Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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Of Note

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
March 1, 2, & 3 • 9 a.m.-4 p.m.

Events

WE CARE Children's Holiday Party
Feb. 23, 2011 at Domus

Hon. Elaine Jackson Stack Moot Court Competition
March 22 & 23, 2011 at Domus

WE CARE "Dressed to a Tea"
April 7, 2011 at Domus
See insert

Law Day
Thursday Evening, April 28, 2011 at Domus

112th Annual Dinner Dance
Sat., May 7, 2011
Long Island Marriott, Uniondale

Dinner Dance Journal Ads
See insert

What's Inside

Leaders in the NCBA BOLD Initiative receive the 2011 NYS Bar Leaders Innovation Award at the NYS Bar Association Annual Meeting at the Hilton in New York City: NCBA Past President A. Thomas Levin, NCBA President Marc Gann, NCBA First Vice President Marian Rice, NCBA Director of Marketing and PR Valerie Zurblis, NCBA President Elect Susan Katz Richman, NYSBA President Elect Vincent Doyle (back), NCBA Executive Director Deena Ehrlich; NYSCBL Chair Earamichia Brown, BOLD Co-Chairs Linda Nanos and Howard Brill; NCBA Past President Emily Franchina, BOLD Task Force member Elizabeth Pessala and NCBA Administrator, Community Relations and Public Education Caryle Katz.

Being BOLD has its rewards

By Valerie Zurblis

Last month, NCBA officers, chairs and staff were presented with New York State's 2011 Bar Leaders Innovation Award, the top award presented to bar associations in New York State for its ground-breaking BOLD Initiative. This is the second year in a row that NCBA has been recognized for its innovation and leadership to enhance the public's understanding of the law.

BOLD (Bridge Over Language Divides) aims to service more effectively an increasingly diverse public whose primary language is other than English. In the past year, a Language Line was installed at the Bar Association, demonstrations for the public of US Citizenship interviews were held, attorneys fluent in foreign languages were incorporated into the monthly Mortgage Foreclosure and Senior Citizen legal consultation clinics, and for the first time, foreign consuls were invited to Mineola for a CLE seminar at Domus relating to the arrest of foreign nationals. In addition, BOLD was able to quickly mobilize after the devastating earthquake in Haiti to offer seminars in Haitian Creole advising the public about Temporary Protected Status.

"With approximately 20 percent of Nassau County residents speaking a language other than English, the Nassau County Bar Association has done a tremendous job of using its members to better serve the public with legal services they need, but might not be aware of or know how to get. The Nassau County Bar members have shown genuine caring for their community and in the process have built bridges of assistance between the bar and public," noted Earamichia Brown, chair of the NYS Conference of Bar Leaders. "We are delighted to present the Nassau County Bar Association with our Bar Leaders Innovation Award in recognition of its terrific new initiative."

BOLD's enthusiastic Task Force is far from resting on its past accomplishments, according to co-chairs Linda Nanos and Howard Brill. On April 5 BOLD will again partner with the U.S. Citizenship & Immigration Services to present a third Citizenship Interview Demonstration program to help citizenship applicants prepare for their own interview and citizenship exam. The Task Force is also following up with foreign consuls to set up meetings at the consulate offices to provide them with resources for legal information and guidance.

For the fall, the BOLD Task Force is working to present a seminar for the many organizations, churches and community groups that serve non-English speaking communities, to inform them of the multilingual services available through the Bar Association.

Upcoming Publications Committee Meetings

Tues., Feb. 15 , 2011 • Thurs., March 10, 2011 – 12:45 at Domus

The Lawyer Assistance Program provides confidential help to lawyers and judges for alcoholism, drug abuse and mental health problems. Call 1-888-408-6222. Calls are completely confidential.

William F. Levine to be Medallion Recipient

By Dede Unger

William F. Levine will be honored as the sixty-eighth recipient of the Association's Distinguished Service Medallion, to be presented at the One Hundred and Twelfth Annual Dinner Dance on Saturday, May 7, 2011. The Distinguished Service Medallion is awarded to an individual, either attorney or non-attorney, for service which has enhanced the reputation and dignity of the legal profession. Bill is being recognized for the time he has given, and advice or assistance dispensed, to any attorney in need. He is an ambassador of the legal profession.

William F. Levine

A graduate of University of Pennsylvania and the Syracuse University School of Law, Mr. Levine was admitted to practice in 1961. After practicing with several different firms, Bill became a solo practitioner in 1971, trying plaintiff's' personal injury and malpractice cases. The following year he partnered with Michael B. Grossman to create the firm with which he continues to practice today, trying cases in all of the metropolitan area counties. He has been named as one of

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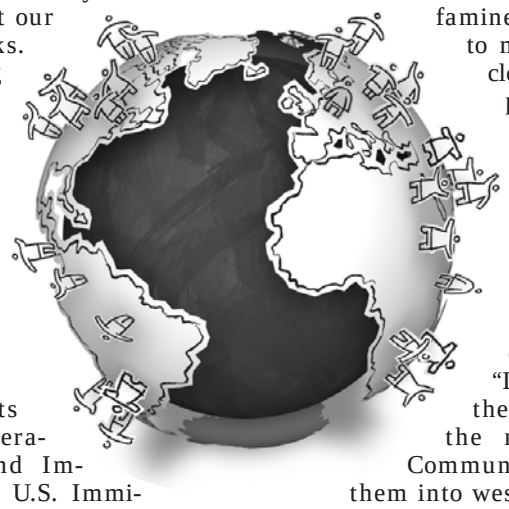
Immigration Law Focus

As The World Turns: Immigration Law in the Post-9/11 Era

"As The World Turns."[1] It could be said that two important benchmarks in the development of contemporary Immigration Law over the past two decades have been the collapse of the Soviet Union[2] and 9/11.[3] Without question, the demise of the Soviet Union has had a profound and lasting effect on U.S. Immigration Law policy and practice.

But before *perestroika* even had a chance to finish its reshaping of the world's map, perhaps to augur a new era of global peace and democracy, the U.S. suffered its greatest terrorist attack on the morning of September 11, 2001 ("9/11"). The reaction by our legal system to 9/11 was massive. President George W. Bush and the U.S. Congress were immediately forced to reassess how to protect our country from further attacks. Various laws, the foremost being the Patriot Act,[4] were passed on a fast track, and a top to bottom overhaul, still a work in progress at best, was begun of intelligence, military, other government and civil defense operations.



Among the most affected bureaucracies was the former U.S. Immigration and Naturalization Service (INS), which was split into two separate units involving Immigration Law operations, the U.S. Citizenship and Immigration Service (USCIS) and U.S. Immigration and Customs Enforcement (ICE).[5]

And it was at this moment that U.S. Immigration Law entered into a new, daring and controversial era. Previously widely touted, though by many accounts unsuccessful and perhaps even counterproductive, attempts at Immigration Law reform,[6] were dwarfed by the changes in America's post-9/11 legal landscape. Immigration Law practitioners suddenly had to master a new juridical world view, replete with a controversial, contradictory statutory and regulatory corpus of enlarged proportions.

Throughout history, much like the Tax Code, Immigration Law has served as the second favorite government tool for achieving prevailing "social architecture" goals. Australia's founding penal colonies were Great Britain's answer to cleansing its soil of criminal elements that had begun to run amok in His Majesty's backyard.

Andrij V.R. Szul

For more than half a century, until 1991, the Kremlin has openly used forced, criminal migration, including expatriation, exile into Siberia and forced death by famine ("Holodomor"), not only to maximize control over its closed police state, but to push Russian hegemony over its vast occupied Eastern and Central European territories by genocidal counter-colonizing schemes. For example, in the late 1940's, to accommodate the new Communist government in Poland, the U.S.S.R. forcibly resettled tens of thousands of ethnic Ukrainian families (the "Lemkos") by tearing them out by their ancestral roots in the middle of the night from their homelands in Communist-occupied Poland, and dropping them into western Soviet Ukraine. Likewise, the Russians condemned countless millions of Ukrainians from their native lands to the terminal gulags and artificial industrial-mining death mills of the Siberian hinterlands and the Urals. At the same time, the Kremlin assiduously, forcibly resettled millions of ethnic Russians into the displaced Ukrainians' homes, particularly in the eastern areas around Kharkiv, the southern Black Sea regions near Odesa, and the Crimea.

So when this cauldron of suffering, enslaved, captive nations imploded in 1991, U.S. Immigration Law faced the challenge of regulating entry for massive new waves of emigres. Earlier in the 1970s and 1980, the U.S. government had some success with measures, such as the Jackson-Vannick Amendment,[7] but today that law is totally discredited and arguably repealed.

The main difference in the jurisprudential philosophy of Immigration Law pre- and post-9/11 was that, before the terrorist attacks, immigration was viewed as a broad, culturally indexed regulatory lever for balancing ongoing U.S. interests vis-à-vis the presumed contributions that potential immigrant groups could offer to our society. For example, the newly industrializing Northeast of the late 19th century required cheap labor, so hundreds of thousands of foreign factory and farm laborers were admitted through Ellis Island. Elsewhere the gold rushes and other opportunities arose for Chinese and other nationalities willing to migrate to northern California, mainly around San Francisco.

After 9/11, however, Immigration Law has come to be viewed as a premier governmental mechanism for protecting national security. Though the usual work visa categories are still available, the overall new orientation is not to view immigrants as contributors, but as potential unwanted elements, harboring secret, dangerously disruptive or terroristic inclinations or in their motives for crossing our borders. Such a scenario certainly illustrates the unfortunate maxim about "difficult cases making for even worse laws." For example, the entire border security dilemma has now come full circle as an integral factor in the new Immigration ethos. For the past two decades, border security, or the lack of it, has taken on a life of its own in legislative and social discourse, effectively overshadowing our vaunted historical inclinations to welcome people from abroad so they may acculturate on the way toward becoming productive members of our society. Proponents of this traditional immigration orientation

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Criminal Law and Immigration: Cross-Currents

At last, the interconnectivity between immigration law and criminal law has gained the attention it has long deserved. Immigration practitioners have for years encouraged criminal defense attorneys to take more of an interest in their client's immigration status when resolving their criminal law matters.

Michael Kohler

While many, if not most, criminal law practitioners would properly consider the immigration consequences of a criminal conviction on a client's immigration status and advise them accordingly, the unfortunate truth is that some would routinely ignore the issue or provide grossly inadequate or inaccurate advice – often times with devastating consequences. Recently, the U.S. Supreme Court issued a wake-up call to the criminal defense bar: you ignore the immigration consequences of your client's criminal conviction at your own peril.

Padilla v. Kentucky, explicitly held, "that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." This holding is particularly significant because it clearly states that the failure to provide proper advice is a violation of a defendant's Sixth Amendment right to counsel, and therefore a "constitutional" violation, as well as opening defense counsel to a claim of ineffective assistance of counsel. Futhermore, if a conviction is vacated based on a constitutional ground, it may no longer be used as a basis for removability under the immigration laws. Prior to this decision, if a criminal conviction formed the basis for an individual's removability, and the conviction was vacated solely to prevent deportation or on other collateral grounds, the conviction would remain for immigration purposes and could be used as a ground of deportability.

While, the full, far-reaching effect of this decision has yet to be determined, it has provided the basis for immigration and criminal counsels to work together to attack previous convictions on the basis of ineffective assistance by prior criminal counsel. Resulting motions to vacate, pursuant to NY Criminal Procedure Law §440.10 rely on the contention that their clients failed to receive the proper advice that they critically needed to make a decision regarding a guilty plea and, consequently, their immigration status and ability to remain in the United States was in jeopardy. Such motions have resulted in varying degrees of success so far.[1]

Some courts have held that the holding of *Padilla* did not create a new rule of criminal procedure; rather, it only clarified the Supreme Court's long established rule relating to ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). For that reason, several courts have applied *Padilla* retroactively and vacated criminal convictions.[2]

However, as indicated in *People v. Ramirez*,[3] even if a court finds that *Padilla* does apply retroactively, success is not guaranteed. In *Ramirez*, the Court, applying *Padilla* in reviewing the facts contained in the record, held that the defendant failed to establish that he received ineffective assistance of counsel.

The success rate concerning the vacating of past convictions, under *Padilla* is impossible to quantify at this point. It does appear that *Padilla* will encourage criminal defense attorneys to recognize the underlying potential negative immigration consequences confronting their clients, and, to proactively seek to ameliorate them.

While a main objective of a criminal defense attorney is to reduce, if not completely avoid, penalty from the criminal justice process (imprisonment, fine, probation, etc.), the goal of immigration counsel in such a situation, to whatever extent possible, is to safeguard the individuals' immigration status, and the ability to continue living and working in the United States with their families. While these goals often intersect and converge, there are times when they do not. For example, a criminal defendant getting "a good deal" or "no jail time", effectively, is irrelevant if ultimately the individual is deported after the sentence is served.

For example, pleading to a particular statute resulting in 15 or 30 days of incarceration, may, in fact, be far more desirable than accepting a plea under some other statute resulting in no jail time, but leading to deportation. While this may seem like an oversimplification, such strategic scenarios do emerge not uncommonly in real life Criminal Law practice and most such situations are highly fact driven.

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What Domus Does For You!

From the President

Marc C. Gann

We often talk of the ways in which membership in, and participation in, the activities of this Association is of value to you as a member. Sometimes that concept is amorphous in that it involves networking opportunities or notoriety through publication or lectures. But the leadership of the Association has recently addressed two very different issues that demonstrate what Domus does for you.

As you all are aware, the mortgage foreclosure issue on Long Island and beyond has reached critical mass. In an effort to address some of the foreclosure issues, Judge Lippman imposed rules on attorneys in pursing foreclosures that essentially places a burden on the attorney to affirm the allegations underlying the foreclosure. While his intentions were admirable, the means of accomplishing them appears to be misguided. Fortunately, the Association has members who recognize these issues and volunteer to offer solutions.

Past President Doug Good immediately saw that Judge Lippman's "remedy" for "robosigners" raised issues for all lawyers: that the affirmation requirement is a lawyer issue and not a foreclosure issue. Doug immediately volunteered to chair a Task Force to evaluate and suggest redress to the rules. We enlisted the aid of lawyers on both sides of foreclosure matters including Past Presidents Peter Levy and Lance Clarke, Gale Berg of NCBA probono services and Jordan Katz, a lender's attorney. This Task Force worked quickly and diligently is assessing Judge Lippman's rules and suggesting alternatives. Suffice it to say that this Task Force recognized that all attorneys were potentially being penalized by the affirmation requirement in that a burden and sanctions were being imposed on attorneys in foreclosure matters that is not imposed on lawyers in any other type of matter; and that this requirement was a "slippery slope" for attorneys in such other types of matters. Our current criminal and disciplinary rules provide sufficient sanctions for attorneys who engage in inappropriate or fraudulent conduct. Our Board of Directors supported the position of the Task Force opposing Judge Lippman's rules and so notified the Chief Judge and the New York State Bar Association. To my knowledge our Association is the first to have taken such a thoughtful articulated position. It is reflective of our principle of standing up for the rights of lawyers. Thank you Doug and the members of the Task Force. (A complete copy of the report is available at www.nassaubar.org.)

Second, our Board of Directors authorized the Association to implement a new, creative and exciting way of obtaining CLE credit. Through a Task Force headed by Judge Andrew Engel, Dean of the Nassau Academy of Law, we engaged in an evaluation of our dues structure and the Academy of Law. I am pleased to announce that based on the work of that Task Force and with the approval of the Board of Directors, this year we will be offering an exciting new CLE opportunity for members only! This will be an offer too good to pass up! Details will be announced shortly, but to my knowledge, this type of program will be a first for any bar association. Look for more information in the weeks and months to come. But thank you to Judge Engel and his Task Force for envisioning such a bold and creative idea.

It is clear that we have the best of the best in this Association in our members and staff. They are never satisfied, always trying to improve what we do and the way in which we do it. But we always do it for you!

Try out your trial talents at NAL's Trial Skills Workshop series

By Hon. Andrew M. Engel

Do you want to become a trial attorney? Are you eager to get up on your feet, address a jury, examine and cross-examine witnesses, but have not yet had the opportunity? Are you an experienced trial attorney who would like to sharpen your skills, or pick up practice tips that will make you even more effective? If so, you now have the golden opportunity to "Try It!"

For the first time, the Nassau Academy of Law is offering "Try It!", an extensive hands-on trial skills lecture and workshop series designed to assist attorneys who want to learn or improve effective trial skills and trial advocacy from jury selection through summation from some of the top personal injury litigators in New York State. Participants will have the chance to practice what they have learned in small workshop groups, followed by immediate constructive critique from experienced and skilled litigators.

This program is open to all attorneys, from the more seasoned litigator who wants to spruce up his or her skills to the attorney who has never stepped foot into court to argue a case in front of a judge and jury. While the workshops are based upon a "case file" for an automobile collision, the techniques and skills learned, as well as the opportunity to get up on your feet and practice, will be of invaluable benefit to any attorney trying any type of case, be it criminal, civil, commercial, matrimonial, jury, non-jury, etc.

The "Try It!" workshops will be held at the Nassau County Bar Association in six 3-hour evening sessions 5:30-8:30 p.m. spread out over the next 5 months to June. Upon completion of the program, participants will receive 16 CLE credits in skills and professional practice as well as a Certificate of Completion from the Nassau Academy of Law.

The tuition for "Try It!" is $300 for members and $400 for non-members, which includes dinner at each of the six sessions. There will be no per-session fee. To register, use the NAL Order Form on page 13 or enroll online at www.nassaubar.org. For more information contact Barbara Kraut at the Nassau Academy of Law, 516-747-4464 or bkraut@nassaubar.org.

Either way, do not miss your opportunity to "Try It!"

Hon. Andrew M. Engel is Dean, of the Nassau Academy of Law

'Try It!' You'll Like It!

Session I, Wednesday, February 16

Participants will be given a "case file" involving a two car head-on collision, complete with pleadings, bill of particulars, EBT transcripts, police investigative reports, private investigative reports and photographs, which will serve as the foundation for this program. Seasoned trial attorney Jeffrey S. Lisabeth, Esq., from the offices of Jeffrey S. Lisabeth, will speak on effective jury selection.

Session II, Wednesday March 16

Students will be divided into groups of 5-10 and each take a turn conducting a jury selection for the liability phase of a trial involving the facts in the case file. Each group will be supervised by an experienced trial attorney who will offer comments to each participant on their performance. At the conclusion of the workshop the participants will hear a lecture from David Dean, Esq., from the office of Sullivan, Papain, Block, McGrath & Cannavo, P.C., on how to prepare and deliver an opening statement.

Session III, Monday, April 4

Workshop group participants will take turns delivering a brief opening statement. Again, each participant will be provided with constructive commentary on their performance. The students will then hear a lecture from Marvin Salenger, Esq. from the firm of Salenger, Sack, Schwartz & Kimmel on proper direct examination and from Ben B. Rubinowitz, Esq. from the firm of Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz on effective cross-examination.

Session IV, Wednesday, April 27

This will be a workshop session wherein some participants will conduct the direct examination of a witness and some will conduct the cross-examination of that witness. At the conclusion, the instructor will provide commentary.

Session V, Wednesday, May 18

Workshop participants will switch roles and try direct and cross examinations of the witness, followed by commentary from the instructor. Then Robert G. Sullivan, Esq., from the office of Sullivan, Papain, Block, McGrath & Cannavo, P.C., will speak on persuasive summations.

Session VI, Wednesday, June 15

The last workshop allows each student to deliver a summation based upon the case file, to be followed by the instructor's critique.

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Immigration Law Focus

Life is But a DREAM and Anchors Away

Many of us remember the always confused character Emily Litella, played by Gilda Radner on Saturday Night Live in the 1970's. A skit today might go something like this:

"What's all this fuss about people talking about angry babies and the dream act? Why are babies angry these days and who doesn't like dreams?"

"Hold on, Emily. They're talking about immigration issues – Anchor Babies, born in the U.S. to foreign nationals, and The DREAM Act, a bill in Congress."[1]

"Oh. Never mind!"

Linda G. Nanos

Currently there are two vulnerable groups in the immigration spotlight: babies born in this country to undocumented foreign nationals who are citizens by birthright (so-called "Anchor Babies")[2] and youth who arrived here as minors and have been educated in our system but lack legal immigration status. The commonality of the two is that their status, or lack thereof, was determined by the acts of their parents.

In the case of babies born in the United States, the law has been settled since the passage of the 14th Amendment in 1868 that citizenship is a birthright: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The 14th Amendment overthrew the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), which had denied citizenship to children of slaves born in this country. One hundred and fifty years later, there is a movement to take away citizenship rights of the offspring of another disenfranchised group residing in this country, the expanding undocumented population.

"Anchor Baby" implies that a baby born here can anchor its parents to the U.S. In fact, a baby cannot provide an anchor into the U.S. to its undocumented parent. The Immigration and Nationality Act of 1965, which amended Title 8 of the U.S. Code, requires that a U.S. citizen child must be twenty-one years of age to sponsor a parent. Even if an adult son or daughter desires to sponsor a parent, the parent who entered the country without inspection by immigration doesn't qualify for residence due to the unlawful entry or presence in the U.S.

The only time a U.S. citizen child could serve as an "anchor" is when the foreign national is facing removal from the U.S. and has 10 years of good moral conduct prior to commencement of proceedings. Rather than trying to repeal the 14th Amendment to eliminate birthright citizenship, it is proposed that several states will offer children of undocumented foreign nationals a differentiated birth certificate and will undoubtedly be challenged in the court.

While laws are being drafted to prevent children born in the U.S. – to undocumented foreign nationals – from becoming U.S. citizens, another law, the DREAM Act, has been repeatedly presented in Congress since 2001 to give legal status to undocumented youth. The premise of the DREAM Act is to offer a legal status to undocumented youth educated in our school system who are hampered in their development by their lack of legal immigration status. It is estimated that approximately 65,000 undocumented students graduate from high school each year.

The proposed law provides for a conditional status to those who arrived in the U.S. before age 16, lived in the U.S. for five years, and graduate high school (including through a GED program). The right of children to receive a public education, regardless of immigration status, has been upheld by the Supreme Court, in *Plyler v. Doe*, 457 U.S. 207 (1982).[3]

One argument in favor of the DREAM Act is that it

makes no sense to provide educational opportunities to youth and then deny them the ability to move forward with their futures because of their lack of legal standing. Without legal immigration documents they cannot have a Social Security number or driver's license and they cannot join the military.

The House Bill, H.R. 6497, underwent numerous amendments and, ultimately, succeeded in passing. The Senate agreed to consider the House bill rather than its own version of the DREAM Act, S. 3992. One important point in favor of the Act was to make conditional status be for 10 years before a permanent resident status could be attained. The Immigration and Nationality Act requires five years of permanent residence, with exceptions, to be eligible for U.S. citizenship. Postponing permanent status and eventual citizenship may thwart a snowball effect of DREAM Act beneficiaries' sponsorship of family members. As with the Anchor Baby debate (also referred to as "chain migration"), immigration restrictionists appear to fear a geometric progression of immigration expansion.

A study by the Congressional Budget Office determined the DREAM Act would result in billions of

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Surrogate Judge McCarty Chosen for ASTAR Program

Nassau Surrogate Judge Edward McCarty has been designated by the U.S. Department of Justice as an Advance Science and Technology Resource (ASTAR). The ASTAR resource judge program is an effort to enhance the capacities of the courts to resolve complex cases involving intricate or novel scientific and technical evidence. It operates by training selected judges to retain an understanding of the terms of the scientific methodology underlying evidentiary proffers.

Selected judges for the program are required to focus on: (1) brain mapping of the violent criminal psycho-path; (2) genetic medicine and discrimination; (3) civil justice proceedings involving energy sciences and climate changing technologies; (4) health related cases involving comparative environmental crime detection; and (5) genetic engineering of agricultural crops. Judicial determination of underlying scientific methodology and technical authenticity is a common denominator for the course.

Participating judges will experience a fulsome, 120 hour program over a term of approximately 18 months. This robust educational experience will open new doors for evidence management for trial judges. The course will consist of general training in scientific methodology, cutting edge biological evidence, high profile scientific cases and other forensic applications. The instructional phases of the program will take place at the National Institute of Health, Johns Hopkins School of Medicine, the Ohio State School of Medicine, St. Louis University Law School and the John Marshall School of Law in Chicago.

Judge McCarty is particularly well suited for this program. He holds two certificates from the New York University School of Post Graduate Medicine in Forensic Science. He was mentored by the late Nassau County Medical Examiner Leslie Lukash in advanced technologies in forensic medicine. During that period of time he participated in over 1000 autopsies. As a Nassau County Assistant District Attorney he coordinated all investigations into the quality of medical care when such questions were brought to the attention of the District Attorney. Judge McCarty also investigated allegations of mass murderers as an Army Reserve Colonel during Operation Desert Storm. As a New York State Supreme Court Justice he specialized in complex medical malpractice litigation and teaches a course in medical malpractice at the Hofstra Law School. When the ASTAR course is completed, Justice McCarty will become a resource to share his latest scientific knowledge with judges, lawyers and law students.

NCBA talent takes to the stage at Hofstra

You've seen their talent in the court room, and now they've taken their talents to a new stage. In January, NCBA members performed in Hofstra Entertainment's production of "Night of January 16th", a murder trial drama that involved jurors from the audience determining the final verdict. Each show was followed by legal commentary and discussion directed by NCBA attorneys. NCBA's legal thespians are (from l.) NCBA President Marc C. Gann, Hon. Dana F. Winslow (seated), NCBA Past President Joe Ryan and Jim Bradley, Esq.

Please Note ...

E-Filing initiative in Westchester has been Enhanced and Expanded

In accordance with the enabling legislation signed into law by Governor Paterson on September 17, 2010, implementation of the E-Filing initiative is as follows:

• E-Filing is now available on a voluntary basis for the commencement of tort case.

• Beginning February 1, 2011, E-Filing will be mandatory with respect to cases commenced in the commercial division.

• On March 1, 2011, E-Filings will be mandatory with respect to the commencement of tort cases.

• On or about June 1, 2011, E-Filing will be mandatory with respect to the commencement of other case types, including commercial claims that do not meet the criteria for inclusion in the commercial division.

E-Filing is a faster, less expensive and "green" way to file and receive court documents, conveniently from any place in the world with an internet connection. It is available 24/7, every day of the year. While many attorneys may already be familiar with the benefits of electronic filing from a similar system in the federal courts, others may not be award of E-Filing's ease and efficiency. The 9th Judicial District and the Westchester County Clerk's office offer free training sessions, with CLE, to assist the bar. For more information, please go to:

http://www.courts.sate.ny.us/courts/9jd/index.shtml

www.nycourts.gov/efile

http://westchesterclerk.com

We are confident that the implementation of the New York State Courts E-Filing program (NYSCEF) here in Westchester will prove to be a significant advantage and source of support for the practice of law, not only for Westchester based firms and solo practitioners, but for all who practice in Westchester Supreme Court.

Member Benefits Corner

Barrister's Table

Alone for lunch? Looking to network or just meet new people? Domus is open for lunch Monday - Friday from 12 to 2 and all NCBA members are welcome at the Barrister's Table. On February 7, March 7, April 4 and May 2 representatives from the Executive Committee, Association Membership Committee and the NCBA Staff will be available to answer your membership and benefits questions. Join Us!

Domus Dining

Did you know that you can sign for your lunch at Domus? One of your benefits of membership is that you automatically have a "house" account. You will be billed at the end of each month. There are no charges as long as you keep your account current. Simply present your membership card to the cashier in the Dining Room at Domus.

Committee Membership

Don't miss out on what may be your most valuable member benefit: Committee Membership. With over 50 committees to choose from, at least one must be right for you! You can select committees online (www.nassaubar.org) or call the membership department (516.747.4070). There are no additional fees for joining committees.

E-bulletin

Every week or so an email is sent to members which contains pertinent information including upcoming events and seminars, as well as benefits, important news and more. Please make sure we have your current email address in our records so you don't miss out on this valuable benefit. Send email additions/changes/corrections to membership@nassaubar.org.

For information on these, or any other member benefits, contact Dede Unger at 516-747-4070 or dsunger@nassaubar.org

In Brief

Member Activities

Terence E. Smolev, a partner at the Uniondale-based law firm of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, has been appointed to the Dean's Advisory Council of the American University – Washington College of Law, located in Washington D.C. Comprised of business and community leaders from across the region, the Dean's Advisory Council provides a collaborative forum and resource for the Dean to seek advice from Advisory Council members on issues critical to the growth and success of the law school.

Hon. Stephen L. Ukeiley

David N. Wechlser, a partner in the Garden City law firm of Moritt Hock & Hamroff LLP, was recently elected to serve on the Board of Directors of the United Way of Long Island, a nonprofit organization managed by an independent volunteer board of directors.

David P. Leno, a member of the Real Estate Department and chair of the Zoning & Land Use practice group at Ruskin Moscou Faltischek, P.C., has been named a member of the New York State Board of Real Estate. The Board of Real Estate consists of 15 members and has general authority to promulgate rules and regulations affecting real estate brokers and other individuals in order to administer and effectuate the purposes of Article 12-A of the Real Property Law. Mr. Leno is also a member of the IDA & Municipal Incentives and Environmental practice groups at the firm. In 2007, he was named as one of Long Island's "Top 40 Under 40" by Long Island Business News. Mr. Leno is also a frequent lecturer, including CLE presentations and programs, and a Trustee of the Old Westbury College Foundation and a President's Council Member of Big Brothers Big Sisters of Long Island.

James C. Ricca, a Banking and Finance Partner at Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana LLP, was recently selected as a "Fifty Around Fifty" leader by Long Island Business News. The recipients of the award were selected based upon demonstrated leadership in business, mentoring skills, and commitment to the community. Mr. Ricca concentrates his practice in the areas of banking and finance law, foreclosures, creditor's rights, trusts and estates, corporate law and real estate

See IN BRIEF, Page 15

NOTE NEW DATES

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CLE Seminar & Networking Reception (*Note New Date*)
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- ❑ UN-Grievance--Do NOT go There! (May 16 at 4:00)
- ❑ How to Run a Law Office (May 16 at 6:00)

Immigration Law Focus

May an 'Undocumented Alien' Recover Lost Wages?

An undocumented alien is hired by a company. He climbs up a dangerous and defective ladder fifteen feet above the ground with a heavy sack over his shoulder. The ladder tips and tosses the employee to the ground where he sustains serious injuries. Are there any remedies available for him? The answer is that it depends.

Another undocumented alien is hired by the same company and is fired for getting involved in organizing a union in the workplace. Can that employee recover lost wages? Once again, the answer is that it depends.

Should undocumented aliens have the same rights under the employment laws as documented aliens and citizens?

Should employers be obligated to follow applicable laws, rules and regulations regardless of whether the employee is legally entitled to work?

Pursuant to the Immigration Reform and Control Act of 1986, an employer is obligated to take the appropriate steps when hiring workers to ensure that the worker has the right to work in this country.[1] The statute requires that every employer, before hiring any person, verify that the person is authorized to work in the United States. The employer has the burden to examine specified documents that confirm the person's identity and eligibility for employment in the United States. The employer is also responsible to properly complete Form I-9, which is evidence of that examination. Form I-9 must be maintained by the employer for three (3) years after the employee is hired or for one (1) year after the employee leaves the company, whichever period is longer. If the employer fails to verify eligibility, that employer can be subject both civil and criminal penalties.[2] An employee who submits false or fraudulent documents is likewise subject to criminal prosecution.[3]

David Gabor

New York Courts have drawn a sharp distinction between the rights of a person who submits false or fraudulent documents and a person who is merely not required to submit any documentation. As will be seen later, an undocumented alien who submits false documentation in order to get a job will likely be viewed as having committed a criminal act and will likely have less rights and remedies as compared to an undocumented alien who was hired by an employer who did not complete an I-9 Form.

The *Balbuena* Court[4] faced a situation where an undocumented alien was injured while working at a construction site. In its decision, the Court recognized that the power to regulate immigration rests with the federal government, and reviewed the relevant immigration laws, their evolution over time, and the policy considerations underlying those laws, noting the increase in aliens entering United States illegally. The Immigration and Nationality Act (INA) was created in 1952 as a comprehensive federal scheme for the regulation of immigration and naturalization.[5] In 1986, Congress enacted the Immigration Reform and

See LOST WAGES, Page 20

Immigration Laws – Federal v. State Jurisdiction

The ball is in whose 'court'?

Due in large measure to the perception, whether valid or not, that the federal government has failed in its attempt to enforce immigration laws and enact comprehensive immigration reform, many states have taken it upon themselves to pass their own legislation in the immigration arena. This article will discuss the proliferation of state immigration related legislation and address the various litigation brought by organizations as well as the federal government against states that have enacted this legislation.

Howard Brill

The federal government has historically been the principal authority with respect to U.S. Immigration laws, rules, regulations and policies. The courts have traditionally upheld the exclusive jurisdiction of the federal government concerning immigration matters. In *Hines v. Davidowitz*,[1] the Court upheld the premise that state attempts to enact immigration related legislation were preempted under the Supremacy Clause of the U.S. Constitution. In *Toll v. Moreno*,[2] the Court again enunciated its position that the federal government is the principal authority over U.S. Immigration law and policy. However, the Ninth Circuit in *Chicanos Por La Causa v. Napolitano*[3] held that not every state related immigration law is preempted by federal law especially in the area of state regulated licenses and businesses.

In April, 2010, the Arizona State Senate enacted the Support Our Law Enforcement And Safe Neighborhoods Act (S.1070). With this Act, the Arizona legislature sought to criminalize undocumented foreign nationals in Arizona and provide local law enforcement with broad authority to detain, question and check immigration status of individuals where there was "reasonable suspicion" that the suspected person was undocumented and residing/working in Arizona illegally and without proper immigration status. This legislation led to such a public outrage that the federal government filed a challenge in *U.S. v. Arizona*.[4]

There is currently a split in the Circuits regarding the issue of whether states can enact immigration related legislation. This split is most pronounced in cases decided by the Ninth and Third Circuits. By virtue of another piece of legislation entitled the Legal Arizona Workers Act (LAWA), Arizona imposes penalties on employers who have hired or employ undocumented or unauthorized to work as foreign nationals. However, under the federal governments Immigration Reform And Control Act (IRCA), state and local governments are expressly preempted from imposing civil or criminal sanctions on employers who hire unauthorized workers; with one exception: a savings clause that permits state sanctions on employers in violation of licensing or similar laws.

The Ninth Circuit in *Chicanos Por La Causa* held that state employer compliance laws such as LAWA are permitted if related to a state's ability and power to grant or revoke business licenses and approvals. In 2008, the Ninth Circuit upheld the LAWA since, as the Court reasoned, it was within IRCA's "Savings Clause." This decision is now on appeal to the U.S. Supreme Court.

However, in *Lozano v. Hazelton*,[5] the Third Circuit held that, even where a state law is related to a business license issue, such laws are preempted because they conflict with IRCA and Congress' attempt to create a uniform system of employment compliance laws and regulations. In *Lozano*, a local Pennsylvania ordinance rendered it unlawful for any business to "recruit, hire for employment or continue to employ" unauthorized workers in the city of Hazelton. The Third Circuit found this ordinance to be preempted by IRCA because it stood as an impediment to the purpose and execution of IRCA.

It is against this backdrop and split among the Circuits that the U.S. Supreme Court granted certiorari in *Chamber of Commerce v. Whiting*.[6] Oral arguments were heard on December 8, 2010.

It is anticipated that the Court will address the issue of whether LAWA is preempted by IRCA. Essentially, the U.S. Supreme Court will address three questions:

1. Whether LAWA is invalid because it violates IRCA's preemption clause,

2. Whether the state requirement of employers to use the E-Verify employment system is preempted by federal law which makes the use of E-Verify voluntary and,

3. Whether the Arizona statute is preempted because it dilutes Congress' "comprehensive scheme" to regulate the employment of foreign nationals.

Most likely the Court will also address the question of whether the federal government's failure to enact comprehensive immigration reform justifies state action in Immigration Laws.

The Petitioners were represented by Carter G. Phillips, Esq. who attempted to persuade the Court that issues surrounding employment authorization are under the exclusive purview of the federal

See JURISDICTION, Page 19

PRO BONO ATTORNEY OF THE MONTH

John P. Reali

By RHODA SELVIN

John P. Reali has always made room in his professional life for the indigent citizens of Nassau County who need pro bono representation. Because he has long been a devoted participant in the Landlord/Tenant Attorney of the Day Project, the Volunteer Lawyers Project has named him Pro Bono Attorney of the Month for February 2011.

This is not the first time that Mr. Reali has been honored for his pro bono work. He was previously Pro Bono Attorney of the Month in 1994 (when he also received the Pro Bono Attorney of the Year Award from the New York State Bar Association) and October 2002. Since the latter date he has continued to spend a day in the Landlord/Tenant Part of the District Court every two or three months, amassing over 120 hours in 67 cases.

The Landlord Tenant Project's early life came to an end in 1997, when VLP lost funding. It was revived with the help of NCBA's Senior Attorneys Committee in 2000, when funding was restored. Mr. Reali, who has served in both incarnations, pointed out that nowadays there are many more attorneys on the panel, among them retired attorneys who come to court almost every day. Whereas in the past the District Court judges rotated the assignment, now one judge presides in the Landlord/Tenant Part most of the time. The judge's familiarity with the process and appreciation of the volunteers, Mr. Reali said, result in greater cooperation from the court and, along with the large cohort of volunteers, allow the Project to handle a greater load.

Mr. Reali, who earned his bachelor's degree from Queens College in 1957, graduated from St. John's University Law School and was admitted to the New York State Bar in 1961. 2011 is a special anniversary year in his career; he will be among the 50-year veterans of the bar to be honored at NCBA's annual dinner dance. The May dinner dance will give Mr. Reali a chance to pursue one of his favorite activities. He loves to dance!

A member of NCBA and NYSBA, Mr. Reali serves on the Elder Law and Real Estate Committees of both organizations and the NCBA Military Law Committee. For many years he has been part of NCBA's mentoring program and has been the mentor coordinator for the Jericho Middle School for 10 years. He served on the Board of Directors of the Nassau/Suffolk Law Services Committee for 12 years, ending in 2006. Now in his sixth term as Village Justice in the Sea Cliff Village Court, he is a member (and Past President) of the Nassau County Magistrates Association as well as the American Justinian Society of Jurists and the Columbian Lawyers Association of Nassau County (which in 2006 awarded him the Frank J. Santagata Memorial Award for Exemplary Ethics, Professionalism, Love of the Law, and Devotion to Justice for All). A general practitioner in Jericho, he has had the same secretary for 31 years. Since 1995 she has also been his wife.

John and Doreen Reali have eight grandchildren.

John P. Reali's long and effective work with indigent clients makes him a most deserving Pro Bono Attorney of the Month. The Volunteer Lawyers Project is proud to confer this honor on him for the third time.

LEVINE ...

Continued From Page 1

New York's "Super Lawyers," and is a Past President of this Association.

Though Mr. Levine has been trial counsel in thousands of cases during his years with Levine & Grossman, two cases in particular stand out. During the Agent Orange litigation, Levine & Grossman was one of several law firms that originally banded together in support of Vietnam War veterans who developed illnesses following exposure to the herbicide Agent Orange. The second, a Right to Die case in which the firm was retained by the brothers and priests of the Chaminade School, ultimately set forth the standard by which people (who are in a comatose state) who do not wish to be kept alive artificially could use the courts to enforce their wishes.

The Annual Dinner Dance is the crowning event of the "social calendar" of the Nassau County Bar Association, and this year will be held at the Long Island Marriott, Uniondale, New York, on Saturday, May 7, 2011. In addition to the Distinguished Service Medallion, those of our members who have been admitted to the Bar for fifty, sixty and seventy years will be honored as well. Please join our celebration. For more information or to offer congratulations or greetings in the Dinner Dance Journal, contact Dede Unger or Mindy SantaMaria at (516) 747-4070, or email events@nassaubar.org.

Dede Unger is a Special Events Coordinator at the Nassau County Bar Association. She also acts as Manager of Member Services for the Association.

Immigration Law Focus

Young Immigrants: Special Relief for the Most Vulnerable

One of the most vulnerable segments of society is undocumented, abused children removed from the home and placed in the care and custody of the State. Many have been the targets of gang violence or exploitation by organized crime. In addition to the threat of arrest, detention, and deportation, undocumented minors are unable to obtain lawful employment and/or attend college.

Miriam Chocron

The U.S. Congress established relief under federal law to allow immigrant children to obtain Lawful Permanent Resident (LPR) status or a "green card," and a path to citizenship after 5 years. The Immigration and Nationality Act (INA)[1] contains special provisions for undocumented, unaccompanied minor children through Special Immigrant Juvenile Status (SIJS). Most children eligible for SIJS are foster children in the custody of the Department of Social Services, and were abandoned by parents or whose parents have been deported and with whom reunification is not possible.

Special Immigrant Juvenile Status is a way for a dependent of a juvenile court to become a permanent resident of the United States (*i.e.*, get a "Green Card"). If the juvenile applies for this status and is successful, s/he may remain in the U.S., work legally, qualify for in-state tuition at college, and in five years apply for U.S. citizenship. However, should the application ultimately be denied, the child might also be deported.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008[2] contains the procedures for SIJS relief. Its eligibility requirements are a follows:

1. The foreign-born child must be declared dependent in a juvenile court located in the U.S. and placed under the custody of an agency or department of a state, an individual or entity appointed by a state, or juvenile court, and

2. It must be established that reunification with one or both of the immigrant's parents is not viable due to abuse, neglect or abandonment, or a similar basis found under state law, and

3. For whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to their or their parents' previous country of nationality, or country of last habitual residence.[3]

In 2010, the law was amended with new provisions, mandating USCIS to process SIJS petitions within 180 days of filing and expanding the exemptions of inadmissibility grounds. Under these exemptions, the SIJS applicant is no longer barred from relief because of some likelihood of becoming a public charge, lack of valid immigration documents, fraud or misrepresentation.

In order to qualify for SIJS, the child must be under the age of 21 at the time of filing, unmarried and present (domiciled) in the United States. No child can be denied SIJS because of age as long as s/he was a child (under age 21) when s/he properly applied for SIJS, regardless of the individual's age at the time of adjudication. Hence, a special immigrant juvenile will be deemed to have made lawful entry into the United States regardless of how s/he actually entered the country.

A legal conflict existed between provision of New York State Family Law and Immigration Law applicable to SIJS. The first law limited jurisdiction for guardianship and special findings determination to children up to age eighteen, while the other allowed for SIJS eligibility until the applicant turned 21. However, young people eligible either for guardianship, special findings, or SIJS who were

See SIJS, Page 15

Consequences in Criminal Proceedings of Foreign Consular Notification, or Failure to Notify

The arrest of a foreign national by the United States becomes an international affair. The United States has complex treaty obligations governing this situation. This article is intended to provide the practitioner with an overview of this process because Article 36 of the Vienna Convention creates obligations for arresting authorities.

The principal treaty obligations are contained in Article 36 of the Vienna Convention. As applicable to criminal proceedings, the convention requires that when a foreign national from most countries is arrested or otherwise detained, the arresting officers must take actions. If the detainee is from a country on the "mandatory list" under the Convention, the arresting officers must notify consular officials of the detainee's country without delay. However, if the detainee is from a country not on the mandatory list, the arresting officers must only offer the detainee the option of having that person's consular official notified.

Peter J. Tomao

Notification is done directly by the arresting authorities to the country's consulate, not by the State Department. In federal cases, the agency which handled the arrest is responsible for the notifications. For arrests by agencies such as the U.S. Immigration and Customs Enforcement (ICE) or the U.S. Postal Inspection Service, the notification is handled by that agency. For agencies which are part of the U.S. Department of Justice (DOJ) such as FBI, DEA and U.S. Marshall's Service, the U.S. Attorney's Office handles the notification.[1] However, in cases involving both ICE and a DOJ agency, ICE will handle the notification. In non-federal cases, the notification is handled by the local authorities. For example, arrests or detentions made by the Nassau County Police Department are handled by the arresting officer.

Although, as noted above, the U.S. State Department is not responsible for notifications, arresting agencies generally keep records to respond to inquiries made through the U.S. State Department or directly by a foreign consulate. In some cases, the court may inquire at the initial appearance whether the notification has been made.

The United States has treaty arrangements with some countries which require consular notification in every case including cases in which the foreign national may not request it or even ask that the consul not be notified. In such cases, the arresting authority should advise the detainee that notification will be made.

In mandatory notification cases, the obligation exists notwithstanding the detainee's privacy concerns even if there is a legitimate fear of persecution or mistreatment. Local authorities cannot ignore treaty obligations because they have the force of federal law under the Supremacy Clause of the U.S. Constitution.[2]

However, the arresting authorities should not inform consulate of detainee's refugee or asylum status. In most cases, there is no obligation for the U.S. authorities to disclose the reason for the detention, just the fact of it.

The Vienna Convention and other

See NOTIFICATION, Page 22

NASSAU ACADEMY OF LAW

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TO REPORT OR NOT TO REPORT- TO WHOM, WHERE & HOW: THESE ARE THE QUESTIONS!

with the NCBA Ethics Committee

Tuesday, February 15, 2011

5:30 - 7:30 p.m.

This program will provide you with all the information you need to know about what happens when an attorney violates the NYS Rules of Professional Conduct.

A member of the NYS Grievance Committee for the 10th Judicial District will discuss these questions and what violations of the NYS Rules of Professional Conduct Rule 8.3 requires an attorney to report and how one goes about reporting them.

Guest Speaker
Mitchell T. Borkowsky, Esq., Deputy Chief Counsel, State of NY Grievance Committee for the 10th. Judicial District

Moderator
Evelyn Kalenscher, Esq., *Chair, NCBA Ethics Committee;* Roslyn Heights

Skit Actors from Young Lawyers Committee
Terence Tarver, Esq., *Chair, Young Lawyers Committee;* Sullivan Papain Block McGrath & Cannavo P.C., Mineola

Brian P. Sullivan, Esq., Sullivan and Sullivan Garden City

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Richard D. Collins, Esq.
Collins, McDonald & Gann, P.C., Mineola

Sharon N. Berlin, Esq.
Lamb & Barnosky, LLP, Melville

Moderator
Daniel W. Russo, Esq.
Collins, McDonald & Gann, P.C., Mineola

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LEGAL ISSUES INVOLVING ELDERLY OR DISABLED PERSONS AND THEIR ANIMALS

with the NCBA Animal & Elder Law Committees

Thursday, March 3, 2011

5:30 - 8:30 p.m.

PLANNING FOR THE LIFETIME CARE OF PETS
Maureen Rothschild DiTata, Esq.
Berwitz & DiTata LLP, Garden City

PROVIDING CARE FOR PETS WHEN NO PLAN IS IN PLACE
Maureen A. Gest, Esq.
Law Office of Maureen A. Gest Bethpage

SERVICE ANIMALS UNDER THE AMERICANS WITH DISABILITIES ACT
Martin J. Coleman, Esq.
Law Office of Martin J. Coleman, P.C. Woodbury

THE RIGHTS OF ELDERLY AND DISABLED INDIVIDUALS TO KEEP PETS IN HOUSING
Karen Copeland, Esq., New York

LEGAL ISSUES AFFECTING INDIVIDUALS DIAGNOSED WITH PSYCHIATRIC DISABILITIES AND THEIR PETS
William M. Brooks, Esq.
Professor of Law; Director of the Civil Rights Litigation Clinic
Touro College Jacob D. Fuchsberg Law Center

INCORPORATING PETS INTO HOME CARE PLANS
Marsha Flowers, MSW
Director of Professional Relations
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Q&A
Panel

Moderator
Elinor Molbegott, Esq.
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Wednesday, March 16
Monday, April 4
Wednesday, April 27
Wednesday, May 18
Wednesday, June 15
5:30 - 8:30 p.m. *Includes Light Suppe*

Wednesday, February 16
INTRODUCTION
Hon. Andrew M. Engel, Judge, District Court
Dean, Nassau Academy of Law
JURY SELECTION LECTURE
Jeffrey S. Lisabeth, Esq., Mineola

Wednesday, March 16
CONDUCT VOIR DIRE WORKSHOP
OPENING STATEMENTS LECTURE
David J. Dean, Esq.
Sullivan Papain Block McGrath & Cannavo, P.C. NY

Monday, April 4
DELIVER OPENINGS WORKSHOP
DIRECT & CROSS EXAMINATION LECTURE
Marvin Salenger, Esq., Salenger Sack Schwartz & Kimmel, Woodbury
Ben Rubinowitz, Esq.
Gair Gair Conason Steigman Mackauf Bloom & Rubinowitz, New York

LC ADV

Trial

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	The Matrimonial & Family Court Connection	0.5	0.5	**1.0**	35 /50	50 /70	1MAT0122
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	Powerful Writing Techniques to Persuade Judges & Win Cases	1.0		**1.0**	35 /50	50 /70	1WRITE0122
	What the Bench Wants!	0.5	0.5	**1.0**	35 /50	50 /70	1BENCH0123
	Your "First" Article 81 Proceeding	1.0		**1.0**	35 /50	50 /70	DH011011
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VIEW from the BENCH

– Part Two –

A Comparison of the Rules of Evidence and Trial Procedures In Federal and State Courts

By Hon. Arthur D. Spatt

Editor's note: this is the second of a two-part article; last month's piece focused on the hearsay rule.

The differences between the Federal and State rules of evidence and trial procedures are hardly confined to the hearsay rule. Below, I will discuss rules on unfairly prejudicial evidence, the role of the judge and expert testimony before giving an overview of some differences between Federal and State practice.

Rule 403

A major Rule impacting practice in the Federal court is FRE 403, entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time." There is no comparable formal rule in the State courts.

Rule 403 reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading he jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The most important aspect to understand regarding Rule 403 is that it only bars evidence when its probative value is "substantially outweighed by the danger of unfair prejudice." Emphasis is placed on the word "unfair" because all adverse evidence is "prejudicial." "Unfair prejudice" exists only when the evidence creates the probability of an improper or irrational basis for the jury's decision. The court will look at whether the evidence tends to elevate emotion over intellect, arousing extremes of horror or an impetus to punish.

Some examples of how the Rule works are found in *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993) (in a drug conspiracy prosecution, evidence that the defendant had made threats against two people he suspected of stealing his drugs was not unfairly prejudicial) and *United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993)(when the charge was purchasing child pornography through the mail, evidence of graphic adult pornography found at the defendant's home was unfairly prejudicial because it was not a crime charged and would have inflamed the jury).

The most inflammatory and sometimes shocking evidence to be found in any court are photographs of injuries or death. Notwithstanding the emotion the depictions may evoke, however, such photographs are generally admitted and not deemed to be unfairly prejudicial if they are relevant to proof of the crime or tort at issue.

The Role of the Judge

As for the judge's role during a Federal trial, it can be an active one. For example, Rule 614 provides that the judge may call witnesses on his or her own motion or at the suggestion of a party and may question a witness called by a party. Of particular interest is the provision that allows a party to object to the court's questions or calling of a witness "at the time or the next available opportunity when the jury is not present. Rule 614(c).

There is no comparable rule in the State courts, although at one time State Supreme Court Justices has the right to call impartial medical witnesses to resolve certain witnesses. Even that past rule did not allow the use of the testimony at trial.

Expert Evidence – *Frye* or *Daubert*?

Since 1923, New York's State courts have governed the admissibility of expert testimony by the standard established in *Frye v. United States*, 293 F. 2d 1013 (D.C. Cir. 1923). The *Frye* case involved the exclusion of expert testimony with regard to a primitive lie detector. The D.C. Circuit held that expert testimony was admissible only after the scientific principles upon which the testimony was based had gained general acceptance as reliable in its field. After the FRE's were adopted in 1975, Federal courts determined the admissibility of expert testimony under Rule 702. The Rule's language was not very different from the standard enunciated in *Frye*.

In 1993, a unanimous United States Supreme court held in *Daubert v. Merrill Dow*, 509 U.S. 597 (1993), that *Frye* no longer applied in Federal court. Admissibility of scientific evidence – now expanded to all expert testimony in all fields – does not depend on general acceptance in the field of expertise. Rather, the judge acts at gatekeeper and has to be assured that the evidence is reliable based on five factors, none of which is dispositive or exclusive. The *Daubert* factors require the judge to consider (1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community.

Later, the United States Supreme Court ruled in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that *Daubert* applies to all expert testimony in Federal courts. Then, in 2000, Rule 702 was amended to codify *Daubert* in a three-pronged test. Under the Rule's current approach, the proponent must now show that (1) the expert relied on sufficient facts or data; (2) the expert utilized reliable principles or methods; and (3) the expert reliably applied those principles or methods to the facts of the case. There is no requirement that the expert have a particular degree, license or certification.

In New York State, *Frye* is still the rule, at least in theory. In 1994, the New York Court of Appeals stated that *Daubert* is inapplicable in State courts because the case's reasoning was based on the Federal Rules of Evidence. *People v. Wesley*, 83 N.Y. 2d 417(1994). The Court of Appeals contrasted State law with the "liberal trend" and inclusionary thrust of the FRE's. Yet, notwithstanding the *Wesley* case, State courts increasingly use the multiple term *Frye/Daubert*. Some decisions refer to trial judges as "gatekeepers" for expert testimony and, very interestingly, some State courts apply solely a *Daubert* analysis.

One of the aspects of *Daubert* that supposedly made it so significant was its recasting of the Federal judge's role as gatekeeper of the types of expert evidence admitted, as opposed to relying on the principles' acceptance by the scientific community, as originally articulated in *Frye*. In my view, however, the judge was always the gatekeeper, even pre-Daubert. It has been my observation that, contrary to some other learned opinions, the *Daubert* doctrine, which emphasizes judicial gatekeeping, actually may be the more restrictive approach. Application of the five *Daubert* factors gives judges more grounds for precluding expert testimony. By the same token, the *Frye* approach may allow expert testimony even when some *Daubert* factors are not present.

Personally, I generally take an inclusive approach, only rejecting expert testimony when it is contrived to fit certain situations without any scientific reliability, or if it delves into factual matters that are within the jury's province. In other words, if a party presents a witness who appears to have been more motivated by expert fees than scientific reliability, I will draw the line.

WHAT ARE SOME OF THE MAJOR DIFFERENCES IN TRYING A CASE IN THE FEDERAL COURT AS OPPOSED TO THE STATE COURT?

• Federal courts employ a "pure" individual calendar system. One judge is assigned the case from the filing of the complaint through post-

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litigation. He is a former Bronx Assistant District Attorney and is presently Chairman of the Queens County Bar Association's Banking Law Committee. Mr. Ricca has been recognized by the Neighborhood Housing Development Corporation for pro bono services, has served as a volunteer mentor with the Big Brothers/Big Sisters Organization and also a Trustee on the Board of Jamaica Hospital.

Thomas F. Liotti was recently appointed by Professor Bruce Green, Chair of the American Bar Association's Criminal Justice Section, to a Special ABA Task Force on The Collateral Consequences of Pleas. The establishment of the Task Force was brought about following the United States Supreme Court decision in *Padilla v. Kentucky* which involved the issue of counsel's obligation to inform a client that he was facing deportation as a collateral consequence of pleading guilty. Mr. Liotti is also a Village Justice in Westbury.

Patricia C. Marcin, a trusts and estates attorney at Farrell Fritz, P.C., was appointed to the Caumsett Foundation's Board of Directors. Ms. Marcin, who earned her Juris Doctor from the Jacob D. Fuchsberg Law Center at Touro College, is also a member of the board of directors of The Long Island Community Foundation and a member of the professional advisory committee for the North Shore/LIJ Foundation. She is also co-vice president of the Cold Spring Harbor Special Education Parent Teacher Association.

Joel M. Greenberg, a senior partner at Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato, & Einiger, LLP and Co-Chairman of the firm's Health Law practice, has been accepted onto the three (3) legal services panels maintained by the New York State Dental Association. The panels focus on managed care issues, professional discipline and Medicaid issues for dentists.

Heather P. Harrison, an associate in the commercial litigation department at Farrell Fritz, P.C., has been selected as a "Rising Star" award recipient by the Queens Courier for her leadership in the legal and business community. Ms. Harrison and the other recipients were honored at a ceremony at Citi Field. Ms. Harrison concentrates her practice in labor and employment law and serves on the Legislative Advocacy Committee of the Queens Chamber of Commerce. Last year she was elected to the board of Flushing Council on Culture and the Arts. In addition, Ms. Harrison, who earned her Juris Doctor from St. John's University School of Law, lectures on various topics relating to employment law and performs pro bono services for not-for-profit clients.

Several attorneys and staff members of Mineola-based **Kelly, Rode & Kelly, LLP** recently distributed food donations to assist families who are clients of Family & Children's Association, a local, non-profit organization devoted to helping Long Islanders in need.

New Partners, Of Counsel And Associates

Andrea Tsoukalas has been named a partner at Uniondale-based Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP. Ms. Tsoukalas joined the firm in January of 2005 and concentrates her practice in zoning, land use, environmental, litigation and municipal law matters. She is also general counsel to the Long Island Gasoline Retailers Association, a nationally recognized non-profit trade association with over 600 members, and serves as counsel to the Village of Kensington Board of Trustees, Zoning Board of Appeals and Architectural Review Board.

Christine M. LaPlace and **Bonnie L. Gorham** have been named partners of Guercio & Guercio, LLP.

Leslie Bennett was recently appointed as Counsel to Rigano LLC. Mr. Bennett concentrates his practice in civil and commercial litigation, environmental and toxic torts, employment law and appellate advocacy. Mr. Bennett is a former Assistant United States Attorney in the Southern District of New York and former Law Clerk to the Honorable Harry E. Kalodner in the Third Circuit. He earned his Juris Doctor at New York University Law School.

Vishnick McGovern Milizio LLP announced that **Michael J. Stacchini** has been promoted to partner. Mr. Stacchini, a former Bronx County Assistant District Attorney, concentrates his practice in the areas of commercial, matrimonial and Surrogate Court litigation. He earned his Juris Doctor, magna cum laude, from Boston University School of Law where he was honored as the G. Joseph Tauro Distinguished Scholar and the Paul J. Liacos Scholar, and was a recipient of the American Jurisprudence Award in Criminal Law and the American Jurisprudence Award in Criminal Procedure.

Heather L. Winters has been named a partner in the firm of Jay Davis & Associates, PLLC and the firm has changed its name to Davis & Winters, PLLC. Ms. Winters, who concentrates her practice in Matrimonial and Family Law, earned her Juris Doctor from Hofstra University School of Law.

Desiree Lovell Fusco was named a partner at Bondi & Iovino and the Garden City-based firm has changed its name to Bondi Iovino & Fusco. Ms. Fusco heads the Wills, Trusts & Estates area of the practice.

New Firms And Locations

Bracken & Margolin, LLP and Harvey B. Besunder, P.C. have merged firms. The new firm will be known as Bracken Margolin Besunder LLP with offices located at 1050 Old Nichols Road, Suite 200, Islandia.

Jay Davis & Associates has changed its name to Davis & Winters, PLLC, located at 600 Old Country Road, Suite 535, Garden City.

Herman Katz Cangemi & Clyne, LLP has relocated its offices to 538 Broadhollow Road, Suite 307, Melville.

A.J. Temsamani has established The Law Firm of A.J. Temsamani, located at 666 Old Country Road, Suite 303, Garden City. Mr. Temsamani concentrates his practice in the areas of matrimonial and family law and was recently recognized by Ten Leaders as one (1) of the top ten (10) leaders of matrimonial and family law on Long Island under the age of 45.

The new firm of Leslie R. Bennett LLC has opened at 425 Broad Hollow Road, Suite 217, Melville.

The In Brief section is compiled by the Honorable Stephen L. Ukeiley, Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and an Officer of the Suffolk County Bar Association's Academy of Law.

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SIJS ...

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unaware of this law until after turning 18 simply missed out on their sole opportunity to legalize their status and normalize their life. In these cases, the only mechanism by which they could be brought under Family Court jurisdiction would through a guardianship petition of a relative or family friend who stepped forward to care for them.

A recent amendment to Section 661 of the Family Court Act resolves the question of whether youths over the age of eighteen are eligible to have a guardian appointed for them. Both Surrogate's Courts and Family Courts now have jurisdiction to appoint guardians for youths up to age 21.

When the child has a criminal record, looking at the nature of the offense and its adjudication is essential for weighing the impact on the child's eligibility for relief. While most juvenile delinquency and youthful offender adjudications are not considered convictions for purposes of immigration law, such adjudications still could be used in a discretionary waiver phase of SIJS approval. Hence, juvenile delinquency determinations are negative factors which must be mitigated by positive equities.

Some juvenile adjudications do bar the child from relief, such as for controlled substance and firearms offenses. Since some discretionary waivers are available for such issues, it would be very advisable to have the cases reviewed by an Immigration attorney. Special Immigrant Juvenile Status applicants may be inadmissible if they are tried and/ or convicted as an adult.

The child, a caseworker or an attorney can complete the application for SIJS for submission to USCIS, including proof of age, custody, and an order from a dependency court that the child is eligible for foster care due to abuse, neglect or abandonment. Along with the SIJS Form I-360 (Petition for Special Immigrant), additional applications must be filed in order to adjust status and obtain authorization to work while the petitioner await the interview for changing status to lawful permanent residence. This process includes a criminal check by fingerprinting and a medical exam.

If the child was apprehended by immigration while entering the U.S. s/he is placed in removal proceedings. If the minor appears eligible for SIJS, that petition should be filed as soon as possible. Many judges will not terminate or administratively close the case until the I-360 Petition for Special Immigrant has been approved, while other judges may be willing to terminate or administratively close the case once the attorney has filed the I-360, or received an I-360 filing receipt.

If the child placed in removal proceedings fails to appear at a hearing, he may have an outstanding order for removal/ deportation issued against him, meaning deportation can occur at any time. A motion to reopen the proceeding is necessary if the child has a final outstanding removal order from the immigration court. USCIS cannot adjudicate an application for legal relief (such as SIJS) unless the case is reopened by an Immigration Judge.

While the scope of this article doesn't allow for an analysis of other forms of relief available to minors under immigration laws, the practitioner is advised to be particularly aware of, and weigh, possibility of assistance under various Visa forms and statutes. [4]

There are legal consequences to consider when opting for SIJS relief since this remedy may be more or less favorable, depending on the specific circumstances of each case. A child granted SIJS cannot later petition for his or her biological or prior adoptive parents. SIJS creates an immediate path to LPR status, in contrast to asylum, U or T visas. Undocumented children who are being adopted may also apply for SIJS as a faster track to legal status since acquisition of legal status by adoption has become complicated with the acceptance of Hague Convention guidelines for adoptions. SIJS applications must be adjudicated within six months by USCIS, but other processing times may be much longer and uncertain. SIJS is an efficient and predictable process (going by USCIS standards) as compared to other discretionary immigration relief.

Finally, it is very important to note that by failing to make a timely and appropriate application for SIJS, a child is exposed to deportation and this, in turn, may prohibit the juvenile from being able to establish legal residency in the future.

Miriam Chocron an immigration practitioner serves as Vice-Chair of the NCBA Immigration Law Committee.

1. The Immigration And Nationality Act (INA), §101(a)(27)(J), codified at 8 USC 1101(a)(27)(J).
2. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (VPRA), P.L. 110-457.
3. See INA §101(a)(27)(J), and TVPRA §235(d)(1).
4. The U Visa (for crime victims), INA §101(a)(15)(U); T Visa (for trafficking victims), INA § 101(a)(15)(T); protection under the Violence Against Women Act (VAWA); asylum (with special provisions for unaccompanied alien children), INA §208(b)(2)(E); and family-based immigration petitions.

DREAM ...

Continued From Page 5

deficit-reducing economic gains as enactment would, over the long term, lead to higher earning power for its participants and more tax revenue for the government. Some agencies, such as the Department of Labor and the Social Security Administration, are looking toward immigration to balance the declining birth rate of U.S. citizens. This would seem to be an argument in favor of birthright citizenship as well as legal status for youth raised in this country.

A significant feature of the DREAM Act is the requirement that initial conditional status can be made permanent by completing either two years of college or two years in the military.

The Department of Defense's Fiscal Year 2010-2012 Strategic Plan states that the DREAM Act is a smart way to expand its recruitment pool.[4] In September 2010, the DREAM Act was actually attached to a defense-spending bill because of the close connection to the needs of the military, but the Senate failed to act on it in that format. Despite support from diverse sectors, the Act has been vehemently opposed by anti-immigration factions who are against legislation that proposes to give amnesty to immigration law-breakers.

There are basically two ways that a person in the U.S. can be undocumented: entry without inspection at a place other than an official designated point, or entry with a visa and then overstaying its authorized time allowance.[5]

It is far easier for a foreign national to obtain a visa coming from an industrialized country than from a poorer country. A large percentage of immigrants who

enter without inspection overland, as opposed to overstaying a visa, would be ineligible for benefits under the DREAM Act because they often immigrate after age 16 when they can cope with the rigors of the journey. Even those who are brought here at a younger age from the less developed agrarian countries have limited education in their native lands and may drop out of school before graduating because they cannot keep up with the academics.

It can be anticipated that a good number of those who might initially qualify for conditional status could have difficulty complying with the requirement to complete college or military service to gain permanent residence. The proposed filing fees of over $2,500 provide a short term economic gain for the government, but may be unrealistic for young people who are students and may not have parental support. If participants fail to comply with the Act's requirements, they can be referred for removal from the U.S. to a country they barely know.

If the DREAM Act had passed, it could have postponed further consideration of a more comprehensive approach to immigration reform that could benefit wider segments of the foreign national population. There is danger that the DREAM Act can be offered in Congress as a trade-off in the future for harsher enforcement measures that are considered by immigrant advocates as already draconian.

Despite the shortcomings of the DREAM Act, hundreds of thousands of young people would have benefitted from its provisions and the opportunity to be on a path toward citizenship. The proponents of the bill have vowed to continue the fight for its passage and, someday, the dream that they dare to dream really may come true.

Handicapping the youth who are our future, by giving them second-class citizenship or no opportunity to become lawful residents of the country where they live, may have dire consequences in the long term, and should be carefully weighed as the debate on immigration continues.

Linda G. Nanos a practicing immigration attorney serves as a Co-Chair of the "Bridge Over Language Divides" NCBA (BOLD) Task Force.

1. The DREAM Act, acronym for Development, Relief and Education for Alien Minors Act, has been introduced repeatedly since 2001 in Congress and has yet to pass.
2. The Supreme Court has upheld the refusal by the Immigration and Naturalization Service (INS) or Immigration and Customs Enforcement (ICE) to stay the deportation of illegal immigrants merely on the grounds that they have U.S.-citizen minor children, *e.g.*, "anchor babies." *Immigration and Naturalization Service v. Jong Ha Wang*, 450 U.S. 139 (U.S. Supreme Court, March 2, 1981); Immigration and Nationality Act of 1965 ("Hart-Celler Act") (INA), Pub.L. 89-236,
3. In *Plyler* the Court reviewed a revision to the Texas education laws in 1975 that allowed the state to withhold from local school districts state funds for educating children of illegal aliens.
4. FY 2009 Annual Report Joint Strategic Plan (September 30, 2009), VA/ DoD, Joint Executive Council.
5. Terms that are used for undocumented individuals include undocumented immigrant, illegal immigrant, undocumented alien, unauthorized migrant, illegal migrant, illegal alien, migrant, or undocumented worker. Illegal Immigration, U.S. Immigration Support (2010), www.usimmigrationsupport.org/illegal-immigration.html.

CROSS-CURRENTS ...

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For example, is the defendant a permanent resident? How long has he or she been a permanent resident? What prior convictions, if any, are there and, most particularly, what are the specifics of said prior convictions? Does the defendant have family or other compelling roots here? Is the criminal statute in question divisible and, if so, could taking a plea under even a different subsection divert the outcome more favorably? Is there an "amount of loss" mentioned? When was the crime committed? How much marijuana was involved? The list of such potential highly probative but crucial questions can go on and on and on.

It must be noted that these queries are used by immigration counsel not only to determine a person's deportability, *i.e.*, whether a particular predicate conviction renders a criminal defendant removable from the United States. But, more importantly, once found removable, these queries will assist immigration counsel to determine whether such a defendant will actually be removed, or whether there is relief available in removal proceedings that will allow the individual to remain in the United States.

In other words, even when a conviction appears reasonably inevitable and, most especially if the client is an "illegal [undocumented] alien," such analysis will assist immigration counsel in maintaining eligibility for relief from removal for their clients. There may be little that even the most accomplished criminal or immigration attorney can do to prevent a client from being deemed "deportable."

The *Padilla* decision clearly requires that counsel recognize that there is a potentially devastating confluence between Criminal and Immigration Laws, and that such recognition must be addressed in a proper manner. At a minimum, *Padilla* requires counsel to instruct criminal defendants to seek the advice of competent immigration counsel. Providing wrong advice or providing no advice, and remaining silent on the issue, is explicitly prohibited.[4]

The effect of *Padilla* thus far in opening the lines of communication between the Criminal and Immigration barshas been positive and hopefully, long-lasting.

Mr. Kohler serves as Chair of the Immigration Law Committee and practices immigration and customs law in Syosset.

1. Noeleen G. Walder, "Courts Differ About Retroactive Effect of High Court Counsel Ruling," www.law.com, July 27, 2010.
2. See e.g., People v. Garcia, 4050-06, 2010 NY Slip Op 20349 (Aug. 26, 2010); *People v. Ortega*, 29 Misc.3d 1203(A)(Sept. 28, 2010)(unreported decision)("Because this Court finds that *Padilla* merely applied the old rule described in *Strickland* to a specific set of facts, Defendant's *Padilla* claim applies on collateral review.")
3. 29 Misc.3d 1201(A), (Sept. 17, 2010)(unreported decision),
4. *Padilla*, at 1484.

He shoots! He scores!!

By Dede Unger

"Let's do it again!"
"We had so much fun."
"Perfect day after a big snow storm..."
"Looking forward to the next one."
"Count me in next time around."

On Thursday night, January 13th, the Nassau County Bar Association stormed the Nassau Coliseum. Okay, not really stormed per se, but 110 members, guests and family got together for a fabulous event; one we are sure to do again.

Starting out at the Long Island Marriott, we ate our fill of a wonderful smorgasbord, including barbequed ribs, buffalo wings, chicken fingers, onion rings, mac-n-cheese, freshly carved roast beef, mashed potatoes, vegetables, corn on the cob and desserts. Stuffed, we left the warmth of the Marriott to head across the parking lot in the frigid weather, many wearing the t-shirts provided by the Islanders, to the Coliseum for the big game. Bill Hodges noted, "Parking was a pleasure, the buffet was sumptuous...the seats were terrific..." and what he failed to mention was the price, which at $50 per person was incredible!

Maybe it was the price, or just that it was a totally different event than usual, but it was great to see members who are not generally active in the Association. Indeed, one member stated that it was "the first bar association outing that I participated in and I would gladly do it again!" So while success is measured in different ways for different events, and the night was definitely a sell-out (we had originally committed to only 20 tickets!), the fact that members were able to socialize and network with others they had never met before was the ultimate success!

Perhaps it was David M. Gross who may have summed it up best, "It was a nice 'perk' event for Bar members, and it was nice to do something a little different that wasn't all about law or continuing legal education...." And while the Islanders did not come through with a win, it was the perfect way to spend an evening with friends, family and colleagues.

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	Evidence Update - 18B	2.5		**2.5**	105/140	120/160	0EVUP0510
	Hot Topics in Torts from both Plaintiff & Defendant Perspectives	2.5	0.5	**3.0**	105/140	120/160	0TORT0524
	Insurance Law Update	2.5	0.5	**3.0**	105/140	120/160	0INSR0510
Criminal Law	Depraved Indifference in a Post-Feingold World	2.5	0.5	**3.0**	105/140	120/160	0DEPRAV0527
	Misconceptions in Criminal Law Practice	2.0		**2.0**	70/100	85/120	H72110
	Annual Criminal Law Update 18B	2.5	0.5	**3.0**	105/140	120/160	0CLU1029
	Animal Cruelty Law & Enforcement	1.0		**1.0**	35/50	50/70	DH101310
	To Plead or Not To Plead: How To Prepare, How To Advise	1.0		**1.0**	35/50	50/70	0PLEADo123
Estate/Elder Law	2006 Pension Protection Act	1.0		**1.0**	35/50	50/70	DH111010
	Practice Tips for the Civil Litigator in Surrogate's Court	1.0		**1.0**	35/50	50/70	DH61010
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Ethics	Estate Planning Malpractice		1.0	**1.0**	35/50	50/70	DH93010
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	Representing Parents & Children in Article 10 Proceedings	1.0		**1.0**	35/50	50/70	DH120110
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	The Changing Business of Healthcare for Physicians	2.5	0.5	**3.0**	105/140	120/160	0HLTH0519
	Drafting Agreements That Make a Difference	2.0		**2.0**	70/100	85/120	0DRAFT0123
	E-Filing in NYS Courts	2.0		**2.0**	70/100	85/120	0EFILE0518
	Landlord/Tenant: The Lease Has Been Breached, Now What?	1.0		**1.0**	35/50	50/70	0L/T0123
	Law Office Management: Taking Charge!	1.0		**1.0**	35/50	50/70	0LOMO123
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Contributions may be sent to: NCBA, Attn: ***WE CARE,*** 15th & West Streets, Mineola, NY 11501 or at: **www.nassaubar.org**

LICC Receives Grant Money from WE CARE

The Nassau County Bar Association's charitable arm, the WE CARE Fund, awarded the Long Island Council of Churches (LICC) a $10,000 grant to help the LICC feed individuals and families in crisis and provide other essential social services for poverty-stricken residents in Nassau County. The LICC, our region's largest ecumenical and interfaith organization, operates an emergency food center located at 450 North Main Street in Freeport, and provides other social services from its Hempstead facility located at 1644 Denton Green on the corner of Fulton Avenue and Washington Street in Hempstead.

"We greatly appreciate WE CARE's generous donation," said Rev. Tom Goodhue, the LICC's Executive Director. "We fed 10 percent more hungry Nassau residents in 2010 than we did the year before, and 2009 was a record high as well. This gift is extremely helpful in enabling us to keep up with the demand. Thanks to folks like the Nassau County Bar Association, we can provide emergency food to people more often, and we've been able to give them the nutritious food they need."

Freeport Food Center manager Walter Merna added, "We are profoundly grateful for the Nassau County Bar Association's WE CARE Fund's continued loyalty and compassion for the hungry Nassau residents we feed. These grants help us to feed more than 13,500 guests every year."

The LICC unites diverse Christians to work together to serve people in need on Long Island and promotes understanding between Christians and non-Christians. Through partnerships with nearly 800 congregations and more than 40 public and private health and social service agencies the LICC provides emergency food, housing, medical assistance, transportation assistance, chaplaincy services in the jails, disaster relief, advocacy and education for a wide range of social issues including affordable housing, adequate health care, the environment, social, racial and gender equality, anti-poverty and anti-bias programs, prison reform, substance abuse and domestic violence programs.

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VIEW FROM THE BENCH ...

Continued From Page 14

judgment proceedings, giving the judge great flexibility and knowledge of the case. With the fast track, a trial may be scheduled within a month. Each judge has individual procedural rules. For example, I ask attorneys to file briefs no longer than 25 pages and to use no footnotes.

• In the Eastern District, all cases are automatically referred to a magistrate judge through the discovery, and the District Judge does not become directly involved until the case is ready for trial except for dispositive motions, such as one for summary judgment.

• There are virtually no interlocutory appeals in Federal civil matters. State court is an entirely different story.

• All civil matters in Federal court seeking less than $100,000 are required to undergo mandatory arbitration. The threshold amount in State court is substantially less, and applies generally only in the lower courts.

• The jury demand in Federal court must be made together with the first pleading or within a short time after removal from the State court.

• In a Federal court, as opposed to State court, jury selection is always conducted with judicial supervision, and the attorneys do not address the prospective jurors directly. The attorneys may submit question requests to the court. In the Eastern District, there is a district-wide jury pool that includes Brooklyn, Queens, Staten Island and both Long Island counties.

In civil cases, I have my law clerks conduct jury selection. There are no alternate jurors; every juror will deliberate. I usually use 10 jurors or 12 if I expect a longer trial. The minimum number of jurors in a civil case is six. If appropriate, I may request a stipulation that 5 jurors sit. The goal is to achieve a fair and impartial jury. There are 3 peremptory challenges per side, with discretion to increase that number if appropriate. In Federal court, the verdict must be unanimous; in State court, a 5/6th verdict is sufficient.

In civil cases, I have my law clerks conduct jury selection. There are no alternate jurors; every juror will deliberate. I usually use 10 jurors or 12 if I expect a longer trial. The minimum number of jurors in a civil case is six.

In criminal cases, the judge supervises voir dire, or the Magistrate Judge will do so. Defendants are entitled to 10 peremptory challenges and the government has 6, plus more for each side to select alternates.

• There are usually no court officers or clerks in the courtroom during a Federal trial, in contrast to State practice. Attorneys must mark, handle and maintain their own exhibits. Even in criminal cases, when the potential for violence is not present, there may be no uniformed officers present during the trial, only a U.S. Marshall outside the jury room during deliberations.

• Federal courts encourage the use of modern technology. All district court and appellate attorney filings and court notifications are performed electronically. Most documents are available online to anyone with a PACER account. In the courtroom, video depositions and testimony are not uncommon, particularly for expert witnesses and situations involving distantly located inmates. In addition, exhibits are often "published" to the jury through advanced technology, particularly in the well-equipped courthouse at Central Islip.

• The taking of notes by jurors during trial is encouraged in Federal court, especially in complex cases. The court even provides pads and pens. I do not allow the jurors to ask questions during trial. Many times, trial lawyers intentionally decline to ask certain questions for tactical reasons and jurors should not intrude in that process, especially in a criminal case.

• As for summations, in civil cases the judge determines the order, usually allowing a brief rebuttal by the plaintiff.

• During jury deliberations in Federal court, the written charge is sent in with the jury. I always do that, and encourage the jurors to have loose-leaf books containing the evidence at their disposal during the trial and deliberations.

My Final Advice: Come to Federal Court

I want to encourage all of you to come to Federal court. When I was practicing law more than 30 years ago, I sometimes viewed some Federal judges as being inflexible. Those days are over. I predict that you will enjoy the experience, whether in a diversity case or one involving a Federal question. In my view, my colleagues in the Eastern District of New York are among the finest trial judges in the nation as measured by their scholarship, dedication and judicial temperament.

One avenue to experience the rewards of Federal court work is to take on pro bono cases. While working on a pro bono matter has its own unique benefits, financial rewards are also possible. A few years ago, I had a Section 1983 case and the plaintiff could not obtain an attorney after five years of trying. I appointed pro bono counsel and the jury rendered a verdict of $680,000 for the plaintiff. I awarded attorneys' fees of $220,000 to pro bono counsel. In another case involving the notice requirement to employees before a plant closing, the jury rendered a verdict of $28,000 and I awarded $117,000 in counsel fees.

My final advice for those of you who plan to litigate cases in Federal court is that you learn the Federal Rules of Evidence, come prepared and arrive on time. If you can accomplish these reasonable goals, you will find yourself most welcome in the Federal courts.

United States District Judge Arthur D. Spatt formerly a New York State Supreme Court Justice, in the 10th Judicial District from 1978 to 1982. Administrative Judge of Nassau County, Associate Justice, the Appellate Division, from 1986 to 1989, and since 1989, United States District Judge, assuming senior status in 2004.

JURISDICTION ...

Continued From Page 9

government. Justice Scalia questioned Mr. Phillips as to why this issue is not simply a licensing law that allows regulation by the State. In addition, in a remark by Justice Scalia to the issue of enforcement, the Justice reasoned that the States have undertaken to pass and enforce immigration related laws due to the federal government's failure to enforce said laws and restrictions.

Neal Kumar Katyal, Esq., Acting Solicitor General of the United States, also argued the case on behalf of the federal government, and in support of the Petitioners. He reemphasized that any state sanction is preempted and immigration related work authorization is expressly under the jurisdiction of the federal government. Since Congress formulated and passed IRCA, including federal sanctions on individuals and/ or corporations that employ unauthorized workers, any employment-based law that can lead to federal violations is under the sole and exclusive domain of the federal government, argued Mr. Katyal.

In response, Mary R. O'Grady, Esq., Solicitor General of Arizona, representing the Respondent, argued that States have policing powers to regulate the conduct of employers within a State's jurisdiction. Justice Ginsberg asked Ms. O'Grady to respond to the apparent contradiction, in that the States cannot impose a fine under IRCA, but, according to Ms. O'Grady, can revoke a business license entirely if there are immigration related unauthorized employees. Ms. O'Grady replied that there was no contradiction since the States have authority to impose sanctions pursuant to their licensing laws. Justice Ginsberg also questioned under what authority could Arizona mandate that employers use of the E-Verify[7] system when the federal government has made participation in this program voluntary.

In apparent agreement with Justice Ginsberg's question, Justice Kennedy opined that the Arizona law is a "classic example of a State doing something that is inconsistent with a Federal requirement." Justice Breyer also questioned the enormous discrepancy in penalties imposed under the federal law versus Arizona law. Ms. O'Grady's response was that the savings clause permitted the States to impose these penalties, and that there were no new obligations being imposed on employers or individuals by Arizona that were not already imposed by the federal government.

Employers, attorneys, judges, legal scholars and foreign nationals are all anxiously awaiting the Supreme Court's ruling because it will determine in whose court the ball falls, state or federal, and consequently whose rules must be followed. This is one of the most highly charged issues in Immigration Law today.

Howard R. Brill, Hempstead, N.Y. concentrates his nationwide practice in Immigration and Naturalization Law. Mr. Brill is a former Chair of the NCBA Immigration Law Committee and, currently, serves as Co-Chair of the NCBA BOLD Task Force.

1. *Hines v. Davidowitz*, 312 U.S. 52 (1941).
2. *Toll v. Moreno*, 458 U.S.1 (1982).
3. *Chicanos v. Napolitano*, 544 F.3d 976 (9th Cir. 2009).
4. *U.S. v. Arizona*, 703 F. Sup.2d 980 (D.Ariz., July 28, 2010).
5. *Lorano v. Hazelton*, 2010WL3504538 (3rd Cir., September 10, 2010).
6. *Chamber of Commerce v. Whiting*, 130 S.Ct. 3498 (2010).
7. E-VERIFY is a free, Internet based system operated jointly between the United States Immigration and Citizenship Services (USCIS) and the Social Security Administration (SSA).

LOST WAGES ...

Continued From Page 9

Control Act (IRCA).[6] According to the *Balbuena* Court, "[b]oth Congress and the President expressed the view that '[t]he principal means of closing the back door, or curtailing future illegal immigration, [wa]s through employer sanctions'… that were intended to 'remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens into the country…. To attain this goal, the most important component of the IRCA scheme was the creation of a new '[e]mployment verification system' designed to deter the employment of aliens who are not lawfully present in the United States and those who are lawfully present, but not authorized to work.[7] Under this system, aliens legally present and approved to work are issued some form of documentation demonstrating their eligibility status.[8] The goal was that the individual had to present documentation to the employer before the employer could hire the individual. If the required documentation is not presented, the alien cannot be hired.[9]

The *Balbuena* Court noted that "[i]t was against this federal statutory backdrop that the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB* (citations omitted).[10] In *Hoffman*, the Supreme Court was faced with an illegal alien who presented an employer with false documents in order to gain employment. The employee was laid off after supporting a union-organizing campaign. The NLRB found that the layoffs violated the National Labor Relations Act and ordered back pay. At a hearing before an Administrative Law Judge the employee testified that he was born in Mexico, that he was never legally admitted to or authorized to work in the United States and that he gained employment only after furnishing a birth certificate that belonged to a friend born in Texas. The ALJ found that the individual was precluded from gaining any form of relief.[11] The Board reversed with respect to back pay finding that the most effective way to advance the immigration policies embodied in the IRCA was to provide the NLRA's protections and remedies to undocumented workers in the same manner as to other employees.[12]

The *Hoffman* Court held that to allow "…the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[13]

In the *Balbuena* case, the defendant argued that IRCA, as construed by

Hoffman, precludes an undocumented alien from recovering lost wages in a state personal injury action. The defendant reasoned that such an award would be a penalty upon an employer that is expressly preempted by IRCA. The defendant also argued that permitting the illegal alien to recover lost wages would contravene the purposes and objectives of IRCA in that it would condone past transgressions of immigration laws and encourage future violations.[14]

The plaintiff in *Balbuena* argued that he should be able to recover for earning capacity as a result of defendant's failure to adhere to workplace safety requirements established under the state Labor Law. According to the plaintiff, precluding a lost wage claim would make it more financially attractive to hire illegal aliens, thereby undercutting the central goal of the federal act, and would further provide less of an incentive to comply with state labor law requirements contrary to the purposes of Labor Law §§200, 240(1) and §241(6).[15]

The Court addressed the Supremacy Clause of the U.S. Constitution and discussed "express preemption," "field preemption" and "conflict preemption." With respect to "express preemption," the Court found that IRCA does not contain an express statement that it intended to preempt state laws regarding the permissible scope of recovery in personal injury actions predicated on state labor law claims.[16] Instead, the Court reasoned that Congress only preempted the imposition of civil or criminal sanctions on employers of undocumented aliens, stating that the plain language appears directed at a penalty or coercive measure such as a fine for hiring undocumented aliens.[17]

The Court then addressed "field preemption" and found that there was nothing in the legislative history of IRCA indicating that Congress intended to affect state regulation of occupational health and safety or to limit labor protections of existing laws.[18]

Finally, the *Balbuena* Court addressed "conflict preemption" and whether the award for lost wages to an injured undocumented alien would conflict with or otherwise erode the objectives of IRCA in a manner sufficient to surmount the strong presumption against preemption.[19] The *Balbuena* Court was concerned that employers would have less incentive to comply with the Labor Law if the rights of undocumented aliens were to be limited,[20] and that the "… absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens…"[21] In addition, the court was concerned that, because undocumented aliens are willing to work in more dangerous, undesirable jobs and for less money that they would increase employment levels of undocumented aliens.[22] The Supreme Court has recognized the broad authority that states possess to regulate the employment relationship to protect workers in their states.[23] Immigration laws do not intrude into the area of what protections a State may afford these aliens.[24]

A sharp distinction noted by the Court was the fact that the *Balbuena* plaintiff, unlike the undocumented alien in *Hoffman*, did not commit a criminal act under IRCA. IRCA does not make it a crime to work without documentation. "We see no reason to equate the criminal misconduct of the employee in *Hoffman* to the conduct of the plaintiffs here since, in the context of defendants' motions for partial summary judgment, we must presume that it was the employers who violated IRCA by failing to inquire into plaintiffs' immigration status or employment eligibility."[25]

Accordingly, the Court held that New York Labor Laws apply to all workers, whether documented or undocumented.

There has been a spirited debate over the reach of *Hoffman*.[26] It will be interesting to monitor cases in New York involving undocumented aliens, such as where an undocumented alien provides an employer with false documents. For example, what will be the exposure for an employer who knew or should have known that the documentation provided by the new employee was false? What is very clear is that it is critical for employers to remain current about the requirement to be vigilant in verifying that all employees have provided them with proper documentation prior to working.

David G. Gabor Mediator and partner at the Law Firm of Gabor & Gabor in Garden City concentrates in the areas of Labor & Employment Law and is a member of the NCBA Membership Committee and the BOLD Task Force.

1. The Immigration Reform and Control Act of 1986 (8 USC §1324a).
2. 8 USC §1324a[a][1][B][1]; §1324A[E], [F]; *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d 44, 49, 867 N.Y.S.2d 158, 163 (2d Dept. 2008).
3. *Id.*; 8 USC §1324c[a]; 18 USC § 1546[b].
4. *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 845 N.E.2d 1246, 812 N.Y.S.2s 416 (2006).
5. *Id.*, at 351; U.S. Constitution, Article 1, §8[4].
6. *Balbuena*, at 352; Pub. L. 99-603, 100 U.S. Stat. 3359, as amended, 8 U.S.C. §1324a, et seq.
7. *Balbuena*, at 353.
8. *Id.*, 8 USC §1324a[b][1][B], [C].
9. 8 USC §1324a[a][1].
10. *Hoffman Plastic Compounds v. NLRB*, 535 US 137 (2002).
11. *Id.*, citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)
12. *Id.*
13. *Id.* at 138.
14. *Balbuena*, at 355.
15. *Id.*
16. *Id.* at 357.
17. *Id.*; 8 USC §1324a[h][2].
18. *Balbuena* at 357.
19. *Id.* at 358.
20. *Balbuena* at 359.
21. *Balbuena* at 359.
22. *Id.* at 360, citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893-894 (1986).
23. *Id.*, *De Canas v. Bica*, 424 U.S. 351, 356 (1976).
24. *Continental PET Tech., Inc. v. Palacias*, 269 Ga.App. 561, 562-563, 604 S.E.2d 627, 630 (2004), Cert Denied, 546 U.S. 825 (2005)
25. *Id.*
26. *Id.*, at 358, citing *Rosa v. Partners in Progress Inc.*, 152 N.H.6, 868 A.2d 994 (2005); *Correa v. Waymouth Farms Inc.*, 664 N.W.2d 324 (Minn.2003); *Farmers Bros. Coffee v. Workers' Compensation Appeals Bd.*, 133 Cal.App.4th 533, 35 Cal.Rptr.3d 23 (Ct.App.2005); *Crespo v. Evergo Corp.*, 366 N.J.Super. 391, 841 A.2d 471 (App.Div.2004), certification denied 180 N.J. 151, 849 A.2d 184 (2004); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tx.Ct.App. 2003); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798 (Okla.Ct.Civ.App.2003); *Madeira v. Affordable Hous. Found., Inc.*, 315 F.Supp.2d 504 (S.D.N.Y.2004); *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F.Supp.2d 1317 (M.D.Fla2003); *Hernandez-Cortez v. Hernandez*, 2003 WL 22519678, 2003 U.S. Dist LEXIS 19780 (U.S. Dist. Ct. D.Kan., Marten, J., 01 Civ 1241).

NCBA New Members

We welcome the following new members

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Andrew S. Goodstadt
Eliezer Hecht
Robert E. Hornberger Jr.
Margaret Weld Korson
David E. Mollon
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Danielle Seid
Amanda Wolf

Students

Danielle Becker
James J.C. Byrne
Daniel A. Glass
Alex Lo
Maria Miglino
Tillie S. Mirman
Erik Seidel

In Memoriam

Michael C. Axelrod
Spencer Steele

WORLD ...

Continued From Page 3

argue that porous borders per se are not the core problem; rather, it is the lack of fair play toward new immigrants who, unable to "legalize" their status, are condemned to live a shadow existence lives, undermining our open society. Proponents of strong borders, however, argue that in our post-9/11 world border insecurity has become the paramount threat to national security from organized and random terrorists alike, who would penetrate our space to cause injury and destruction to our way of life, and to democracy in a land renowned for its Rule of Law.

Consequently, the entire menu of U.S. visa categories has undergone not just refinement, but redefinition, as indexed to "national security" concerns at every levels. Of the two Visa categories (non-immigrant Visas for temporary stay, and immigrant Visas for permanent residency).The granting of Visas in all categories, – B-1 (Business) B-2 (Tourist), H-1B (Employment of credentialed professionals) and H-2B (skilled and unskilled workers), C-1 (Transit for passing through to another country), F-1 (Student) and J-1 (Exchange Visitor), – is predicated on whether the applicant could become a threat to our economic and national security; rather than solely a presumptively valued contributor to our way of life.

The one possible exception to this perspective may be the Green Card Lottery ("Diversity Lottery") program, where individuals from around the world submit applications by email and, upon winning a green card by lottery chance, are permitted to emigrate with their families, irrespective of their work skills, education or reasons for coming here.[8] The program was created to provide additional opportunities for individuals from selected "listed" countries (*i.e.*, other than the countries that already are sending us large groups of immigrants). Yet given the Diversity Visa protocols, a considerable level of scrutiny is applied a priori before final admission approval. And practically in every case, even the slightest blemish on the applicant's background, even from many years ago in the person's youth back home, may summarily disqualify the entire family. Accordingly, in addition to the usual criminal background and personal character checks, important question concerning the potential for lottery winners to harbor terroristic inclinations must now be dispositively addressed pre-emptively by counsel during the pre-admission screening, all to the full satisfaction of U.S. immigration authorities to a degree previously unheard of. Perhaps the applicant should not be faulted that much for feeling "guilty" until proven innocent.

Even garden variety family-based Visas have been affected. For example, the processes for 1-R Visa for immediate relatives (limited to spouses, unmarried children under age 1, adoptable or adopted orphans, and parents of U.S. citizens over age 21), a well as the more extended "Family Preference" categories (for more distant family members, but excluding a grandparent, aunt or uncle, cousin or in-law) now entail colloquies specifically meant to identify profiles of individuals who may pose even the slightest potential, if not actual past given history, as a national security threat. While, historically, vetting of this kind is not new, today it is far more stringently enforced.

In the Visa premised on a valid marriage to a U.S. citizen, in the new K-type spousal adjustment process, just as with the K Visa for a fiancé, the scrutiny of immigration authorities is focused on disproving that the purported marriage is a sham, and/ or whether any terroristic ties are involved under color of the sham. Yet it is still difficult to prove a "negative." All this in the name of protecting us from undesirable criminal or terrorist elements stepping through our "back" doors by marital ruse.

Likewise, the employment-based Form I-140 Green Card process has become more arduous. The applicant for either the H-1 or L-1 Visa must prove, as usual, not only his or her unique work qualifications by advanced credentials or some other metric. But now, driven by post 9/11 economic and labor conditions which have been drastically exacerbated since 9/11 with security fears being abated at confiscatory cost, the applicant not only must receive prior certification by the labor department (*i.e.*, that there is no one already living here with equivalent skills and credentials), but the vetting process seeks to divine psychologically beyond fairly objective employment credential, *i.e.*, whether there is any basis for the applicant's motives to come here and propound hostility against the U.S.

There are perhaps two remaining Visa types that so far have not been affected as much by a pervasively reactive post-9/11 mindset. One is the post-NAFTA TN Visa, allowing a Canadian citizen to work here and file for permanent residence. The other involves dual citizenship, procedure for "legalizing" foreign documents for the U.S. or, conversely, affixing an Apostille to official U.S. documents for submission to Geneva Convention-signatory countries.

In the arena of international business as it intersects with Islamic (shari'ah) precepts, the post-9/11 environment already has caused a significant ripple effect across not only commercial enterprises, but even in the usually comfortable, insulated U.S. non-profit (NPO) corporate world. The transfer of funds abroad has become a particularly "hot button" issue. Homeland Security and Immigration authorities alike are pro-actively investigating, preventing and punishing money laundering, fraud and other economic crimes where an outcome may be support of a terroristic entity or activity. In recent years, several Muslim NPOs, in particular, have actually lost their exempt status or were shuttered by criminal justice authorities. If ultimately proven unfounded, such government actions philosophically contradict the traditional view under IRC 501(c), where the legislative intent for a NPO (whether U.S.-based or cross-border) to be accorded exempt status as a "public charity" hinges on the fact that, historically, NPOs have provided valuable, lasting services and goods to America's commonwealth in the realms of culture, education and social welfare. In the past two years the IRS has begun weaving a black widow's cobweb by reconstituting a formerly meek Form 990 into a severe front line compliance regime under color of the NPO's annual tax return. Today an entity must not only document a plethora of newly propounded (though still too abstract for comfort!) "good corporate governance" practices to warrant continued exempt status. In addition, the 990 effectively must serve to "dispel" any suggestion that the NPOs activities could support illegal conduct, especially through foreign funds exchanges or anything else that could foster some terroristic outcome.

Similarly, the years-long metamorphosis of a typical DUI case involving no serious personal injury or property injury, treated as a minor infraction with a desk ticket or mild misdemeanor, today often is accorded far higher misdemeanor or felony treatment, resulting in severe denials of liberties (*i.e.*, loss of driving privileges, incarceration). But because of the spreading plague of undocumented aliens driving around without proper operators' licenses or in unregistered or uninsured vehicles, suddenly the DUI bar has had to recalibrate its defense strategy against huge new stakes by transcending criminal law, but incorporating a sharpened awareness of DUI convictions as likely summary triggers for grave Immigration Law consequences. Hence, in addition to felony charges, the undocumented DUI defendant may face the two highest penalties under current Immigration Law, deportation and a long-term statutory future re-entry bar.

So "As Our World Turns" today, the horrific cataclysm of 9/11 continues to reverberate like some "Doppler" effect over all Americans' lives in ways few could have imagined 20 years ago. And as the venerable historic gatekeeper for our nation's social and economic welfare over the past 300 years, and the cradle of conscience for humanitarian outreach to legions of "huddled masses" pining for our teeming shores, Immigration Law today has assumed a new, rather raw posture in our body politic: to defend and protect our country not only from terroristic foreign incursions, but also from internal corrosion by aliens in whose hearts we impute little sympathy for preserving the best interests of our naturally tolerant and patient fellow denizens.

Andrij V.R. Szul, Ph.D., J.D., a 30 year practitioner in the area of business and international law serves as Chair of the Consular Affairs Group of the NCBA BOLD Task Force.

1. With apologies to the soap serial As the World Turns, which aired on CBS-TV from 1956 to 2010, passed its 10,000th episode in 1995 and 50th anniversary in 2006, and was retired on September 17, 2010.
2. The reforms of decentralization and democratization that emerged during the era of "perestroika" (reconstruction) and "glasnost" (greater freedoms) under Mikhail Gorbachev, General Secretary of the Central Committee of the Communist Party of the U.S.S.R. (1985 until 1991), and as the last head of state (1988 until its collapse in 1991), President (1990-91). This perestroika began as a dissembling process of dysfunction by the totalitarian government until 1991, when the first "domino" fell, and most of the fifteen former Soviet "Republics" and three "independent" Baltic states declared their independence and sovereignty, eventually to be recognized as sovereign nation-states by the international community. While Lithuania, Latvia and Estonia had been illegally "incorporated" in 1940 into the U.S.S.R. under the notorious Molotov-Ribbentrop Pact of 1939, the fifteen Republics were simply opportunistically overrun and occupied by communist forces during the war.
3. 9/11 was a series of four coordinated jihadist suicide attacks by nineteen al-Queda-based terrorists, all but one of them Saudis, who struck the United States. On October 29, 2004, as reported by CBS News, al-Queda leader Bin Laden claimed responsibility for 9/11, www.cbc.ca/world/story/2004/10/29/ binladen_message041029.html.
4. The USA Patriot Act (commonly known as the "Patriot Act") was signed into law by President George W. Bush on October 26, 2001. The title of the Act is based on an acronym which stands for: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub.L. 107-56; full text of enrolled bill H.R. 3162 at: www.GovTrack.us.
5. These two agencies, together with six others Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Transportation Security Administration (TSA), U.S. Coast Guard, U.S. Secret Service, and Office of Inspector General (OIG) – were rejiggered and nested into the new Department of Homeland Security, http://www.dhs.gov/index.shtm. All government immigration administrative operations were combined with enhanced counterpart law enforcement resources.
6. Such as the passage in 1986 of the Immigration Reform Act Immigration Reform and Control Act (IRCA), *also* "Simpson-Mazzoli Act," Pub.L. 99-603, 100 Stat. 3359.
7. The "Jackson-Vanik Amendment" (1974) was intended to pressure the U.S.S.R. into allowing Soviet "refusnick" Jew and other religious minorities to migrate to the U.S. and Israel in the best spirit of Emma Lazarus. Unfortunately, since then this law has become a particularly odious anti-democratic relic of the Cold War, twisted to foment some of the most partisan of recent immigration controversies. The Amendment is contained in Title IV of the 1974 Trade Act (following the Soviet American Trade Agreement of 1972). The 1974 Act was passed unanimously by both houses, and signed by President Gerald R. Ford on January 3, 1975. H.R. 10710, esp. §402.
8. "Diversity Lottery Program" (DLP) (1990), *see*: Immigration Act of 1990 (INA), below. The U.S. issues 55,000 Visas annually. The DLP, to be applied for under Form I-485, was created in response to the greatly increased number of worldwide H-1B Visa applicants. With over 65,000 such visas already issued each year, the demand far exceeds this quota in that sometimes 65,000 people have applied on the same day. Immigration and Nationality Act (INA) (1965), §203(c), et. seq. Immigration Act of 1990; §131 (Pub. L. 101-649) amended INA §203. *See also*: http://www.dvlottery.state.gov, http://travel. state.gov/visa/ immigrants/ types/types_1318.html and http://travel.state.gov/visa/immigrants/types/ types_1322.html. For a list of countries by region whose natives qualify for the DLP, *see*: http://travel.state.gov/pdf/1318-DV2012 Instructions-ENGL.pdf.

JUDGES SWORN IN

President Gann at the January 11, 2011 induction ceremony of judges. L-R: Hon. David W. McAndrews and Hon. Helen Voutsinas, District Court, Hon. Merik Aaron, Family Court.

President Marc C. Gann at the January 10, 2011 induction ceremony of judges. L-R: President Gann, Hon. Edward McCarty, Surrogate, Hon. Norman Janowitz and Hon. Daniel Palmieri, Supreme Court, Hon. Anthony Marano, Administrative Judge, Courts of Nassau County.

NOTIFICATION ...

Continued From Page 11

treaties not only create obligations for the government to notify the consulate, they also create rights for consulates to contact their nationals.

Consular officers are entitled to communicate with their nationals in detention. Even if the detainee does not want it, treaty obligations may still entitle consular officers to at least one face-to-face visit.

Such communication is subject to the security procedures of the place of detention. Such procedures may limit visiting hours and what materials may be brought into the visiting area. However, the security procedures may not be so restrictive as to defeat the purpose of treaty to allow communication

Consular officers may arrange for legal counsel or provide other services to detainees, such as facilitating communication with family in the detainees home country. Of course, the consular officer may not act as an attorney for the detainee. In an appropriate case, a defense attorney should consider contacting the con-

sulate to urge it to exercise its rights to contact the detainee. The Consular Officer will decide whether, when and how to respond to notification that a national has been detained, subject to its own laws, customs and resources.

While there are certain consequences in criminal proceedings of notification of Foreign Consuls, consular notification should have no direct effect on the criminal proceeding as the foreign country has no standing to participate in the criminal case. While consular officers may not practice law in the United States, in rare instances they may choose to participate in a friend of the court status, for example, to provide information of their country's law and customs.

Consular notification obligations do not affect the rights of the person arrested. If the person has a right to counsel, s/he would still be entitled to a court appointed attorney. While the consular official may assist the national in obtaining counsel, there is no obligation to do so. As a result, courts should follow their usual procedures in appointing counsel.

Consular notification, however, may have some indirect effect on the criminal proceeding. The consular officer may assist in arranging for counsel and in the preparation of the defense, by, for example, locating interpreters, consultants, investigators and by obtaining information from the foreign country. The officers may also provide information regarding foreign laws and customs and verifying the authenticity of documents from the home country. The consular officer may also seek to ensure that the national receive a fair trial by monitoring the trial; communicating with defense counsel and the prosecutor.

A defense attorney should obtain his client's consent before requesting or accepting the consular officer's assistance, while under U.S. law the consular officer has no duty to the foreign national. Since consular officials can, and frequently do, assist American prosecutors and law enforcement officers, extreme care should be taken in what information is disclosed to the officers by the defense. While the consular officer may have immunity concerning the exercise of its duties, the officer may waive that immunity and divulge confidences to American prosecutors and law enforcement officers.

In a death penalty case, in particular, the consulate may provide substantially greater assistance. Most foreign countries oppose the death penalty and will assist their nationals to avoid it. Procedures in federal death penalty cases permit defendants to offer a wide range of mitigating evidence, which consulates may assist in obtaining foreign records in support of mitigation, *i.e.*, a non-death sentence. Mitigation cases often rely on documents such as school records, birth certificates, health and military records, as well as criminal history checks (which may all be negative.) Of course, competent counsel will not rely on promises of political entities who may have competing interests.

The consular officer may seek to ensure that the national is treated properly in prison; for example, being allowed to engage in religious practices. The consular officer may also assist with the repatriation of the national after the disposition of the case.

At the same time, the practitioner should not ignore the potential negative consequences of consular notification. In some cases, consular notification may result in additional penalties or persecution by the home country. In other cases, the arrest may result in persecution of the client's family members in the home country.

There are consequences in criminal proceedings when an arresting agency fails to notify a Foreign Consul. The consequences however are a matter of foreign relations only, not individual rights. The purpose of notification is merely to allow a foreign ("sending") government to ensure that its national, temporarily residing in the "host" country, are properly represented. Nevertheless, counsel, may want to raise Vienna Convention violations especially in cases with demonstrable prejudice.

Courts have routinely rejected challenges from foreign nationals concerning their convictions and/or sentences on the basis that the consulate was not notified, even though such post-conviction relief strategies generally are based on ineffective assistance of counsel arguments.

Courts have generally held that consular notifications obligations in the Vienna Convention may not create individual rights which may be enforced in court. The Supreme Court in *Sanchez-Llamas v. Oregon*[4] held that a violation of the Vienna Convention alone will not support suppression of post arrest statements. In *De Los Santos Mora v. New York*,[5] the Second Circuit held that "Article 36's obligation to inform detained aliens of the prospect of consular notification and access cannot, when violated, be vindicated by a private action for damages." And the Second Circuit in *United States v. Bustos De La Pava*[6] has also held that the Government's failure to comply with the consular-notification provision is not grounds for dismissal of an indictment. Hence, failure to raise a claim for a Vienna Convention violation will not support a claim of ineffective assistance of counsel.

In *United States v. Gomez*[7] then U.S. District Judge Denny Chin[8] said that defense counsel's failure to move to dismiss an indictment under Article 36 of the Vienna Convention does not constitute ineffective assistance of counsel "[b]ecause a foreign national cannot seek dismissal of an indictment on the basis of an alleged failure of the Government to notify him of his right to consular notification under the Vienna Convention." And the burden is on government authorities, not the defendant's attorney, to contact the defendant's home country.[9]

Counsel, nevertheless, may want to raise Vienna Convention violations especially in cases with demonstrable prejudice. Courts have left the door open for remedies on this particular theory, if, in appropriate cases, it is not based on Article 36 issues.[10]

As discussed, while consular notification is a matter of foreign relations and not individual rights, a practitioner should not ignore these treaty obligations because they may still bear some effect, whether negative or positive, on the a foreign national's case.

Peter J. Tomao has a multi-jurisdictional practice in criminal defense, tax and commercial litigation, is a member of the NCBA BOLD Task Force, past chair and directorof the Federal Courts Committee.

1. 28 CFR § 50.5.
2. U.S. Constitution, Article VI, clause 2 ("all Treaties… shall be the supreme law of the land.")
3. To establish a claim of ineffective assistance of counsel, a convicted defendant must show that: 1. Counsel's performance fell below an objective standard of reasonableness, and 2. but for the deficiency, there is a reasonable probability that the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-96 (1984); *United States v. Bustos De La Pava*, 268 F.3d 157, 163 (2d Cir., 2001)
4. 548 U.S. 331, 350 (2006).
5. 524 F.3d 183, 188 (2d Cir.), cert. denied, __ U.S. __, 129 S. Ct. 397 (2008),
6. 268 F.3d 157, 165 (2d Cir. 2001)
7. 644 F. Supp. 2d 362, 372 (S.D.N.Y. 2009)
8. Judge Chin is now a member of the Second Circuit.
9. *Sandoval v. United States*, 574 F.3d 847 (7th Cir. 2009)
10. De Los Santos Mora v. New York, 524 F.3d 183, 209 (2d Cir. 2008) and cases cited therein. *Also see*: Jogi V. Voges, 480 F.3d 822, 835-836 (7th Cir. 2007) (The Vienna Convention does not claim under 42 United States Code §1983).

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