Queens BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

May 2021 | Volume 88, No. 8

2021 Family Law Update

By Joshua Katz

Hindsight is 2020. Thankfully!

Last year was an extraordinarily difficult year for all of us, but certainly for family law practitioners. There is light at the end of the tunnel, however, and much to be grateful for.

Divorce filings are up. Way up. Something about quarantining for a year in tight quarters makes you realize how much you love, or don't love, your spouse and children. While some parents have withheld visitation using the pandemic as an excuse, most lawyers seem to be working collegially and appropriately to resolve unprecedented issues in a highly professional manner. Hopefully, we've all kept busy. I am, personally, proud of the matrimonial bar in Queens!

2020 saw matrimonial cases enter the 21st century, and we are now e-Filing just like real lawyers! After most of the kinks were ironed out by NYSCEF, electronic filing has proven quite easy and productive. Affidavits of service are hardly necessary. Even trial exhibits can be easily uploaded, identified and screen-shared at trials. Microsoft Teams meetings are, for the most part, technologically smooth, starting on time, and have proven quite productive. And, while I will avoid the running joke about not wearing pants… it is nice not to have to wear a tie every day!

The Presumptive Mediation program is in full swing in Queens, now being managed by Linda Dardis. Additional, qualified mediators have been added for matrimonial cases, and matters are being referred from the preliminary conferences.

While the Court remains closed to foot traffic, the Clerk's Office is operational. E-filed motions are being processed. Paper-filed judgment rolls have been processed, and the Clerk's are assigning e-Filed uncontested to judges, so we will soon learn exactly how back-logged the judgment rolls are.

Despite the pandemic, the Family Law Committee has remained active. We held several informational meetings and accredited CLE programs on a Zoom platform, which were all well attended and raised essential funds for the Bar Association. Thank you to all our 2020 sponsors, who included Heidi Muckler, East Coast Appraisals, Gemelli Gross Shapiro & D'Agostino, Law Office of Joshua Katz, NAM, Tova QDRO & Retirement Valuation Consultants, Fensterman Eisman Formato, Ferrara, Wolf & Carone, Davidoff Hutcher & Citron, Jaspan Schlesinger.

Our Annual Equitable Distribution Update was held April 15. Speakers were preeminent Queens practitioners Mark Plaine and David Gross. Thanks to our generous sponsors Heidi Muckler and East Coast Appraisers, the 4-credit CLE was offered for FREE to all QCBA members.

May 4 was a very exciting 1.5 credit FREE CLE on Zoom in conjunction with the LGBTQ+ Committee. We discussed the Child-Parent Security Act, which went into effect in New York last month to legalize gestational surrogacy contracts. Our speakers and sponsors were Melissa Brisman of Reproductive Possibilites, LLC and Carole Bass of Moses & Singer, LLP, and was co-sponsored by Denisa Tova of Tova QDRO & Retirement Valuation Consultants, LLC.

It is an honor to co-chair the Family Law Committee with Deborah Garibaldi, and I look forward to seeing all our friends on Zoom, Teams and hopefully soon… in person!

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

MAY 2021

Tuesday, May 4	CLE: Child-Parent Security Act - Family Law and LGBTQ+ Committees.
Wednesday, May 5	Business Update for Attorneys - 1 pm
Thursday, May 6	CLE: Ethics Update - Pt 1
Wednesday, May 12	NYS Academy of Trial Lawyers: What I Wish I Learned in Law School-Pt 1 - 1 pm
Thursday, May 13	CLE: Ethics Update - Pt 2
Tuesday, May 18	Search & Seizure Update 2021 - 1 pm
Wednesday, May 26	Purchasing & Financing Commercial Real Estate - 5 pm
Monday, May 31	Memorial Day - Office Closed

JUNE 2021

Tuesday, June 1	Virtual Installation of Officers & Managers
Wednesday, June 9	Article 81/Guardianship Training-Pt 1 - 4:00 pm to 8:00 pm
Wednesday, June 16	Article 81/Guardianship Training-Pt 1 - 4:00 pm to 8:00 pm

JULY 2021

Monday, July 5, 2021	Independence Day Observed - Office Closed

SEPTEMBER 2021

Monday, September 6	Labor Day - Office Closed
Monday, September 13	Golf & Tennis Outing - Garden City Country Club

OCTOBER 2021

Thursday, October 7	Annual Dinner at Terrace on the Park
Monday, October 11	Italian Heritage/Indigenous People's Day - Office Closed

UPCOMING SEMINARS

CPLR & Evidence Update
Recent Significant Developments From Our Highest NYS Appellate Courts
Diversity & Inclusion Committee Events
Young Lawyers Committee Events

New Members

Navina Daramdas
Amish Doshi
Rourke Feinberg
Scott Fridkin
Di Di Ying

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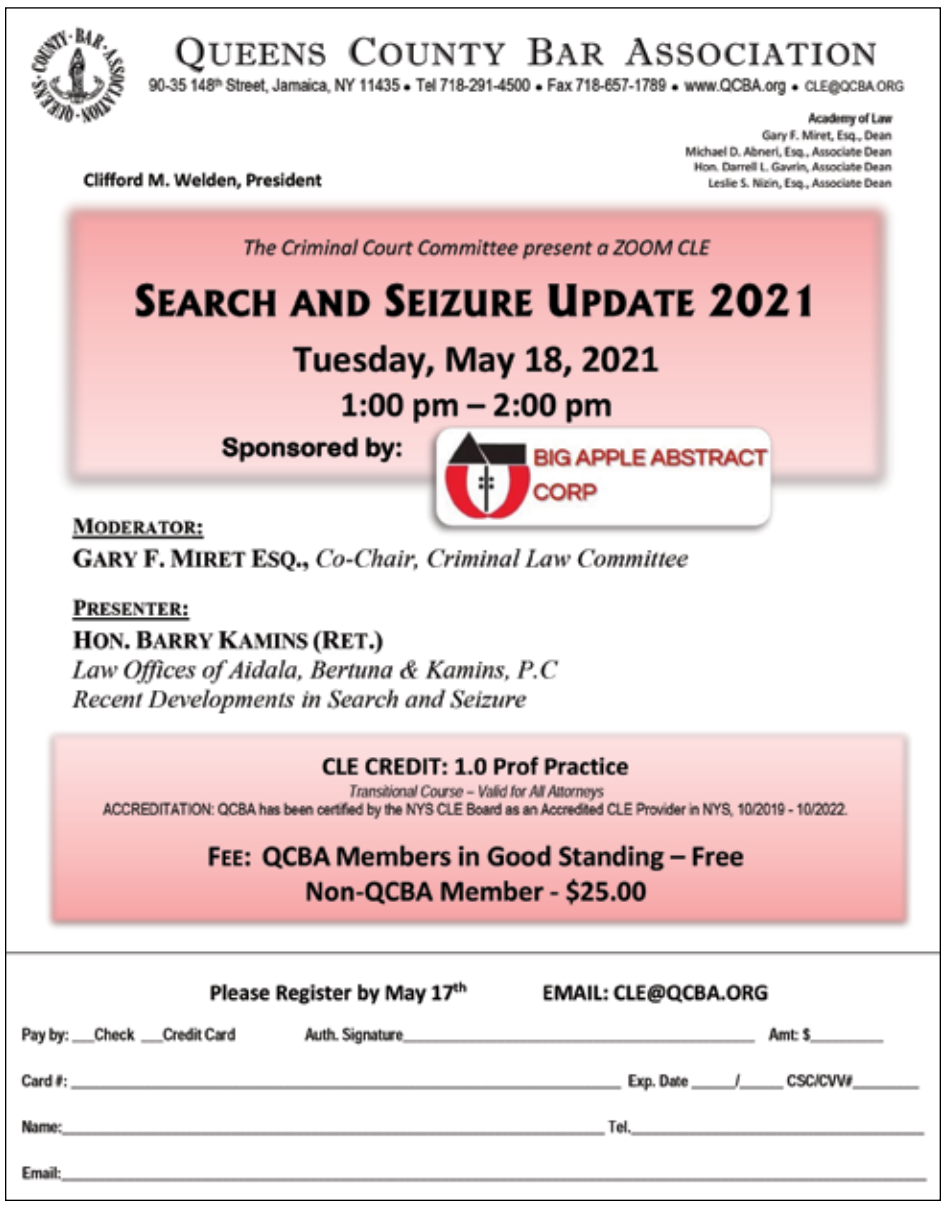

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The Criminal Court Committee present a ZOOM CLE

SEARCH AND SEIZURE UPDATE 2021

Tuesday, May 18, 2021
1:00 pm – 2:00 pm

Sponsored by: BIG APPLE ABSTRACT CORP

MODERATOR:
GARY F. MIRET ESQ., *Co-Chair, Criminal Law Committee*

PRESENTER:
HON. BARRY KAMINS (RET.)
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Recent Developments in Search and Seizure

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President's Message:

May Newsletter To Members

May has always been a great time of the year. It's the month of spring flowers and honoring mothers. In the legal community, we are all back from spring break vacations and traditionally we are going full speed with trials and appearances in our courthouses. Most of us never take time off in May due to our workloads but we did look ahead to the summer when our kids were out of school and the courts slowed down for training.

In the Queens County Bar Association, May is the month where we are wrapping up our planning meetings, CLE programs and events including our annual dinner where we assemble with friends old and new over cocktails and dinner while overlooking the spring beauty of Flushing Meadows Park and Citifield. It is here in the heart of Queens where we honor past members and welcome the new members of the Board of Managers.

For many of us May 2021 has been no different. Across our profession we see increased workloads in our offices as vaccinations increase and we are returning to our prior level of business activity. This May our association will meet virtually in June to welcome Frank Bruno as the next President and the incoming members of our board. In October we will meet in-person in a delayed installation dinner where we will again meet with our friends and see the colors in the park in its fall glory.

It has been an honor and a privilege for me to serve during this past year. For me this May will be melancholy as I am seeing my term as president come to an end while witnessing the retirement of Arthur Terranova as our Executive Director after almost 40 years. Arthur has been our historian, our confidant, our friend, and he has silently guided the QCBA. He has worked with multiple boards and mentored many members through difficult decisions. He has established relationships with the directors of other bar associations and organizations throughout Queens and has the 'institutional knowledge' that has made us a better association.

I want to thank Carol, Arthur's wife, for all that she has done for us. I am sure that there were significant sacrifices made during his tenure. I don't take that for granted and I am sure that Arthur doesn't either. You are probably looking to have him home with you, but we also know that a retired husband is also often a spouse's full-time job. To Arthur's daughters, Beth, Catherine and Allison I would like to recognize you for your support because your family has made our QCBA better. I imagine that there were some absences growing up and your love and support has contributed to your dad's success. I am sure that you are very proud of him just as he is very proud of you. He leaves a tremendous legacy for us and we all hope that you will be doing more of the things that you like to do together.

I want to thank Janice and Sasha in our office for their dedication to the bar. They are always there when I reach out to them and have also given up family time to monitor the functions that we have put on this past year. Thanks are also extended to the committee chairs who conducted so many meetings this past year and produced our numerous successful legal education programs on the new virtual platforms. This year there were hundreds of you who attended the CLEs and our individual committee meetings have never had so many attendees. This is due in no small part to the work of the Board of Managers. I have served on this board for the last 12 years and I have never seen a board that was so active and involved. Frank Bruno has a great group of people to go forward into 2021-22 alongside him. One of them is our new Executive Director Jonathan Reigel who has the business background and work experience to take over for Arthur and work with our office staff. I am sure that you will all look forward to meeting him in person and reading his updates in the Bar Bulletin in the coming months.

To Judges Grays, Catapano-Fox, Zayas, Johnson, Lansden, Taylor and Surrogate Kelly as the leaders of your respective courts you are to be commended for your openness to our committee chairs this past year and for your willingness to listen to us. You had been given a difficult task by senior court management and not always told how you should go about performing these directives. You all have done a great job keeping us informed during the pandemic and have all participated in our virtual meetings and programs. You are fine jurists who make us proud. Queens is lucky to have you all.

I have tried to thank many of our sponsors throughout the year and I again thank them all now for helping us to make our events available to our members at little or no cost. Our friends in the QUEENS EAGLE have helped us to get important updates out to the legal community between the monthly printing of Paul Kerson's monthly BULLETIN. In addition, I would like to thank those of our members who have paid their dues on time. Our offices remained open during the pandemic servicing our members and the Queens community and the timely payment of dues helps to make this possible. Mark Weliky and the attorneys in the Queens Volunteer Lawyers Project are the epitome of what a non- profit should be and continued to provide services to the residents of Queens County this past year. They are to be commended for their service and are a model of what attorneys should strive to be.

Me gustaría dar la bienvenida a los miembros de nuestra comunidad legal latina que se unieron al colegio de abogados el año pasado. Entiendo que en los últimos años muchos han sentido que fueron ignorados por la QCBA. Espero que hayamos tomado medidas el año pasado para corregir esta percepción y espero trabajar más con ustedes y los miembros de la comunidad legal de Queens en los próximos años.

Finally, I want to publicly thank my wife Marianne for her patience over the 12 years that I have served on the Board and before that, for the 10 years that I was on the Judiciary Committee attending meetings at night. Over the years, I have missed family time to attend our functions. I cannot say how much I love and appreciate her and my two sons Cliff and Patrick.

The past year has been an exceptional one that has given us good reason to look toward a promising future. I hope that you all feel that we have served your interests well this past year and that we did a good job during a difficult and challenging time. The Queens County Bar Association has been here for 144 years and it will continue to evolve as it strives to serve our Queens legal community in the future.

Thank you for allowing me to serve as your president.

SINCERELY YOURS,
CLIFFORD M. WELDEN | PRESIDENT

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Editor's Note

Book Review: Bob Haig's Commercial Litigation in NY State Courts, 5th Edition

By Paul E. Kerson

Well, Bob Haig has done it again. He has produced what is perhaps the best NY law treatise of our time. It covers virtually every possible topic in the field of New York commercial litigation, including how it interrelates with every other field of law. The sheer size and scope of the work is breathtaking: 11 volumes covering 156 topics.

Published by Thomson Reuters (f/k/a West Publishing Co.) in conjunction with the NY County Lawyers Assn., Commercial Litigation in NY State Courts, 5th Edition is part of the 61 volume set of law books entitled West's New York Practice Series.

Our State's 15 law schools should take a good, hard look at this 61 volume set and make a serious inquiry as to why it does not constitute the curriculum for a true New York City and State law school. Or did they want their students to continue to remain without any practical knowledge of what we actually do every day in every courthouse in the state?

Of particular importance is Bob's Forward. In it, he explains how he assembled a team of well-respected judges and lawyers to write each of the 156 chapters. He also writes with complete candor about the failings of the NY State Court system, and how these problems led to the creation of the Commercial Division in 1995:

"Twenty-five years ago, the business community did its best to avoid the New York courts, perceiving them as inefficient, unproductive, unpredicatable and unfair…

As a result, many businesses were turning to the federal courts with their vastly greater resources as well as to the courts of other states such as Delaware and to private resolution." See Haig, Volume 2, pages viii and vii.

Thus, the State Court system created the Commercial Division of the State Supreme Court in 1995 starting with five justices in two counties. By this year, the Commercial Division has expanded to 28 Commercial Division justices in nine counties, including three parts here in Queens County. (Your Editor predicts that our county, Queens County, home to the State's true leading economic engines, Kennedy and LaGuardia Airports, will ultimately have more Commercial Division Parts than any other county.)

Bob explains to us how the Commercial Division lifts all boats:

"…there has been the increasing recognition during the past few years of the fact that the Commercial Division helps New York State attract and retain businesses and therefore to generate tax revenues and provide jobs.

The benefits to New York are enormous. I believe that this treatise will enhance those benefits." See Haig, page ix.

So now, the honest reviewer must ask the question every good lawyer asks in every situation, WHY? Why is this treatise so important to the successful functioning of the Commercial Division, so important to the economy of New York City and State? (Cultural footnote: Why is this night different than all other nights?)

Answer: Because very few of the chapters were written by full time law professors. This is a hands-on book written by hands-on judges and lawyers.

Two of the leading chapters, 73 (Techniques for Expediting and Streamlining Litigation) and 148 (Commercial Leasing) are written by our own retired Queens County Supreme Court Justices, Hon. Martin Ritholtz and Hon. Orin Kitzes.

And what do Justices Ritholtz and Kitzes tell us with nearly a century of experience between them?

Justice Ritholtz is very clear as to why the Commercial Division has been such an improvement:

First of all, he quotes Abraham Lincoln, one of the leading lawyers in Springfield, capital of Illinois, before he entered politics:

"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time." See Lincoln, quoted by Ritholtz in Haig, Vol. 4B, page 946.

We veterans know that the system works best when the Law Secretary or the Justice Presiding calls the lawyers into Chambers and has a non-binding mini-trial – an exploration of all of the outstanding issues in the case. Then the Law Secretary or Justice Presiding gives his or her views on how these issues may be adjusted to avoid further motion practice and trial. Justice Ritholtz (and his co-author, Rebecca C. Smithwick, Esq.) go on for 127 pages explaining how to get the case to the point where the lawyers can have that meaningful mini-trial with the Law Secretary, or Justice Presiding. See Ritholtz in Haig, Vol. 4B, pages 943-1070.

For his part, in Chapter 148, Commercial Leasing, Justice Kitzes shows us how Law School must be reformed.

He spends considerable time explaining Yellowstone injunctions. Readers will recall that First National Stores, Inc. v. Yellowstone Shopping Center, Inc.,21 N.Y. 2d 630, 290 N.Y.S. 2d 721 (1968), was originally a Queens County Supreme Court case that went all the way to the NY State Court of Appeals in Albany, NY and made law on the subject of injunctions in the midst of on-going commercial leasing disputes.

Justice Kitzes (and his co-authors, Mark S. Mullholland, Esq., Robert S. Nash, Esq. and Robert J. Ward, Esq.) clearly lays it all out for the reader: There is a four-part showing necessary for a Yellowstone injunction.

But a law student, or lawyer, or Justice. Judge or Law Secretary would never be able to understand this by reading the Yellowstone Court of Appeals opinion standing alone. What Justice Kitzes does so elegantly is to read and summarize many of the leading similar court opinions that came after Yellowstone. That is what we all need to understand this topic.

And so it goes with every topic under the legal sun: Chapter 4, Investigation of the Case; Chapter 5, Internal Investigations; Chapter 7, The Complaint; Chapter 18, Coordination of Litigation Within NY and Between Federal and State Courts; Chapter 26, Bill of Particulars; Chapter 29, Depositions; Chapter 38, Referees and Special Masters; Chapter 41, Settlements (the goal of every case); Chapter 108, Personal Injury; Chapter 125, White Collar Crime; Chapter 128, Fraud; Chapter 130, Negligence; and Chapter 156, Surrogate's Court Practice for the Commercial Litigator.

As the appreciative reader can see, Bob Haig did not just assemble a commercial law treatise. He did far better than that. He assembled 156 teams of leading judges and practicing lawyers to explain how commercial law, tort law, criminal law, civil procedure, federalism, and decedent's estates all interrelate.

Exactly which Law School does that today?

Answer: None.

And that is why all NY City and State Law Schools should be requiring every law student, on Day One, to purchase (at a discounted price) the entire 61 volume West's New York Practice Series, which includes Bob's 11 volume masterpiece on Commercial Law.

Then the next three years should be spent reading each volume under the supervision of a judge or lawyer who has actually practiced in the area covered by that volume. Reading of cases and statutes should be done in the framework set out by Bob and his fellow editors, not the other way around, as is currently the case.

But only do this if we want anyone to know anything about the NY State court system as we know it today.

USCIS Issues Policy Guidance for Respecting Previous Decisions!

Fantastic News for those Stakeholders to H1B, L1, and extension requests in various visa types!

USCIS is issuing policy guidance in the USCIS Policy Manual instructing officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts unless there was a material error, material change, or new material facts. This is particularly helpful for all those companies and petitioning sponsors who got stuck in the Anti-Immigrant Trump Era of policies that made review of petitions De Novo (meaning from the beginning/new) and added additional scrutiny to make the standards tougher. We can recognize that a huge number of H1B and L1 visas were denied in 2018 and 2019 based on those policies.

With this update, USCIS is reverting in substance to prior long-standing guidance issued in 2004, which directed officers to generally defer to prior determinations of eligibility when adjudicating extension requests involving the same parties and facts as the initial petition or application. In 2017, USCIS rescinded the 2004 guidance. But with this reversion, we will hopefully see the fair and reasonable implementation of deference to previous approvals again. When the policy guidance was rescinded in 2017, USCIS began looking at each extension and renewal as if it was a brand new stand alone application. And then coupled with a higher standard of review, they began issuing denials and Request for Evidences at an alarming rate.

This update is in accordance with President Biden's executive order, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans. The executive order directs the Secretary of Homeland Security to identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits. Affording deference to prior approvals involving the same parties promotes efficient and fair adjudication of immigration benefits. Since Secretary Mayorkas is very familiar with the inner workings of USCIS, being the previous Director of the Agency, he knows all too well, how to fix many of the issues that were broken over the previous 4 years.

We applaud the Administration, The DHS, and the USCIS in their efforts to restore fairness, equity, and hopefully prosperity to the American people, to the hundreds of thousands of intending foreign national employees or intending employees, as well as the many companies who were significantly hurt because of the previously implemented policies.

BY DEV B. VISWANATH, ESQ.

DEV BANAD VISWANATH, ESQ

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The Practice Page

Authenticating Records Under CPLR 4540-A

CPLR 4540-a is a relatively new statute, effective on January 1, 2019. The statute is only two sentences long. The first sentence directs that if a party provides a discovery response pursuant to CPLR Article 31, and includes material "authored or otherwise created" by the responding party itself, the adverse party who has received the material may offer it into evidence with a presumption of authenticity. The second sentence provides that the presumption may be rebutted by a preponderance of the evidence showing that the material is not authentic. Since legal presumptions may always be rebutted, the second sentence of the statute adds little to our general law, other than to define the preponderance standard applicable to this instance of rebuttal. The second sentence also states that a rebuttal to authenticity does not preclude any other objection to the materials' admissibility. In other words, the statute is only what it is.

Some observations are in order. Materials provided by a party during discovery may be of admissible relevance at both summary judgment and at trial. CPLR 4540-a is written broadly enough to be applicable to both. Practitioners may therefore proffer material authored or created by the adversary as evidence in chief, without having to establish its authenticity. Examples may conceivably include accident reports, photographs, recorded statements, business records, and tax returns. If a party moves for summary judgment, for example, and attaches an adversary's self-authored discovery material to meet the prima facie burden of proof on the motion, the opposing party cannot object on authentication grounds unless prepared to contest the authenticity of its own previously-disclosed material.

The sound legislative intent behind the statute is to relieve parties of proving the authenticity of an adversary's self-authored or self-created material offered as evidence, when authenticity would typically not be a contested issue anyway. The presumption of authenticity saves the offering party the time, trouble, and expense of establishing the materials' genuineness, and saves the court the trouble of having to adjudicate the issue. In the rare event that a party's disclosed material is a product of forgery, fraud, or other defect, the disclosing party may utilize the backstop provision of CPLR 4540-a to challenge the legal presumption, by producing a preponderance of evidence that the material is not authentic. By that means, the producing party may protect itself from the pitfalls of being victimized by an unwitting disclosure of inauthentic material.

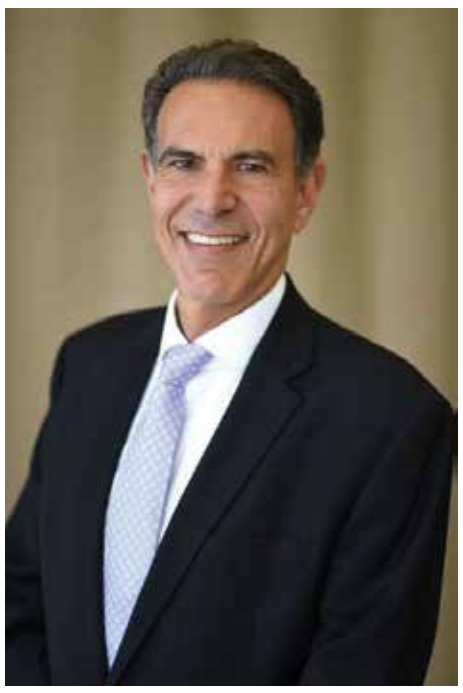
The statute is limited to materials authored or created by the party providing them in discovery. The statutory presumption does not extend to materials authored or created by third parties outside of the producing party's vicarious control, or to materials obtained outside of party discovery.

CPLR 4540-a does not displace other methods of authenticating evidence, but merely augments the means by which authenticity may be established. A party proffering materials as evidence at summary judgment or trial may, if it chooses, use other recognized methods for establishing the materials' authenticity and admissibility.

The statute is still too young to have generated much decisional authority. So far, in McCarthy v

CONTINUED ON PAGE 9

Ronald Fatoullah & Associates



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Legislative Update -

The Perils to Coop of the "Good Cause" Eviction Bill

We have received information that there are currently over fifty (50) bills introduced that would affect Coops and Condominiums. Many of these bills would radically alter how a Coop functions and would have a profound impact on their day-to-day operations. Perhaps most significant of these proposals is the so called "Good Cause" Eviction bill. It appears once again the State Legislature in efforts to protect Tenants, are in fact including Coops in this sweeping piece of legislation. The Good Cause eviction bill does not provide any benefit to shareholders and will be make the function of operating a Coop much more costly and difficult.

The Good Cause Eviction Bill, A.573/S.3082, covers "landlords" which includes "any person entitled to receive rent for occupancy or use of a housing accommodation", "tenants" who are "any person entitled to use or occupy a housing accommodation", and "rent" which covers "any consideration for use of a housing accommodation or transfer of a lease. These very broad terms include Coops, possibly Condos, and certainly individual Condo leases and Coop subleases. There are exceptions for owner occupied 1-3 family premises, and the right of owners of 1-4 family homes to recover units for their principal residence and the right of owners of 1-11 family homes to recover one unit for their, or a family member's, principal residence, provided unit is not occupied by a person over 62 or disabled.

The Good Cause Eviction Bill prohibits eviction or removal from housing accommodations for anything other than "Good Cause", which includes nuisance, illegal use, violation of substantial terms of the lease, the and failure to provide access. However, there is a rebuttable presumption that failure to pay rent is not "Good Cause" if it results from a rent increase of more than 3% or 1.5 times the increase in Consumer Price Index. Therefore, Coops and Condos can only enforce maintenance or common charge increases within these caps, regardless of the increases in operating costs, taxes, obligations under emissions control rules, and other costs.

The bill completely ignores the fact that a Coop Board is required to submit a balanced budget to their shareholders on an annual basis. Any increase in maintenance is a direct result in increased costs, many of which is the result of skyrocketing tax increases in New York City. This bill also completely ignores the fact that Coop budgets contain no profits. All income over expenses is put into reserves accounts or reinvested in the Coop.

Under this proposal investment Coop and Condo owners must provide renewal leases and subleases under these terms and cannot recapture their own units except for Good Cause. Therefore, the unintended effect of this legislation will result in a substantial reduction in the number of units available for rent in Coops will be dramatically reduced. Reducing the amount of affordable housing in New York City is counter-intuitive and will have a negative impact on the rental market by tightening the supply and may result in the increase in rents.

The irony of this proposed legislation is it will have a deleterious effect on those individuals it designed to protect. This legislation will make the operations of balancing a Coop budget problematic; collection of arrears will be far more costly and difficult and fewer units will be sublet, reducing the affordable housing stock. This legislation will have a devasting impact on all Coop shareholders and no discernible benefit.

BY GEOFFREY MAZEL, ESQ.,
FOUNDING MEMBER, HANKIN & MAZEL, PLLC

Authenticating Records Under CPLR 4540-A

CONTINUED FROM PAGE 8

Hameed, the Fourth Department held the statute inapplicable to the medical records of a plaintiff's physician, as they were not "created" by the plaintiff herself. The result would likely be different in a medical malpractice action involving treatment records disclosed by a defendant physician as the self-generating party. One reported trial-level decision from the Supreme Court, Monroe County, Messinger v Messinger, involved a dispute between ex-spouses over their proportional responsibilities toward a child's college education expenses. The spouses' respective contributions would be affected by their incomes and assets. At trial, the court held that the father had "created" a document that he had downloaded from his pension account and was within CPLR 4540-a, even though the actual contents were derived from a state pension website. However, the court also directed that the father could establish in a supplemental submission that the documentary material was inauthentic under the second sentence of CPLR 4540-a. The holdings of McCarthy and Messenger may not be entirely consistent, as in both cases the records in question were created by a non-party but produced different results.

Stay tuned for further court decisions on this statute.

BY HON. MARK C. DILLON
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The Sale Of Real Property By A Court-Appointed Guardian

BY DANIELLE M. VISVADER, ESQ.
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP

Under Article 81 of the Mental Hygiene Law, the Court may appoint a Guardian of the Property to handle the financial affairs of an individual who lacks the capacity to handle those affairs on his/her own. A hearing must be held and the Court must make a finding that either the Alleged Incapacitated Person consents to the appointment of a Guardian, or, that the Alleged Incapacitated Person is incapacitated. The Court will issue an Order and Judgment Appointing Guardian, which outlines all of the powers given to the Court-appointed Guardian. The powers granted to the Guardian must be the least restrictive form of intervention to assist the Incapacitated Person.

It is not uncommon for an Incapacitated Person to own real property and reside elsewhere, such as in an assisted living facility or skilled nursing facility. In that case, it may be prudent for the Guardian of the Property to sell the real property to avoid having the added expense of maintaining the property, particularly if there is no likelihood of the Incapacitated Person returning to the community.

A Guardian of the Property is typically empowered, pursuant to Section 81.21 of the Mental Hygiene Law, to sell real property, however, the sale of real property requires Court approval. The procedure to obtain Court approval is complex as it involves a number of requirements under Article 17 of the New York Real Property Actions and Proceedings Law ("RPAPL").

Our office has handled countless applications for the sale of real property on behalf of the Guardian. The Guardian may enter into a Contract of Sale without the Court's approval, however, the Contract of Sale must be approved by the Court. The Contract of Sale must also state that "it is subject to Court approval" and that all brokerage commissions are determined by the Court.

In order to obtain Court approval, the Guardian must make a Motion to the Court by Order to Show Cause and Verified Petition. The Order to Show Cause must contain a provision for the Court to appoint an appraiser, which is a requirement under the RPAPL. The goal of the legislature and the Court is to ensure that the Incapacitated Person receives, at minimum, fair market value for the property.

To that end, there is also a requirement for publication of the sale so that potential buyers can appear on the return date of the Motion and bid on the property. The requirement for publication may be waived for good cause shown but in majority of cases, the Court will require publication and conduct an auction. In the event that there is a bid higher than the purchase price in the Contract, the Court may void the original Contract and direct the Guardian enter into a Contract of Sale with the highest bidder.

In addition to holding an auction, the Court will also conduct a hearing on the return date of the Motion. The burden is on the Guardian to demonstrate that it is in the best interests of the Incapacitated Person to sell the real property. The Guardian will need to give testimony on the current medical condition of the Incapacitated Person; where the Incapacitated Person resides; why the Incapacitated Person is unable to return to live in the property; the current value of the guardianship estate; the monthly expenses associated with the property; and any other monthly expenses of the guardianship. There will also need to be testimony on the methods taken to market the property, which is typically given by the Court-appointed real estate broker, and testimony as to why the Contract price is appropriate, which is typically given by the Court-appointed appraiser.

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35 Years in a New York Minute:

Arthur Terranova Retires, Jonathan Riegel named QCBA Executive Director

Our esteemed QCBA Executive Director, Arthur Terranova, has retired. Just a few minutes ago, in October 1986, the Queens Bar Bulletin announced the commencement of his long, productive, and meaningful leadership. On that noted occasion, we said:

"He looks forward to years of service to the Association and its members and to the continued success of the Queens County Bar Association in the years ahead."

After 35 years of hosting Stated Meetings, teaching us at Continuing Legal Education programs, organizing Committees, leading disciplinary probes into errant judges and lawyers, negotiating for court improvements with OCA - the Office of Court Administration (Office of Constant Aggravation), dealing with Administrative Judges, tending to our brand new 1959 building and entertaining every disgruntled and angry litigant who walked into our headquarters seeking justice, Arthur has stepped down.

Among Bar Association executives throughout the State and Nation, Arthur had no peer. He was one of a kind. He wore so many hats, his head was spinning every day and night. Last week, I asked him to sum it all up for you, our Member-readers. In characteristic understatement, Arthur said:

"My goal was to make sure the QCBA was always protected and never embarrassed."

In achieving that goal, Arthur elevated the QCBA to a function beyond itself: In a County whose independent county government was wrongfully abolished in the municipal consolidation of Greater New York in 1898 and the creation of Nassau County in 1899, he filled the role of County Executive. When Queens County's voice needed to be heard in the halls of "City" or State Government, Arthur was there for us.

When asked what he was most thankful for in his long 35 year tenure, Arthur had this to say: "All the fine attorneys and judges I met over the years, and the long lasting friendships."

So who can replace him? A great deal of time and attention went into this important decision. QCBA Past Presidents David Adler and David Cohen, current President Cliff Welden, Vice President Adam Orlow, Secretary Zenith Taylor, Board Member Kristen Dubowsky-Barba and Arthur himself constituted the Search Committee.

An Executive Management recruitment firm was retained. Hundreds of resumes were read. Many interviews were conducted. Ultimately, our Board of Managers decided to retain our new QCBA Executive Director, Jonathan Riegel.

Arthur Terranova

Jonathan Riegel

Of Jonathan, our President-elect, Frank Bruno, Jr. had this to say: "After a robust inquiry, the Search Committee located an outstanding candidate in Jonathan Riegel. His life experience, non-profit and organizational knowledge and exemplary people skills will serve our membership exceedingly well for years to come."

Jon has years of experience in managing professional associations. He has served as Executive Director of the Premier Group Network of Hewlett, NY, the association of promotional products companies (2017-2021); and the Specialty Advertising Association of Greater NY of Rye, NY (2011-2017).

For many years, 1994-2011, Jon headed his own business, Concepts Unlimited Promotional Merchandise, Inc., of Hewlett, NY. He thus has decades of experience in management, advertising, and marketing. Who better to advise our Board of Managers than a Management professional?

I spoke to Jon at length last week and offered him whatever help he needs in serving as our new QCBA Executive Director. I asked him how he would go about managing the backbone of our society, for that is the definition of a Bar Association. Our "City", State and Federal Governments have executive, legislative and judicial branches. The Judiciary has the last word. And the judiciary and its officers (lawyers) are governed by the educational, fraternal and disciplinary functions of Bar Associations.

Jon gave me the best answer one could expect from someone taking on such a vital task: He plans to get in his car, drive around Queens County, and meet as many of our Members as he can. He must fill the shoes of our past Executive Directors William Weinstock, Fred Brue and Arthur Terranova, and each of us must help him do so. Let us all combine our efforts to make certain that Jon's tenure is just as successful as Arthur's, and hopefully, even more so.

BY PAUL E. KERSON

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The Sale Of Real Property By A Court-Appointed Guardian

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After the hearing, the Court will issue a decision. In the event that the Court denies the application, the Contract of Sale is void and the down-payment is returned. There is no penalty to the Guardian if the Court denies the application.

If the Court approves the sale, the Court will issue an Order approving the Contract of Sale. This Order will outline the specific authority of the Guardian to effectuate the sale by executing any and all necessary documents, including the deed, and paying all necessary closing costs. The title company overseeing the transaction will not schedule a Closing until the issuance of the Order approving the Contract of Sale. The Order will also direct the filing of a real property bond in the amount of Contract price. This, too, must be provided to the title company prior to Closing.

The Closing occurs shortly after the issuance of the Order approving Contract of Sale. A copy of the Closing Statement must be submitted to the Court. The Court will issue an Order Confirming the Sale, which directs the payment of certain fees, including counsel fees and a fee to the Court-appointed appraiser.

The entire process takes anywhere from three (3) to five (5) months due to all of the requirements under the RPAPL and the Motion process. This is a consideration for all Court-appointed Guardians when trying to sell real property on behalf of a ward. Some buyers are reluctant to get involved in the legal process due to the length of time.

Residential real estate transactions in New York are already more complicated than in other states. The procedure for the sale of guardianship property in New York state takes it to a whole other level. Any Court-appointed Guardian seeking to sell real property should always consult with experienced counsel to effectuate the sale, subject to Court approval.

BY DANIELLE M. VISVADER, ESQ.
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Immigration Questions

Practice Alert: ICE Interim Guidance on Civil Immigration Enforcement and Removal Priorities

Allen E. Kaye

Joseph DeFelice

This alert provides a brief summary of the 2/18/21 memo from ICE Acting Director Tae Johnson titled Interim Guidance: Civil Immigration Enforcement and Removal Priorities ("Johnson Memo"). The AILA EOIR/ICE Joint Liaison Committee released an earlier practice alert, which provided a summary of President Biden's 1/21/21 Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities and Acting DHS Secretary David Pekoske's 1/20/21 memo Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities ("Pekoske Memo").

The Johnson Memo is effective immediately and purports to be in support of the interim civil enforcement and removal priorities from the Pekoske Memo. It will remain in effect until DHS Secretary Mayorkas issues new enforcement guidelines, which the memo states will happen within 90 days.

The Johnson memo covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning. To the extent the new guidelines conflict with the Pekoske Memo, the Johnson Memo explicitly states that it controls. The Johnson memo notes that it does not implement or take into account the proposed 100-day moratorium on removals at Section C of the Pekoske Memo, which is currently enjoined.

The memo instructs that its interim priorities "shall be applied" to all civil enforcement and removal decisions including, but not limited to:

• Whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;

• Whether to issue, reissue, serve, file, or cancel a Notice to Appear;

• Whether to focus resources only on administrative violations or conduct;

• Whether to stop, question, or arrest a noncitizen for an administrative violation of civil immigration law;

• Whether to detain or release from custody subject to conditions;

• Whether to grant deferred action or parole; and

• When and under what circumstances to execute final orders of removal.

In addition to resource constraints, the guidance acknowledges that ICE has "the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws."

Priorities

The Johnson Memo lists three categories of cases that are considered to be presumed priorities.

• **Category 1: National Security.** A noncitizen is presumed to be a national security enforcement and removal priority if:

o Engaged in or suspected of engaging in terrorism-related activities;

o Engaged in or suspected of engaging in espionage-related activities; or

o Otherwise necessary to protect national security. General criminal activity does not amount to a national security threat and should be analyzed under the Public Safety Category.

• **Category 2: Border Security.** A noncitizen is presumed to be a border security enforcement and removal priority if:

o Apprehended at the border or a port of entry while attempting to enter the country unlawfully on or after November 1, 2020; or

o Not physically present in United States before November 1, 2020. Note that this priority category will include future overstays who enter on or after November 1, 2020.

• **Category 3: Public Safety.** A noncitizen is presumed to be a public safety enforcement and removal priority if they pose a threat to public safety and:

o Have been convicted of aggravated felony as defined in INA § 101(a)(43); or

o Have been convicted of an offense with active gang participation as an element or are 16 years old or older and "intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization

Practitioners should note the following regarding the Public Safety Category:

• Analysis of whether someone is a priority should always be a two-step process. The person must have been convicted of an aggravated felony or trigger the gang participation prong, and separately, must be judged to pose a threat to public safety. In evaluating whether the person poses a threat to public safety, the memo instructs officers to consider:

o The extensiveness, seriousness, and recency of the criminal activity; and

o Mitigating factors, including, but not limited to:

• Personal and family circumstances;

• Health and medical factors;

• Ties to the Community;

• Evidence of rehabilitation; and

• Whether the individual has potential immigration relief available.

• The Pekoske Memo had instructed that only those with aggravated felonies who were incarcerated on or after January 20, 2021, would fit into the Public Safety Category. This guidance removes that temporal limitation and allows an aggravated felony conviction at any time to trigger priority treatment, if the person also poses a threat to public safety.

• The guidance instructs officers to base conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consultation with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

The memo instructs that the execution of removal orders must be supported by a compelling reason and have approval from the Field Office Director for cases involving noncitizens:

• Who are elderly or are known to be suffering from serious physical or mental illness;

• Who have pending petitions for review on direct appeal from an order of removal;

• Who have filed only one motion to reopen removal proceedings; or

• Who have pending applications for immigration relief and are prima facie eligible for such relief.

If a case meets the criteria for a presumed priority case, ICE officers do not need any further pre-approval for enforcement actions.

For cases not meeting the criteria for a presumed priority case, pre-approval from the Field Office Director or Special Agent in Charge is required. Requests for pre-approval for non-priority cases take into consideration:

• The nature and recency of the noncitizen's convictions;

• The type and length of sentences imposed; and

• Whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors.

The justification for taking an enforcement action in a non-priority case must be in writing. Also, pre-approval to carry out an enforcement action against a particular noncitizen does not authorize collateral arrests, except in exigent circumstances, generally limited to situations where a noncitizen poses an imminent threat to life or imminent substantial threat to property. Where an action is taken in such circumstances, the officer must request approval following the action within 24 hours.

ICE Case Review Process

The guidance noted that ICE would create and maintain a system for evaluating individual requests for prosecutorial discretion. On March 5, 2021, ICE announced its ICE Case Review (ICR) process for individuals who believe their case does not align with ICE's enforcement, detention, and removal priorities.

ICE's Case Review website, www.ice.gov/ICE-casereview, offers additional information on how cases should be elevated. In general, individuals requesting a detention case review should contact their local ERO field office for initial consideration. Upon request, cases will be further reviewed by a Senior Reviewing Official, who, where appropriate, will communicate the ultimate resolution with the requestor. The cases of individuals detained in ICE custody or pending imminent removal will be prioritized.

After contacting your local ERO field office, individuals may also initiate the ICE Case Review (ICR) process by emailing the ERO Senior Reviewing Official to request a case review at ICEcasereview@ice.dhs.gov. ICE asks that requests include the individual's A-number, other identifying information, a telephone number, a valid email, and a Form G-28 or ICE Form I-60-001, Privacy Waiver Authorizing Disclosure to a Third Party (when applicable).

BY ALLEN E. KAYE AND JOSEPH DEFELICE

Allen E. Kaye and Joseph DeFelice are Co-Chairs on the Immigration and Naturalization Committee on the Queens County Bar Association.

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GOVERNMENT SERVICE MEMBERSHIP: *Members who are in Government Service (Judges, Court Attorneys, Law Secretaries, Legal Aid Society, Queens Legal Services, District Attorneys, Queens Law Associates, Corporation Counsel, etc.) are eligible for a 30% dues reduction. Please inform us of which Government Service gives you this eligibility.*

☐ Government Sustaining Membership $ 245.00
☐ Government Attorney 10+ years $ 210.00
☐ Government Attorney 5-9 years $ 157.00
☐ Government Attorney less than 5 years $ 94.00

18B ASSIGNED COUNSEL PLAN MEMBERSHIP:

Eligible for a 20% dues reduction. Please inform us of which 18B Assigned Counsel Plan gives you this eligibility (Family or Criminal).

☐ 18B Sustaining Membership $ 280.00
☐ 18B Attorney 10+ years $ 240.00
☐ 18B Attorney 5-9 years $ 180.00
☐ 18B Attorney less than 5 years $ 108.00

Discounts are also available for members of other local (Queens) bar associations who have never belonged to the Queens County Bar Association.

Membership dues can be made in one payment or by installments.

QUEENS COUNTY BAR ASSOCIATION
90-35 148TH STREET
JAMAICA, NEW YORK 11435

TEL - 718-291-4500
FAX - 718-657-1789

WWW.QCBA.ORG
INFO@QCBA.ORG

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