Winning Oral Argument: Do’s And Don’ts

BY: HON. GERALD LEBOVITS

Lawyers are society’s best speakers. The speaker’s goal is to communicate. Communication skills are essential for all lawyers, not just litigators. For litigators, oral argument—arguing with the preparation, research, and writing that leads to the argument—is the ultimate, formal way to communicate. Except, perhaps, when arguing before a jury, nowhere more than at oral argument, whether before a trial judge or an appellate panel, is communicating effectively so essential. Effective oral argument is rewarding. Consistent with the rewards of oral argument are the difficulties and challenges. The challenge of oral argument explains why lawyers are paid to communicate. The challenge also explains why the lawyer who speaks well—why lawyers who argue fact and law persuasively—can win for the client while at the same time benefiting society and the administration of justice.

Real oral argument before a trial judge or appellate panel differs from a law-student’s Moot Court argument. Students work with a fact pattern. Lawyers work with a record they help shape or which was developed at trial. Students argue distinct points of law professors or their intramural Moot Court competition director created for them. Most student issues are academic, constitutional questions of first impression designed to be argued before the highest state appellate court or the United States Supreme Court. Lawyers take diffuse points and creatively weave them into issues. Mostly the issues are broad and butter problems, sometimes with twists and turns but rarely of first-time constitutional dimension.

Students are graded or receive pass-fail academic credit to represent imaginary clients. Lawyers have real clients, and with real clients come real pressures. Students have abundant time to prepare and practice. Lawyers must balance their time based on many factors; lawyers in the real world sometimes have to wing it. Students are scored by Moot Court judges who critique to encourage them and enhance their skills. Lawyers’ performance is never scored by student criteria, and judges almost never critique or encourage: except by example, judges judge, not teach. Students almost always work in teams; Moot Court competitions are designed to have two issues, one for each student speaker. Lawyers work in teams when they write their briefs; they rarely argue orally in teams.

The biggest difference between Moot Court and real-life advocacy, however, is not in any of the above factors: The biggest difference is that law-school Moot Court stresses style while real-life advocacy stresses substance. Moot Court grader is told never to grade on the merits; grading on the merits would be unfair because students do not pick which side they argue. In real life, all that counts is the merits. Real judges do not decide which litigant wins on the basis of which side has the better lawyer. The lawyer’s goal in real life, therefore, is to tell the judge, “I’m just a country lawyer who can never do justice to the merits of my client’s case.” In Moot Court, the students must suggest to the judge, “I’ve been assigned to represent the worst pretend client, but don’t you agree that I’m doing a super-great job in this lousy case?”

Flowing from the difference between style and substance is that some believe that law school Moot Court winners are witty, charming, and gentle boy and girl scouts, whereas winning litigators are Rambo lawyers who intimidate and crush. The reality is that winning litigators aggressively fight for their clients with undivided loyalty and pursue litigation as a martial art, but they fight under the rules, and with integrity, because a good reputation and professionalism persuades. Professionalism for winning litigators means understating: It is the honest understatement, never exaggeration or bluster that persuades.

Beyond fighting for the client and doing so with professionalism are some specific ways to increase the chances of winning when speaking to judges, whether before a trial judge or an appellate panel, and some ways to increase the chances of losing. Here are some dos and don’ts of oral argument.

Ten Oral Argument Dos

Start strong. Begin with a roadmap in which you introduce yourself, your client, and the issues you will argue. You must state what relief you seek and, quickly, why you should obtain that relief. It is ineffective to begin with or dwell on history and givens, why the case is so simple or interesting, or why it is such an honor to appear before the court.

Argue issues. Law school trains people to think like lawyers. Thinking like a lawyer means explaining in simple, clear understandable English why you are right. The uninstructed will explain things by telling a story, perhaps in narrative form, and hope that the listener will figure it out. The novice will be better than the uninstructed and will talk about cases and statutes. The expert will first give the rule and then support the rule with authority and apply the authority to fact, understanding that what persuades is the rule and its application, not what this or that case said about such and such.

Limit your issues. Less is more, in oral argument as in everything else. Winning requires the guts to argue only those points that are likely to succeed. That means arguing only the strongest two or three, maximum four, issues, unless you are dealing with a real issue of first impression or a critically

Continued On Page 13
THE DOCKET . . .

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

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

2008 FALL CLE Seminar & Event Listing

November 2008
Monday, November 17  Stated Meeting - New Foreclosure Law
Tuesday, November 18  How Consumers Find Attorneys Online - 1:00 - 2:00 pm
Wednesday, November 19  Landlord & Tenant Seminar
Thursday, November 20  Civl & Criminal Practice in the Federal Court Seminar

December 2008
Thursday, December 4  Holiday Party
Wednesday, December 10  Insurance Law Seminar
Monday, December 15  Foreclosure Intervention Seminar with NYSBA

January 2009
Tuesday, January 20  Article MHL 81/Guardianship Training - 2:30 - 5:00 pm

February 2009
Monday, February 23  Stated Meeting - Small Firm & Solo Practitioners

March 2009
Monday, March 23  Past Presidents & Golden Jubilarians Night - TENTATIVE

April 2009
Wednesday, April 1  Equitable Distribution Update
Monday, April 20  Judiciary Night - TENTATIVE

May 2009
Thursday, May 7  Annual Dinner & Installation of Officers

CLE Dates to be Announced

Queens County Bar Association
90-35 148th Street, Jamaica, New York 11435
Tel 718-291-4500  Fax 718-657-1789

NEW FORECLOSURE LAW

Monday, November 17, 2008
5:30 - 8:45 p.m.

PROGRAM

Queens County has been described as the mortgage foreclosure epicenter. Thousands of pro se defendants are involved in mortgage foreclosure proceedings, and the number is expected to only increase. A new law provides that some of these borrowers are entitled to a pre-foreclosure settlement court conference. Attorney Volunteers are needed to provide limited assistance to home-owners at the conferences.

MODERATOR
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QCBA Past President

GUEST SPEAKERS
TRACY CATAPANO-FOX, ESQ.,
Principal Law Clerk for
Administrative Judge Jeremy S. Weinstein
SAMUEL B. FREED, ESQ., Chair, Real Property Committee
PAUL LEWIS, Esq., Chief of Staff to the Chief Administrative Judge of the State of New York
APRIL A. NEUBAUER, ESQ., Queens Legal Aid Society

COCKTAILS & BUFFET DINNER -
$30.00 5:30 p.m. to 7:00 p.m.
PROGRAM - FREE
7:00 p.m. to 8:45 p.m.

Accreditation: The Queens County Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Continuing Legal Education Provider in the State of New York for the period of October 8, 2007 through October 7, 2010.

FREE PARKING:
Available on a First Serve Basis at 148th & 150th Streets.

To Reserve for the
Stated Meeting: Monday, November 17, 2008
Fax or Mail to: Queens County Bar Association, 90-35 148 Street, Jamaica, NY 11435 Fax: 718-657-1789

I will be attending:
DINNER ($30): 5:30 - 7:00 PM  PROGRAM (FREE): 7:00 - 8:45 PM
Pay by:  Check  MC  Visa  AMEX  Disc
Authorized Signature
Card #: ____________________________ Exp. Date / ______/ ______  Amount: $ ____________
Name: ____________________________ Address: __________________________________________
Tel. No.: __________________________ Fax No.: ______________________________________

PRE-REGISTRATION IS GREATLY APPRECIATED!

THE QUEENS BAR BULLETIN – NOVEMBER 2008

Editor’s Message

This is the time of year that we begin to reflect on the things that we are thankful for. I wish to thank the many members of the Bar Association and the staff of the Bar Association for their contributions in making our bar bulletin a great success. On behalf of the Bar Association may I wish you and your families a Happy Thanksgiving.

Les Nizin

Lawyers Assistance Committee

The Queens County Bar Association (QCBA) provides free confidential assistance to attorneys, judges, law students and their families struggling with alcohol and substance abuse, depression, stress, burnout, career concerns and other issues that affect quality of life, personally and/or professionally.

QCBA Lawyers Assistance Committee (LAC) offers consultation, assessment, counseling, intervention, education, referral and peer support.

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QUEENS BAR BULLETIN

EDITOR - LESLIE S. NIZIN

Associate Editors - Paul E. Kerson, Michael Goldsmith & Peter Carrozzo

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Les Nizin

Chanwoo Lee - Vice President
Changing Times In The Family Court

BY MERYL KOVIT

In the spring of 1989, at a family dinner in the month of June celebrating Shavuot, the giving of the Ten Commandments to Moses at Mount Sinai, in between requests by the assembled to pass another blueberry blintz with some sour cream, I proudly announced to my then eighty-seven year old grandfather that I had a job. I told him “I’m an attorney at the Queens County Family Court.”

My grandfather silently looked at me. He appeared to be confused. I tried again – I told my grandfather that I worked in a Court for mishpacha – I hoped that the word for family in his more familiar Yiddish might help him to understand. No luck. My husband tried raising his voice to say Family Court in a louder tone to accommodate hearing aid issues. This too just brought the same confused glare. Finally, my grandfather ventured to explain his confusion. He looked at us and began very slowly in his version of perfect English: I can hear you, I can understand you, but I don’t know what you are talking about, “Why do families need a Court?”

Culture is always a matter of perspective and one’s perspective on the culture of the Family Court is no different. The administrators of the court system, working to meet the needs of the community served by the Family Court, and without the ability to consult my grandfather, - he died in 2000 - determined in recent times that not only do families need a Court, they need a Court that is available to provide vital services to families during regular business hours and during the early hours of the evening. Night Court commenced in Queens County, as you and I know it, but I don’t think I knew what you are talking about, “Why do families need a Court?”

The petition room staff remains the same to the appearance before Referee Moriber. The petition room filings on these same evenings continue to be handled by the Night Court team.

Referee Marilyn J. Moriber and Senior Court Clerk John Aiken.

Referee Marilyn J. Moriber and Senior Court Clerk John Aiken.
BY ANDREW J. SCHATTIN

In two previous articles, analyzing the statutory scheme of CPL 730, which is divided into seven sections, and which is entitled overall Article 730/Mental Disease or Defect Excluding Fitness to Proceed, I analyzed the first two sections, i.e. Section 730.10, entitled “Fitness to Proceed; Definitions” and Section 730.20 entitled “Fitness to Proceed; Order of Examination”.

This article, following those two articles, will analyze Section 730.30 denominated, “Fitness to Proceed; Order of Examination”.

That Section sets up the basis whereby a defendant may be declared an incapacitated person. Subdivision 1 states that when the court where a Criminal action is pending must issue an Order of Examination, when it is of the view that the defendant may be an incapacitated person. Subdivision 2 states that when the examination report submitted to the court showed that each psychiatrist is of the opinion that the defendant is not an incapacitated person, the court may on its own Motion conduct a hearing to determine the issue of capacity or dangerousness.

This article will first consider the purpose of this specific statutory subsection. The leading case is People v. Greene. In that case, the trial court held that the legislative intent, when providing the procedure, for determining mental competency of the accused to defendant criminal charges, was to allow the court complete discretion, irrespective of the findings of the official examiners, to determine whether the accused is capable of proceeding to trial, and therefore, where the court was of the opinion that the accused was incapable of understanding the charge against him, the proceedings, or making his defense, the accused would be committed to the state hospital, until sufficiently recovered so that criminal proceedings might be resumed despite the hospital examiner’s report contrary to the court’s opinion.

The next issue to be considered in this article is the matter of the burden of proof. The weight of the case law is that the People have the burden of proving the defendant’s competence by a fair preponderance of the evidence. Thus, in People v. Breeden, the Appellate Court held that the People’s burden of proving the defendant’s competency at the hearing to determine the defendant’s fitness to proceed to trial was met through testimony of psychiatrists at the facility, in which the defendant was confined for five months prior to the hearing, despite opinions of defendant’s expert witnesses who concedingly had less exposure to the defendant’s behavior, as the opinion of the psychiatrists who had more extensive opportunity to observe the defendant were of more value.

It should be added that in general it is the law that the issue of mental competency may be raised on Appeal, despite the absence of objection at the trial level. The weight of the case law is that the People have the burden of proof.

Next, the next topic to be considered here is the factor of danger. It should be added that in general it is the law that it has been the court’s discretion to order an examination as to the defendant’s competence or sanity. The next issue to be considered here are what factors the court must consider in ordering an examination.

The leading case is People v. Greene, in which the court held that the People have the burden of proving the defendant’s competence at the hearing to determine the defendant’s fitness to proceed to trial was met through testimony of psychiatrists at the facility, in which the defendant was confined for five months prior to the hearing, despite opinions of defendant’s expert witnesses who concedingly had less exposure to the defendant’s behavior, as the opinion of the psychiatrists who had more extensive opportunity to observe the defendant were of more value.

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MARITAL QUIZ

BY GEORGE J. NASHAK JR.

Question #1 -
What are Tier I benefits of the Railroad Retirement System?
Your answer -

George J.
Nashak Jr.

Question #2 -
Are Tier I benefits subject to Equitable Distribution?
Your answer -

Question #3 -
Is a former spouse of a railroad employee entitled to Tier I benefits of their own?
Your answer -

Question #4 -
What are Tier II benefits of the Railroad Retirement System?
Your answer -

Question #5 -
Are Tier II benefits subject to Equitable Distribution?
Your answer -

Question #6 -
Do Social Security benefits for a child reduce the parental obligation of support?
Your Answer -

Question #7 -
Is it proper for the Family Court to dismiss a petition for visitation because it was not filed in the county in which the children reside?
Your answer -

Questions #8 -
If an action for divorce is discontinued and the parties continue to live separate and apart for a number of years before a second action for divorce is commenced, is the court permitted to fix the valuation date for marital assets as of the date the first action was filed?
Your answer -

Question #9 -
Is the Supreme Court permitted to appoint an 18B attorney in Custody proceedings?
Your answer -

Question #10 -
When a spouse, during a second marriage, incurs education loans for the education of a child of a prior marriage, is this marital debt to be shared by the parties in a divorce proceeding of the second marriage?
Your answer -

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

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Profile of....
Steven S. Orlow

BY LESTER SHICK*

William Langland, famed 14th century English poet, wrote in his allegorical epic, “Piers Plowman,” “Like father, like son, every good tree maketh good fruits.” This being said, Steven Orlow, new President of the Queens County Bar Association, has produced two fine sons whom together comprise the law firm of Orlow, Orlow & Orlow (Orlowlaw.com).

Steve was born in Manhattan and his family moved to the borough of Queens when Steve was six years old. His dad worked in the retail and wholesale end of the jewelry and handbag industry. Steve attended Queens College, graduating in 1965, with a Bachelor of Arts Degree and went on to Cornell Law School, receiving his Juris Doctor degree in 1968. He was admitted to the New York Bar in 1969.

Steve’s first job was working as an Assistant District Attorney in Kings County. He worked under the auspices of the then District Attorney, Eugene Gold. He prosecuted numerous narcotic cases. He was married to the then District Attorney, Eugene Gold. He prosecuted numerous narcotic cases. After three years, he became counsel to the Queens Borough President, Donald Manes. He worked there from 1972-1980.

Steve coordinated the rehabilitation of the Carlton Apartments in Kew Garden Hills. The development had 250 units that were in total disrepair.

In 1975, Steve was approached by his Rabbi and other members of his community with the idea of establishing the first Eruv, a thin monofilament line strung from light pole to light pole to symbolically extend a Jew’s private domain to everything within the loop. It would enable orthodox Jews to carry keys and push strollers on the Sabbath without violating Halacha or Jewish law. The Eruv was created for the Kew Garden Hills neighborhood.

Steve has been a member of the Brandeis Association Board for over twenty years. He is also a member of the New York State Trial Lawyers Association. He is a past president of the Young Israel of Queens Valley. Steve has been active in a variety of charitable organizations, including being the founding and current president of the One Israel Fund. This organization has been in existence for 15 years. Its primary concern is the well being and physical safety of the Jewish residents residing in the areas of Judea and Samaria in Israel. He is also a board member of the Orthodox Union. This entity is the main umbrella organization comprising the union of Orthodox congregations in America. He has been a tireless fundraiser for the groups over the years.

Steve and his lovely wife, Susan, have been married for thirty-eight years. They first met not in New York, but on a tour to the Gaza Strip. His two sons, Brian and Adam, joined the law firm over ten years ago. The firm specializes in personal injury cases. Steve and his wife are also blessed with a daughter, Miriam, who is a speech therapist for the Board of Education. In addition, they have five beautiful grandchildren.

Steven Orlow is a man who embodies the characteristics of loyalty and commitment. He has always taken a “hands on” approach to everything he gets involved in. The County Bar Association has made a wise choice in its selection of their new President.

ANSWERS TO MARITAL QUIZ ON PAGE 5

Question #1 - What are Tier I benefits of the Railroad Retirement System?
Answer: Tier I benefits are similar to Social Security benefits.

Question #2 - Are Tier I benefits subject to Equitable Distribution?
Answer: No

Question #3 - Is a former spouse of a railroad employee entitled to Tier I benefits of their own?
Answer: Yes, if he or she meets the following requirements:
1. Both the participant and alternate payee are 62 years of age.
2. The parties’ marriage lasted at least 10 consecutive years.
3. The alternate payee did not remarry.
4. The participant has retired and begun receiving a railroad retirement or disability.

Question #4 - What are Tier II benefits of the Railroad Retirement System?
Answer: Tier II benefits represents the pension portion of the benefit.

Question #5 - Are Tier II benefits subject to Equitable Distribution?
Answer: Yes, these benefits are valued and distributed like any other pension benefit.

Question #6 - Do Social Security benefits for a child reduce the parental obligation of support?

Question #7 - Is it proper for the Family Court to dismiss a petition for visitation because it was not filed in the county in which the children reside?
Answer: No, the proper procedure under Family Court Act 174 is to transfer the proceeding to the proper county. Cruz v. Cruz 49 A.D.3d 904, 853 N.Y.S.2d 569 (2nd Dept. 2008).

Questions #8 - If an action for divorce is discontinued and the parties continue to live separate and apart for a number of years before a second action for divorce is commenced, is the court permitted to fix the valuation date for marital assets as of the date the first action was filed?

Question #9 - Is the Supreme Court permitted to appoint an 18B attorney in Custody proceedings?
Answer: Yes, Judiciary Law §35 (8).

Question #10 - When a spouse, during a second marriage, incurs education loans for the education of a child of a prior marriage, is this marital debt to be shared by the parties in a divorce proceeding of the second marriage?

The first five questions and answers were derived from an email newsletter of Pension Appraisers, Inc. Pension Appraisers, Inc. has given permission for the use of their material in this Marital Quiz. If you would like to receive their email newsletter, free of charge, your request should be emailed to “penapp@pensionappraisers.com.”
Sex Offender Management And Treatment Act

BY PETER DUNNE*

On March 14, 2007, Governor Eliot Spitzer signed into law the Sex Offender Management and Treatment Act1 which went into effect April 13, 2007. This law will have enormous consequences in the prosecution and defense of sex offenders.

This article will examine the major points of the law, review the legal basis and constitutional issues of the act, and finally, describe difficulties for practitioners in representing sex offenders.

First, and most importantly, the law establishes a new sex offender civil commitment procedure under the Mental Hygiene Law.

In addition, it creates a new felony sex offense entitled “sexually motivated felony”, introduces new sentencing requirements, enhances some post release supervision periods, and designates certain Class D and E felonies and “violent” felonies. According to the legislative history, the primary purpose of the legislation is “to enhance public safety by allowing the State to continue managing sex offenders upon expiration of their criminal sentences, either by civilly confining the most dangerous recidivistic sex offenders, or by permitting strict and intensive parole supervision of offenders who pose lesser risk of harm.”2

The civil commitment procedure outlined by the act is the most revolutionary aspect of the law.

It applies to all persons who have been convicted and sentenced to state prison for all felonies contained in Penal Law section 130 as well as some specifically delineated felonies, such as Incest, Patrons of a Prostitute, and those under post release supervision periods, and designates certain Class D and E felonies and “violent” felonies. It applies retroactively to all persons convicted of more serious crimes and who have received shorter periods of post release supervision.

The Act defines mental abnormality as “a congenital or acquired condition, disease, or disorder that affects the emotional, cognitive or volitional capacity in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct”.3

The act establishes three decision making stages. If the defendant is found to be civilly committed a defendant is filed by the Attorney General.

First, the act authorizes the Commissioner of Mental Health to establish a “multi-disciplinary staff” to initially screen all sex offenders to determine whether the defendant is subject to further evaluation.4 Although this group is authorized to “review” and assess relevant medical, legal, clinical, criminal, or institutional records, actuarial risk assessment instruments, or other records and reports provided by the District Attorney of the County where the person was convicted, there are no guidelines within the act which guide this decisionmaking beyond the broad definition of “mental abnormality”.

Second, the Act authorizes the commissioner of Mental Health to establish a case review panel consisting of 15 members, who will sit in groups of three to review each case submitted by the multi-disciplinary team.5 The panel will determine whether the defendant requiring civil management.6 The panel is charged with examining the same records as the multi-disciplinary staff of the first stage. In addition, the panel may “arrange” for psychiatric examination of the defendant.7

The defendant is to be notified when his case is referred to this panel, and the panel will notify the defendant of its decision.8 If the panel decides that the defendant is a “sex offender requiring civil management” it will notify the Attorney General in writing within 45 days of the anticipated release of the defendant.9

One of the unusual aspects of the law involves the numerous time frames of the commitment procedure. Unlike C.P.L. 30.30, for example, which mandates a speedy trial, on penalty of dismissal, many of the time frames of the law are not mandatory. The law specifically states, for example, “failure to [notify the Attorney General in writing within 45 days] shall not affect the validity of such notice.”10

The last stage of review is by the Attorney General. Upon receiving a case from the case review panel in the second stage, the Attorney General must decide whether to file a petition to initiate civil commitment. Presumably, in the event of review of all the records and reports previously reviewed, the Act also directs the Attorney General to consider “information about the continuing supervision to which the [defendant] will be subject as a result of the criminal conviction, and shall take such supervision into account.”11

The provision presumably refers to any post release supervision or parole of the defendant. This presents an unusual situation. This language seems to indicate that persons convicted of less serious crimes and who have received shorter periods of post release supervision would be more likely to be subject to a petition and civil commitment than persons who have been convicted of more serious crimes and received longer periods of post release supervision.

Within 30 days of receipt of the case review panel’s recommendation, the Attorney General may file a civil management petition in Supreme Court of County Court where the defendant is located. The petition must allege facts of an evidentiary nature to support the allegation that the defendant is a sex offender requiring civil management. The petition must be served on the respondent, and it triggers the respondent’s right to counsel.12

The Attorney General is directed to file the petition in the county of the respondent’s incarceration. Within 10 days, the respondent has the option to move to change the venue to the county where the conviction took place. The Court is directed by the Act to grant removal unless the Attorney General shows “good cause” for retaining the case in the county of incarceration.13

Within 30 days of filing, the court must conduct a probable cause hearing. Certified psychiatric reports are admissible without testimony from the examiner, and the respondent may not relitigate the underlying offense.14

Within 60 days after the probable cause determination, the respondent must be tried before a jury of twelve. The respondent may waive a jury trial and choose a bench trial. During the trial, commission of the underlying sex crime shall be deemed established and cannot be relitigated. Plea minutes and prior trial testimony are all admissible.15

The burden of proof is on the Attorney General to prove by clear and convincing evidence that the respondent suffers from a mental abnormality.16 The verdict must be unanimous in the case of a jury trial. The Court must charge the jury that commission of the sex offense cannot be the sole basis of the finding that the respondent suffers from a mental abnormality.

If there is a unanimous verdict that the respondent does not suffer from a mental abnormality, the court must issue a discharge order and dismiss the petition. If there is not a unanimous verdict, the respondent must be retried within 60 days.17

If there is a unanimous verdict that the respondent does suffer from a mental abnormality, the jury will be discharged and the trial will move on to a second stage to determine the appropriate “post sentence treatment”.18

This phase is for the Court alone. The question is whether the respondent is a “dangerous sex offender requiring confinement” or a sex offender requiring strict and intensive supervision. If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong disposition to commit sex offenses and such an inability to control behavior that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court will find the respondent to be a dangerous sex offender requiring confinement.19

The only other choice is to find that the respondent is a sex offender requiring strict and intensive supervision. No other choice is given to the court once the jury has unanimously determined that the respondent suffers from a mental abnormality.20

Commitments to a secure facility are indefinite. Annual reviews are authorized by the Act.21

For years, New York has had a mechanism in place which authorized the civil commitment of individuals who represented a danger to himself or herself or others.22 Briefly, under this section of the law...
Recent Significant Decisions from our Appellate Courts - Monday, September 22, 2008

Alan Chevat - Chief Ct Atty, Appellate Division, 2nd Dept.

Andrew Fine - Director, Ct of Appeals Litigation, Legal Aid Society.


Daphne Loukides, Matt Hunter, Hon. Jeffrey Lebowitz and Steven Orlow.


Hon. Alan Scheinkman - Justice of the NYS Supreme Court, White Plains.


Hon. Lee Mayersohn and Spiros Tsimbinos.


John Castellano - Chief of Appeals, Queens DA’s Office.

Photos by Walter Karling
Recent Significant Decisions from our Appellate Courts - Monday, September 22, 2008

Photos by Walter Karling
The grass is always greener, as the saying goes. I spend most of my year dreaming of vacations to my friends’ home in Provence and the Côte d’Azur. My friends there, on the other hand, say they are deadly bored by the lack of the stuff to do or see. The mountains and sea are breathtakingly beautiful, they say, but they yearn for the cultural variety of New York City. I understood City’s cultural wealth, too, as a result of my commitment in accepting the cultural variety of New York City.

BY HOWARD L. WIEDER

Last season, I was spellbound by Natasha Dessay’s performance in the title role of LUCIA di LAMMERMOOR. In October, I saw and heard German coloratura DIANA DAMRAU give a mesmerizing performance and thrilling vocal account with a brilliant supporting cast. It was the finest LUCIA I have heard. Also brilliant were SEAN PANNIKAR as Arturo, whose performance last year in Manon Lescaut I featured in my March 2008 column, Polish tenor PIOTR BECZALA as Edgardo, Lucia’s true love, and Russian baritone VLADIMIR STOYANOV as Lord Enrico Ashton, as Lucia’s overbearing, destructive, and manipulative brother. STOYANOV has a wonderful baritone voice, and his acting skills will hopefully improve since a control-freak can be portrayed with greater depth than the constant banging on a table. The first-rate cast was underlined by a major, mechanical failure of the set in the third and final act that prevented the proper set from being placed. In January, 2009, another all-star cast comes in to the Met Opera to perform LUCIA. Don’t miss it. Check www.metopera.com for details.

Composer John Adams was rightly brought on stage for curtain calls following the performance of his modern opera DOCTOR ATOMIC, based on the stories of the characters and events involved in the testing of the atomic bomb. His music showed depth and variety, including pulsating driving passages that were evocative of the film scores of action-adventure movies. Adams’s score was grasped by Alan Gilbert, the much-awaited new maestro of the New York Philharmonic. You may recall that I was the ONLY reviewer who correctly forecast Gilbert’s selection, and I did so months in advance. What a pleasure to see Gilbert’s merit, passion, and competence rewarded!

I was also privileged to hear and see one of my favorites, Finnish soprano KARITA MATTILA, perform Salome. The one-act opera was presented in contemporary setting, with Mattila dancing the dance of the seven veils, down to total nudity – no body stocking for her – and her obsession for John the Baptist, based on the character with his head for spurning her sexual advances.

On Mondays to Thursdays, 150 Rush tickets are available, meaning that you need to be among the first 75 persons on line. Check www.metopera.com for details.

THE METROPOLITAN OPERA

Before my own rehearsal schedule got intense, I was fortunate to see several blockbuster operas at the Met, including LUCIA di LAMMERMOOR by Gaetano Donizetti, SALOME by Richard Strauss, and DOCTOR ATOMIC by John Adams.

I do not regret my commitment, because I am learning and growing creatively, and know that I am contributing with the ensemble to a top-notch opera set from being placed. In January, 2009, the first-rate cast was undeterred by a major, mechanical failure of the set in the third and final act. The range of Anastasia’s accents and impersonations is amazing. She, like Jade, has an exciting on-stage presence. Anastasia has quit all other jobs to become a full-time actress.

PETITE JADE JUSTAD, playing Leah and prominent civil rights attorney MARGARET FUNG, Esq., has a riveting physical presence and commands the stage with an electric charisma, in her portrayals of Leah and other characters. ANASTASIA MORUSCI is versatile in her multiple roles. The range of Anastasia’s accents and impersonations is amazing. She, like Jade, has an exciting on-stage presence. Anastasia has quit all other jobs to become a full-time actress.

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THE QUEENS THEATRE IN THE PARK

During November 14-23, 2008, “YELLOW FACE,” a play that gave Tony Award-winning Chinese American playwright DAVID HENRY HWANG his third Obie Award and made him a finalist, will be performed at the QUEENS THEATRE IN THE PARK at Flushing Meadows-Corona Park. The play in Act 1 is a hilarious comedy about racial identity, before proceeding to the deeper, more serious, and absorbing second act. Racial identity, the willingness to sacrifice one’s comfort, and the lure of resting on one’s laurels, the anonymity involved in hit-and-run journalism are among the many themes probed by Hwang in his masterful play. My roles in the play are the ANNOUNCER NAME WITHHELD ON ADVICE OF COUNSEL. permit a certain objectivity. My scene in the play is with one member of the cast. So during rehearsals, I often sit and observe the rest of the ensemble.

The talent of the seven other cast members is so high that there isn’t one who couldn’t be in a Broadway production or film. I am in constant awe of their talent and of the creative juices of the director, SOFIA LANDON GEIER, an accomplished actress, writer, drama professor, and drama coach.

FENTON LI, as the title character of DHH, brings great energy to the role, since his role is involved in nearly every scene. PETITE JADE JUSTAD commands the stage with an electric charisma, in her portrayals of Leah and other characters. ANASTASIA MORUSCI is versatile in her multiple roles. The range of Anastasia’s accents and impersonations is amazing. She, like Jade, has an exciting on-stage presence. Anastasia has quit all other jobs to become a full-time actress.

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The band survived a short-lived deal with Sony Music. Tom has gone on to write songs that have appeared in several films and TV shows including “A View From The Top” (Gwyneth Paltrow), “My Boss’s Daughter” (Ashton Kutcher), “Dickie Roberts: Former Child Star” (David Spade), and “True Calling” (Eliza Dushku).
Innovative New York Lawyers Use Online Video to Get New Clients

BY GERRY OGINSKI, ESQ.

As the internet has taken hold and more lawyers have recognized the benefits of marketing online, one marketing tool is defining the standard of advertising on the web. Online video. It is the newest, hottest tool available for lawyers to communicate their message on the web. Admittedly, attorney videos are one-way communication, but they offer significant advantages over other advertising mediums.

Most attorneys have failed to understand the true value of video and how it can improve their chances of a potential client calling them over their competitor. Legal marketing experts agree that the sooner you start to see the value of video marketing, the sooner you’ll see the results. Legal marketing expert Larry Bodine (www.lawmarketing.com) recently commented that putting video on your website is “...a great opportunity to present how you look, how you talk, what you do and how you measure up to other attorneys. It’s a great business-getting technique.” The key to encouraging a website visitor to call you, is with video. Static websites and fancy graphics just do not cut it anymore, and fail to distinguish yourself from your competition. Tom Foster, CEO of Foster Web Marketing (www.fosterwebmarketing.com) says “If you get in early by putting video on your website, you can take advantage of good search engine rankings and make your website video search engine fledgling.”

If you thought that internet video was for the MTV crowd, you’d be wrong. If you thought that video was only for geeky technolo-lawyers, you’d be wrong too. If you thought that putting a video of yourselves online was useless, you’d definitely be wrong. In fact, Google thinks you’re so wrong that they recently paid one billion dollars to buy a video sharing site called YouTube. To give you an idea of just how important internet video has, consider this: a ten minute video clip by comedian and ventriloquist Jeff Dunham; his video has been viewed over 60 million times. Most attorney videos are viewed in the hundreds, if not the single digits. Has. Plus, if done correctly, does not cost you anything more if it is watched 100 times or 100,000 times.

Pre-historic times

In the pre-internet age, lawyer advertising was limited to television, radio, yellow pages, billboards, newspapers and magazines. Since the 1970’s when the Supreme Court of the United States decided that lawyers could advertise (Bates v. State Bar of Arizona), the general public has been bombarded with lawyer ads. Every jurisdiction in every state has their own peculiar set of ethical rules regarding what lawyers can and cannot say in their advertisements. Cheesy lawyer advertisements have been the bane of late-night talk shows and comedy shows for decades.

Lawyers trying to get a foothold into their particular market often looked upon lawyer advertising as a necessary evil. Many felt it was beneath them to advertise. Not many lawyers wanted to be in the same category as a salesperson looking to pitch his latest slicer and dicer. Traditional advertising is costly. Lawyers often complained that the cost to advertise in each medium was prohibitive. The advertisements themselves were not able to be viewed repeatedly for the same client. If you had a full page ad in the yellow pages and were at page 30. The yellow pages representative always managed to explain that even if you were at page 30, “just one client” would be enough to pay for your ad. Unfortunately, the yellow pages representative also explained why a potential client would call a lawyer that was at page 30. It was pages 29 and 30 that contained the other 29 lawyers in front of you. However, if your website comes up on page one of Google, there is a good chance that a web visitor will click on your site. Unfortunately, with all the competition today, that alone does not get a potential visitor to call you.

Once a visitor actually clicks on your site, what do they find? Is the website static and filled with fancy graphics or flashy media that does nothing to differentiate your site from all the others? What information do you provide that will cause a visitor to want to pick up the phone and ask you questions? The answer according to Gerry Oginski, a medical-legal practice and personal injury lawyer in New York, is video. Oginski has created over 100 educational video tips on medical malpractice and personal injury law in New York. He posts them on his website, and uploads them to video sharing sites such as YouTube, Google Video, Yahoo and AOL.

Benefits of Video For The Practicing Attorney

Millions of viewers go online every day to watch video clips about every topic imaginable. From ‘how-to’ videos where you can learn to build a house, to bizarre videos of no-talent singers pretending to be Tom Cruise in their din- ning room, video is everywhere. Online video is the newest and hottest tool available for lawyers to communicate their message on the web. Video allows the attorney not only to convey their marketing message, but allows viewers to see, hear, and determine whether the lawyer inspires confidence and knows what he is talking about. Video allows for more than a 30 second commercial that screams at you. Online video gives lawyers the opportunity to explain to viewers how they are different from every other lawyer who is competing with them.

Video Is The Key To Show You Are Different

How does video distinguish you from everyone else? By creating a personal bond with your viewer. Admittedly, it’s a one-way conversation, but it allows the viewer to see you, hear you, and judge for themselves whether you sound confident and intelligent enough to want to call you. So far, the biggest users of online video for law firms have been personal injury and medical malpractice lawyers. These attorneys have gotten in on the ground floor and are now just learning how to optimize their videos so that the major search engines identify the videos and improve their search engine rankings. Lawyers who fail to create useful videos lose the opportunity to connect with their website visitors and distinguish themselves from all the other lawyers out there competing for the same business. Those lawyers lose the advantage of letting a viewer get to know them and trust them before they ever walk into their office.

Generating Half The Calls To His Office

Oginski says “These educational videos together with my informative website have caused my phone to ring. In fact, they generate half of all the calls to my office.” He explains that this is a dramatic increase from the previous year when he only had his website online.

Virginia Personal Injury Trial Lawyer Ben Glass, who teaches marketing to lawyers all over the country says that after viewing Oginski’s website and the videos he created, lawyers say that they would not only call him, they would also contact the other 29 lawyers in front of them. He even created a video on how to market your firm through a video. If you thought that putting a video of yourself online was useless, you’d definitely be wrong. In fact, Google thinks you’re so wrong that it shows the potential that video has. Plus, if done correctly, you can take advantage of good search engine rankings and make your website video search engine fledgling. The key to a great marketing campaign is understanding how Google works. Only by understanding how Google searches work can a lawyer truly make the most of it with video marketing.

Typically, a potential client will do a Google search if they are looking for an attorney online. Obviously there are many search engines, but Google’s popularity cannot and should not be ignored. The results that pop up on Google will likely determine if your website will be clicked on. If you are on page 10 of a Google search result, it is unlikely your website will be found. The same reasoning applies if you had a full page ad in the yellow pages and were at page 30. The yellow pages representative always managed to explain that even if you were at page 30, “just one client” would be enough to pay for your ad. Unfortunately, the yellow pages representative also explained why a potential client would call a lawyer that was at page 30. It was pages 29 and 30 that contained the other 29 lawyers in front of you. However, if your website comes up on page one of Google, there is a good chance that a website visitor will click on your site. Unfortunately, with all the competition today, that alone does not get a potential visitor to call you.

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Friends, Romans and Brethren, Lend Me Your Ear

It has come to the attention of the Queens County Bar Association’s Academy of Law that too many attorneys on a fairly regular basis are foregoing the credits needed, and the time remaining is insufficient. The Knight in Shining Tapes will come to your rescue! Not only does our Association run a large and varied number of seminars, but we are fortunate to have a well stocked library of the tapes of past seminars. Each tape carries with it a certain number of qualified CLE credits. So, at the end of the day, purchase a tape and lend your ear to it and your problem will be solved. To obtain the tape call our Association, 718-291-4500, or visit the website, qcba.org, where you can select the tape or tapes which you may need. There is a fee for each tape purchased, but in the end, it is well worth it by virtue of the information acquired and the CLE credits earned. Formats available for the tapes are CDs, DVDs and VHS.

PAUL S. GOLDSMITH Member of the Academy of Law and former President of the Queens County Bar Association

Qcba Celebrates Opening of New Tech Center and Pro Bono Office

Continued From Page 1

The law library now has wall to wall carpeting, is fully air-conditioned and the Tech Center has new seating as well. The law library also has free Wi-Fi access.

The new office of the Queens Volunteer Lawyers Project, allows several staff members to work simultaneously at new work stations with networked computers and telephones. This will greatly increase the efficiency of the program and increase the number of pro bono clients who can be assisted.

All QCBA members are urged to stop by and view the newly refurbished facilities when they are at the Association for a seminar or meeting. We would also like to thank those whose monetary contributions to QVLP helped to make these improvements become a reality.

Judge Bernice Siegal, Supervising Judge, Civil Court, Queens County, checking out a new tech center computer with Interim President Steven Wimpfheimer.

Mark Welicky is the Pro Bono Coordinator for the Queens County Bar Association

Mark Easton (May 20, 2008)

Following a disciplinary hearing, the respondent was found guilty of neglecting legal matters entrusted to him by failing to timely and/or diligently pursue such matters, and conduct involving dishonesty, fraud, deceit or misrepresentation, by misleading his clients as to the status of the legal matters entrusted to him.

Jeffrey A. Irving (June 10, 2008)

On May 24, 2004, the respondent pleaded nolo contendere in the Vermont District Court, Unit 1, Windham Circuit, to three misdemeanor counts of shoplifting. As a result of the foregoing, the respondent was found guilty, following a disciplinary hearing, of engaging in illegal conduct adversely reflecting on his honesty, trustworthiness, or fitness as a lawyer in violation of DR 1-102(A)(3); engaging in conduct adversely reflecting on his fitness as a lawyer in violation of DR 1-102(A)(7); and professional misconduct as a result of his conviction of a “serious crime” involving theft within the meaning of Judiciary Law §90(4)(d) and 22 NYCRR §691.7.

Edward C. Klein, admitted as Edward Carl Klein (June 10, 2008)

On or about June 6, 2006, the respondent pleaded guilty in the District Court, Nassau County, First District, to attempted recklessly endangering the second degree, a class B misdemeanor; disorderly conduct by creating a hazardous or physically offensive condition by an act which serves no legitimate purpose, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof, a violation; and harassment in the second degree by striking, shoving, kicking, or otherwise subjecting another person to physical contact, or attempting or threaten-
Winning Oral Argument: Do's And Don'ts

Continued From Page 1

important case in which you must preserve the record for further appeal. Throwing in the kitchen sink or wasting time arguing contentious or irrelevant points distract the person you are trying to persuade. Make that person believe that no argument you have is strong.

Argue your best issues first. The human mind expects speakers to begin with their strongest arguments and then support these points with their best legal authority and their best applicable facts. Beginning with weaker points will tell the listener that your weak point is your strong point. You might even get derailed or run out of time arguing contentious or irrelevant points.

Apply fact to law. The judges might know the law, but they do not know your facts, and law without context is meaningless. Everything depends on the facts. When applying facts do not simply raise facts or even argue them: Apply them to the issues in the case. Introduce, then amplify. Tell the court at every turn what you will argue. For example, “There are three reasons: First,...; second,...; and third,...” Then argue each in turn. That provides organization to speak- er and listener alike, and it offers necessary, persuasive repetition.

Answer: Then explain. You need to make it easy for the court to rule for you. One way to do that is with a yes or no, and then to explain why. Beginning the answer with a narration without first answering the question will frustrate the judge and possibly lead to confusion. The goal is to help the judge, not to speak for the court, and avoid introducing the case for the sake of self-importance. Your client’s rights are at stake – not your ego.

Do not begin with rebutting the other side’s points. You need to make that person believe that no argument you have is strong.

Argue your best issues first. The human mind expects speakers to begin with their strongest arguments and then support these points with their best legal authority and their best applicable facts. Beginning with weaker points will tell the listener that your weak point is your strong point. You might even get derailed or run out of time arguing contentious or irrelevant points.

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The respondent was found guilty of having been convicted of a serious crime.

Michael S. Kimm (July 1, 2008)

Brooklyn Bar Association.

Editor’s Note: Gerald Lebovits is a judge of the New York City Court, Housing Part, and an adjunct professor at St. John’s University in Queens, New York, where he teaches trial and appellate advocacy.

Conclusion

Oral argument is difficult but exhilarat- ing. Oral argument affects cases. Cases, and not only the cases in which you welcome the court’s interrup- tions but in which you answer the court’s questions concisely. Do not ramble. Get to the point, and make it count.

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

Failing to timely re-register as an attorney with OCA (5)

Improperly asserting a lien

Neglecting a legal matter; failing to promptly tender funds due the client; failing to timely re-register as an attorney with OCA; and failing to cooperate with the Grievance Committee

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JENNIFER GEGAN, playing a variety of roles, including the owner of a sleazy porn shop, was last seen as Virginia in "La Traviata" (just finished training with Terry Schreiber Studios and has studied with Austin Pendleton at HB Studios. In addition to commercial and film work, she purchased by sending checks trial-ready including a summer stock production of "The Odd Couple.

Tickets for "YELLOW FACE" are $22 with an advance purchase, and $25 at the door [if any are available, by then]. The theater’s capacity, however, is strictly limited to 90 seats. Tickets may be purchased by sending checks trial-ready including a summer stock production of "The OUTRAGEOUS FORTUNE COMPANY, 42-24 Douglaston Parkway, Douglaston, NY 11362, tel. 718-428-2500, ext. 20. Performances are: November 14 [8 P.M.], Nov. 15 [8 P.M.], and Nov. 16 [Sunday, 3 P.M.], and a Thursday night performance on November 19, 2008 [at 8 P.M.] Nov. 22 [8 P.M.], and Nov. 23 [Sunday, 3 P.M.]. The performance on November 21 [8 P.M. ] was sold out weeks ago, and some of the other performances are already at the time that this column was submitted to press.

Audience-generated Question-and-Answer sessions will follow the performances. The performance will be moderated by GARET FENG, ESQ, the Executive Director of the Asian American Legal Defense and Education Fund, Nov. 21 [at 8 P.M.], Nov. 22 [8 P.M.], and Nov. 23 [moderated by HONORABLE DOROTHY CHIN-BRANT, a Justice of the Queens Supreme Court].

\*Information available at the theater. Free shuttle trolleys will be running from the #7 train at Shea Stadium/Willet’s Point to the theater, running one hour before and after all performances. THE QUEENS THEATRE IN THE PARK is located in the heart of Flushing Meadow’s World’s Fair Park and can be found at Exit 9P from Long Island and Exit 9E from Manhattan.

JORDAN C. WENTWORTH has been teaching voice for 20 years, 8 years full-time in New York. He studied with the legendary MAESTRO ANTONIO PAPPANO, the impresario, and his wife, the late Tatiana Menotti (col- ortaria) in Barcelona. She currently lives with Judith Natalucci.


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How many opera performers do you know who are also educators? JORDAN WENTWORTH’s opera “Day Boy and Night Girl,” based on the popular fantasy, will soon be given a special preview at Manhattan’s Upper West Side’s prestigious Symphony Space. See www.sympsonyspace.org. JORDAN WENTWORTH has also composed seven film scores.

JORDAN WENTWORTH, incidentally, is a noted and gifted photographer in great demand. His extraordinary creative genius of portraits, landscapes, and stills has been often exhibited and is available at www.davidwentworthphotography.com.

HOWARD L. WIEDER is the writer of both “THE CULTURE CORNER” and the “BOOKS AT THE BAR” columns, appearing regularly in THE QUEENS BAR BULLETIN. The Met Opera’s production stars ANJA HABERES as Violetta and MASSIMO GIORDANO as her lover. La Traviata’s last performance at the Met Opera for the season is on Thursday, November 20.

JORDAN WENTWORTH was recently on "The Morning Show with Mike and Juliette." Her performances include roles and solo engagements with the Liceu di Opera of Barcelona, Austin Civic Opera, Benaroya Hall and Civic Light Opera of Seattle, and the Bellingham Theatre Guild. Her recent roles have included "The Barber of Seville," "Musetta" in La Bohème, "Ophelia" in Hamlet, "Adele" in Die Fledermaus, "Norina" in Don Pasquale, "Frugaita" in Il Trovatore, "Adina" in Elixir of Love, "Juliette" in Il Capuletti e i Montecchi, "Zerlina" in Don Giovanni, "High Priestess" in Aida, Madame Butterfly, "Luisa" in The Fantasticks, "Meg" in Brigadoon, "Chava" in Fiddler on the Roof, and "Virginia" in The Pajama Game.

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Changing Times In The Family Court

Continued From Page 3 –

Court referee. I am in the unique position of being able to immediately provide a petitioner in need of services with not only an attorney, but also with assistance from ACS and Safe Horizons." She finds that she is able to call upon agencies such as ACS and Safe Horizons to invest more time in each individual case during Night Court than during regular court hours. ACS, Safe Horizons and interpreters are more readily available to provide important services to the litigants during Night Court hours. There is always a Spanish language interpreter available in Night Court and, since many of the Spanish language interpreters usually speak a third language, Night Court has the enhanced ability to sometimes provide interpretation in languages other than Spanish.

Cases heard in Night Court are given a return date to return during the daytime. The visitation, custody and guardianship hearings are returned to the Queens Family Court for filing on weekend days, however, Family Court Juvenile Delinquency matters have recently begun to be heard on weekends in Manhattan pursuant to a new Court initiative announced in May, 2008 by Mayor Bloomberg. According to the Mayor, this was a first for New York State. The Mayor explained in announcing the new program that seven day per week juvenile processing, a standard already in place for those sixteen years and older in the Criminal Court, was intended to reduce detention time for youth under the age of sixteen who could safely be released to the community and might otherwise be detained for up to forty-eight hours or longer. The new program was planned so as to provide high risk youth with access to weekend processing and the availability of a Judge who would determine whether detention is warranted. The program began on May 31st, 2008.

Mayor Bloomberg said in May that “it’s not enough to be tough on crime; we also have to be smart about crime”. He explained that “the fifteen year old who snatches a video game from another youth on a Friday night should not be detained all weekend long when a seventeen year old who does the same thing would see a Judge within twenty-four hours. We already have weekend arraignment for adults; the kids we still have a chance to save are entitled to at least as much.” A Mayor spokesperson, explained in a press release in May, 2008, that the nearly 12,000 kids processed by the New York City delinquency system each year are often youth who are disconnected from school and family and may face an uncertain future. When there is an encounter with the juvenile justice system, this can lead to further alienation. Part of the goal of adding Week-End Court processing is to send young people home where they can best receive the support they need to get them on a more positive path.

The juveniles arrested on a weekend day are processed by Judges who currently arraign adults on a regular basis. The intake of the juvenile’s case occurs in a separate courtroom from any adult arraignment. The Family Courts, in all five boroughs, remain closed on the weekend. The intake of the juvenile cases is held in the Manhattan Criminal Court at 100 Centre Street. An average of eight juveniles entered detention each weekend. The juvenile court judges assigned to the Manhattan Criminal Court, Family Court for filing on weekend days, however, Family Court Juvenile Delinquency matters have recently begun to be heard on weekends in Manhattan pursuant to a new Court initiative announced in May, 2008 by Mayor Bloomberg. According to the Mayor, this was a first for New York State. The Mayor explained in announcing the new program that seven day per week juvenile processing, a standard already in place for those sixteen years and older in the Criminal Court, was intended to reduce detention time for youth under the age of sixteen who could safely be released to the community and might otherwise be detained for up to forty-eight hours or longer. The new program was planned so as to provide high risk youth with access to weekend processing and the availability of a Judge who would determine whether detention is warranted. The program began on May 31st, 2008.

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Sex Offender Management And Treatment Act

Continued From Page 7 — Mental Health law, a court is authorized to civilly commit a person when the court is "informed...that a person is apparently mentally ill and is conducting himself or herself in a manner...which is likely to result in serious harm to himself or herself or others..."

Such a finding triggers a series of psychiatric evaluations and judicial reviews revolving around a finding that the person “...is in need of care or treatment...in that he or she is a person who...has a mental illness for which care and treatment in a hospital is essential to such person..." and is sufficiently stable to withstand the stresses of trial without suffering serious prolonged or permanent breakdown.10

The next area to be considered here is what constitutes, under this statute, sufficient psychiatric evidence. There are a plethora of cases concerning this issue.

For example, in People v. Wolf Court, the Appellate Division held that the finding that the defendant was competent to stand trial was supported by the evidence, notwithstanding the defendant’s contention that he had been overly medicated with psychoactive drugs, the court held that the psychiatrist designated to evaluate the defendant found him to stand trial, and the defendant’s own doctor stated that the defendant was oriented as to time and place, understood the trial process, and was capable of understanding the charges against him. In People v. Milholland12, the Appellate Division held that the evidence adequately established that the defendant was competent at the time he pleaded guilty. The court noted that the psychiatrist, who had originally examined the defendant, testified as to tests that were performed on the defendant to determine competency and that based on those tests he found the defendant was competent.13

ENDNOTES

1 13.00 Fitness to proceed; order of examination
At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, or at any time before he is found incompetent to cause to hold a trial. There has been no report that such a trial was held or what the determination was.

When the examination report submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity and it must conduct such hearing upon motion thereof by the defendant or by the district attorney.

When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity and it must conduct such hearing upon motion thereof by the defendant or by the district attorney.

Editor’s Note: Peter Dunne is Principal Attorney, Legal Service of St. John’s University School of Law, where he was an editor of the Law Review.

1 Mental Health Law Article 10.
2 Mili. 10.03 (p)
3 Mili. 10.03 (q-g(2),s(3)
4 Mili. 10.03 (u)
5 Mili. 10.05 (d)
6 Mili. 10.05 (a)
7 NY. 10.05 (g)
8 Mili. 10.05 (e)
9 Mili. 10.05 (f), (g)
10 Mili. 10.15 (g)
11 Hendricks also accompanies the time frame for the Attorney General to file a petition, Mili. 10.06 (a), and for the probable cause hearing, Mili. 10.06 (b).
12 Mili. 10.06 (a)
13 Mili. 10.06 (a)
14 Mili. 10.06 (c)
15 Hendricks, at 335, S.Ct. at 2080, L.Ed at 513.
16 Id., at 362, S.Ct at 2081, L.Ed at 514.
17 Id., at 362, S.Ct at 2087, L.Ed at 515.
18 Id., at 353, S.Ct at 2077, L.Ed at 509.
19 Mili. 10.07 (d)
20 Id. 3d 327, 836 N.Y.S.2d 856.

Article 730 Mental Disease or Defect Excluding Fitness to Proceed: Part III

Continued From Page 4 — the advice of counsel and based on that advice, appreciate, without necessarily adopting, the fact that one course of conduct may be more beneficial to him than another; and is sufficiently stable to withstand the stresses of trial without suffering serious prolonged or permanent breakdown.

In Hendricks, the court noted that the psychiatrist, who had always divided 5-4 opinion. The state of Kansas enacted a civil commitment process for sex offenders which was basically similar to the New York Act. The Kansas Supreme Court struck down the law because of the Act’s definition of “mental abnormality”. It held that the Act’s definition of “mental abnormality” did not satisfy what it perceived to be the U.S. Supreme Court’s mental illness requirement in the civil commitment context.10 The U.S. Supreme Court had previously generally approved involuntary civil commitment of mentally ill persons.31 However, it was always with the following caveat. “A finding of dangerousness, standing alone, is ordinarily not a sufficient basis upon which the court may commit a person to the mental hospital.”32 The finding of dangerousness was usually coupled with a finding of mental illness.

In Hendricks, the Court dismissed the difference and essentially held that for the purposes of civil commitment the terms were synonymous.

The Court of Appeals will certainly review this Act in the future. There is one striking difference, which the Court may notice, between the New York Law and the Kansas Law, which passes with the constitution muster. The difference is in the burden of proof. In the Kansas law, the state had to prove by a reasonable doubt that the respondent suffered from a “mental abnormality”.33 The New York Law, the burden of proof is by “clear and convincing evidence.”34 Whether this difference is significant is an interesting question.

As of now, the Act has put an incredibly difficult burden of the practitioner in the defense of an individual charged with a sex crime. Specifically, defense counsel has absolutely no idea what a reasonable doubt is, whether these incompetent persons are in fact offenders within the meaning of the Act.

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4 Mili. 10.03 (u)
5 Mili. 10.05 (d)
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7 NY. 10.05 (g)
8 Mili. 10.05 (e)
9 Mili. 10.05 (f), (g)
10 Mili. 10.15 (g)
11 Hendricks, at 335, S.Ct. at 2080, L.Ed at 513.
12 Id., at 360, S.Ct at 2081, L.Ed at 514.
13 Id., at 362, S.Ct at 2087, L.Ed at 515.
14 Id., at 353, S.Ct at 2077, L.Ed at 509.
15 Mili. 10.07 (d)
16 Id. 3d 327, 836 N.Y.S.2d 856.
18 120 AD2d 609, 502 NYS2d 82 (1986).
19 120 AD2d 394, 602 NYS2d 141 (1st Dept. 1993).
20 106 AD2d 413, 482 NYS2d 335 (1984).
22 1176 AD2d 1070, 575 NYS2d 726 (2002).
24 See also, People v. Christopher, 65 NY2d 417, 492 NYS2d 566, 482 NE2d 45 (1985).