A Modest Proposal to Prevent Economic Meltdowns

BY PAUL E. KERSON

How was Bernie Madoff able to misappropriate $65 Billion?
How did AIG and Citibank manage to lose untold billions requiring a Federal Government bailout?
Could it be that we 21st century Americans have been done in by our own cleverness? Is it just too easy to complete a multi-million dollar transaction electronically, in the blink of an eye? Does the sheer speed of the personal computer and the internet actually encourage fraud?

Think of the slow, ponderous, deliberate wealth and power transfer systems left to us by prior generations who were obviously far more clever than we are. This assumes that the absolute standard of a clever society is one that is able to prevent the kind of massive financial failure we have witnessed in the past year.

A New York Last Will and Testament still must be signed in ink by the testator and at least two witnesses. The Witness Statement must by signed and stamped in ink by a Notary Public.

A New York deed must be signed in ink by the Seller and signed and stamped in ink by a Notary Public.

A New York nominating petition for a candidate for public office must be signed in ink by a certain number of registered voters depending on the office. The petition must be witnessed by a registered voter in that same district or by a Notary Public.

We have used these 18th century methods of transferring wealth and power into the 19th, 20th and 21st centuries for one reason alone – because they work very well to prevent fraud and abuse. All of them have one thing in common – the person doing the transferring of significant wealth or power is watched over by one or more other people who have little or no stake in the transaction.

Even the most honest person sitting alone at a computer screen is tempted to cut corners. This is much less likely if a Notary Public is standing over one’s shoulder holding the stamp. After all, the Notary’s sole function at the will signing, the real estate closing or the candidate’s nomination is to verify the truth of the transaction.

So here is a very modest proposal that should save us untold grief in the future: Congress should pass a law requiring that all stock, bond and mortgage derivative transactions of over $100,000 be notarized by a Notary Public not otherwise involved in the transaction.

Oh, I can hear the financial boys hooting, “But that will slow us down, capital will not be able to flow freely over the internet, we will have too much paper.”

And that, my dear readers, is exactly the point – Stock, bond, and mortgage derivative transactions should all have exactly as much notarized paper as wills, deeds and nominating petitions.

Or would you rather have dozens and dozens of Bernie Madoffs, AIGs and Citibanks? Would you rather have Federal Government bailouts and prosecutions far into the future?

As far as I can determine, our system for verifying the truth of wills, deeds and nominating petitions has NEVER been as clever as that of a Notary Public.

We have always been a bottom-up country, not a top-down kingdom. Put the Notary Publics of our country in ABA Bar Leadership Institute

Queens County Bar Association Participates in ABA Bar Leadership Institute

CHICAGO—Joining some 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association’s Bar Leadership Institute (BLI), March 12-14 was President-Elect Guy R. Vitacco, Jr. and Executive Director Arthur N. Terranova of the Queens County Bar Association.

The BLI is held annually in Chicago for incomning officials of local and state bars, special focus lawyer organizations, and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such associations.

Mr. Vitacco and Mr. Terranova joined ABA officials, bar leader colleagues, executive lawyer organizations, and bar foundations. The Director Arthur N. Terranova of the Queens County Bar Association

CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

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

Limitations

A new concluding sentence has been added to CPLR 205(a), 7 addressing the question of dismissals “for neglect to prosecute.” The phrase is in quotation marks, since it is not completely clear what dismissal falls within that description. 205(a), you will recall, is the “speedy and certain” provision, which allows commencement of an action, even if the limitations period has expired, if the action was originally timely commenced and terminated for any reason other than the four listed, one of which is a dismissal for neglect to prosecute. 38 The new sentence in CPLR 205(a) states: “Those are the dismissals for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”

It is unclear from the language of the amendment what its intended scope actually is. Is it intended to limit the class of cases excluded from 205(a) to those where the dismissing court issued such a detailed order? Or, is it intended merely to guide dismissing courts in the proper content of the dismissal order? Or is it intended as a wide-ranging limitation, that dismissals for any conduct falling under the undefined heading of “neglect to prosecute” are invalid unless there has been a general pattern of delay?

The CPLR gives a similar name to only one ground for dismissal: the dismissal “for want of prosecution” pursuant to CPLR 3216. Other dismissals, however, clearly come within the meaning of “neglect to prosecute,” and hence have not gained the benefit of the second chance. Andrea v Arnone, Heidi, Caspar, Kennedy & Drake 50 was such a case, and it apparently provoked the amendment to 205(a). It was another in the line of recent Court of Appeals cases in which the Court has taken a firm line against litigation delays. In Andrea, a dismissal for failure to disclose was held to be the equivalent of a dismissal for failure to prosecute. When the plaintiffs thereby commenced a new action after the limitations period had expired, they were there—Continued On Page 14
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

THE DOCKET . . .

THE QUEENS 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

Queens County Bar Association

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2009 SPRING CLE Seminar & Event Listing

April 2009
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
Thursday, May 21: All You Might Want to Know About LLC’s

June 2009
Monday, June 8: Juvenile Justice Seminar

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A Note to Our Young Colleagues

We just recently held our annual Jubilarians’ Night where we honor and celebrate those among us that have practiced law for half a century. To many of us, and especially those whose careers are near the beginning stages - perhaps the first five years or so, – it may be difficult to contem- plate someone having spent half a century working the vineyards of the law.

Needless to say, in a field presenting as many challenges with such frequency, as our chosen profession, it is self-evident that Jubilarians have earned the “ups and downs” we might expect.

To attain the longevity we witness among the Jubilarians, each must have developed some means to address the strains and tensions associated with an active and challenging law practice. Nothing contributes more to frustration, anger and, ultimately disgust with an activity, one’s profes- sion or otherwise, than a per- sistent and increasing barrage of annoyances and distractions about which one feels helpless to affect or alleviate.

On Jubilarians’ Night, we had eighteen Jubilarians, the common factor being their long standing membership in our Bar Association (refer to my article in the 2009 Annual Directory) not the least of which is that it gives you a means to deal with many of the stress-causing factors.

Factors including conditions in the par- ticular court or part in which you practice, the rules or procedures that you must con- tend with, the proclivities of individuals (judges, other attorneys, clerks and officers) that you are subjected to, all weigh heavily on the quality of professional life you experi- ence – and for all these issues and more, the Bar Association stands ready to assist you in an attempt to alleviate the stress- es and strains that you face.

I would also suggest that a new member, in particular, take advantage of the opportunity of socializing with members of the bench at the various meetings that we have where atten- dance by sitting Judges is usual. Most notably, among these, is our annual Judiciary Night which this year will take place on Tuesday, April 21, 2009 at our Association headquarters. What finer way to familiarize yourself with those before whom you may soon appear than to sit down and have a meal, or have the opportunity to discuss issues of concern, with those same individuals. There is a certain level of com- fort in appearing before a Judge with whom you recently spoke, and with whom you have created a sense of familiarity. While, of course, no advantage in terms of decision making can, or should be expected (and I can tell you of some doozies in my own experience where it seemed to work the opposite way), it does contribute to a lessen- ing of stress levels when this type of famil- iarity can be established.

To this end, I encourage you to make the very most of your Association membership and join one or more committees. It is through our active committee system that change and improvement can be most effectively implemented. It will be a great step in your path to, one day, being hon- ored as a Jubilarian too.

A Generation on Trial:
Nazis before the German Courts

BY FRITZ WEINSCHENK

I was born in Mainz, Germany, in 1920 and attended the regular German school sys- tem. When the Nazis assumed power in 1933, all Jews, myself included, were kicked out of school. My family and I were fortunate to escape from the “fatherland” (for which two of my uncles had died in World War I) in 1935. I spent the war years in the U.S. army, seeing action both in Normandy and the Pacific. In 1946, I joined the U.S. army’s Counter Intelligence Corps in defeated Germany and served there until 1950. I witnessed the disastrous denazi- fication program, the Berlin airlift, the founding of the federal republic, and the cold war in close proximity.

After my return in 1950, I studied law under the G.I. Bill and was admitted to the New York Bar in 1953. Besides speciali- zing in trust and estate matters, I became involved in restitution and indemnification cases in aid of Nazi vic- tims.

One day in 1964, I was called to a meeting with the head of the legal divi- sion of the German Consulate in New York, which had meanwhile been consid- erably expanded. This gentleman with the prefix “von” to his name, (denoting him German – and, generally, continental jurist) explained to me that a German-speaking American attorney was urgently needed to assist the German authorities in assem- bling proof of Nazi crimes for cases then pending before the German courts. Vital evidence had to be procured from the United States, but for reasons of interna- tional law, the German authorities were unable to act on their own in a foreign jurisdiction, and therefore needed a local “commissioner” authorized to apply to local courts and issue subpoenaes, if necessary. He shoved a thick file labeled “District Attorney’s Office, Hamburg” in my direction and told me that about two hundred witnesses, most of them residents of the New York area, would have to be sworn accord- ing to local law, interrogated and deposed. The irony of the Jewish kid who was thrown out and later given a hot reception at Omaha Beach became “com- missioner” for the courts of the former persecutors twenty years later did not entirely escape me, and a host of moral questions gave me pause, but times had changed. A new Germany was trying to bring the perpetrators of the greatest crime in history before the bar of justice.

I felt that, however small, I could perhaps make a contribution to achieving that end.

Thus started a second career, which would stretch out over thirty years and comprise more than two hundred cases involving over a thousand witnesses. I managed to juggle this between my “day job” and my family commitments.

German – and, generally, continental European criminal procedure differs vastly from our own practice rooted in the common law. Instead of grand juries, “examining magistrates”, usually judges, would assemble the evidence to see whether a crime has been committed. Since 1977 they have been replaced by district attorneys. Felony cases are tried not by judge and jury, but by a panel of three judges assisted by two “jurors”, lay persons who are supposed to lend a “human” touch to the fact-finding process, but who usually – so I was told – subordinate their views to those of the judges sitting with them. Judges are nei- ther elected nor appointed, but are civil servants – members of the state or federal judicial system, somewhat akin to “hearing officers” in an American adminis- trative agency. There are other marked differences: German criminal felony tri- als do not provide for a continuous ses- sion in which the State and the defense examine and cross-examine witnesses before the jury which decides the facts, but of a series of hearings stretching out for weeks, months and even years. Cross- examination is conducted by the parties opposite the witness through the judges.

We may scoff at this system as being prone to arbitrariness, lack of contact with the “real” world, trial by bureaus- ecrats, and “positivism” – going by the let- ter of the law no matter how perverse the outcome. In turn, Europeans find our sys- tem, particularly that of electing judges, quaint, to say the least. I have seen German jurists stare in disbelief at New York taxis bearing advertisements for “Communist judges”嚼 and, generally, continental European criminal procedure differs vastly from our own practice rooted in the common law. Instead of grand juries, “examining magistrates”, usually judges, would assemble the evidence to see whether a crime has been committed. Since 1977 they have been replaced by district attorneys. Felony cases are tried not by judge and jury, but by a panel of three judges assisted by two “jurors”, lay persons who are supposed to lend a “human” touch to the fact-finding process, but who usually – so I was told – subordinate their views to those of the judges sitting with them. Judges are nei- ther elected nor appointed, but are civil servants – members of the state or federal judicial system, somewhat akin to “hearing officers” in an American adminis- trative agency. There are other marked differences: German criminal felony tri- als do not provide for a continuous ses- sion in which the State and the defense examine and cross-examine witnesses before the jury which decides the facts, but of a series of hearings stretching out for weeks, months and even years. Cross- examination is conducted by the parties
Maintaining America’s Global Competitiveness in a Time of World Economic Crisis

BY: ALLEN E. KAYE

America’s economy is in a tailspin. As our nation struggles to reverse the downward spiral and get back on course, America’s H-1B program has come under fire. And when H-1B’s are discussed, emotions run high. Recent articles have targeted the program as “anti-American” and “un patriotic,” but what exactly is America’s H-1B program designed to do? Let’s set the record straight!

The H-1B program is a long-standing part of our nation’s business immigration system. It was developed to give U.S. employers access to highly skilled, professional foreign talent (often students who have been educated here in U.S. universities) for up to six years and as a means for employers to buy his plane ticket home—something that did not take into account the needs of the international marketplace. The program remained capped at 65,000 visas per year for bachelor’s degree positions, with another 20,000 for advanced degree holders who graduated from U.S. universities. Now that the economy is not booming, judicious admission of international professionals is more important than ever. Where the program was used to fill in labor shortages that no longer exist, companies have stopped using H-1B workers in those occupations. But even companies that have been laying off workers need isolated, specific skills to better compete in the international marketplace and effect their own recovery. U.S. businesses must have access to specialty skills without having to locate operations outside the U.S. to obtain them. Otherwise, the entire nation’s economic recovery will be severely hindered.

There remain vital areas that require that our system make adequate provision for future needs. Studies have shown that over the next ten years, the U.S. may need two million more K-12 teachers in this country. We will also need 250,000 new math and science teachers by the end of 2010. Further, nearly 80 million baby boomers will reach the age of retirement within the next ten years. In 2004, the U.S. produced 137,000 new engineers, compared to China’s 352,000. It is well-documented that America is well behind the curve in producing sufficient skilled professionals to make our country “tomorrow’s center” for innovation. Recent economic events have not changed these facts; they have made all the more important that we deal with them.

The H-1B visa category is used by universities, school districts, hospitals, research organizations, and businesses competing in our global marketplace to fill more than 250,000 specialty occupations. “Let’s say a school district in rural Iowa or in poor urban area of Chicago needs a math or science teacher to help students be prepared to compete and innovate in our global economy,” said Charles H. Kuck, President of the American Immigration Lawyers Association (AILA). “Does it really make sense for our children to go without, or should we encourage the entry of qualified educators from abroad? What about our research institutions developing new medical cures or our hospitals trying to care for an increasing large aging population? We have to recognize that while not a panacea, the H-1B visas program, when used according to law, provides a critical resource to help drive our future economic success.”

Hiring the H-1B professional seems like a good solution so long as the reason for lack of interest by U.S. workers is not low pay and as long as protections are in place to ensure that qualified U.S. workers are not replaced by foreign labor. In fact, H-1B regulations require that workers on these visas are paid the HIGHER of the prevailing wage or the actual wages of comparable U.S. workers within the company. This wage protection makes that H-1B professionals are not used as “cheap labor.” In addition, H-1B regulations do not allow a company to use the H-1B category to break a strike or lockout or to replace U.S. workers laid off the same job,” Kuck stated. “In other words,” Kuck noted, “protections against those abuses already are in the law.”

In addition to the wage protections in the law, the fact is that H-1Bs cannot be “cheap labor.” H-1Bs are hired at a high transaction cost. The government charges fees paid by H-1B sponsoring employers and requirements is critical to create a level playing field for employers and employees alike, which is why part of the additional legal and human resource expenses that come with an H-1B hire. Also, if the H-1B worker is fired, the employer must buy his plane ticket home—an often expensive proposition.

To put the impact of H-1B professionals in perspective, with a U.S. workforce of about 145 million, the new H-1B allotment each year accounts for less than one-tenth of one percent of the U.S. workforce.

Enforcement of the H-1B protections and requirements is critical to create a level playing field for employers and employees alike, which is why part of the fees paid by H-1B sponsoring employers are paid to ensure that qualified U.S. workers are not used as “cheap labor.” In other words,” Kuck noted, “protections against those abuses already are in the law.”

“Let’s set the record straight! America’s H-1B program designed to do?”

How I Spent My Summer Vacation

BY RICHARD N. GOLDEN*

“The gates are closed . . . you cannot board the plane!”. The words were spoken with the authority not unlike the New York State Supreme Court clerks advising counsel that the calendar has already been called and your case has been marked “off calendar, no appearance.” I was stunned and shocked.

The self incrimination took hold. I asked myself: Why did you schedule a Real Estate Closing this morning? As a single practitioner I was trying to squeeze in a few more billable hours before leaving on a ten-day summer adventure that I hoped would take me 19,330 feet above sea level to the summit of Mt. Kilimanjaro, the snow capped crown of Tanzania.

My flight was to depart from Newark International Airport at 4 p.m. “That gives me plenty of time to complete a closing scheduled to begin at 9 a.m.”

How could I be so wrong! I arrived at the closing expecting to finish quickly, drop off my briefcase and pick up my 50 pound back pack. However, when the client arrived without a certified check I began to realize I made a mistake scheduling a closing 7 hours before my flight!

The next six hours were the most stressful in my life. Everything and anything that can go wrong did, just before the closing. After sitting in bumper to bumper traffic on the Cross Bronx Expressway I arrived breathless at Newark International Airport at 3 p.m. making my rebuttal argument: “The plane is not scheduled to depart for Kilimanjaro for another hour and my only luggage is the pack on my back. Surely, there is time to get on the plane.”

Equity was on my side. I continued my plea, “I have been training to climb Mt. Kilimanjaro for the past 10 months. If I cannot board this plane the psychological pain will be irreparable. I could already hear the sneering of my “friends” gleeful and gloating that I failed in my courageous attempt to conquer Mr. Kilimanjaro. Suddenly I felt a real connection to Icarus after he tried to soar too close to the sun and crashed to earth.”

My entire body began to perspire at the thought of coming home nine days short . . . getting no closer to the summit of Kili-manjaro than the airport gate.

“If you allow me to board the plane neither the Airline or the other passengers will incur the slightest inconvenience or expense.”

I was erudite, forceful, yet respectful. I was certain that the gate keeper would appreciate my argument and allow me to pass. I was wrong!

My plans to trek Kilimanjaro began ten months earlier. I considered all uncertainties . . . except arriving late at the airport. I researched on the Internet the precautions to take to avoid being sick during the physical exertion of my foreign travel regarding the possibility of contracting Malaria, Hepatitis and Yellow Fever. I took a string of seven pills to protect myself. I was warned that there is no water filtration on Kilimanjaro. Therefore, I searched for the best water
Once Upon A Time
In The Bronx

BY STEPHEN J. SINGER

Never go to the Bronx. It is truly unsafe at any speed. I had made that promise to myself many years ago following several actual accidents and unfortunate incidents which had taken place there and involved the personal safety of anyone traveling near any of the courthouses in the Grand Concourse area of 161st Street.

First, I was at the Supreme Court Building during the same week when an assistant district attorney was shot and killed during his lunch hour by a stray bullet, within two blocks of the courthouse. Next, a few months later, a defense attorney was shot and killed during his lunch hour by a stray bullet, and might even have some influence in that area.

Unfortunately, ten or more years after the preceding incidents, after not having been in the Bronx for most of that time, I was called upon to attend with a client who had an outstanding warrant for a violation of probation in the Bronx Criminal Court. Had I not been representing him on a very serious felony matter in our own county, I would have simply referred the matter to one of the local Bronx attorneys I know. The man pleaded with me to go with him when he surrendered on the warrant and I acknowledged that my presence should by all rights speed up the process and might even have some influence in having him released without posting additional bail.

I arranged to meet the client in front of the Criminal Court warrant part inside the “new court building” at 11:00 a.m., not anticipating much pedestrian or vehicle traffic since it was a beautiful summer morning before the Labor Day weekend. Coming across the Triboro Bridge proved to be a good idea as we got there and involved the personal safety of anyone traveling near any of the courthouses in the Grand Concourse area of 161st Street.

For more information, please visit www.personalinjurylawyer.ws
In April, the highlights of the cultural season in New York City should invite you to visit the Metropolitan Opera on Manhattan’s Upper West Side, the Brooklyn Academy of Music (BAM) on Fulton Street in Brooklyn, and the 92nd Street Y on Manhattan’s Upper East Side. The spellbinding soprano Angela Gheorghiu, a beloved opera star with a golden voice, performs in L’Elisir d’Amore. BAM presents Shakespeare’s The Merchant of Venice. The 92nd Street Y closes its chamber music spring 2009 season with a powerful new original work.

THE METROPOLITAN OPERA: Angela Gheorghiu Returns in L’Elisir d’Amore
Opposite Massimo Giordano, Rolando Villazón, and Joseph Calleja

Donizetti’s comic masterpiece L’Elisir d’Amore returns to the Met with Angela Gheorghiu reprising her acclaimed portrayals of Adina and three tenors singing the role of Nemorino for the first time with the company: Massimo Giordano, Rolando Villazón, and Joseph Calleja. Other members of the cast also making role debuts include Franco Vassallo as Belcore and Simone Alaimo as the quack Doctor Dulcamara. In the final two performances, Nicole Cabell sings the role of Adina for the first time at the Met. Maurizio Benini conducts all performances, which begin March 31 and run through April 22. The production is by John Copley; Beni Montresor created the set and costume designs, and Gil Wechsler the lighting design.

When Angela Gheorghiu sang Adina at the Met in 1999, the New York Times critic said “her singing had an appealing fluidity, ample variety and an admirable consistency from top to bottom.” Earlier this season, Gheorghiu sang the role of Magda opposite her husband Roberto Alagna as Ruggero in the Met’s new production of La Rondine that opened on New Year’s Eve. More recently, she appeared in the Met’s 125th Anniversary Gala on March 15, singing an aria from Faust and a duet from Simon Boccanegra opposite Plácido Domingo. Next season she will sing the title role of Carmen for the first time on any stage in Richard Eyre’s new production. Carmen will be transmitted worldwide as part of The Met: Live in HD. The Romanian soprano also reprises the role Violetta, one of her most renowned interpretations. Last season, she sang Mimì in La Bohème, which was transmitted Live in HD. Mimì was the role of her Met debut in 1993. Gheorghiu’s other roles at the Met include Marguerite in Faust, Juliette in Roméo et Juliette, Amelia in Simon Boccanegra, and Micaëla in the premiere of Franco Zeffirelli’s production of Carmen (1996).

Nicole Cabell, who made her debut earlier this season as Pamina in The Magic Flute, sings Adina in the season’s final two performances of L’Elisir d’Amore. Next season she will make her Met role debut as Musetta in La Bohème. The young American soprano earns international attention as the 2005 winner of the BBC Cardiff Singer of the World Competition. Her other engagements this season include Mimi in Les Beaux-arts de Perles at the Lyric Opera of Chicago, her first Countess in Le Nozze di Figaro at Cincinnati Opera, and Micaëla in Carmen at Berlin’s Deutsche Oper.

Massimo Giordano sings the role of Nemorino for the first time at the Met after having added two other roles to his repertoire with the company earlier this season: Alfredo in La Traviata and Rodolfo in La Bohème. The Italian tenor made his Met debut in 2006 as Des Grieux in Manon and sang Raimondo in Gianni Schicchi in Jack O’Brien’s new production of Il Trittico in 2007 (part of The Met: Live in HD series).

With Nemorino, Rolando Villazón makes his second Met role debut of the season following his first Edgardo in Lucia di Lammermoor with the company in the 2006-2007 season. Next season for the first time at the Met, the Mexican tenor sings the title role in a new production of Les Contes d’Hoffmann, with Bartlett Sher, which will be transmitted as part of The Met Live in HD series. Villazón made his Met debut opposite Renée Fleming in La Traviata in 2003. Since then he has appeared as Rodolfo in La Bohème, the Duke in Rigoletto, and headlined a special gala performance with Anna Netrebko in 2007, celebrating the Met’s 40th anniversary at Lincoln Center.

Joseph Calleja supplements Nemorino opposite Nicole Cabell in the season’s final L’Elisir d’Amore. He made his Met debut in 2006 as the Duke in Rigoletto, a role he reprises this season from April 1 to 17. He also participated in the Met’s 125th Anniversary Gala on March 15, singing Rodolfo’s famous Act I aria from La Bohème. Last season he sang Macduff in Macbeth at the Met. This season the Maltese tenor sings Rodolfo at the San Francisco Opera; the Duke in Rigoletto at the Hamburg State Opera and Berlin’s Deutsche Oper; and Alfredo in La Traviata at the Vienna State Opera and the Royal Opera, Covent Garden.

Franco Vassallo sings Belcore for the first time at the Met. He made his debut in Donizetti’s comic masterpiece L’Elisir d’Amore when it was transmitted worldwide live in HD, which he also led at the premiere of Bartlett Sher’s production in the 2006-2007 season. He also led the previous run when it was transmitted worldwide live in HD. The Italian maestro also conducted the Met’s 2006 new production of Don Pasquale, as well as Don Basilio in Il Barbiere di Siviglia (1996).

Maurizio Benini returns to the opera and the production of his 1998 Met debut. Since then he has conducted frequently at the Met, largely in the bel canto repertoire and in works of Verdi. Last season he was on the podium for Norma, and next season he returns to conduct Il Barbiere di Siviglia, which he also led at the première of Bartlett Sher’s production in the 2006-2007 season. He also led the previous run when it was transmitted worldwide live in HD. The Italian maestro also conducted the Met’s 2006 new production of Don Pasquale, as well as Don Basilio in Il Barbiere di Siviglia.

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.

The Met’s recently announced 2009-2010 season will feature eight new productions, four of which are considered top-tier Met premieres. Opening night will be a new production of Tosca starring Karita Mattila, conducted by Levine and directed by Luc Bondy. The four Met premieres are: Janáček’s From the House of the Dead, conducted by Esa-Pekka Salonen and directed by Patrice Chéreau, both in Met debuts; Verdi’s Don Carlos, which was transmitted as part of The Met: Live in HD series in 2007. The Milanese baritone sings major roles in the Italian and French repertoire, including Marcello in La Bohème, Rodolfo in La Traviata, and Don Alfonso in Così fan tutte. He makes his second Met role debut of the season following his first Edgardo in Lucia di Lammermoor, which he also led at the premiere of Bartlett Sher’s production in 2006.

Other new productions are Offenbach’s Les Contes d’Hoffmann, conducted by Levine and directed by Bartlett Sher; Carmen with Angela Gheorghiu in the title role, conducted by Yannick Nézet-Séguin and directed by Richard Eyre, both in Met debuts; and Thomas’s Hamlet with Natale DeVincentiis and Renée Fleming, directed by Louis Langrée.

BAM’S PRESENTATION OF Shakespeare’s The Merchant of Venice

The Merchant of Venice
By William Shakespeare
Watermill Theatre (UK) and Propeller production
Directed by Edward Hall
Set design by Michael Pavelka
Lighting design by Ben Ormerod

BAM Harvey Theater (651 Fulton Street)
May 6–9, 12–16 at 7:30 pm
May 10 & 17 at 3 pm
Tickets: $25, $45, $65

Artistic Director with Propeller
May 7, post-show (free for same-day ticket holders)

BAM Harvey Theater (651 Fulton Street)

BAM is delighted to present a new staging of Shakespeare’s The Merchant of Venice, now being performed under the direction of Ed Hall, one of the award-winning company Propeller. Last at BAM with renowned productions of The Taming of the Shrew and Twelfth Night (2007 Season), comedies that revel in the trials and inevitable tribulations of roman

Continued On Page 7
tic love, Propeller returns with an auda-
ciously compelling interpretation of The Merchant of Venice, critically acclaimed in its recent U.K. run. Edward Hall and Propeller aim to rediscover Shakespeare by staging his plays with great clarity, speed, and imagination. Their adherence to the original men-only tradition onstage underscores Shakespeare’s intricate tangl-
gings between the sexes and animates the physical life of the production with the poetry of the text.

BAM will present 11 performances of The Merchant of Venice in the BAM Harvey Theater (651 Fulton Street) on May 5-9 and 12-16 at 7:30 pm, and May 10 & 17 at 3 pm. Tickets—priced at $25, $45, and $65—may be purchased by calling BAM Ticket Services at 718.636.4100 or online at BAM.org.

Shakespeare’s The Merchant of Venice is a work that poses still-incipient questions about truth, morality, and prejudice. The story revolves around Shylock, an observant Jewish moneylender caught between his faith’s strictures and the demands of Christianity. In this astute pro-
duction, Hall and his company reveal the play’s underlying absurdities—the virtue in vice and vice in virtue—while delivering an unsparring rendition of the harrow-
ing bargain at its core.

Director Edward Hall, a member of a major theatrical family, made his U.S. directorial debut in 2003 with Rose Rage at the Chicago Shakespeare Theatre—a production which he and Roger Warren adapted from Henry V parts I, II, and III. This production subsequently transferred to the Duke Theater in New York, where it received four Jeff Awards including Best Play, Best Director, and Best Ensemble Cast. The original production, for which he received an Olivier Award Nomination for Best Director and the TMA Award for Best Touring Production, opened with Propeller at the Watermill Theatre in Newbury, U.K. and subsequently toured to the Haymarket Theatre in London, as well as internationally. He made his New York directorial debut with Propeller at BAM with A Midsummer Night’s Dream in Spring 2004, which was nominated for several Drama Desk Awards. Hall and Propeller returned to BAM in 2005 with The Winter’s Tale as part of the Next Wave Festival and subsequently in spring 2007 with a double-bill of The Taming of the Shrew and Twelfth Night. A former director with the Royal Shakespeare Company, Hall has received a South Bank Show Award for Henry V for the Royal Shakespeare Company. Career highlights include directing Natasha Richardson on Broadway in A Streetcar Named Desire and Kenneth Branagh in an acclaimed National Theatre production of Edmund. He also directed the Olivier Award nomi-
ated production of A Funny Thing Happened on the Way to the Forum at the National Theatre.

The all-male Propeller was formed in 1997 in conjunction with the Watermill Theatre to create an ensemble for Edward Hall’s Henry V and has been praised for its original interpretations of Shakespeare’s works including Henry V, The Comedy of Errors, Rose Rage, A Midsummer Night’s Dream, and The Winter’s Tale. Both Henry V and The Comedy of Errors toured extensively in Europe, South America, and the Far East. Hall and Propeller aim to perform Shakespeare’s plays with a con-
temporary aesthetic while maintaining emphasis on the spoken word, and to con-
tinue developing relationships between performers and audiences. “Working with a minimum of money and fuss, and a max-
imum of ingenuity and imagination,” says the director, “the ensemble has become one of the finest and most dis-
tinctive acting ensembles in the country.”

The Watermill Theatre (U.K.), a year-
round, regional producing theater created in the mid-60s, is a converted 19th-centu-
ry mill situated in gardens beside the River Lambourn in the Berkshire coun-
tryside. The Watermill Theatre has brought new energy to its historic space, featuring “a Septet made the pre-composition process of the Zviilch’s 70th birthday with the world premiere of her Septet for Piano Trio and String Quartet, co-commissioned by the 92nd Street Y and a consortium of nine other organizations.

Zwilich writes of the Septet: “My greatest joy is writing for performers whom I can be sure will not only deliver the notes accurately, but will project the meaning behind the notes. To have musi-
cians who will bring their own imagination and deep understanding to a performance is an inspiration to me. So I approached the writing of my Septet for the Robinson Trio and The Miami String Quartet with great antici-
patation and pleasure.”

“The fact that there is no model for such a Septet made the pre-composition process a most enjoyable exploration,” Zwilich further comments. “While the instrumen-
tation of the Septet provides an almost orchestral palette—and it was interesting to explore that aspect—I also love the idea of seven artist-performers, each of whom can be a stunning virtuoso one moment and a thoughtful partner the next, and I rel-
ish the electricity that results from those shifting roles.”

The concerts include two additional works: Luigi Boccherini’s String Quintet in E Major, G. 275, which fea-
tures his famous Minuet, often considered the cellist/composer’s most famous melody; and Robert Schumann’s Quintet for Piano and Strings in E-Flat Major, Op. 44, composed during his “year of chamber music” in 1842 and premiered by his wife Clara in January 1843 at the Leipzig Gewandhaus.

Each evening will be preceded by a pre-concert interview with Zwilich by pianist Joseph Kalichstein at 7pm.

After three decades of great success, many recordings, and newly commis-
sioned works, the Kalichstein-Laredo-Robinson Trio continues to dazzle audi-
cences and critics alike with their perform-
cances. Pianist Joseph Kalichstein, violin-
ist Jaime Laredo and cellist Sharon Robinson have set the standard for per-
fomance of the piano trio literature for more than thirty years. The Trio balances the careers of three internationally-
acclaimed soloists while making annual appearances at many of the world’s major concert halls, commissioning spectacular new works, and maintaining an active recording agenda. The ensemble kicked off the 2008-2009 season at Wigmore Hall in London, with the complete Beethoven cycle. In addition to performing the world premiere of Ellen Taaffe Zwilich’s Septet for Piano Trio and String Quartet at the 92nd Street Y, the Trio will present pre-
merries at the Kennedy Center, Detroit Chamber Music Society, and Virginia Arts Festival. The group has worked exten-
sively with the Miami String Quartet, as well as the Guarneri and Emerson String Quartets, allowing the opportunity to explore the rich literature for strings and piano.

At a time when the musical offerings of the world are more varied than ever before, few composers have emerged with the unique personality of Ellen Taaffe Zwilich. Her music is widely known because it is performed, recorded, broad-
cast, and – above all – listened to by a diverse and global audience. A prolific composer in virtually all media, Zwilich’s works have been performed by most of the leading American orchestras and by major ensembles abroad. She is the recipient of numerous prizes and honors, including the...
Marital Quiz

BY GEORGE J. NASHAK JR.*

Question #1 - When an adverse party is called as a witness may it be assumed that such adverse party is a hostile witness?

Your answer -

Question #2 - When an adverse party is called as a witness, may the direct examination assume the nature of cross-examination by the use of leading questions?

Your answer -

Question #3 - When an adverse party is called as a witness, can he or she be impeached by prior statements made either under oath or in writing?

Your answer -

Question #4 - When the remedy, for the violation of a Family Court order, is incarceration, is the burden of proof “clear and convincing evidence” or “beyond a reasonable doubt”?

Your answer -

Question #5 - At the time of trial, the parties children were three and seven years of age, was it error for the trial court not to order the defendant to contribute to the children’s college education?

Your answer -

Question #6 - Is a provision in a separation agreement that the father would provide total support of the children without the contribution from the mother, enforceable?

Your answer -

Question #7 - May a mother counterclaim in a divorce proceeding for emotional pain and suffering due to the father’s removing the children to a foreign country and depriving the mother of her visitation with the children?

Your answer -

Question #8 - Is the failure of the non-custodial parent to make payment of child support, sufficient basis to deny visitation?

Your answer -

Question #9 - Before ordering interim visitation, is the court required to conduct a hearing?

Your answer -

Question #10 - In defending an action for divorce based upon an abandonment, must the defendant plead justification for leaving the marital residence as an affirmative defense?

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 16
The Following Attorneys Were Disbarred By Order Of The Appellate Division, Second Judicial Department:

Kevin J. Keelan, admitted as Kevin Joseph Keelan (January 27, 2009)
On April 14, 2008, the respondent pleaded guilty in the County Court, Westchester County (Cacace, J.) to aggravated unlicensed operation in the first degree, a class E felony, in violation of Vehicle and Traffic Law (VTL) §511.3, and driving while intoxicated, an unclassified misdemeanor, in violation of VTL §1192.2. By virtue of his felony conviction, the respondent automatically ceased to be an attorney and counselor-at-law pursuant to Judiciary Law §90(4)(b).

Gary G. Gauthier (February 3, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself against pending charges that he, inter alia, engaged in the unauthorized practice of law while suspended.

Peter A Takvorian, admitted as Peter Andrew Takvorian, a suspended attorney (February 3, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against charges of professional misconduct concerning his breach of fiduciary duties with respect to his attorney trust account.

Edward Marvin Cohen, a suspended attorney (February 10, 2009)
The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against pending charges of professional misconduct emanating from his conviction of the serious crime of attempted criminal possession of a forged instrument in the third degree.

Joel D. Tenenbaum, admitted as Joel David Tenenbaum (February 17, 2009)
The respondent was disbarred by order of the Supreme Court of the State of Delaware dated February 6, 2007. At the time of that order, the respondent was already under a three-year suspension following an order of that same court dated August 5, 2005. Upon the Grievance Committee’s application for reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

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

Fred A. Schwartz, a suspended attorney (February 3, 2009)
The respondent was found guilty of employing an unenforceable and improper retainer containing a provision rendering the initial payment nonrefundable, and neglecting a legal matter entrusted to him.

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

Martin Schnee (February 17, 2009)
Following a disciplinary hearing, the respondent was found guilty of employing an unenforceable and improper retainer containing a provision rendering the initial payment nonrefundable, and neglecting a legal matter entrusted to him.

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The Business Bank

Continued On Page 19
Past Presidents and Golden Jubilarians Night
March 23, 2009

Photos by Walter Karling
Past Presidents and Golden Jubilarians Night
March 23, 2009

Joe Carola, Chair, Program Committee

Hon. Arthur Cooperman, Arthur Terranova, David Cohen and David Adler

Hon. Seymour Boyers, Herbert Rubin and Hon. Allen Beldock

Hon. Sid Strauss and Sanford Kaufman

Seymour James, Hon. Carmen Velasquez and Tim Rountree

Mona Haas, George Nicholas and Hon. Carmen Velasquez

Past Presidents, Standing: Douglas Krieger (81-82), Hon. Joseph Dollard (85-86), Edward Rosenthal (02-03), Paul Goldstein (94-95), George Nashak (05-06), Hon Sidney Strauss (90-91), Herbert Rubin (71-72), A. Paul Goldblum (79-80) Sitting: Steven Wimpfheimer (99-00), David Cohen (07-08), Leslie Nizin (00-01), David Adler (98-99), Joseph Baum (92-93), Seymour James (01-02), Jules Haskel (73-74), Robert Bohner (93-94)

Past Presidents, Standing: Tim Rountree, Bob Bohner and Dave Adler

Seymour James, Hon. Phyllis Orlikoff Flug and Michael Getnick

Photos by Walter Karling
There are millions of reasons to do Pro Bono.
(Here are two.)

Each year, in communities across New York State, indigent people face more than three million civil legal matters without assistance. Women seek protection from an abusive spouse...children are denied public benefits...families are faced with losing their homes — all without the benefit of legal counsel. They need help. We need volunteers.

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The history of the Nazi trials in the German courts is largely unknown in the United States. After the 1945 surrender, the German criminal justice system slowly recovered from the results of thirteen years of Nazi perversion and started to right the wrongs of the past thirteen years. In the shadow of the Nuremberg trial and the other Allied prosecutions, the German courts, limited in their jurisdiction by the skeptical occupiers, tried their first cases: an ex-general who had ordered 200,000 men to desert, a supposed “deserter”, Nazis who had denounced innocents to the Gestapo, participants in the “Kristallnacht” program, and per- sonnel of the “Reich Chief Security Agency” the term used to designate the various Nazi agencies to which the “Kristallnacht” and similar programs were subordinated. Although the results during the first few years were meager, the number of investigations, trials and convictions rapidly increased. By 1947, the German courts had handed down 6,181 judgments against Nazi criminals, 12 of whom were sentenced to death and executed.3 Already in the early fifties the German public, including many jurists, had come to believe that German guilt had been “whitewashed” by the Nuremberg and other Allied courts.4 As well as their own proceedings. Consequently, Nazi crimi- nality appeared to be done. However, history was to turn out quite differently.

The turning points came in the middle-fifties: in 1953, the German indemnifica- tion law was passed; in 1955, the Universal Declaration of Human Rights was adopted; and in 1956, the German courts, at the behest of the Allied powers, began to investigate the activities of the “special court martials” as well as the interrogator. Of course, there were not compelled to testify against their interest, are permitted to state their answers to the accusation at length, a sort of plea with an explanation. In Nazi cases, the defendants seldom denied the event itself, but consistently denied their presence or their active participation in the crimes they were accused.

German practice requires the back- ground and biography of the defendants to be included in the judgment. A perusal of the biographies of the death camp defendants frequently reveals no more than a public school education and a career in the SS, the Gestapo, or the crimi- nal police. Among the ranking com- mander, higher standards of education, usually university degrees or professional degrees prevailed. Most defendants were not compelled to testify against their interest, are permitted to state their answers to the accusation at length, a sort of plea with an explanation. In Nazi cases, the defendants seldom denied the event itself, but consistently denied their presence or their active participation in the crimes they were accused.

There are three types of witnesses in Nazi crime cases: the perpetrators, the participants, and the experts. The first group of the defendants as witnesses usually stonewalled the proceedings, and in the words of private Schultz in “Hogan’s Heroes”, maintained: “I know nothing”. They were not about to testify against their comrades, either out of loyalty to their former comrades or in fear of being incriminating themselves.

The Holocaust survivors as witnesses were asked to relive the most horrendous events of their lives. To ask persons in deathly fear at the critical time to identify particular defendants and verify their presence was a difficult, often emotionally- draining experience for the witness as well as the interrogator. Of course, there were notable exceptions: witnesses with impeccable memories or those who had to labor under defendants they came to know and who witnessed these horri- fic, individual encounters with the accused. I spent many evenings on the phone persuading unwilling witnesses to undergo the torture of having to relive the most traumatic events of their lives.

The experts in Nazi crimes cases were mainly historians and criminologists. Their role became extremely important in one vital aspect: the almost universal defense of “I only followed orders.” Almost all defendants in these cases claimed duress, in that by not following the inhuman orders they would them- selves have become victims in the iron- fisted Nazi system. They pointed to the activities of the special courts, the “deserters” which sentenced thousands of “deserters” to death in summary proceedings. Experts, were able to demon- strate how the special courts were able to carry out illegal and inhuman orders did not result in the claimed dras- tic punishment meeting the standards of genuine duress (which would excuse the crime), but only in admonition, reduction in rank, or, at most, transfer to a fighting unit. Thus the “duress” defense was rejected by all German courts, including the Supreme Court.

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To THE QUEENSBURY BAR ASSOCIATION:
We, the undersigned, members of the Nominating Committee do hereby respectfully report that pursuant to the provisions of Article VI, Section 3, of the By-Laws of the Queen County Bar Association, we have nominated the following list of nominees for the positions to be filled at the coming election at the Annual Meeting of the Bar Association on March 8, 2010.

OFFICERS 2009-2010
For President GUY R. VITACCO, JR.
For President-Elect RICHARD M. GUTIERREZ
For Vice President JOSEPH F. DEFELICE
For Secretary JOSEPH R. RIBI, JR.
For Treasurer

FOR FOUR MEMBERS OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS (expiring May 31, 2012)

JENNIFER M. GILROY RICHARD H. LAZARUS GARY F. MIRET JAMES E. PRIETET

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS AS IMMEDIATE PAST PRESIDENT (expiring May 31, 2012)

STEVENS S. ORLOW

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF ONE YEAR (expiring May 31, 2010)

GREGORY J. NEWMAN

NOMINATING COMMITTEE
Joseph A. Sturm Cherie A. Bugas Edward H. Rosenfeld Signes A. Tammisch
Chandra E. Auge Madonna E. Gelfeld Wallace L. Lindehart
Lucille S. DiGiglio Stephen J. Singer Steven W. Finklestein

THE ANNUAL MEETING of the Queen County Bar Association will be held in the 1st Headquarters Building, 99-145th Street, Jamaica, New York on FRIDAY, MARCH 6, 2009, at 4:00 P.M.

The election of officers will take place at that time, together with such other business as may regularly come before the meeting. Since NO INDEPENDENT NOMINATIONS HAVE BEEN FILED WITH THE TIME LIMIT OF THE BY-LAWS, THE ELECTION WILL BE PRO FORMA.
A new judicial district has been created, comprised of the county of Richmond. The thirteenth 64 district comes into existence as of January 1, 2009. There should be no outward change in the operation of the court. It is possible that there may be some rearrangement of public records in forms other than paper, but there was a 65 minor amendment to CPLR 8019 relating to fees for preparation of records in non-paper form.

The Appellate Division reversed and dismissed the actions, and the Court of Appeals affirmed the dismissals, holding that it was not bound by Supreme Court’s statement, since the basis for the dismissal was clear from the record. Left unstated are the effects of a judge’s failure to set forth the specific conduct, or of the failure of that conduct to “demonstrate a general pattern of delay.” The 3216, for example, a general pattern of delay does not necessarily need to be shown before the court enters a dismissal. That section allows for a dismissal if no issue within 90 days of the service of a demand to do so, and the court is given specific authority to start the process in motion “on its own initiative.” If 3216 is “extremely forgiving of litigation delays” has been well established by the Court of Appeals in Bazakowski v Collins Const. Co., and Diar v. Diar Group 66 the defendant moves for dismissal under 3216, or if the 67 plaintiff proactively moves for an extension of time to file, dismissal will not be granted if the plaintiff can show a reasonable excuse for delay and not a frivolous claim.

On the other hand, it is now commonplace for a court to issue a CPLR 3216 demand, and a case may be dismissed after 60 days, without the note of issue having been filed, the court will frequently issue the dismissal order without further notice to the plaintiff. Such an order would normally fall within the class of dismissals excluded from the benefits of CPLR 3212. In such an order, it is not intended that the plaintiff be notified. Rather, the order would at best describe the plaintiff’s failure to meet the note deadline, and include a statement which the plaintiff has failed to meet any deadline of any nature.

The Appellate Division in Smalls v AJI Indus., Inc. Court of Appeals reiterated its frequent holding that the 67 proponent of a summary judgment motion bears the burden of proving entitled to judgment as a matter of law. The summary judgment motion cannot be denied, whether the merits of the order granting summary judgment.

Pleasings
The general rule for specificity of statements in a pleading is that only such are sufficiently particular to give the court and the defendant notice of the occurrences intended to be proved, and to state the material elements of each cause of action or defense. 72 Fraud cases present an exception, found in CPLR 3016(b), which provides that “the circumstances constituting the wrong shall be stated in detail.” How detailed does that have to be?

The Court of Appeals in Pludeman v Northern Leasing Systems, 73a case involving imputations of corporate fraud to corporate officers and directors, that CPLR 3216 does not require the plaintiff to allege in the complaint that a defendant was a director or officer.

These questions remain unanswered.

The Appellate Division rejected it. Forgetting that “hoary maxim,” ignorance of the law is no excuse, the court viewed this excuse as nothing more than law office failure. The one time that the court has known of the defense to be known a priori was in a 70 court retains inherent discretion to excuse de minimis delays, even after Brill, and the majority’s insistence that Brill requires an excuse for any lateness, the one time that the court has known of the defense to be known a priori.

The rule of the Chief Judge relating to fiduciary appointments has been amended, retroactive to January 1, 2007, to provide that the entity responsible for the appointment of record is barred from compensated appointments during the following calendar year. The amendment raised the triggering point from $50,000. 66

Motion Practice - Summary Judgment - Timeliness - Brill Doctrine
The Appellate Division opinion in Crawford v Liz Claiborne, Inc., focused on whether a 62 de minimis delay in moving for summary judgment was necessarily fatal under the Brill doctrine, with the majority holding that it was. The Court of Appeals, however, rejected the motion timely and Brill inapplicable.

The action was for unlawful discrimination on the basis of sexual orientation. The note of issue was filed on May 15, 2006. Pursuant to directive in the preliminary conference order, motions for summary judgment were to be made “per local rule,” which at the time this motion was made, was July 14. Defendants’ motion for summary judgment was made on July 19. In the meantime, the local rule had been amended to permit, upon written motion and after court acceptance, the individual assigned Justice had accepted an individual rule shortening the time to 60 days. Counsel’s excuse for the late motion was that she was unaware that the court had shortened the time. Supreme Court accepted this explanation, considered the motion on

Continued From Page 1 _________________
would have started by adopting the view of this pleading requirement prevailing in the Federal cases, and in the similar rule to the CPLR, and the rule as stated by the Court of Appeals for the Second Circuit is that claims of fraud must be supported by “particularity and precision” to support the inference that the defendants acted recklessly or with fraudulent intent and sufficient to support a “strong inference of fraud.”

Judge Smith acknowledged that the Federal test is not significantly different from the one applied by the majority. His dissent focused primarily on the application of the rules to the facts. He found that the complaint was completely devoid of individualized allegations against the individual defendants, and that there was insufficient support for its claim that the defendants had actually told Zalk to keep the down payment. The contract was a lesser of the formation in form only, but was binding as to the rights and obligations of the parties.

Trial Practice - De Man's Rule

The De Man's Rule (CPLR 4519) precludes a party to an action or proceeding (or a person having an interest in the event) from testifying against the personal representative of a deceased concerning a communication or transaction between the witness and the deceased. In Matter of Zalk, the case was whether the Rule applied to an attorney disciplinary proceeding where the 78 estate of the deceased client was not directly a party, but stood to gain or lose depending on whether the respondent attorney was found guilty of misconduct. The charges related to the handling of the deceased client's sale of real property to Rose Benjamin ("the Levys") to the plaintiff. The Court of Appeals dealt with a situation where the conveyance of property to a lessor of the equipment in form only, but is never actually entering into a contract.

The Disciplinary Committee argued that the Rule prevented him from testifying as to any transactions or conversations with Gellman. The referee found that the “plain language of the statute,” the referee found that the disciplinary hearing was not against Gellman's executor, administrator or survivor, and therefore the Rule did not apply. White Zalk did not allow to testify if the administrators sued him to recover the money, he could not be barred from testifying to defend himself in the disciplinary proceeding.

At trial, the referee was asked if the De Man's Rule applied, the witness and transactions with the deceased client. Without that testimony, it was true that the witness and transactions were admitted, and it was testified to his own use without any written agreement as to his fee. The difference to the respondent attorney case was stark: with the testimony admitted, the referee recommended dismissal of four of five charges, and recommended a public censure as to the fifth. Barring the testimony, the Appellate Division sustained the findings and charges, and suspended him for two years.

Richard Zalk, the attorney in this case, had represented the deceased, Ruth Gellman, for service of process in the event. And, in fact, this was the only service of process to which he was entitled to be entitled to a recovery of the amount of $20,000. On this basis, the referee's report and recommendations, and of the hearing panel. The referee's cross-motion sought to have the Court review the record de novo and to disbar Zalk, or impose some other sanction.

The Appellate Division affirmed the conclusions of the referee's report and recommendations, and of the hearing panel. The referee made findings of fact, and basis of the disbarment and recommended a public censure.

Zalk moved to confirm the referee's order and the order of disbarment. Zalk moved to confirm the referee's order and the order of disbarment. The referee’s cross-motion sought to have the court review the record de novo and to disbar Zalk, or impose some other sanction.

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The referee’s cross-motion sought to have the court review the record de novo and to disbar Zalk, or impose some other sanction.

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purifying system and also asked my physi-
cian for diuretic medication. I was also
aware of the risks of High Altitude
Sickness and got a prescription for
Diamox which was to help the body
absorb oxygen at the higher altitudes
where the oxygen was at least 20% less
than at sea level. Along with all of this prepara-
tion, and all of the potential obstacles I
anticipated it was incomprehensible that
my quest to reach the summit of Mt.
Kilimanjaro would end in failure at the
airport gate.
For ten months I followed an aerobic
and strength training regimen. Kilimanjaro
is sometimes referred to as the mountain of
the strong warriors. At 56 years of age I
was no longer a young man but, in my
mind, I was not ready to join the AARP.
I knew I had to do more. I got to know
five fellow Kilimanjaro trekkers who
were, on average, twenty five years
older than me. I was aware that Mt. Kilimanjaro
would test my strength and endurance
and it would also challenge my
resolve. I was warned that the mere vision
of the steep peak and the magnitude of the
mountain itself was more than one climber
retreating to lower ground. After ten
months of training I lost 18 pounds. I felt
myself that this trip was not merely to
experience the unique geology and
landscape of the mountain. I was also
looking forward to challenge Mt. Kilimanjaro.
Therefore, I needed to give my body time to
adjust to the "thin air". I was not willing to rush the ascent.
But, now I had to call home and tell my
wife I missed the flight and I would need
to make a side trip to New York the next day and . . .
the way . . . next week can you pick me up from Kennedy Airport?" My wife was
very helpful, but to this day she will be
quick to remind me “Are you leaving
Swahili by my African guide: "Acuna
Mataado" No Problem. I
congratulated myself for having over-
come the first challenge in my quest to
summit Mt. Kilimanjaro.
I was not ready to join the AARP. I
was not willing to rush the ascent.

How I Spent My Summer Vacation
Continued From Page 4 –

Marital Quiz

**ANSWERS TO MARITAL QUIZ ON PAGE 8**

Question #1 - When an adverse party is called as a witness may it be assumed that such adverse party is a hostile witness?

**Answer:**

Yes, in the discretion of the trial court. Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)

Question #2 - When an adverse party is called as a witness, may the direct examination of the adverse party be conducted as if he/she was a hostile witness?

**Answer:**

Yes, in the discretion of the trial court. Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)

Question #3 - When an adverse party is called as a witness, can he or she be impeached by prior statements made either under oath or in writing?

**Answer:**

Yes, in the discretion of the trial court. Ferri v. Ferri 2009 NY Slip Op 01610 (2nd Dept. 2009)

Question #4 - When the remedy for the violation of a Family Court order, is incarceration, is the burden of proof “clear and convincing evidence” or “beyond a reasonable
doctrine?"

**Answer:**


Question #5 - At the time of trial, the parties children were seven years of age. Was it error for the trial court not to order the defendant to contribute to the children’s college education?

**Answer:**

No, if the court finds that this provision does not provide for adequate support for the parties’ children. An inad-
quately supported provision contained in a separation agreement is “voidable and cannot bind an appropriate court from
remedying the inadequacy.” Pecora v. Cerillo, 201 A.D.2d 615; 624 N.Y.S.2d 363 (2nd Dept. 1995)

Question #6 - Before ordering interim visitation, is the court required to conduct a hearing?

**Answer:**

No, if the court finds that this provision does not provide for adequate support for the parties’ children. An inad-
quately supported provision contained in a separation agreement is “voidable and cannot bind an appropriate court from
remedying the inadequacy.” Pecora v. Cerillo, 201 A.D.2d 615; 624 N.Y.S.2d 363 (2nd Dept. 1995)

Question #7 - May a mother counter
claim in a divorce proceeding for emo-
tional pain and suffering due to the
father’s removing the children to a foreign
country and depriving the mother of her
visitations with the children?

**Answer:**

Yes, if the court possesses ade-
sufficient basis to deny visita-
tion.

Question #8 - Is the failure of the non-
custodial parent to make payment of child
support, sufficient basis to deny visita-
tion?

**Answer:**

No, if the court finds that this provision does not provide for adequate support for the parties’ children. An inad-
quately supported provision contained in a separation agreement is “voidable and cannot bind an appropriate court from
remedying the inadequacy.” Pecora v. Cerillo, 201 A.D.2d 615; 624 N.Y.S.2d 363 (2nd Dept. 1995)

Question #9 - Before ordering interim visitation, is the court required to conduct a hearing?

**Answer:**

No, if the court finds that this provision does not provide for adequate support for the parties’ children. An inad-
quately supported provision contained in a separation agreement is “voidable and cannot bind an appropriate court from
remedying the inadequacy.” Pecora v. Cerillo, 201 A.D.2d 615; 624 N.Y.S.2d 363 (2nd Dept. 1995)

Question #10 - In defending an action for divorce based upon an abandonment, must the defendant plead justification for leaving the marital residence as an affir-
mative defense?

**Answer:**

No, if the court finds that this provision does not provide for adequate support for the parties’ children. An inad-
quately supported provision contained in a separation agreement is “voidable and cannot bind an appropriate court from
remedying the inadequacy.” Pecora v. Cerillo, 201 A.D.2d 615; 624 N.Y.S.2d 363 (2nd Dept. 1995)
An Analysis of the Motion to Set Aside a Verdict: Subsection I

Continued From Page 5

perspective Judgment or conviction would require reversal or modification of the judgment, as a matter of law, by the Appellate Division. 25

Prosecutorial misconduct, if objected to and preserved at trial, can be a ground for the granting of this Motion. 26 People v. Rodriguez, 304 AD2d 822, 761 NYS2d 105 (1st Dept. 2002); People v. Martir, 18 AD3d 1066, 776 NYS2d 656 (4th Dept. 2004). The Appellate Division Fourth Department held that the trial court's authority to set aside a verdict under this Subsection, is not a matter of discretion. Thus, in People v. Adams, 26 People v. Squires, 26 People v. Buxton, 24 People v. Marin, 19 People v. Brown, 19 the Appellate Division Second Department held that the prosecutor's conduct during summation, which should be analyzed in order to rehabilitate the defendant on cross-examination; the prosecutor improperly elicited testimony from the prosecution witness, which both identified testimony of an undercover officer, and improperly suggested, during her summation, that the defendant and his co-defendant were "sophisticated business" to whom underpaid officers "buy" money were not new.

Prosecutorial misconduct can be found in summation by the prosecutor. For example, in People v. Anderson 18 the Appellate Division Second Department held that the prosecutor misled the jury by pointing to the absence of evidence the prosecution would have obtained, if the defendant had been with a certain person at the time of the crime, and the prosecutor argued that the defendant had not told the police that he had been there. Similarly, in People v. Brown 19 the Appellate Division Second Department held that the prosecutor's conduct during summation, was a matter of speculation instead of fact, the defendant's failure to testify, mis-statements concerning the evidence, and references to matters not in evidence, denied the defendant a fair trial. In People v. Becerra 24 the Appellate Division Second Department held that the trial court's authority to set aside a verdict under this Subsection, is not a matter of discretion. Thus, in People v. Adams, 26 the Appellate Division Fourth Department held that the defendant's Motion is properly based on matters outside the record.

There is an inconsistent verdict that rises to the level of prejudice, this can be ground for a reversal. 21 Similarly, although the issue is non-moot, or at least the contention to that effect, in view of the modification of the verdict on Appeal, 21

Another topic in connection with this, is the area of speculation instead of fact, the defendant's failure to testify, mis-statements concerning the evidence, and references to matters not in evidence, denied the defendant a fair trial. In People v. Becerra 24 the Appellate Division Second Department held that the trial court's authority to set aside a verdict, a verdict, however, based upon speculation and conjecture cannot stand. 22

Summarily, general, cannot be a ground for reversal. 26

The same is true of examination of witn-
esses, as a ground for reversal or modific-
ation. In People v. Pratto 29 the Appellate Division Fourth Department held that any error in the trial court's eviden-
tiary rulings precluding proposed cross-
examination of the prosecution witness regarding the defendant's testimony was not reversed.

omission of material facts, was not of such nature as to require reversal or modification as a matter of law, so as to warrant vacating the verdict prior to sentencing, where a robbery defendant failed to preserve challenge to rulings on weighing witness credibility, as the issue was raised in pre-sentencing conference, and the trial court did not err in holding that the trial court's authority to set aside a verdict under this Subsection, is not a matter of discretion. Thus, in People v. Rodriguez, 304 AD2d 822, 761 NYS2d 105 (1st Dept. 2002); People v. Martir, 18 AD3d 1066, 776 NYS2d 656 (4th Dept. 2004). The Appellate Division Fourth Department held that the trial court's authority to set aside a verdict under this Subsection, is not a matter of discretion. Thus, in People v. Adams, 26 the Appellate Division Fourth Department held that the defendant's Motion is properly based on matters outside the record.

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Once Upon A Time In The Bronx

Continued From Page 5

a daunting task and in of itself because of the never ending construction project on the Bronx-Whitestone Bridge which was never ending traffic congestion. Once I got to the Bronx side of the toll booth the traffic was pretty bad, but it turned out that it was just so happened that the Yankees were playing Boston that afternoon, so that I cranked my way to the Grand Concourse exit on the Major Deegan.

Once the Major Deegan was cleared of any maneuver further complicated by the always present broken down truck in the right lane in the Bronx, I immediately recognized all of the old, familiar potholes on the Concourse which, of course, had not been repaired during my ten year sabbatical from the area. Hoping against hope that my car would not lose a tire or suspension part, I loped along at a very moderate speed, also avoiding the endless stream of wild eyed drivers of illegal taxi vehicles which abounded. When I arrived at the block west of 161st Street, I came to a dead stop. The Yankee game traffic had caught up with me. In order to avoid the “rip-off” parking fees, I sprinted to the nearest of the lots remotely close to the Stadium, many of the attendees were seeking parking in the surrounding area; most- ly in the questionable lots where you could potentially have a “crasher” tailgate party.”

The police officers, who were standing in fair numbers on 161st Street, had done nothing except further exacerbate the traffic congestion with their parking ticket “control” measures. When I finally crawled into the only parking lot available, the women at the entrance gate were demanding my car’s license plate, parking fees, just because they could, and to take advantage of the Yankee game parkers. Of course, one could avoid the flat fee of twenty-five bucks, if you were willing to shop in the stores in that shopping center and purchase a minimum of twenty plus dollars worth of merchandise … a sort of going and coming proposition. Thus far, my trip to the Bronx was as anticipated … quite horrid.

Now that things were moving along, pretty much as planned by me, I hurried my way across 161st Street, amidst the shouting and cursing from Yankee fans in their automobiles, who somehow were shouted at however the police line was mov- ing. I did manage to cross the street with- out incident and entered the “new court building”, a truly imposing structure. Of course, the warrant part had been relocated to a lower class than he had in the a.m. session. He must have had some unexpected news, the Clerk was saying. He added to my personal embarrassment at obviously not being familiar with any of the court procedures in that locale. We handled our case and it was finally our turn. As with some other tenants, mostly involun- tary jail cases. The Judge, a man with no sense of humor, reminded virtually every- one. The only reason for hope was that we had come on a voluntary basis. At 12:30, the Sergeant, having pity on me as a stranger in a strange land, advised me to go to his office in the basement and ask for my case file from the Clerk. We were doomed, it appeared, to spend additional time (unre- munerated, I might add) in Hell town. Shortly, the Defendant, one of a lower class than our Queens criminals, the courthouse seemed seedy, and the streets were dirtier than the Boulevard of Death, that I was used to. All of the area buildings were quite ancient, and therefore in great need of resurfacing and repair. It was quite depressing. The next imperative was to find a relatively safe place within which I might pass the next hour or so before I had to return to court. I located a Diner. It proved to be passable and was acceptable to unrepentant tenants and assistant district attorneys. Apparently there were Defendant eateries, defense counsel eateries, and this one. I selected a safe grilled cheese sandwich and a cup of tea … figuring there wasn’t much that could be done to a commercially packaged tea bag. The bill for the grilled cheese and two cups of tea was $4.44… which I found to be slightly excessive, especially in this second class area. Clearly, knowing that the place was relatively clean and that there was much ambiance, comfort on that level, the owners took advantage.

I had some time to kill and decided to return to the area where I had last seen my car, just to make certain that it had not already been dissembled and shipped to Curacao or some other distant place. What a mistake. That little venture involved crossing 161st Street twice … once going and once returning. My car was still there; although it appeared to have acquired an extra layer of dust in the interim (I’m quite certain that was only my imagination). As I attempted the return trip to the court building, in the midst of dodging various motorized vehicles … and they do seem to have an inordinate number of motorcycles in the Bronx … I missed in one of the multiple potholes/sinkholes on 161st Street, badly twisting my right foot. My shoe had flown off. It had to be collected from a dial tone.

We met up and entered the courtroom together. I asked one of the Court Officers to direct me as to the procedures I needed to fol- low. This old timer added this fitting phrase to fit the calendar. In truth, the personnel were very nice. They were so surprised to see a real life “retired” lawyer that they treated me with respect. When I went to the Clerk’s Office, another two floors down, and hoped to find an attorney courtesy win- dow so that I could proceed quickly. Of course, the warrant part had been relocated to a relatively safe place within which I might pass the next hour or so before I had to return to court. I located a Diner. It proved to be passable and was acceptable to unrepentant tenants and assistant district attorneys. Apparently there were Defendant eateries, defense counsel eateries, and this one. I selected a safe grilled cheese sandwich and a cup of tea … figuring there wasn’t much that could be done to a commercially packaged tea bag. The bill for the grilled cheese and two cups of tea was $4.44… which I found to be slightly excessive, especially in this second class area. Clearly, knowing that the place was relatively clean and that there was much ambiance, comfort on that level, the owners took advantage.

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A Modest Proposal to Prevent Economic Meltdowns

Continued From Page 1

charge of securities transactions. As things currently stand, the top-down fed- eral Securities and Exchange Commission will NEVER be able to police the Internet. It is only by requiring notarized paper that we will get back to some reasonable stan- dard of honesty and reliability.

It is not the Internet or the technology that is the problem. The problem is the inability of imperfect human beings to act ethically when sitting alone with a machine that allows them to think no one is watching as they cut just a little corner. Hundreds of thousands of people each cutting a little corner leads to today’s mess.

Does anyone really believe that Bernie Madoff is the only larcenous soul out there on the Internet?

Paul E. Kerson is a Member of the Board of Managers, Associate Editor of this Bulletin, and Chair of the Bar Panels and Human Rights Committees.

Secure Court Notes

Continued Page 9

in violation of an order of suspension

Failing to return an unearned fee fol- lowing substitution by another attorney; putting his/her interests ahead of a client’s; and engaging in “sharp tactics” with a pro se litigant

Improperly delegating responsibility to issue a payoff letter at a closing to a third party, thereby compromising the interests of both the borrower and lender whom the attorney represented, and appearing at a closing without adequate preparation

Permitting the person who recom- mended the attorney’s employment to direct his/her professional judgment

Failing to properly maintain his/her escrow account

Disparaging a client in court, thereby prejudicing or damaging the client

“Loaning” money to a client to cover loan actually made by another party

Improperly delegating responsibility to attend the court when sitting alone with a client’s file and appearing at a court appearance without explanation

in violation of an order of suspension

Failing to adequately supervise an attorney’s work

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, has compiled this edition of Court Notes. The material is reprinted with permission of the Brooklyn Bar Association.
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