience.

Photos by Walter Karling

PHOTO CORNER

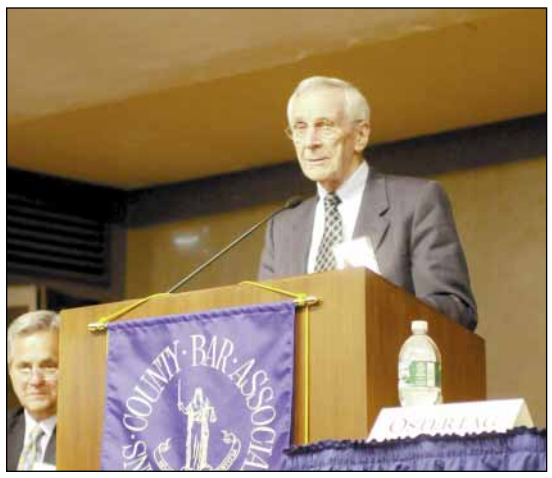
Solo and Small Firm Practitioners Meeting
Monday, February 23, 2009

Kenneth Kanfer, partner in the law firm of Snitow, Kanfer, Holtzer & Millus, LLP.

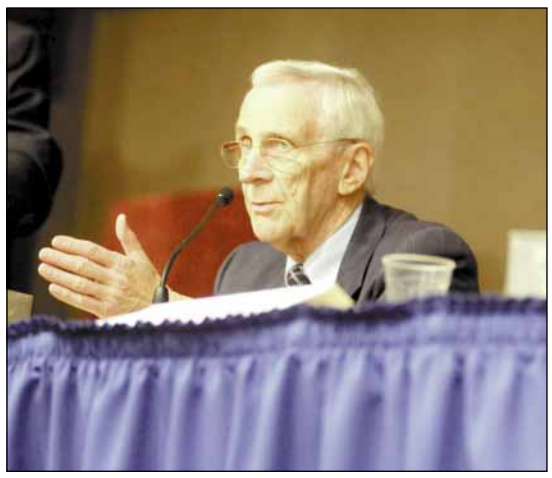
Steven Orlow, Hon. Jeremy Weinstein and Hon. Seymour Boyers

Wally Leinheardt, Tracy Catapano-Fox and Hon. Allen Beldock

Zenith Taylor, Joseph Ledwidge and Michael Davidov



Robert Ostertag, partner in the firm Ostertag, O'Leary & Barrett and Past President of the NYSBA.



Robert Ostertag giving his opinion of an inquiry.

Annamare Policriti, Cathy Lomuscio and Agnes Kirschner

Jeff Boyar, Barry Seidel, George Nicholas and Richard Lazarus

Hon. Bernice Siegal, Hamid Siddiqui and Joe Carola

Hon. Jeremy Weinstein, Kenneth Kanfer and Arthur Terranova.

Howard Angione, Karina Alomar, Angelo Picerno, Hon. Carmen Velasquez and Gary Miret

Photos by Walter Karling

Court Notes

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

Donahue G. George
(December 16, 2008)

The respondent was found guilty, on default, of failing to cooperate with three investigations into allegations of professional misconduct.

David A. Gross
(December 16, 2008)

On July 13, 2007, the respondent pleaded guilty in the United States District Court for the Eastern District of New York to conspiracy to commit money laundering, a Federal felony.

Inasmuch as the Federal felony of conspiracy to commit money laundering is "essentially similar" to the New York felony of conspiracy to commit money laundering in the second degree, the respondent ceased to be an attorney and counselor-at law upon his conviction, pursuant to Judiciary §90.

Laurence S. Jurman
(December 16, 2008)

On February 5, 2008, the respondent entered a plea of guilty in Supreme Court, Suffolk County (Doyle, J.) to possession of a forged instrument in the second degree, a class D felony. Pursuant to Judiciary Law §90, the respondent ceased to be an attorney upon his felony conviction.

Michael S. Feit, admitted as Michael Scott Feit (December 23, 2008)

On February 27, 2006, the respondent pleaded guilty in Supreme Court, Kings County (Walsh, J.) to grand larceny in the second degree, a class C felony; falsifying business records in the first degree, a class E felony; and attempted grand larceny in the second degree, a class D felony. By virtue of his felony convictions, the respondent ceased to be an attorney pursuant to Judiciary Law §90.

Dorothy Baratta (December 30, 2008)

The respondent tendered a resignation wherein she acknowledged that she could not successfully defend herself on the merits against allegations that, in the course of a real estate transaction, she used monies entrusted to her as escrow agent without permission or authority.

Mayank V. Munsiff
(December 30, 2008)

After a disciplinary hearing, the respondent was found guilty of converting to his own use and benefit funds belonging to the Estate of Anibal Tellez and commingling funds belonging to the Estate with his own funds. The Appellate Division noted, "Throughout the proceeding the respondent…evinced an inability to grasp the concept that his actions, albeit not venal in nature, [were] in direct contravention of the Disciplinary Rules…"

Diana J. Szochet

Devon F. Clarke, admitted as Devon Fitzgerald Clarke (January 13, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of irregularities involving his attorney escrow account arising from a dishonored check report.

Edwin E. Drakes, admitted as Edwin Eustace Drakes, a suspended attorney (January 13, 2009)

After a disciplinary hearing, the respondent was found guilty of improperly converting funds entrusted to him as a fiduciary; engaging in the unauthorized practice of law following his suspension as an attorney; improperly using his attorney escrow account following his suspension as an attorney; making materially false statements on an application to renew his real estate broker license; and failing to comply with lawful orders of the United States Bankruptcy Court for the Eastern District of New York.

Stephen Lawrence Brotmann
(January 20, 2009)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he violated Disciplinary 9-102 of the Lawyers Code of Professional Responsibility [22 NYCRR 1200.46].

Joseph R. Maddalone, Jr.
(January 20, 2009)

On April 15, 2008, the respondent entered a plea of guilty to one count of grand larceny in the second degree, a felony, in the County Court, Suffolk County (Doyle, J.) Pursuant to Judiciary Law §90, the respondent ceased to be an attorney upon his felony conviction.

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

Barry L. Goldstein
(December 30, 2008)

After a disciplinary hearing, the respondent was found guilty of engaging in conduct adversely reflecting on his fitness to practice law by converting funds and/or failing to maintain a duly constituted escrow account in breach of his fiduciary duty; failing to obtain escrow checks bearing the title "Attorney Escrow Account", "Attorney Special Account" or "Attorney Trust Account;" engaging in conduct adversely reflecting on his fitness to practice law by failing to comply with a lawful request of the Grievance Committee; failing to maintain required records for his attorney escrow account; engaging in conduct adversely reflecting on his fitness to practice law by failing to account to the Grievance Committee as to the source of funds deposited in, the purpose of funds disbursed from, and the names of all persons for whom funds were held in, escrow; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by making dishonest, false or misleading statements in an article regarding a child custody matter in which the he represented the mother; engaging in conduct that adversely reflects on his fitness to practice law by reason of the foregoing; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by preparing and filing a petition for a writ of habeas corpus and a petition in a proceeding pursuant to CPLR article 78, which contained sworn statements which were dishonest, false or misleading; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by preparing and filing an affirmation in which he wrongfully accused a judge of "initially refusing to provide" a contempt order and having "delayed presenting an order;" engaging in conduct adversely reflecting on his fitness to practice law by reason of the foregoing; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation based upon false assertions against a court-appointed visitation supervisor; engaging in conduct reflecting adversely on his fitness to practice to law by reason of the foregoing; engaging in conduct prejudicial to the administration of justice by failing to abide by one or more court directives; engaging in conduct prejudicial to the administration of justice by entering into a retainer agreement that failed to comply with the requirements set forth in 22 NYCRR §1400; and engaging in conduct prejudicial to the administration of justice and/or conduct reflecting adversely on his fitness to practice law, by submitting a motion to a court containing unsupported statements made without reasonable inquiry into the accuracy of those statements. He was suspended from the practice of law for a period of five years, commencing January 30, 2009, and continuing until further order of the Court.

Edward A. Christensen
(January 15, 2009)

The respondent was immediately suspended from the practice of law, pending further proceedings, based upon his failure to comply with lawful demands of the Grievance Committee for the Tenth Judicial District and other uncontroverted evidence of professional misconduct. In addition, Robert Guido, Esq., was appointed as inventory attorney, to take custody of and inventory the respondent's files and return them to his former clients; take custody of and safeguard the records of any business, escrow, trust or special account(s) of the respondent; receive, open, and read mail addressed to the respondent at the respondent's former place of business; and take "such further action as is deemed proper and advisable to protect the interests of the respondent's former clients in discharging the aforesaid duties, and secondarily, the interests of the respondent attorney.."

Ihab Hussam Tartir (January 15, 2009)

On October 14, 2008, the respondent was convicted, after a jury trial in the United States District Court for the Southern District of New York, of one count of aiding and abetting marriage fraud and two counts of conspiracy to commit that crime, all Federal felonies. On the Appellate Division's own motion, the respondent was immediately suspended from the practice of law, pending further proceedings, as a result of his conviction of a "serious crime" pursuant to Judiciary Law §90.

Lisa L. Cox (January 16, 2009)

The respondent was immediately suspended from the practice of law, pending further proceedings, based upon her failure to cooperate with the Grievance Committee, substantial admissions under oath and other uncontroverted evidence of professional misconduct.

The Following Attorney Was Publicly Censured By Order Of The Appellate Division, Second Judicial Department:

Donald J. Neidhardt
(December 23, 2008)

The respondent was publicly censured by order of the Supreme Court of Montana dated July 19, 2006. Upon the Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR §691.3, he was publicly censured in New York.

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

John C. Lopes, a disbarred attorney
(December 16, 2008)

Daivery Taylor, admitted as Daivery Gerard Taylor, a disbarred attorney
(December 16, 2008)

David C. Kobrin, admitted as David Culman Kobrin, a disbarred attorney
(January 13, 2009)
Scott F. Saidel, a suspended attorney
(January 13, 2009)

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

Guardian & Elder Law: New and Noteworthy

Continued From Page 1

the court determines that there has been a breach of fiduciary duty by the previously appointed agent. "The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person."

MHL §81.44: Speaking of the death of an Incapacitated Person there is a new section of the Mental Hygiene Law. MHL 81.44, effective January 3, 2009, makes certain requirements of the MHL 81 Guardian on the death of the Incapacitated Person.

Within 20 days of the date of death of the Incapacitated Person the Guardian must serve a copy of the "statement of death" upon the court examiner, the personal representative of the decedent's estate, or, if no person representative has been appointed, then upon the personal representative named in the decedent's will or any trust instrument, if known, and upon the public administrator of the chief fiscal officer of the county in which the guardian was appointed, and file the original statement of death together with proof of service upon the personal representative and or public administrator or chief fiscal officer, as the case may be, with the court which issued letters of guardianship.

The statement of death is defined in the law as a statement, in writing and acknowledged, containing the caption and index number of the guardianship proceeding, and the name and address of the last residence of the deceased incapacitated person, the date and place of death, and the names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to paragraph three of subdivision (c) of MHL §81.16, including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person's estate.

Within 150 days of the death of the Incapacitated person, the guardian shall serve upon the personal representative of the decedent's estate or where there is no personal representative, upon the public administrator or chief fiscal officer, a statement of assets and notice of claim, and, except for property retained to secure any known claim, lien or administrative costs of the guardianship pursuant to subdivision (e) of this section, shall deliver all guardianship property to:

1. the duly appointed personal representative of the deceased incapacitated person's estate, or
2. the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative.
3. any dispute as to the size of the property retained shall be determined by the surrogate court having jurisdiction of the estate.

Within one hundred fifty days of the incapacitated person's death, the guardian must also file the Final Account of Guardian with the clerk of the court of the county in which annual reports are filed, and seek judicial approval and settlement upon such notice as required by MHL §81.33, including notice to the person or entity to whom the guardianship property was delivered.

In connection with the Final Account the Guardian may continue to hold assets of the Incapacitated Person in an amount equal in value to the claim for administrative costs, statutory commissions, attorneys' fees, liens and other debts.

MHL 81 Guardian & Gifts: In Matter of Mildred A., NYLJ, Page 27, Column 3, two daughters

bought financial assistance from their mother, an Incapacitated Person. Daughter A sought a loan in the amount of $150,000.00 from the guardianship estate. Daughter B sought permission to invade two custodial accounts set up by the incapacitated person for the benefit of her grandchildren. And both daughters sought gifts in the amount of the annual exclusion from the guardianship. Justice Asarch, Supreme Court, Nassau County, denied the loan. Since most of the incapacitated person's assets were in IRA's, the loan would result in both a loss of principal and income tax consequences to the incapacitated person. He also declined to invade the custodial accounts. The Court was deeply concerned with the potential situation of the infant children supporting their mother.

The Court approved the annual exclusion gifts. Still, the Court expressed concerns about the effect of the gifts on prospective Medicaid eligibility under the Deficit Reduction Act of 2005, and the financial impact of gifts in general. The decision seems to stand as a reminder that there are limits, practical and legal, to the Court's application of the gifting power of Guardian's under the substitution of judgment doctrine.

Power of Attorney: The legislature has once again amended the Statutory Short Form Power of Attorney. On January 27, 2009, Governor Patterson signed into law Chapter 644 of the New York State Laws of 2008. The law creates a new Statutory Short Form Power of Attorney. On March 1, 2009, the Governor signed legislation extending the effective date of the new law until September 1, 2009. The new law, including the new form, can be reviewed at www.nysba.org/POALeg.

The new law provides definitions and general requirements for the validity of powers of attorney, describes the duties and responsibilities of the agent, liabilities of the agent and third parties, requires the agent to sign the power of attorney form, provides procedures for the revocation of the power of attorney, provides for civil proceedings with respect to the power of attorney, and furnishes a new power of attorney form. Below is a description of the new form.

The new form consists of 15 sections (§a-m) and a new optional "Power of Attorney New York Statutory Major Gifts Rider".

The form starts with a new plain language **warning** (§a). The principal is cautioned that the power of attorney is an important document; that the appointed agent has "authority to spend your money and sell or dispose of your property" and "without telling you". The principal is told that the agent must act according to the principal's instructions, or in the absence of instructions in the "best interest" of the principal and in accord with the duties and responsibilities enumerated later on in the form (§n). The principal is reminded that the power of attorney is revocable at any time and for any reason. Principals who want more information about the law are told that the law is available at a law library or online at www.senate.state.ny.us or www.assembly.state.ny.us. The warning makes it clear that making health care decisions is the province of a health care proxy, not an agent.

The next four sections (§b-e) include designation of the Agent and Successor Agent(s), a statement that the power of attorney shall not be affected by the subsequent disability of the principal (durability), unless modified, and a statement that the power of attorney revokes any and all power prior powers of attorney, unless modified. Modifications are be made in subsequent §g, Modifications: Optional.

The subjects of the authority of the agent are listed in §(f). The Principal selects the authority to be given to the agent by either placing his initial in the bracket next to each power, or writing or typing the letters for each authority on the blank line (P). This is the same procedure utilized in the current power of attorney form. The authority to be given to the agent includes some old standbys: real estate transactions, chattel and goods transactions, banking, business, insurance and estate transactions, claims and litigation, and some new subjects: personal and family maintenance, and health care billing, payment, records, reports and statements. There is no gifting authority of any kind, including making use of the annual exclusion. Gifting is reserved to the new optional "Power of Attorney New York Statutory Major Gifts Rider".

In the next section (§h) the principal expresses his desire to make "major gifts" and other "transfers of property". The principal must initial the statement in §h and at the same time execute the "Statutory Major Gifts Rider". The form suggests that the preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

The new form includes the designation of a Monitor (§I). The monitor is a new term. The monitor is a third party. The monitor is further protection for the principal and check on the agent. The Monitor is statutorily defined (GOL 5-1501(8) as a person appointed in the power of attorney who has the authority to request receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent of behalf of the principal.

The Principal may provide for compensation to the agent for services rendered. The new form §(j) specifically provides that the agent is entitled to be reimbursed from the principal's assets for reasonable expenses, and may be entitled to reasonable compensation if the principal so elects. The principal can define reasonable compensation and include that in the Modification section (§g).

Third parties acting and relying on the power of attorney are afforded protection in §k. The new form, mirroring the current form, provides for indemnification of third parties by the principal for all claims against the third party.

The Power of Attorney continues until revocation or death, §l.

The principal signs and acknowledges the document at §m. The new form requires that the agent also sign and acknowledge the power of attorney. Before signing, however, the Agent is reminded of his duties, responsibilities, and liabilities in §n "Important Information For The Agent." This is a brand-new section. The agent is reminded that he must act in accordance with the instructions of the principal. That he is a fiduciary and as such must avoid conflicts of interest, keep the principal's property separate and apart from one's own assets, keep records, and not personally benefit from the principal's assets. The agent is warned that if it is found that he has violated the law or acted outside the authority granted, he may be liable under the law for such violation.

The Principal may authorize an agent to make gifts, but only by making use of the optional "New York State Statutory Gifts Rider". The new law provides a sample rider. The rider provides for limited gifts to the principal's spouse, children, and more remote descendants, and parents, not to exceed, for each, the annual federal gift tax exclusion amount. If the principal wants to make gifts in excess of the annual exclusion there is a modification section. The principal may also authorize the agent to make self gifts. The rider must be signed and acknowledged by the principal, and signed by two witnesses.

Medicaid 2009 Regional Rates: The New York State Department of Health has issued the new 2009 Medicaid regional rates. The regional rates are used to determine a transfer of assets penalty period. Based on the average cost of a nursing home in different parts of the state, the new rates are as follows:

Central	$ 6.938.00
Long Island	$10,852.00
New York City	$ 9,838.00
Northeastern	$ 7,766.00
Northern Metro	$ 9,439.00
Rochester	$ 8,720.00
Western	$ 7,418.00

Medicaid 2009 Income & Resource Levels: The New York State Department of Health has issued the new 2009 Medicaid income and resource levels. The new income and resource will apply to budgets with a "from date" effective January 1, 2009.

Single Individual Exempt Resources	$ 13,800.00
Community Spouse Resource Allowance	$109,560.00
Minimum Monthly Need Allowanc	$ 2,739.00
Single Individual Monthly Income	$ 767.00

Medicare 2009 Deductibles and Co-Insurance: The Centers for Medicare & Medicaid Services has issued the new 2009 Medicare premiums and deductibles.

The Medicare Part A premiums and deductibles are as follows:

Hospital Deductible $1,068.00

Hospital Co-Insurance $267.00 per day for days 61-90, $534.00 per day for lifetime reserve days.

Skilled Nursing Facility $133.50 day for days 21-100

The Medicare Part B premiums are as follows:

Annual Deductible	$ 135.00
Monthly Premium	$ 96.40

Higher income beneficiaries pay higher

Summary: The above is only a selective survey of some of which is new and noteworthy in Guardianship and Elder Law. The Elderly & Disabled Committee of the Queens County Bar Association will be meeting each month, April through June, to discuss these and other issues affecting attorneys and their clients. Practitioners are invited to attend the monthly committee meetings.

This article is written by John R. Dietz, Esq., Chair of the Elderly & Disabled Committee and Past President of the Queens County Bar Association.

CPLR Update 2009

Continued From Page 1

had not appeared, and will not be allowed to present evidence as to liability, and will not be heard to complain of fraud when evidence turns up which might have exculpated it. Another issue related to the sufficiency of proof on the motion for default judgment.

The case involved a 16-year-old plaintiff, who claimed to have been struck by a piece of metal that supposedly fell into his eye while he walked under a scaffold assembled by the defendant Safway Steel Products. The piece of metal was surgically removed, and left damage to his retina. Safway was one of several defendants. After failure to comply with a preliminary conference order and plaintiff's demands, the trial court issued a self-executing conditional order directing that Safway's answer would be stricken unless it complied by July 1, 2002. Since Safway still failed to comply, its answer was stricken as of that date. The effect of the answer being stricken was that Safway was now unable to contest plaintiff's allegation that his injury was due to a dangerous condition on its premises. After its answer had been stricken, in August of 2002, and pursuant to the demand of another defendant, plaintiff produced the piece of metal that had been removed from his eye for expert examination.

The co-defendant's expert offered the opinion that the metal piece was in fact an air-gun pellet that had been fired into plaintiff's eye by an air-gun. Plaintiff thereupon discontinued the action against the remaining defendants.

In June of 2003 plaintiff's motion for an inquest against Safway was granted, and Safway's motion to dismiss was denied. Safway made three attempts to vacate the striking of its answer and the order directing an inquest. A motion based upon a claim of "justifiable excuse" was denied, with the Appellate Division affirming on the grounds of the lack of an acceptable reason for an extended pattern of non-compliance with demands, orders and the conditional order. The second attempt was based on the argument that plaintiff's claim had been shown to be fraudulent. The trial court denied this motion, since the striking of Safway's answer and the order directing an inquest was unrelated to the claim of fraud, but was entirely the result of Safway's own conduct in the litigation. The third motion was due to a claim of a stay relating to another action, which the trial court denied as well on the grounds that the stay did not apply to this action. After the inquest and subsequent judgment, the Appellate Division affirmed the liability finding (although it reduced the amount of damages).

The Court of Appeals stated that Safway's default in complying with the conditional order resulted in its answer properly being regarded as stricken, and it was therefore properly deemed to have admitted all the traversable allegations of the complaint, including the allegation of liability, and to have been precluded from introducing evidence to defeat plaintiff's claim.

In the Court of Appeals, Safway attempted to argue that the plaintiff's proof on the motion for inquest was insufficient pursuant to CPLR 3215(f), and that the entire judgment was therefore a nullity. The Court rejected the argument, on the grounds that it had not been raised in any of the prior motions, and was therefore unpreserved. As the Court noted," the requirement of preservation is not simply a meaningless technical barrier to review." Had it been raised timely, the plaintiff might easily have cured any deficiency in his papers on the motion. [36] The failure to raise an objection until this late date, long after the plaintiff has discontinued the action as to the co-defendants, would make it prejudicial to reverse the judgment.

The fact that the Court was willing to view the argument as unpreserved bears on an unresolved question as to the validity of default judgments. As has been noted in this Update in previous years, the cases are in conflict as to whether the entry of a default judgment on insufficient proof (typically by way of an attorney–verified complaint) is a "nullity," [37]or merely a procedural irregularity not affecting the validity of the judgment. In *Woodson v Mendon Leasing*, 100 N.Y.2d 62; 760 N.Y.S.2d 727 [2003], [38] the Court expressly did not reach the issue of whether non–compliance with that section would render a default judgment a "nullity," leaving the question unresolved. A necessary consequence of a judgment being a "nullity," however, is that it is void for all purposes and at all times, and an objection to it does not need to be preserved.

There was a dissent by Judge Pigott, who was concerned that the judgment might have been procured by fraud. He recognized that Safway had not even argued the fraud issue in the Court of Appeals. He wanted to reach it anyway, on the grounds that "courts have a fundamental duty to ensure that judgments are not procured by fraud." The majority declined this invitation to do the "lawyering" on behalf of the defendant. Its view was that the integrity of the judicial process and the objective of prevention of fraud are best served by the parties' compliance with court orders during the entirety of the litigation, especially when both parties are represented by counsel whose purpose is to zealously represent them.

In *Boudreaux v State of La., Dept. of Transp*., [39] the Court of Appeals held that sister-state judgments which are unenforceable in the state of origin are equally unenforceable here, even under the Full Faith and Credit Clause of the US Constitution and the doctrine of comity. Or, to put it more baldly, if the State of Louisiana can simply refuse to pay a judgment entered against it by its own courts, the plaintiff can not do an end run around the refusal and enforce the judgment against Louisiana's assets in New York.

The class action in Louisiana found the state liable for flood damage in 1983 due to negligent construction of a bridge. After the Louisiana exhausted its appeals, the judgment was for over $91 million. Plaintiffs docketed the judgment in 18 Louisiana parishes, but were unable to collect, since under Louisiana law the judgment is not payable against the state, until (and unless) the Louisiana legislature appropriates the funds. The Louisiana Legislature has, so far, failed to do so.

Plaintiffs attempted to docket the judgment with the Supreme Court in New York County, but the clerk refused to accept it, due to technical defect. A motion for leave to correct the defects was denied, and the plaintiffs appealed. The Appellate Division affirmed, on the grounds that the judgment was as unenforceable here as it was in Louisiana, as a matter of comity.

The Court of Appeals upheld the Appellate Division and refused to allow execution in New York. Louisiana's waiver of sovereign immunity is limited by the provisions of its Constitution and statutes which provide that a judgment against it in its state courts are not to be "exigible, payable, or paid" until funds for the payment are appropriated by the legislature. The Supreme Court of Louisiana has recognized that the rule effectively provides the plaintiff with a right but not a remedy, but viewed itself as constrained by the state Constitution and statutes.

The Full Faith and Credit Clause does not make the sister state judgment a judgment of the State of New York. To create a New York judgment requires a New York action. In the absence of a New York judgment, the Louisiana judgment has the same "credit, validity and effect" here as it has in Louisiana. Neither CPLR Article 54 nor the Full Faith and Credit Clause require that New York give the judgment greater effect than it has in Louisiana.

Comity does not require enforcement here. To the contrary, comity is a voluntary decision to defer to the policy of another state, and here requires deference to the laws of the original forum. New York has no interest in providing redress here. The flood, the damage and the resulting litigation all occurred in Louisiana. The wiser course is to defer to Louisiana's limits on its own liability.

Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi, [40] involved conflicting judgments of other states, and the Court of Appeals declined to enforce the most recent judgment. The underlying matter involved a fraudulent loan obtained by an employee of the defendant Sekerbank, a Turkish bank, from the plaintiff Byblos, a Belgian bank. The Sekerbank employee apparently embezzled the proceeds of the loan.

Byblos commenced proceedings against Sekerbank in Belgium, Turkey and Germany. The Turkish court dismissed the proceeding on the merits in 1992, a decision which was upheld on appeal in Turkey in 1994. Sekerbank then pursued recognition of the Turkish dismissal in the German and Belgian courts where the related proceedings were pending. In 1996, the German court granted recognition of the Turkish judgment, which was upheld on appeal in Germany.

Later in 1996, the Belgian court of first instance dismissed on res judicata grounds. However, the Belgian intermediate appellate court reversed, refusing to grant the Turkish judgment res judicata effect, relying on a provision of Belgian law (since repealed) that required an on-themerits review of a foreign judgment. The intermediate Belgian court, conducting its own review

of the merits pursuant to that law, found the Turkish judgment a product of substantial error, and entered judgment in favor of Byblos. This judgment was upheld by the Belgian High Court in September, 2005.

Byblos now sought to enforce this Belgian judgment in New York, seeking an order of attachment and summary judgment in lieu of complaint. Sekerbank cross-moved to vacate the attachment. Byblos relied on the last-in-time rule applicable to conflicting judgments of sister states: the last judgment will generally be considered controlling. Sekerbank argued that this rule need not be applied in cases of foreign country judgments, and that the Belgian judgment should not be given recognition as conflicting with the Turkish judgment. Supreme Court denied the motion to confirm the attachment, declining to recognize the attachment under CPLR 5304(b)(5) due to the conflicting judgment.[41] The Appellate Division went further, dismissing the action on the motion for summary judgment in lieu of complaint, and otherwise affirmed. It held that the last-in-time rule was not required where the last foreign judgment was rendered with the adverse party being denied any opportunity to assert that the earlier judgment should be binding. Further, Sekerbank was entitled to non-enforcement of the Belgian judgment under CPLR 5304(b)(5), since it was itself issued in violation of principles of comity, pursuant to a statute that has since been repealed and replaced by a statute holding to the contrary. The Court of Appeals affirmed. New York recognizes foreign judgments under principles of comity, by which foreign judgments will be accorded recognition absent a showing of fraud, or that recognition would violate a strong public policy of this state. Comity refers to a spirit of cooperation between tribunals of this state an other sovereign states. As stated by the US Supreme Court, " 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[42]

CPLR Article 53 is the Uniform Foreign Country Money-Judgment Recognition Act, which gives recognition to a foreign judgment which is "final, conclusive and enforceable where rendered." A foreign judgment is not viewed as conclusive, and hence not entitled to [43]recognition, where the foreign tribunal is not impartial or fails to accord due process, or where the tribunal lacked personal jurisdiction over the defendant. Among the discretionary grounds listed in CPLR 5304(b) for refusing to give a foreign judgment recognition is that it conflicts with another judgment which is final and conclusive. The Belgian judgment which plaintiff sought to enforce conflicts with the original Turkish judgment, and with the German judgment which recognized it. Thus, CPLR 5304(b) allows the court to refuse to recognize one or both of the conflicting judgments. The Court noted that under 5304 the New York courts may recognize the earlier judgment, the later, or neither. The last-in-time rule need not be applied to conflicting foreign court judgments. These rules are applied here by denying recognition to the Belgian judgment, which itself failed to apply res judicata or to observe comity by permitting the plaintiff to relitigate the merits of the underlying controversy and failed to recognize the Turkish judgment. A sheriff (or as here a marshal) who serves an execution on a judgment, but fails to actually collect anything, may still be entitled to poundage where the judgment debtor has affirmatively interfered with the collection process. The question presented in *Solow Mgt. Corp. v Tanger* [44]was whether the filing of an appeal bond constitutes such affirmative [45] interference. The Court of Appeals held that it did not. The action grew out of a 1991 rent strike. A final judgment was entered in 2004, attorneys fees against the defendants of $655,241.10. Plaintiff began enforcement proceedings, which included the service of an execution on Merrill Lynch against the defendants' accounts, on August 17, 2004. The day after the service of the execution, defendants filed an appeal bond with the Supreme Court, staying all collection proceedings. The judgment was eventually reversed, and in July of 2005 the restraint on defendants' accounts was lifted and the marshal released the assets, except for $32,912.55 in poundage and other claimed fees.

The Supreme Court held in favor of the marshal, accepting the argument that the appeal bond constituted affirmative interference. The Appellate Division reversed, and the Court of Appeals affirmed. The posting of an appeal bond cannot be viewed as affirmative interference. The appeal bond does not require the vacatur of the levy, but stays enforcement of it until the determination on

Continued On Page15

CPLR Update 2009

Continued From Page 14

the appeal. If the appeal is unsuccessful, the levy remains in place and the marshal is free to collect. A contrary holding would "discourage" aggrieved litigants from pursuing an appeal lest they add poundage fees to the underlying judgment amount.

Judgment debtors whose income is exempt from execution, because it is derived from Social Security, disability, pensions, public assistance, child support, or veteran's benefits, may nonetheless find their exempt funds frozen due to restraining notices if the funds have been deposited in bank accounts. The Legislature has added numerous provisions to CPLR 5205, 5222, added a new 5222-a, and amended 5230, 5231 and 5232 to provide for meaningful exemption of these funds. It establishes a procedure for claiming exemption of certain income [46] from levy of execution by judgment debtors; provides that certain accounts shall be exempt from execution.

CPLR 8012 has been amended, to the circumstances and amount of poundage due to a sheriff where the parties have reached a settlement after the execution of a judgment. Poundage fees [47] are due on the judgment amount or settlement amount, whichever is less. Additionally, this legislation clarifies that if the parties settle the judgment after the Sheriff serves an execution, the Sheriff is still due the poundage fees on the settlement amount.

Jurisdiction - Subject Matter

Financial Indus. Regulatory Auth., Inc. v Fiero [48] went all the way to the Court of Appeals without anyone questioning whether the state courts had subject matter jurisdiction to collect penalties imposed under the Securities Exchange Act. They don't, and the Court dismissed the action without considering the merits.

Defendants Johm Fiero and his firm were members of the National Association of Securities Dealers (NASD, now known as "Financial Industry Regulatory Authority," or "FINRA"). NASD and FINRA are self-regulatory organizations, that is, quasi-governmental organizations with regulatory functions under the Securities Exchange Act, and are regulated by the Securities Exchange Commission. The case involved fines and costs of over a million dollars imposed upon the defendants by a hearing panel of NASD, due to securities violations under the Securities Exchange Act, implementing regulations, and violations of NASD rules. Defendants pursued an internal appeal to the NASD National Adjudicatory Council, which affirmed. Under applicable Federal law, the defendants could have sought review of NASD's determination by the Securities and Exchange Commission, (and from there, to the US Court of Appeals) but they did not do so. The SEC could have brought an action in federal court to enforce the NASD sanctions, but that also was not done. Rather, NASD sued in Supreme Court to recover the fine and costs, plus interest.

Defendants moved to dismiss, on the grounds that the fine and costs had not been affirmed by the SEC or converted into a judgment. Supreme Court denied the motion, finding that the matter was grounded in contract law. It viewed NASD as a private membership organization, with the right to impose fines on its members as authorized by statute, charter or by-laws, and further as a self-regulatory organization operating under federal law to regulate and discipline its members. The NASD rules authorize the imposition and collection of the fines.

Defendants then moved for summary judgment on limitations grounds, viewing the fines as arbitration awards and therefore barred by the one-year limitations period on a proceeding to confirm an arbitration award. Supreme Court denied the motion, since the disciplinary proceeding was not an arbitration.

Next up was NASD's motion for summary judgment, which was granted. It viewed the action as a collection case, to recover the fines and costs imposed in the disciplinary proceeding.

The Appellate Division affirmed.

The Court of Appeals, however, noted that the Securities Exchange Act gives the Federal District Courts exclusive jurisdiction over violations of the Act, rules and regulations promulgated under it, and all suits in law or equity to enforce liabilities and duties created under them. NASD's suit originated in violations of the Exchange Act, and the disciplinary proceedings and penalties were provided for by the Exhange Act and rules created under its authority.

Even though the issue was not raised in the Supreme Court or the Appellate Division, the lack of subject matter jurisdiction is not waivable and may be raised at any time. A court, upon recognizing that it lacks subject matter jurisdiction, may refuse to proceed further and dismiss the action, and that is what the Court did.

Jurisdiction - In Personam - Basis - Long-Arm - "Libel Tourism"

The Legislature has acted to allow for long-arm jurisdiction over a non-resident who has\obtained a "libel tourism" judgment in a foreign country, and also to prevent enforcement of such judgments in New York.[49] The Legislature was reacting to one of the most interesting cases of 2007, *Ehrenfeld v bin Mahfouz*, 9 N.Y.3d 501, 851 N.Y.S.2d 381[2007], in which the Court of Appeals addressed the issue of when a party who has never set foot in New York may nonetheless be said to have "transacted business" here for purposes of assertion of long-arm jurisdiction under CPLR 302(a)(1).

In order to understand the Legislature's actions, it is necessary to review the *Ehrenfeld* facts.

The complaint in *Ehrenfeld* sought to address the hot topic of "libel tourism," in which a defamation plaintiff finds a claimant-friendly jurisdiction, where neither he nor the writer have any substantial ties, presence or resources, and uses the resulting judgment to chill the writer's free speech. The actual issue before the Court, however, was the much less juicy consideration of jurisdictional basis: whether the libel claimant's communications with the writer in New York are sufficient "transaction of business" to justify long-arm jurisdiction when the writer institutes an action to enjoin enforcement of the foreign judgment here. The "libel tourism" issue was actually not before the Court.

The case was a prime example of the limitations on New York's long-arm jurisdiction, compared to the maximum permissible jurisdiction under Federal law. Ehrenfeld is an author, who wrote a book which, in part, accused bin Mahfouz, a Saudi national, and his family of providing funding to al Qaeda and other Islamist terror groups. The book, *Funding Evil*, was published in the United States. It was available in the United Kingdom through the Internet, and 23 copies were apparently sold in that manner. A chapter of the book was also available in the United Kingdom through the Internet. The connection to the United Kingdom was thus tenuous, at best. Ehrenfeld's connection to the United Kingdom was essentially nonexistent. Bin Mahfouz, asserting the falsity of plaintiff's claims, nevertheless turned to the English courts and their libel laws, notoriously favorable to defamation plaintiffs on issues procedural and substantive.

The communications to Ehrenfeld in New York, on which she sought to rely for jurisdictional purposes, were all made in furtherance of the suit in the English court. Bin Mahfouz' English counsel wrote to her and asked her to make certain assurances, specifically: (I) to promise the "High Court in England" that she would refrain from repeating similar allegations, (ii) to destroy or deliver to him all copies of *Funding Evil*, (iii) issue a letter of apology (to be published at plaintiff's expense), (iv) make a charitable donation and (v) pay his legal costs in exchange for defendant's agreement to not bring a defamation action against her. This demand procedure is apparently a predicate to suit under English law.

When Ehrenfeld refused to accede to these demands, bin Mahfouz commenced suit in England, in the High Court of Justice, Queens Bench Division. Papers were served upon her at her New York City residence on four occasions between October, 2004 and May, 2005. She claimed that on at least one of these occasions, March 3, 2005, she was threatened by the process server, who said: "You had better respond, Sheikh bin Mahfouz is a very important person, and you ought to take very good care of yourself." (The process server denied making any such statements or threats.) Bin Mahfouz' English counsel also contacted Ehrenfeld at her home in New York by mail and email, providing her with the claim, statements of witnesses, and court orders, including an injunction directing her to prevent copies of *Funding Evil* from entering England and Wales and that a failure to do so could lead to her being held in contempt.

Ehrenfeld did not appear in the English action, due to the expense, the difficulties defending a libel case under English law, and her belief that the bin Mahfouz was attempting to chill her rights of speech in New York by litigating in a jurisdiction to which she lacked any real connection. The English court entered a judgment by default against Ehrenfeld and her publisher, providing for damages and an injunction against any further publication of the allegations in England

Continued On Page16

Marital Quiz

BY GEORGE J. NASHAK JR.*

George Nashak

Question #1 - DRL §250 provides for a three year statute of limitations of prenuptial agreements that is tolled until a matrimonial action is filed or the death of one of the parties. This law became effective July 3, 2007. Does the tolling extend to agreements barred by the six-year statute of limitations on or before July 3, 2007?
Your answer -

Question #2 - Can the non payment of child support be a crime?
Your answer -

Question #3 - Does the Child Support Collection Unit charge a fee for its services?
Your answer -

Question #4 - What must be shown in order to modify a maintenance award contained in a stipulation of settlement incorporated but not merged in a judgment of divorce?
Your answer -

Question #5 - In a stipulation of settlement, if you intend the alternate payee to share in the New York City Police Department pension benefits of his or her spouse whether those benefits are based on a service retirement benefit or a disability benefit, is it necessary to include both an ordinary disability pension and accident disability retirement benefit?
Your answer -

Question # 6 - Can maintenance be awarded after a divorce, when the divorce judgment makes no provision for maintenance?
Your answer -

Question #7 - In a stipulation of settlement, which was incorporated into a judgment of divorce, but not merged therein, the father agreed to pay 100% of the children's college education. The father sought to allocate the college costs based upon his reduced income and the mother's increased income. The child support provision in the agreement provided for reallocation. The College provision was separate and apart from the child support provision and did not provide for such reallocation. Should the father's obligation to pay 100% of the children's college education costs be reallocated?
Your answer -

Questions #8 - If a non-custodial parent presents insufficient and incredible evidence to establish his or her income, how is the court to fix child support?
Your answer -

Question #9 - Does a parties' lack of contribution to the marriage effect the percentage of the marital assets that party receives in equitable distribution?
Your answer -

Question #10 - Lower court permitted counsel to withdraw as defendant's attorney for the defendant's failure to provide financial information. Was it error for the lower court to refuse to adjourn the trial to give the defendant the opportunity to retain new counsel?
Your answer -

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

ANSWERS APPEAR ON PAGE 18

CPLR Update 2009

Continued From Page 15

and Wales, and a second order declaring the statements to be false, fixing damages to bin Mahfouz and his sons in the amount of £ 10,000 each, requiring Ehrenfeld and her publisher to publish an apology, continuing the earlier injunction, and awarding bin Mahfouz his costs of litigation.

The lawsuit at issue here was commenced by Ehrenfeld against bin Mahfouz in the US District Court for the Southern District of New York, seeking a declaration that the statements in the book are not libelous under either federal or New York law, and that the English judgment is not enforceable in the US generally or New York specifically. Bin Mahfouz moved to dismiss for lack of subject matter and personal jurisdiction. The District Court dismissed, on the grounds of lack of personal jurisdiction, holding that the communications to Ehrenfeld in New York, however objectionable they might have been, did not support a business objective. Ehrenfeld appealed, and the Second Circuit certified to the Court of Appeals the question of whether or not the transactions described would be sufficient to confer jurisdiction over the defendant under CPLR 302(a)(1).[50] The Court of Appeals was careful to restrict its opinion to the certified question of jurisdiction, offering no opinion on English law and its differences from American and specifically New York law, and rejecting the invitation from Ehrenfeld to discuss the issue of "libel tourism."

Ehrenfeld's claim of jurisdiction rested on the notion that bin Mahfouz purposefully communicated with her in the state in order to conduct a "foreign litigation scheme" intended to chill her free speech. Bin Mahfouz responded that the communications were mere incidents to the foreign litigation, and that he did not transact any business here. The Court looked to the basic criterion for "transacting business": whether or not the defendant did some act to purposefully avail himself of the privilege of conducting activities in New York. If his acts have invoked the benefits of our laws, jurisdiction is proper here and can reasonably expect to defend his actions here. None of the bin Mahfouz' actions, however, met this standard. Rather than invoking New York's laws, his acts furthered his litigation in England.

The communications were all apparently required under English law, and did not tend to further New York transactions or invoke New York laws or procedures.

Plaintiff asked the Court to endorse the holding of a Ninth Circuit case, *Yahoo! v La Ligne Contre Le Racisme*. There, applying California law, the court held that personal [51] jurisdiction was properly asserted over French citizens who had obtained French court order requiring the California-based plaintiff to alter its practices so as to prevent users of its French website from accessing Nazi-related web pages. Yahoo! sued in federal court in California, demanding a declaratory judgment that the French orders were not enforceable in the US as interfering with Yahoo!'s First Amendment rights.

Our Court of Appeals, however, viewed the case as demonstrating why jurisdiction in New York was not proper. California's long-arm statute is designed to be as broad as possible, to the limits of jurisdiction allowed under the US Constitution. The Ninth Circuit, applying California's broad statute, held that jurisdiction was proper since the French citizens had "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." In New York, however, the analogous statute is CPLR 302(a)(3), which requires a demonstration not merely of an intentional act, but a tortious act, and not merely of harm here, but of "injury to person or property." In effect, allowing jurisdiction under the test employed in *Yahoo!* would superimpose CPLR 302(a)(3) onto (a)(1), which is a determination for the Legislature. As it was, the New York Legislature had conferred jurisdiction over non-residents in a limited set of cases, and *Ehrenfeld* was is not one of them.

The Court, therefore, was simply applying well-established jurisdictional law, observing\ the limits on New York's long-arm jurisdiction as established by the Legislature. The Legislature has acted to expand our long-arm jurisdiction, by adding a new subdivision (d) to CPLR 302, specifically aimed at foreign defamation judgments. It allows for personal jurisdiction over any person obtaining a defamation judgment outside the US for the purpose of rendering declaratory relief on a claim that the foreign should be deemed non-recognizable under New York law.

Getting past the cause célèbre which gave rise to the amendment, the most important thing to notice is that it expands long-arm jurisdiction only in a specific case. Notwithstanding the clause in the new subdivision that it is intended to expand New York's long-arm jurisdiction "to the fullest extent permitted by the United States constitution," it does so only in these "libel tourism" cases. Our law still stops short of the full jurisdiction allowed under the Constitution.

Plaintiffs entitled to invoke jurisdiction are a New York resident or a person amenable to jurisdiction in New York who has assets in New York or who may have to take actions in New York to comply with the foreign judgment.

At first blush, it would seem that this introductory language allows jurisdiction in favor of any New York resident, or any non-resident who may have assets here or who would have to take action here to satisfy the foreign judgment. That is not so, since the provisos which follow make it clear that even a New York resident must either have assets here which may be used to satisfy the judgment or may be required to take actions here to satisfy the judgment.

As to non-residents, it is not clear what the phrase "amenable to jurisdiction in New York" may mean in this context. The language of the new subdivision makes it possible for a non-New Yorker, burdened with a foreign defamation judgment, to place assets into New York and declare himself willing to submit to New York's jurisdiction solely to invoke the right to challenge the enforceeability of the foreign judgment in our courts. The clause concerning taking actions in New York to comply with the foreign judgment seems to have been inspired by the California *Yahoo!* case, where the French judgment would have required Yahoo! to take action in California by altering its servers, which were physically located there. It is an open question whether, put to the decision, the Court of Appeals would agree with the Ninth Circuit that the mere existence of such a foreign judgment, without any attempt having been made to enforce it, would be sufficient to sustain constitutional due process.

Similarly open is whether the actions required of Ehrenfeld which might be done in New York, the issuance of an apology and ensuring that copies of the book did not reach English jurisdiction, would be sufficient. The cease-and-desist portions of the English judgment would not seem to be sufficient for a non-New Yorker to invoke jurisdiction here, since they forbid the United States resident to do something in England and Wales, but do not compel him to do anything in New York.

The foreign judgments involved are, of course, limited to those of foreign countries, not of sister states, since those judgments are entitled to full faith and credit under the federal Constitution.

The subdivision also carries the proviso that the publication as issue was published in New York, disallowing jurisdiction in favor of an otherwise eligible plaintiff who published elsewhere. The subdivision then adds the provisos noted above, that the resident or non-resident amenable to jurisdiction must have assets here which might be used to satisfy the judgment, or might have to take actions here to satisfy it. This would seem to have the effect of disallowing jurisdiction to a New York resident whose only assets are exempt from enforcement procedures under CPLR Article [52]. Even if there are New York assets which might be subject to enforcement of a money judgment, it is an open question whether that fact alone, without any attempt having been made to enforce the judgment, would be sufficient.

In addition to CPLR 302, the Legislature added a new paragraph (8) to CPLR 5304, which deals with non-recognition of foreign country judgments. That paragraph allows for nonrecognition "unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions."

It is entirely an open question as to how the court is to make this determination. It is an open question whether or not there are any jurisdictions, anywhere, which would satisfy this standard.

Moreover, one of the fundamental issues concerning the English judgment in *Ehrenfeld* was not the substantive law of defamation, but the procedural law which allowed the case to be heard at all. In the *Ehrenfeld* case itself, the underlying determination in the English court was made on Ehrenfeld's default. If the positions had been reversed, a New York court might well have denied a judgment, despite the default, upon determining that it did not have personal jurisdiction over the defendant. What is to be done in cases where the substantive law of the foreign jurisdiction is as protective of the rights of speech and press as New York, but the procedural law is as liberal as England's?

Finally, and undoubtedly of lesser significance, the legislation in no way addresses one of the fundamental issues of the *Ehrenfeld* case, which is that bin Mahfouz himself had no connection to England. It was that fact, after all, which put the "tourism" in the "libel tourism" label. Had American procedural standards been applied, Ehrenfeld might have had a strong argument for dismissal of forum non conveniens grounds.

Jurisdiction - In Personam - Service Outside the State

CPLR 313 allows service of process, including a summons and complaint, to be served beyond New York's borders in the same manner as service is made within the state. The requirements are that the person served be a New York domiciliary or subject to jurisdiction here, that service is made in the same manner as it would be within the state, and that the process server be any of: (a) a New York resident authorized to make service, (b) a person authorized to make service by the laws of the place where service is made, or (c) an attorney, solicitor, barrister or equivalent in that jurisdiction.

In *Morgenthau v Avion Resources Ltd.* [52] the Court of Appeals considered whether there were additional requirements, arising out of comity or treaty, which prevented service from being made in Brazil according to the CPLR and not by letters rogatory. The Court concluded that there were none, and sustained service.

This action involves the alleged fruits of a criminal international money transfer scheme originating in Brazil. The matter was first prosecuted by Federal authorities, who seized over $21 million in assets deposited by the defendants and their associates in a New York bank. After the United States District Court held that the government had not shown entitlement to the funds, the Federal authorities sought the involvement of the plaintiff, the New York County District Attorney, who commenced this civil forfeiture action pursuant to CPLR Article 13-A. [53]

The defendants included 14 individuals and five corporations who were served with the summons and complaint in Brazil. Certain of the defendants were served by expedient service on their attorneys, authorized by an order of Supreme court. Others were served by personal delivery in Brazil by Brazilian law enforcement officials.[54] Supreme Court dismissed the complaint, finding that the service of process in Brazil failed to comply with either the Inter-American Convention on Letters Rogatory or with service requirements under Brazilian law, and violated principles of comity. The Appellate Division affirmed, finding that the service of process violated Brazilian law, failed to defer to international comity, and also failed to comply with the Mutual Legal Assistance Treaty on Criminal Matters.

The DA argued that no treaty or international agreement applied to supersede service procedures under the CPLR, and that the principles of comity do not compel deference to another country's rules for service of process.

Looking at the plain words of CPLR 313, the Court noted that it contains no requirement to serve a defendant according to the laws of the place where he is found. The principle is well established in New York law that service may be made outside the state in the same manner as service within the state. The statute thus has the purpose and effect of removing state lines as a consideration in determining the manner of service. A plaintiff may use any of the various methods allowed under the CPLR to serve an out-of-state defendant.

The Court then looked to the issue of comity, and found no reason why comity should interfere with service of process. Comity is a matter of cooperation with the laws and interests of other states, and is applied as a matter of the court's sound discretion. The doctrine usually arise in the context of enforcement of foreign-country judgments, but has never been applied so as to make foreign laws controlling in a New York lawsuit. The New York plaintiff was therefore not required, as a matter of comity, to comply with Brazilian law requiring service by way of letters rogatory. Comity, a discretionary principle, should be distinguished from treaty law. A treaty is the supreme law of the land, and would supersede the CPLR if applicable. The Court found that there was no treaty applicable to the circumstances which would have required a different procedure. The Hague Convention is not controlling, since Brazil is not a signatory to it. Both the US and Brazil are signatories to the Inter-American Convention on Letters Rogatory, but it is well established that the treaty does not limit the means of service to

Continued On Page17

Pretrial Advocacy: An Ethical Checklist - Part II

Continued From Page 9

that the evidence was false, the attorney must correct the situation. If the attorney knows of false statements made by a client during a deposition (called an "examination before trial" in New York), the attorney must act immediately. Comment 10 to ABA Rule 3.3 provides that the "advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence." If that fails, then the attorney must withdraw from the representation, if the court permits. If withdrawal is not an option or will not undo the effect of the false evidence, "the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by [ABA Model Rule 1.6, Confidentiality of Information]."[36]

Attorneys may not use discovery tactics to delay litigation or force settlement.

Discovery abuse is a persistent problem in the legal profession. Legal commentators continue to call for reform, while criticizing the effectiveness of "moralistic sermons about the breakdown of civility in the legal profession and nostalgic yearning for the good old days when lawyers acted like gentlemen."[37] In *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, one of many cases on the subject, the court wrote after a year-and-a-half battle between the parties over discovery motions that "the only things accomplished in this time span are the production of incomplete answers to Plaintiff's first set of interrogatories, the impregnation of my file cabinets, the generation of legal fees and the fact that I have aged a year. Or is it ten?"[38] The court noted that many defendants instruct their attorneys to delay litigation to make the plaintiff lose money and interest in the lawsuit. Although this practice deters future litigation and is desirable from a defense standpoint, it is "indefensible under the Federal Rules of Civil Procedure"[39] and potentially sanctionable under Rule 37.

The ABA Model Rules impose an ethical duty to avoid using discovery delay tactics. Canon 31 of the ABA Canons of Professional Ethics, a predecessor to the Model Rules, provided that "[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."[40] ABA Model Rule 3.4 provides that an attorney shall not, "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." N.Y. Rule of Professional Conduct 3.2 similarly prohibits an attorney from using means "that have no substantial purpose other than to delay or prolong the proceeding." N.Y. Standard of Civility VI(A) advises attorneys to avoid discovery procedures designed to place an undue burden or expense on a party. Attorneys should advise clients that they will not use delay tactics.

D. Ethical Considerations During the Motion Stage of Litigation.

In contemplating responses to another party's motion or application, attorneys should consider not only tactical but also ethical and professionalism issues a motion or application might present. When another attorney requests additional time to respond to a motion or meet a deadline, opposing attorneys should recall that at some later point in the litigation they might be in the same position.

Attorneys must treat other attorneys with respect and grant their reasonable requests.

The court in *Regional Transportation Authority v. Grumman Flexible Corp.* addressed the issue of how attorneys treat their fellow attorneys, noting that "[i]t is a truism that a commission and a uniform may make someone an officer, but not an officer and a gentleman. Apparently the same may be said of a license to practice law."[41] In that case the defendant's reply brief was due on a Friday, immediately following an immobilizing snowstorm in Washington, D. C., where defendant's local counsel's offices were located. The attorney was unable to travel to his office to complete the brief for a timely filing. The attorney telephoned plaintiff's counsel to ask whether he would agree to a four-day extension. The plaintiff's attorney twice refused, forcing defendant's Chicago counsel to serve a notice of motion and appear in court for an extension. The plaintiff's attorney did not appear at the motion call. In granting the extension, the court noted that because the brief was the final brief on the motion, there was no reason for the plaintiff's attorney not to have acquiesced to the requested extension.[42]

The court criticized the plaintiff's attorney's behavior. The court wrote that plaintiff's attorney "continued to show the same myopic view of the matter that caused the needless effort in the first place" and that he continued to "characteriz[e] the issue as whether anyone may be forced to stipulate to an extension."[43] The court explained that the plaintiff's attorney was missing the point and that "[w]hat is rather involved is the responsibility of a lawyer in dealing with his fellow lawyer."[44] The court then summarized "what every lawyer is expected to know and live by"[45]: lawyers shall seek their clients' lawful objectives through reasonably available lawful means under the disciplinary rules but that "reasonably available means" do not include refusing to accede to an opposing counsel's reasonable requests that do not prejudice the client's rights. Attorneys should be courteous to opposing counsel and consent to reasonable requests about court proceedings, settings, continuances, waiving of procedural formalities, and similar matters that do not prejudice client rights.

When the plaintiff's attorney appeared in court on the motion to tax fees, his explanation was that he did not agree to the extension because his client did not. In response, the court stated that "the thrust of the [Model] Code [of Professional Responsibility] is that such a decision–certainly in the circumstances here–is for the lawyer and not for the client at all."[46] The court was also alarmed that the attorney's argument in response to the motion for fees, after having had the Code provisions called to his attention, remained the same, namely that his conduct was justified. The court reprimanded the attorney to "relieve the defendant of a burden in unjustly-caused attorneys' fees and expenses that it should not have been required to incur and should not be required to bear."[47] The court wrote that the attorney had multiplied the proceedings in the case "unreasonably and vexatiously" and ordered him to pay the defendant's attorney's fees.[48]

The N.Y. Standards of Civility addresses attorneys' interactions with other attorneys.[49] Attorneys should respect the schedule and commitments of opposing counsel while protecting their client's interests. Attorneys should agree to reasonable requests for extensions of time, consult with other attorneys to avoid scheduling conflicts, and promptly notify opposing attorneys and the court when they must cancel or postpone hearings, examinations before trial, meetings, or conferences. As the Preamble to the Standards notes, the civil-litigation process cannot work unless attorneys treat each other with civility and respect.

Attorneys must reveal to the court binding, adverse authority.

Attorneys must act professionally when they communicate with the court. The focus in written motion papers should be on the major points on which the motion turns. Attorneys should always address and attempt to rebut their opponent's arguments. Ignoring opposing counsel's difficult issues will not make them disappear. Attorneys should file motions only if they have answers to their opponent's arguments.

Attorneys have an ethical duty to call to the court's attention directly adverse and controlling legal authority in the applicable jurisdiction. N.Y. Rule of Professional Conduct 3.3(a)(2) provides that an attorney shall not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Federal and New York courts have disciplined attorneys for failing to do so.[50] The attorney is always free, however, to argue that the cited authority is not sound or that the court should not follow it. Comment 4 to ABA Model Rule 3.3 adds that "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

E. Ethical Considerations During Pretrial Negotiations.

Negotiation ethics have received much attention in recent years. The American Bar Association Litigation Section has adopted guidelines on the ethics of settlement negotiation.[51] Ethical boundaries play an important role in negotiations because of the conflicting duties that arise. Although the attorney's primary duty is to the client, ethical proscriptions impose duties on attorneys in their dealings with other attorneys and parties.

Clients come first in the negotiation.

No matter the stage of litigation, the attorney always owes the client a duty to provide competent representation. N.Y. Rule of Professional Conduct 1.1 provides that "a lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Negotiations outside the courtroom call for the same degree of preparation and competence that the attorney must exhibit inside the courtroom in the presence of a judge and the public. Attorneys place client interests ahead of (1) the attorney's personal interests; (2) the desires of other attorneys in the firm; (3) third parties; and (4) the judge's desires.

Negotiations present unique challenges. When a third party has an interest in the outcome of the negotiation, the attorney must remember who the client is. N.Y. Rule of Professional Conduct 1.8(f) prohibits an attorney from accepting compensation for representing a client "from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6." Attorneys should rely on the N.Y. Rules of Professional Conduct and the Model Rules to structure their negotiations.

The attorney must relay to the client all legitimate settlement offers for approval or rejection.[52] It is good practice when possible to relay all offers to the client in writing, unless the offer is not serious. A written offer serves many purposes: (1) it helps avoid later confusion concerning the exact terms of the offer; (2) it documents the exact terms presented to the client; and (3) it enables the attorney to comply with the N.Y. Rule of Professional Conduct 1.4(b) requirement to explain a matter to the extent reasonably necessary to permit the client to make an informed decision.[53] The client should counter-sign and date a copy of the letter if the settlement is acceptable.

A settlement for multiple clients requires each client's informed consent.

N.Y. Rule of Professional Conduct 1.7 permits attorneys to represent multiple clients in civil cases if they can adequately represent the interests of each and if the clients give informed consent to the multiple representation. Attorneys who represent multiple clients have additional duties when their clients receive a settlement offer. N.Y. Rule 1.8(g) provides that "a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client." The Rule adds that "[t]he lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."[54] Clients must consent to the individual settlement offers made to each client in a joint representation.

Attorneys must not make false representations during negotiations.

Ethical constraints limit attorneys' attempts to negotiate favorable settlements. N.Y. Rule of Professional Conduct 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." This Rule can conflict with an attorney's "puffing" tactics during negotiations. Puffing is not unethical; it is a common negotiation tactic. Comment 2 to ABA Model Rule 4.1 addresses puffing: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value . . . and the party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . . ." The attorney must draw a line separating ethically acceptable estimates and intentions from unethical misrepresentations of material fact.

One helpful technique to conform with the N.Y. Rules of Professional Conduct and the ABA Model Rules is to separate statements concerning the negotiation itself ("He won't take a penny less!") from

Continued On Page18

CPLR Update 2009

Continued From Page 17

letters rogatory. Rather, relevant Federal case law establishes that the treaty controls the mechanism for transmittal and [56] delivery of letters rogatory among signatory states, and does not preclude service by other means.

The remaining question was whether service had indeed been effected pursuant to the CPLR in Brazil, and the Court concluded that they had, except for four served by substitute service or nail-and-mail.

The Court therefore reversed so much of the Appellate Division's decision as dismissed for lack of jurisdiction.

FOOTNOTES

34. The Court cited *Funk v. Barry*, 89 N.Y.2d 364, 653 N.Y.S.2d 247 [1996] as establishing that the rule is invoked only where there is an explicit direction to submit or settle an order or judgment.

35. *Wilson v Galicia Contr. & Restoration Corp*., 10 N.Y.3d 827, 860 N.Y.S.2d 417 [2008]

36. Plaintiff submitted neither a verified complaint or an affidavit of merit on the motion, or for that matter at the inquest, and Safway never objected.

37.*Goodyear v. Weinstein*, 224 AD2d 387, 638 N.Y.S.2d 108; *Zelnik v. Bidermann Industries U.S.A., Inc*., 242 A.D.2d 227, 662 N.Y.S.2d 19; *Wolf v. 3540 Rochambeau Associates*, 234 A.D.2d 6, 650 N.Y.S.2d 161; *Feffer v. Malpeso*, 210 A.D.2d 60, 61, 619 N.Y.S.2d 46; *Mullins v. DiLorenzo*, 199 A.D.2d 218, 219, 606 N.Y.S.2d 161; *Income Property Consultants Inc. v. Lumat Realty Corp*., 88 AD2d 582, 449 N.Y.S.2d 799; *Georgia Pacific Corp. v. Bailey*, 77 A.D.2d 682, 429 N.Y.S.2d 787; *Union Nat. Bank v. Davis*, 67 A.D.2d 1034, 413 N.Y.S.2d 489; *Red Creek Nat. Bank v. Blue Star Ranch*, 58 A.D.2d 983, 396 N.Y.S.2d 936

38.*Bass v. Wexler*, 277 A.D.2d 266, 715 N.Y.S.2d 873 [stating that cases to the contrary are no longer to be followed]; *Roberts v Jacob*, 278 A.D.2d 297, 718 N.Y.S.2d 201

39. *Boudreaux v State of La., Dept. of Transp*., 11 N.Y.3d 321, ___ NYS2d ___ [2008]

40. *Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 N.Y.3d 243, 855 N.Y.S.2d 427 [2008]

41. CPLR 5304(b)(5) states, relevant part: "[a] foreign country judgment need not be recognized if . . . the judgment conflicts with another final and conclusive judgment."

42. *Hilton v Guyot*, 159 US 113, 163-164 [1895]

43. CPLR 5302

44. *Campbell v Cothran*, 56 NY 279, 285 (1874)

45. *Solow Mgt. Corp. v Tanger*, 10 N.Y.3d 326, 858 N.Y.S.2d 63 [2008]

46. L. 2005 ch. 575

47. L. 2008, ch. 443

48. *Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267 [2008]

49. L. 2008, ch. 66, effective April 28, 2008

50. Plaintiff also attempted to justify jurisdiction under the "tortious act" provisions of CPLR302(a)(3), but the federal courts did not need input from the New York courts to hold that, however defendant's acts may be characterized, they were not "tortious" within the meaning of that statute.

51. *Yahoo! v La Ligue Contre Le Racisme et L'Antisemitisme,* 433 F3d 1199 [2006] [en banc]

Interestingly, *Yahoo!* wound up dismissed. Three judges on the eleven-judge en banc panel found that there was no jurisdiction, three others found the case not ripe for determination. The six votes were combined, and the result was a dismissal.

52. *Morgenthau v Avion Resources Ltd*., 11 N.Y.3d 383, ___ NYS2d ___, 2008 NY Slip Op 09006 [2008]

53. After the determination that Federal authorities were not entitled to the funds, they were initially transferred into the DA's custody. The DA sought several orders of attachment, which did not go smoothly for reasons not germane to the appeal here. Eventually, the money was returned to Federal control, by reason of a request from the Brazilian government and an order of the US District Court for the District of Columbia. As the Court of Appeals noted, the attachment issues were thus rendered moot, leaving the service issues as the only ones in the

case.

54. The Court noted that attempts were made to serve four of the defendants in Brazil by

substituted service pursuant to CPLR 308(2) or "nail-and-mail" pursuant to CPLR 308(4), but that service was not completed.

55. *Dobkin v Chapman*, 21 NY2d 490, 501 [1968]

56. *Kreimerman v Casa Veerkamp S.A. de C.V*., 22 F3d 634, 640 [5th Cir 1994]

Pretrial Advocacy: An Ethical Checklist

Continued From Page 17

statements concerning objective facts outside the context of the negotiation ("He paid $16,000 for the car in 2005"). Statements about the negotiation are more likely to be estimates or intentions that fall within Comment 2 protection, while ABA Model Rule 4.1 prohibits misrepresenting objective facts. Another helpful technique is for attorneys to put themselves into the opposing attorney's shoes to assess whether a negotiation statement is abusive or misleading.[55]

F. Conclusion.

Professional aviators from Orville and Wilbur Wright to Chuck Yeager have always counseled student pilots to maintain checklist discipline. Checklists save lives. Just as the most competent commercial aviator can forget to deploy the landing gear, attorneys engaged in pretrial litigation can forget that cases are fraught with potential ethical quagmires. Ethical checklists save careers, protect the public, and promote the good administration of justice.

FOOTNOTES

[32] Fed. R. Civ. P. 26(e)(1). Rule 26(e)(1) further defines the duty to supplement Rule 26(a)(2)(B) expert- witness disclosures. This duty "extends both to information contained in the [expert's] report and to information provided through a deposition of the expert." Fed. R. Civ. P. 26(e)(2).

[33] Fed. R. Civ. P. 26(g)(1).

[34] Fed. R. Civ. P. 26(g)(2)(A).

[35] 22 N.Y.C.R.R. 1200, Rule 3.3(a)(3).

[36] Model Rules of Prof'l Conduct R. 3.3 cmt. 10.

[37] Charles Yabon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 Colum. L. Rev. 1618, 1619 (1996) (proposing that the best solution for lawyer misconduct in discovery proceedings is the same one parents use when their kids act up on long car trips—tell them to "shut up and knock it off").

[38] 72 F.R.D. 110, 112 (D.C. Tex. 1976).

[39] *Id*.

[40] Code of Prof'l Ethics Canon 31, *available at* http://www.abanet.org/cpr/1908-code.pdf.

[41] 532 F. Supp. 665, 668 (N.D. Ill. 1982).

[42] *Id*. at 667.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 668.

[48] *Id*.

[49] *See* Standards of Civility, *supra* note 2, at III.

[50] *See, e.g.*, *Jorgenson v. Volusia County*, 846 F.2d 1350, 1352 (11th Cir. 1988) (imposing Rule 11 sanctions on attorney for failing to cite adverse authority); *Nachbaur v. Am. Transit Ins. Co*., 300 A.D.2d 74, 75-76, 752 N.Y.S.2d 605, 607-08 (1st Dep't 2002) (imposing sanctions and awarding attorneys fees for, among other indiscretions, plaintiff's attorney's failure to cite adverse authority).

[51] *See* American Bar Association, Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (2002).

[52] Model Rules of Prof'l Conduct R. 1.2 cmt. 1.

[53] Dessem, *supra* note 9, at 585.

[54] 22 N.Y.C.R.R. Part 1200, R. 1.8(g).

[55] Dessem, *supra* note 9, at 587.

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ANSWERS TO MARITAL QUIZ ON PAGE 15

Question #1 - DRL §250 provides for a three year statute of limitations of prenuptial agreements, that is tolled until a matrimonial action is filed or the death of one of the parties. This law became effective July 3, 2007. Does the tolling extend to agreements barred by the six-year statute of limitations on or before July 3, 2007?

Answer: Yes, provided a court did not previously bar an action relating to that agreement because it violated the six-year statute of limitations. Amendment to DRL §250 enacted May 21, 2008.

Question #2 - Can the non payment of child support be a crime?

Answer: Yes, New York Penal Law §260.05(2) became effective November 1, 2008. If a parent, guardian or other person obligated to make child support payments by an order of a court of competent jurisdiction, for a child under the age of 18, knowingly fails or refuses, without lawful excuse, fails to provide such support when he or she is able to do so or becomes unable to do so, when though employable he or she voluntarily terminates employment, voluntarily reduces his or her earning capacity or fails to diligently seek employment, said person is committing a Class A misdemeanor.

Question #3 - Does the Child Support Collection Unit charge a fee for its services?

Answer: Yes, beginning with federal fiscal year October 1, 2008 to September 30, 2009, and then each year thereafter, when they collect in excess of $500.00 during the fiscal year, an annual service charge of $25.00 will be deducted from the child support collected. A fee may not be charged to anyone who has ever received cash assistance from the federal Title IV-A program.

Question #4 - What must be shown in order to modify a maintenance award contained in a stipulation of settlement incorporated but not merged in a judgment of divorce?

Answer: Extreme hardship. *DiVito v. DiVito* 56 A.D.3d 601; 867 N.Y.S.2d 334 (2nd Dept. 2008)

Question #5 - In a stipulation of settlement, if you intend the alternate payee to share in the New York City Police Department pension benefits of his or her spouse whether those benefits are based on a service retirement benefit or a disability benefit, is it necessary to include both an ordinary disability pension and accident disability retirement benefit?

Answer: Yes. *Berardi v. Berardi* 54 A.D.3d 982; 865 N.Y.S.2d 245 (2nd Dept. 2008)

Practice Note - Remember if you exclude disability benefits, the alternate payee will lose his or her share of Variable Supplement Benefits. The recipient of a disability pension receives 25% higher pension benefit, but is not entitled to receive any Variable Supplement Benefits.

Question # 6 - Can maintenance be awarded after a divorce, when the divorce judgment makes no provision for maintenance?

Answer: Yes, *Wilson v. Pennington* 301 A.D.2d 445; 752 N.Y.S.2d 887 (1st Dept. 2003).

Question #7 - In a stipulation of settlement, which was incorporated into a judgment of divorce, but not merged therein, the father agreed to pay 100% of the children's college education. The father sought to allocate the college costs based upon his reduced income and the mother's increased income. The child support provision in the agreement provided for reallocation. The College provision was separate and apart from the child support provision and did not provide for such reallocation. Should the father's obligation to pay 100% of the children's college education costs be reallocated?

Answer: *No, Colucci v. Colucci* 54 A.D.3d 710; 864 N.Y.S.2d 67 (2nd Dept. 2008).

Questions #8 - If a non-custodial parent presents insufficient and incredible evidence to establish his or her income, how is the court to fix child support?

Answer: Award child support based on the needs of the child. *Evans v. Evans* 870 N.Y.S.2d 394 (2nd Dept. 2008)

Question #9 - Does a parties' lack of contribution to the marriage effect the percentage of the marital assets that party receives in equitable distribution?

Answer: Yes, in *Evans v. Evans* 870 N.Y.S.2d 394 (2nd Dept. 2008), the Appellate Division affirmed the trial court's award of 15% of the value of the marital assets and 10% of the pension.

Question #10 - Lower court permitted counsel to withdraw as defendant's attorney for the defendant's failure to provide financial information. Was it error for the lower court to refuse to adjourn the trial to give the defendant the opportunity to retain new counsel?

Answer: No, generally CPLR §321(c) requires that there be a 30-day stay of proceedings after counsel is permitted to withdraw. An exception is when the attorney's withdrawal is caused by a voluntary act of the client. *Sarlo-Pinzur v. Pinzur* 2009 NY Slip Op 01207 (2nd Dept. 2009)

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