Inside this issue:

Sabrina Charles-Pierre, Editor

ROCKLAND COUNTY BAR ASSOCIATION NEWSBRIEF

www.rocklandbar.org August 2019

PRESIDENT'S POST

Dear Members,

This is my first opportunity to address our entire membership on where we are and where the Bar Association is headed in the future. First let me start off by saying for those of you that attended the Installation Dinner, I need not say another word, it was fantastic and if you were not there you missed a great event. We were treated to an evening of three great speakers, each with their own amazing story to tell, who received some of the most prestigious awards the Bar Association can bestow upon a member.

First, Richard Glickel was recognized for his dedication to the Bar Association, in particular his work as Committee Chair of the Ethics Committee. Over the course of many years Richard has dedicated his career to leading by example and practicing with the highest ethical standards. He is always willing to assist his fellow lawyer by providing sage advice and offering a helping hand to our Bar Association. Congratulations Richard on the Committee Chair of the Year Award!

Next, Duncan Lee was recognized for the many years of tutelage he has given our local high school students. Duncan has been a coach/mentor for the Bar Association's Mock Trial Competition. His energy and effort have distinguished him for putting service above self and helping to drive the mission of the Bar Association, while working with our youth. Congratulations Duncan on earning the Sterns Award!

Lastly, Isabel Becker was recognized for being a trailblazer in her field and for maintaining and sustaining a legal practice in Rockland County for over forty years. While the Bar can only recognize an attorney based upon one's legal career, there is so much more that is unique and special about Isabel. Isabel's story is all but a miniseries. She was on track to become a doctor, but then fell in love, married, raised a family, and then decided to change directions and go to law school. After law school she began a successful practice which she maintains till this day. Congratulations Isabel on earning the Lifetime Achievement Award!

Please remember the Annual dinner is October 24, 2019. This year we will be honoring five Justice Court Judges: Craig Johns, John Grant, Richard Finning, William Franks, & Djinsad Desir. Our keynote speaker will be Judge Mark Dillion. I look forward to see you all there. There will be many other exciting events throughout the year, but remember, the Annual Dinner is our big night out as a Bar Association.

I want to say thank you to the Immediate Past President, Andrea Composto, for bringing so many positive changes to the Bar Association. One of her greatest accomplishments is that she was the driving force in ensuring that our Board of Directors is diverse, and that all members are represented and respected. An amazing achievement and one we need to continue going forward. So again thank you, Andrea, for your hard work and dedication.

However, there is work that still needs to be done. As always we are looking for additional members, and for members to get involved on committees, functions, and continuing legal education. Over the next year I hope to ensure that all of our members receive more benefits for being members. In addition, I want to encourage mentorship with our young attorneys, I want to support attorneys who are performing pro bono services, I want to make sure that our continuing legal education offerings are topical, interesting, affordable, and yes on video. So with our agenda set, let us work together to make our membership meaningful.

Very truly yours,

Keith I. Braunfotel, Esq.
President, RCBA

ROCKLAND COUNTY BAR ASSOCIATION, INC.
337 NORTH MAIN STREET - SUITE 1
NEW CITY, NEW YORK 10956
845-634-2149

SOUVENIR JOURNAL

Guest Speaker

Hon. Mark C. Dillon

Associate Justice, Appellate Division, Second Department *and*

The Joseph G. Balsamo Award:

Susan Cooper, Esq.

The Natalie Couch Award:

Emily Dominguez *and*

RECOGNIZING AND HONORING FIVE LOCAL JUDGES:

Hon. Craig E. Johns, Hon. John K. Grant, Hon. Richard C. Finning, Hon. William F. Franks, and Hon. Djinsad Desir

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ANNUAL DINNER

THURSDAY, OCTOBER 24, 2019

6:00 P.M. – Pearl River Hilton

RECOGNIZING AND HONORING FIVE LOCAL JUDGES:

Hon. Craig E. Johns, Hon. John K. Grant, Hon. Richard C. Finning, Hon. William F. Franks, and Hon. Djinsad Desir

with **Guest Speaker**

Hon. Mark C. Dillon

Associate Justice, Appellate Division, Second Department *and*

The Joseph G. Balsamo Award:
Susan Cooper, Esq. *and*

The Natalie Couch Award:
Emily Dominguez

IT'S DUES TIME!

This is a friendly reminder that it is time to pay your 2019-20 RCBA Membership Dues.

Annual Dues for 2019-20 for regular Members are $185.00.

Renew and pay online by clicking here, or send in the Renewal Form that was sent to you in the mail with your check.

After September 30, 2019 Dues amount increases to $200.00!

If you have any questions about your Membership, please contact Sabrina Charles-Pierre, Program Coordinator, at sabrina@rocklandbar.org, or call Sabrina at 845-634-2149. Enjoy the rest of your summer!

BELLE MAYER ZECK AND WILLIAM ZECK
ROCKLAND LEGAL HEROES AT NUREMBERG

This is a print copy of a speech I gave on behalf of the Justice Brandeis Law Society, the Rockland County Bar Association and the Holocaust Museum at a program on Yom Hashoah about William and Belle Mayer Zeck, Rockland legal heroes at Nuremberg.

Bill was a Supreme Court Justice and Belle was a democratic powerhouse and esteemed lawyer at Coral, Ortenberg, Zeck and Codispodi.

William Zeck grew up in Manhattan, having been born in 1915. He graduated from NYU Law School and after a short stint in government work went into the military, it being World War II.

Belle, born in 1919, was named Roslyn, but convinced her parents at an early age to have her name legally changed to Belle. She was precocious, skipped grades, and graduated #2 in her class at Fordham Law School. After law school, she went to work for the U.S. Treasury Department.

At the end of the war, General Eisenhower sent some of his men to Germany to collect documents from a firm known as IG Farben upon which they delivered the documents to Washington, D.C. where Belle Mayer began reviewing them.

At the time, the United States had a law known as ATrading With The Enemy Act@ which prohibited U.S. companies from trading with enemies that we were at war with. Belle, working for the U.S. Treasury Department was tasked with the job of uncovering companies that were hiding their true identity in an effort to evade the Act.

IG Farben was a German company that had learned from World War I that they needed to mask their identity so they created shell companies, holding companies, shareholder agreements, nominees, pooling agreements and such to cloak their identities and assets.

Belle went about compiling the massive documentation needed to uncover their true identities. Once the Treasury Department had a strong case against a company, they would then divest the company of its assets.

Why was IG Farben so worthy of deep research? Because some say that without IG Farben, Hitler and the Nazis never would have come into power.

In 1933, Hitler had a meeting at which some of the directors of IG Farben attended. Just a few months prior to this meeting, the Nazi party had been badly beaten. After attending this meeting, IG Farben gave 400,000 Deutsche Marks to the Nazis, estimated to be about $1.5 million at that time. This was money the Nazis desperately needed. Shortly thereafter IG Farben officials convinced German President Hindenberg to appoint Hitler as Chancellor.

IG Farben knew what the Nazis were about said Belle in an interview. They were more than the largest chemical company in the world in the 1920's. They produced 90% of the gun powder and 95% of the explosives in the 1930's as Germany was preparing for war. They were implementing the production of synthetic fuel which the Germans desperately needed. They decided to put a new installation in Auschwitz, partly because of the cheap slave labor. An estimated 10,000 prisoners died building this plant. One of its subsidiaries supplied Zyklon, the poison gas used in the gas chambers.

At the end of the war, Bill Zeck wanted only to go to Nuremberg to prosecute war criminals. He was accepted as part of the legal team and headed off to Germany. While waiting for a trial to conclude, he set about trying to gather information to be used to prosecute officials of IG Farben. He went to Frankfurt and Berlin to their offices but came up empty handed. He was told about a report about IG Farben that was prepared and sent to a congressional committee. The report was prepared by a woman attorney named Belle Zeck.

So Bill headed to Washington in search of documents. He spoke to several people, trying to find the documents he needed while, in his own words, he was avoiding the woman lawyer! Finally, he met with Belle. When he asked her if she had any IG Farben documents, she opened 12 file drawers full of documents related to IG Farben. He responded, “you are a wondrous woman!”

Continued on next page...

BELLE MAYER ZECK AND WILLIAM ZECK
ROCKLAND LEGAL HEROES AT NUREMBERG

He ultimately convinced her to go with him to Nuremberg to become part of the prosecution team.

I say convinced because she was not initially interested in going to Nuremberg. I can only surmise that Nuremberg was not a place where a woman attorney would want to go. Europe was in shambles and one woman attorney who went described having been given the designation of "disabled." Her disability? She was a woman.

But Belle went and we are grateful. All trial lawyers know that the most important aspect of any trial is the preparation. Belle and Bill must have been an incredible team.

Before Belle went to Nuremberg and before Bill came to visit her she had been sent to London as a U.S. Treasury Representative to assist in drafting legislation for the punishment of war criminals which was called the Charter of the International Military Tribunal which was ultimately used in Nuremberg, As Belle said, "Quite heady stuff for a 26 year old."

The Nuremberg trials were important then and remain important today. They were a series of 13 trials held between 1945-1949. The defendants included Nazi party leaders, high ranking military officers, lawyers, doctors and industrialists.

They established precedent for dealing with later war criminals and genocides. While world leaders such as Stalin and even Churchill considered possible summary execution of Nazi war criminals, the Americans convinced the Allies that criminal trials would be more effective.

The IG Farben trials were against directors of IG Farben. The counts were as follows:

1) Crimes Against Peace
2) Spoilation
3) Slave Labor
4) Membership in the SS
5) Conspiracy

The IG Farben trials ended with 13 Convictions with sentences ranging from 21/2 - 8 years.

While some have criticized the Nuremberg trials as ineffective or merely "victor's justice" they actually laid the ground work for international criminal law set forth in the Nuremberg Charter and affirmed by resolution of the UN General Assembly.

Belle wrote in 1996 in response to criticism in a NY times article of Nuremberg for applying "retroactive" and "ex post facto law",

> "The indictments were not grounded in post-war agreements among allied diplomats. The war crimes committed by the Axis powers were defined in the Geneva Convention of 1897. To dismiss treaties and international conventions as "creative" is to deny that international law exists. The fact that enforcement procedures are lacking does not vitiate their effect."

Today we look back and thank our Rockland heroes Bill and Belle Zeck for their role in ensuring that the rule of law prevailed.

This speech given by Hon. Linda Christopher, Associate Justice, Appellate Division, Second Department, Supreme Court of the State of New York, on the occasion of the 2019 Yom HaShoah Holocaust Memorial on May 2, 2019.

RCBA MEMORIAL RECOGNITION CEREMONY

for those who left us in 2018-19

Friday, October 4, 2019

3:00 PM

Ceremonial Courtroom #1

Rockland County Courthouse

TECHNOLOGY TIPS FOR ATTORNEYS

submitted by

Michael Loewenberg*

Improve Your Prospect Inquiry Response Time

In today's online world, people expect to get immediate answers to their questions. Potential clients message you on your website or send you an email and, if you don't respond quickly, they'll move on to the next attorney on the google search list. In this article, we'll talk about making sure you're notified when a prospect sends you an email so you can react quickly.

Let's use the scenario where a prospective client sends you an email or completes a contact form on your website. Yes, you can read your email on your smartphone but this is a situation when you'd like to have a text message sent to your phone as an alert.

Typically, you check your emails and then respond when you can. The problem is response time: you might check your mail sporadically outside of business hours and the time lapse can cost you a client.

What if prospect emails and contact form submissions came to your phone as a text message too so you could respond immediately to those messages that warranted it? Let's make that happen!

First, we'll talk about the free email-to-text service that's available with virtually all cell carriers. The process works via an email to SMS Gateway; your Gateway email address is specific to your cellular carrier. For example, to send an email that is received as a text to a Verizon customer, the address is <phone_number>@vtext.com; AT&T is <phone_number>@txt.att.net. You can see a list of all carriers and their Gateways here: https://en.wikipedia.org/wiki/SMS_gateway.

Text messages of 160 characters or less are best for this situation because they come to your phone as a single text message. Try it yourself on your own phone: send an email to your phone number via your carrier's Gateway; remove the email signature and any disclaimers in your email to keep the message short. You'll see it in your texts.

Now, let's set up your website contact form so you get a text when someone submits a form. I'm going to presume that your contact form sends you an email when someone completes it. To get a notification when someone submits a form, add your cell phone's SMS Gateway address to the contact form settings and you're all set. Some website forms allow multiple notifications; if that's your case, make a custom notification that sends a brief text to your SMS Gateway with just a few words that will prompt you to check your mail and reach out to your prospect.

Another approach is to create a custom email forwarder or alias for prospect emails. You can create a custom email address that forwards to your SMS Gateway (something like info@). Think of the forwarder as your private distribution list that includes the SMS Gateway, as well as any other email recipients you need to add. Once you set it up, be sure to test it so you know it works when a prospect contacts you.

Using this text message notification method can help you be responsive when a prospect needs you. I hope it works well for you.

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*Michael Loewenberg is the President of MESH Business Solutions, Inc., New City, NY, 10956 and he is also an Affiliate Member of the RCBA.

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Legislative Victories!

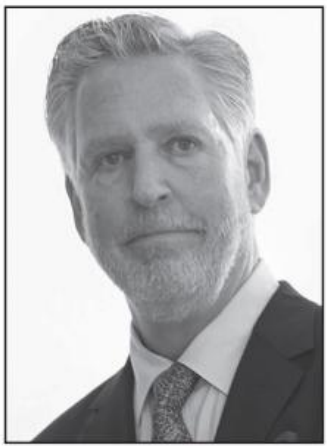
By Andrew Kossover

Seizing an Opportunity

There are times when we can find inspiration in fiction. For example, take Atticus Finch, the fictional lawyer in Harper Lee's *To Kill A Mockingbird*, whose first name is used by the New York State Association of Criminal Defense Lawyers (NYSACDL) in its quarterly publication, dedicated his advocacy to creating a more just system. His psyche, perhaps like all of ours, would only be at peace if a more just and fair criminal justice system could be established; one that doesn't discriminate against the poor or people of color. The recent New York State budget, containing historic criminal justice reforms, goes a long way towards granting us all some of that long-sought-after peace.

NYSACDL, on behalf of our members and the clients we all serve, has been dutifully advocating for criminal justice reforms for many years. To finally realize measures which will reduce mass incarceration, implicit bias, wrongful prosecutions and convictions ushers in a new era of accountability and fairness.

Before examining these reforms in detail, a brief synopsis of how we got here is in order. Ever since NYSACDL's Legislative Committee played a significant role in Rockefeller Drug Law Reform, it has deservingly enjoyed the recognition and platform as the "voice" of the criminal defense community. Year after year, state government has invited our comment on proposed criminal justice legislation and, in many cases, we have submitted memos in support, or in opposition to legislative initiatives. Upon the New York State Senate switching from a Republican controlled house to a Democratic majority following the 2018 midterm election, an opportunity for true significant criminal justice reform was realized. This Association partnered with several other lawyer groups, exonerees, and community grassroots/activist organizations to form the *Repeal the Blindfold Coalition*, a reference to attorneys and the accused being forced to make critical decisions without being sufficiently informed about the case against them. While primarily devoted to advocating for discovery reform, the Coalition also provided legislative input on bail and speedy trial reform.



Governor Cuomo pushed to have these criminal justice reforms made a part of his budget proposal rather than risk delay, inertia, and possible inaction this legislative session. The Governor succeeded and most of our preferred language was incorporated into the budget. These dramatic reforms will make the criminal justice system fairer, and fundamentally alter our practice in many ways.

The reforms are effective **January 1, 2020**. They will apply to all cases pending on that date–regardless of when the case commenced. Until then, with respect to some of the reforms (especially bail and discovery), we strongly encourage, and several courts have already voluntarily assumed, compliance based on legislative intent and fairness. Judges and prosecutors have enormous amounts of discretion to enact these changes today.

Editor's note: Portions of this article are reprinted here with permission of the New York State Association of Criminal Defense Lawyers. The CJS thanks Andrew Kossover for his assistance in providing this overview.

Andrew Kossover is the Ulster County Public Defender and a partner in Kossover Law Offices in New Paltz. He is the Chair of NYSACDL's Legislative Committee, and a Past President of NYSACDL.

2019 Criminal Justice Reforms—Preliminary Advisory

The Criminal Justice Section offers its gratitude and appreciation to the Legal Aid Society of New York City for compiling this summary of the recent historic criminal justice reforms. Thanks go out to John Schoeffel at the Legal Aid Society who approved the use of the attached edited summary for CJS publication purposes, and to Andy Kossover, the Ulster County Public Defender, for obtaining permission on the Section's behalf.

It is clear that these reforms, effective January 1, 2020, are significant. Bail and discovery are two areas that received attention in important areas.

Here is an overview of some of the principal changes:

Bail

Despite a push to formally add "dangerousness" as a consideration in determining bail, the statute does *not* include language regarding "community safety" as a factor. New York remains committed to the presumption of innocence. The new statute drastically reduces the use of cash bail through mandatory release, and provides additional procedural and due process safeguards.

The bill has a mandatory Desk Appearance Ticket (DAT) provision that provides court notifications for everything up to an E Felony. At the arrest phase, the bill mandates that an arresting officer must issue a Desk Appearance Ticket in all cases except those where the arrest is for a Class A, B, C, or D felony or a violation of some sex offenses, escape, and bail jumping. There are circumstances where the police are not required to issues DATs even on eligible cases, for example, if the court can issue an order of protection or suspend/revoke a driver's license. The arrestee "may" provide contact information to receive court notifications, including a phone number or email address.

The bill has a mandatory release or release with nonmonetary conditions for almost all misdemeanors and non-violent felonies. All persons charged with misdemeanors (except sex offenses and DV contempt), non-violent felonies, robbery in the second, and burglary in the second, must be released on their own recognizance unless it is demonstrated and the court makes a determination that the principal poses a risk of flight to avoid prosecution. Otherwise, they must be released with non-monetary conditions (pretrial services) that are the least restrictive condition(s) that will reasonably assure the principal's return to court.

For all other charges the system will largely remain the same. When charged with a "qualifying offense" the court may release the person on his or her own recognizance or under non-monetary conditions, fix bail, or if the offense is a qualifying felony, the court may remand the person. The offenses that qualify for money bail or remand are: violent felony offenses (except Rob 2 [aided] and Burg 2 [of a dwelling]); felony witness intimidation; felony witness tampering; Class A felonies other than drugs (except a "director of a drug organization" under 220.77); some felony sex offenses under 70.80; incest involving children; terrorism charges except 490.20; conspiracy to commit Class A felony under P.L. 125; and misdemeanor sex offenses and domestic violence misdemeanor contempt (still not remand eligible, continue to be eligible for bail as under current law).

Money bail now has additional protections from abuse. If monetary bail is set on a person charged with a qualifying offense, the court must set it in three forms including either *unsecured* or *partially secured* security bond. When setting money bail the court must consider the principal's financial circumstances, ability to post bail without posing an undue hardship, and the principal's ability to obtain a secured, unsecured or partially secured bond. Courts will now have to issue on-the-record findings to justify their determination.

New options will be available to courts to aid people in returning to court instead of using money bail. In all instances, the court or a designated pretrial service agency will notify all people ROR'd or released with conditions of all court appearances in advance by text messages, telephone call, email or first class mail. Prior to issuing a bench warrant for a failure to appear for a scheduled court date, the court will provide 48 hours' notice to the principal or principal's counsel that the principal is required to appear in order to give him or her the opportunity to voluntarily appear.

Additionally, electronic monitoring will be available for a limited subset of cases, but will be placed behind rigorous due process protections. Electronic monitoring is considered incarceration for 180.80 and 170.70 purposes, and may only be imposed for 60 days with the option of continuing only upon a de novo review before a court. Electronic monitoring must also be the least restrictive means to ensure return to court and be "unobtrusive to the greatest extent possible."

There are many more provisions in this bill. Stand by for a more complete summary soon.

Speedy Trial/CPL 30.30

DA's "ready" statement is not valid unless DA has filed a proper "certificate of compliance" affirming that discovery obligations under new CPL 245.20 discovery statute are complete (unless court finds "exceptional circumstances").

"Partial readiness"/"partial conversion" is no longer a valid doctrine for misdemeanors – DA cannot state

"ready" on some counts without certifying that all other counts are converted or dismissed.

VTL infractions are considered "offenses" for 30.30 purposes—this eliminates the problem of a lingering VTL 1192(1) or 509 count after a 30.30 dismissal of higher charges.

Where the DA states "ready" for trial, the judge must make an inquiry on the record as to their actual readiness.

30.30 release motions no longer have to follow the procedural rules for motions to dismiss—so they can be made orally and do not need to be on advance notice to the DA. Where periods are in dispute, the judge must conduct a prompt hearing and the DA has burden of proving excludability.

Denial of a 30.30 dismissal motion can be appealed following a guilty plea (and mandatory language indicates that the parties may not be able to waive such appellate review).

Subpoenas

The new statute discards the 24-hour notice requirement for defense subpoenas on government agencies, as well as any requirement of service on the DA. The defense now only needs a court-endorsed subpoena for governmental agencies, with minimum of three days for the agency to comply. The DA is not notified unless the agency voluntarily informs the DA.

When a subpoena is challenged by a motion to quash or questioned by the judge prior to endorsement, the defense must only show a factual predicate that the item or witness is "reasonably likely to be relevant and *material* to the proceedings." The prior standard set by case law was an advance showing that the item or witness was likely be "relevant and *exculpatory*."

Discovery

Discovery is automatic—not by written "demands" or discovery motions.

Statute requires true "open file" discovery from the DA. The provision listing the DA's discovery obligations states that DAs must disclose "*all items and information that relate to the subject matter of the case*" and that are in the DA's or law enforcement's possession, "including *but not limited to*" all of the listed items in new Article 245 (replaces Article 240). It also states that when interpreting the DA's discovery obligations, there is a **"presumption of openness"** and **"presumption in favor of disclosure."**

There is also a right to **full discovery before withdrawal of plea offers by the DA** (in situations where the offer requires a plea to a crime).

Discovery **from the defense** is also greatly expanded (list of known witnesses [not potential rebuttal witnesses), experts, etc. *after* prosecution completes its discovery obligations). See further discussion below.

Timing of DA's Discovery

The DA's discovery occurs "as soon as practicable but not later than **15 calendar days after defendant's arraignment" on any accusatory instrument**—including a misdemeanor complaint, felony complaint, or any other instrument. This means that the DA's discovery clock starts to run at criminal/town/city court arraignment in almost all cases.

The DA's 15-day period can be extended without motion by up to 30 calendar days if discoverable materials are exceptionally voluminous, or if they are not in the DA's actual possession "despite diligent, good faith efforts." In other words, if DAs are allowed to invoke this extension, full discovery will be required 45 days after first appearance.

There are certain automatic timing extensions for some types of evidence (grand jury minutes, expert witness information, exhibits, electronically stored information).

The DA can seek court-ordered modification of discovery time periods "in an individual case" based on showing of "good cause."

There is a special rule for the defendant's statements to law enforcement. Where the defendant has been arraigned on a felony complaint, the DA must disclose **all such statements no later than 48 hours before the scheduled time for defendant to testify at the grand jury**.

The DA must file and serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). The certificate must affirm due diligence and reasonable inquiries; turn over of all known information; and list disclosed items.

As noted in the "speedy trial" summary above, **DAs cannot validly state "ready" to stop the CPL 30.30 clock until a proper certificate of compliance is filed/served** (unless court finds "exceptional circumstances"—a high standard under existing 30.30 case law).

The DA must disclose defendant's **prior bad acts** that will be offered under either *Molineux* or *Sandoval* "not later than **15 calendar days before trial."**

DA's Discovery (Within 15/45 Days of First Appearance)

This includes:

- **Defendant's and co-defendant(s)' statements** to a public servant engaged in law enforcement activity. This is no longer limited to "jointly tried" co-defen-

dants, and no longer excludes statements made in course of criminal transaction.

- **Grand jury transcripts of any person who testified in relation to the subject matter** of the case, including defendants. Obviously, in many cases, grand jury proceedings will not have occurred (or minutes will not have been transcribed) when discovery is due 15 (or 45) days after first appearance. The DA gets an additional automatic 30-day extension if grand jury transcripts are unavailable due to limited court reporter resources (so disclosure in that situation can occur 75 days after first appearance). Beyond 75 days, the DA must seek court-ordered modification of discovery time period, and the minutes are subject to the general "continuing duty to disclose."
- **Names and "adequate contact information" for all persons (not just testifying witnesses)** whom the DA knows have information relevant to any charged offense or potential defense. The DA also must designate witnesses who "may be called." Physical address is not required, but defense can move for disclosure of physical address for "good cause."
- **All written or recorded statements of all persons** whom the DA knows have information relevant to any charged offense or potential defense, including all police and law enforcement agency reports and notes of police and other investigators.
- **Expert opinion evidence**, including credentials (CV, list of publications, and proficiency tests/results from past 10 years) and all written reports or, if no report exists, a written summary of facts/opinions in testimony and grounds for all opinions.
- **All electronic recordings**, including all 911 calls and all other recordings up to 10 hours in total length. If more than 10 hours exist, the DA must turn over those it intends to introduce at trial or hearing, plus known information describing additional recordings. Defense counsel then has right to obtain any of the other recordings it wants within 15 calendar days of request.
- **All photos and drawings**.
- **All reports of scientific tests/examinations**, including all records, underlying data, calculations and writings
- **All favorable evidence and information** known to DAs and law enforcement personnel acting in the case. This provision uses the same categories as OCA's "Brady Order," but all disclosures are moved up to 15 days (or 45 days) after first appearance. It also specifies that DAs must disclose "expeditiously upon its receipt."
- **List of all potentially suppressible tangible objects** recovered from defendant or co-defendant, with the DA's designation of: actual or constructive possession, abandonment, whether the DA will rely on statutory presumption of possession, and location where each item recovered if practicable. Right to inspect or test property as well.
- **Search warrants** and related documents.
- **"All tangible property"** that relates to subject matter of case, including designation of which exhibits DA will introduce at trial or pretrial hearing.
- **Complete record of judgments of conviction** for all intended DA witnesses and all defendants.
- **DWI cases**—records of calibration/certification/inspection/repair/maintenance for all testing devices for the periods 6 months before and 6 months after the test, including gas chromatography reference standard records.
- **Electronically stored information** ("ESI"—from computers, cell phones, social media accounts, etc.) seized or obtained by or on behalf of law enforcement, either from the defendant or from another source that relates to the subject matter of the case. If device/account belongs to the defendant, the DA must disclose complete copy of all of the ESI on device/account.

Pre-Plea Discovery

If the DA makes an offer that requires a plea to a crime (but not a violation), the DA must disclose all items and information that would be discoverable prior to trial **not less than three days before the plea deadline for felony complaints or not less than seven days before the plea deadline for other accusatory instruments**. The shorter period for felony complaints is designed to accommodate CPL 180.80 deadlines. Note that the pre-plea discovery provisions do not seem to apply to a sentencing promise by the judge on a plea to the top charge.

DAs cannot condition making a plea offer on waiver of discovery rights.

Where the defendant has rejected the plea offer and a violation of this discovery requirement is discovered, then the judge must consider the impact of the violation on defendant's decision to accept or reject the offer. If the violation "materially affected" the decision and the DA refuses to reinstate the offer, the court "must"—"as a presumptive minimum sanction"— "preclude the admission at trial of any evidence not disclosed as required" by statute.

Courts may also take "other appropriate action as necessary" on pre-plea discovery violations. For example, if the discovery violation involved a defendant who entered a plea (as opposed to one who did not accept the offer), the remedy could be vacating the conviction when

the discovery violation involved a *Brady* violation that would have changed the defendant's decision.

Discovery from Defense

Defense must provide its discovery to the DA **30 calendar days after service of DA's "certificate of compliance"** affirming the DA completed discovery. There are automatic timing extensions for certain types of evidence (expert witness information and exhibits).

Defense discovery obligations have been expanded to include witness names and statements within this 30-day period. But when the defense intends to call a witness for the "sole purpose of impeaching" a DA's witness, it does not have to disclose the person's name/address or statements until after the DA's witness has testified at trial.

Discovery from defense applies only to eight specific things that defense "intends to introduce" at trial or hearing, including:

1. Names, addresses and birth dates of witnesses whom defense intends to call at trial or hearing.
2. Written and recorded statements of witnesses whom defense intends to call at trial or hearing (other than the defendant).
3. Expert opinion evidence for experts whom defense intends to call at trial or hearing, including credentials and reports and underlying documents. If no written report was made, a written statement of facts/opinions to which the expert will testify must be disclosed.
4. Recordings that defense intends to introduce at trial or hearing.
5. Photos/drawings that defense intends to introduce at trial or hearing.
6. Other exhibits ("tangible property") that defense intends to introduce at trial or hearing.
7. Scientific testing/examination reports and documents that the defense intends to introduce at trial or hearing.
8. Summary of promises/rewards/inducements to intended defense witnesses, and requests for consideration by intended defense witnesses.

Defense counsel must file/serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). The certificate must affirm due diligence and reasonable inquiries; turn over of all required information; and list disclosed items.

Other Notable Discovery Provisions

Every New York police or law enforcement agency must, upon DA's request, **make available to the DA a "complete copy of its complete records and files"** relating to case to facilitate discovery compliance.

An arresting officer or lead detective must expeditiously notify the DA about **all known 911 calls, police radio transmissions, and other police video and audio footage and body-cam recordings** "made or received in connection with the investigation of an apparent criminal incident"—and the DA must expeditiously take all reasonable steps to ensure all known recordings "made or available in connection with the case" are preserved. If the DA fails to disclose a recording due to any failure to comply with this provision, the court "shall" impose an appropriate sanction.

The defense may move for a **court order that grants defense access to a relevant location or premises** to inspect, take photographs, or make measurements.

The defense may move for a **court order that grants discretionary discovery of any other items or information** not covered by the statute.

There are newly codified standards for imposing sanctions/remedies for discovery violations, based on existing case law.

Either party can obtain **expedited review by a single appellate justice of a ruling that grants or denies a protective order** relating to the name, contact information or statements of a person.

Note on Varying Start Dates for Different Statutory Clocks

Counsel must remember that the new CPL Article 245 (discovery), CPL 710.30 (statement/identification notices), and CPL 30.30 (speedy trial) will each have different triggering dates. Specifically:

1. Under the discovery statute (Art. 245), the DA's 15-day (or 45-day) period to provide discovery starts to run upon defendant's *arraignment on any accusatory instrument*, including a misdemeanor complaint or felony complaint.
2. Under the statement/identification notice statute (710.30), the DA's 15-day period to give notices starts to run upon defendant's *arraignment on an information or indictment*.
3. Under the "speedy trial" statute (30.30), the clock starts to run upon *filing of any accusatory instrument*, including a misdemeanor complaint or felony complaint.
4. But for DATs (which will be more common given the new bail reforms), the 30.30 clock starts to run *on the date when the defendant first appears* in court in response to the DAT [see 30.30(5)(b)] (for discovery in DAT cases, the DA's clock to provide discovery will still begin when defendant is *arraigned on a complaint*).

364-Day Maximum Sentence for Misdemeanors

The bill reduces the maximum sentence of Class A and certain unclassified misdemeanors from 1 year to 364 days. This law will benefit immigrant New Yorkers in several important ways.

It will eliminate the possibility of New York misdemeanors becoming aggravated felonies because of a one-year sentence. The Immigration and Nationality Act defines many aggravated felony offenses—including theft offenses, crimes of violence, and counterfeiting offenses—by an actual sentence of one year or longer. By reducing the possible maximum sentence, the bill eliminates the potential plea bargain of "an A and a year" and the possibility of a non-citizen defendant receiving an aggravated felony as a result of being convicted of an A misdemeanor after trial. In addition to subjecting a non-citizen to mandatary detention while in removal proceedings and to barring a lawful permanent resident from applying for United States citizenship, an aggravated felony conviction after 1996 leads to certain deportation.

The new law will also mean that one New York misdemeanor conviction that is a crime involving moral turpitude will no longer render a lawful permanent resident deportable from the United States. As a result of this bill it will take at least two misdemeanor crimes involving moral turpitude—whether they be A or B misdemeanors—to trigger the deportation statute.

Finally, under current immigration law, one crime involving moral turpitude that is an A misdemeanor or more serious bars non-citizens from applying for Non-LPR Cancellation of Removal—the only form of relief available in removal proceedings to many of our undocumented clients who have children, spouses, or parents who are U.S. citizens or lawful permanent residents. The new law should make it possible for many more of our non-citizen clients to successfully defend themselves against deportation and to remain with their families as contributing members of our communities.

Other Significant Reforms

- An end to license suspension for non-driving drug convictions.
- A prohibition on employment and housing discrimination against people with open ACDs.
- Application of Article 23A protections against baseless discrimination for people with criminal records to certain state-operated professional licenses.
- A prohibition on release of mugshots for certain cases.
- An expedited closure of three state prisons.
- A requirement for local police chiefs to report to DCJS on police use of force with demographic data and for the latter agency to release it publicly annually, and a version of the Domestic Violence Survivors Justice Act.
- Asset forfeiture reforms.

COMMERCIAL LITIGATION ISSUES OF INTEREST

Submitted by Joseph Churgin, Esq. and Susan Cooper, Esq.*

Your client, a brokerage firm, was sued by its former client, a law firm for whom your client secured a ten-year lease. The law firm complained that the leased premises had numerous problems from the start, including malfunctioning HVAC system and extra space that could not be subleased. Your broker client is alleged to have failed to assist the law firm with the many problems at the premises and to have misrepresented that the extra space could be subleased. The law firm vacated the premises when it could not sublease the extra space. The law firm remains liable for future payments under the remainder of the ten-year lease, resulting in substantial damages. You counterclaim for fraud, alleging that your client's reputation with commercial real estate firms was damaged by securing a tenant that defaulted. You also assert a counterclaim for violation of Judiciary Law § 487 for misleading and false statements made in the complaint.

Will you defeat a motion to dismiss the counterclaims for failure to state a cause of action?

The answer is "no" to the fraud claim, but "yes" to the claim under Judiciary Law § 487.

In Gerard Fox Law PC v. Vortex Grp., NYLJ 15763881809NY65479201 (Sup. Ct. N.Y. Co. July 9, 2019) (Index No.654794/2018), a Los Angeles-based law firm ("Fox") was looking to expand into New York City, and engaged Vortex, a real estate advisory firm, to find suitable office space. According to the complaint, Fox asked Vortex to find a small starter office with five or six offices, a conference room and one or two secretarial bays, within a budget of $30,000 per month. All of the spaces presented by Vortex allegedly exceeded the budget.

Vortex, on the other hand, claims that Fox rejected 10 spaces within the budgeted amount, and asked for something bigger and more expensive. Vortex negotiated a deal with a landlord for larger, more expensive space. The landlord sent a lease directly to Fox, who asked Vortex to review it. Vortex declined, advising Fox to get legal counsel to review the lease. One of Fox's partners reviewed the lease, which was signed on October 28, 2015, for a base rent of $59,000 per month. One year later, Fox signed an amended lease adding additional space with a new total base rent of $110,000, and a lease term ending in 2027.

Fox claims that the leased space had problems from the very beginning, including loud noises, unsatisfactory construction, malfunctioning HVAC system, and no submeter for electricity, resulting in overcharges for electricity. Vortex allegedly failed to assist in dealing with the problems, and despite alleged assurances from Vortex that the extra space could be subleased, no one wanted to sublease, even at a deep discount. Fox vacated the premises on May 7, 2019. The landlord has sued Fox for back rent. Fox remains liable for future rent payments.

Vortex pleaded a counterclaim for fraud in misrepresenting Fox's expected future income growth, and another counterclaim for violation of Judiciary Law § 487, which provides for treble damages for an attorney's intentional deceit during a pending judicial proceeding.

Continued on next page...

COMMERCIAL LITIGATION ISSUES OF INTEREST

Submitted by Joseph Churgin, Esq. and Susan Cooper, Esq.*

The Court dismissed the counterclaim for fraud, based on the failure to adequately plead compensable damages. The Court noted that there must be an out-of-pocket pecuniary loss incurred as a direct result of the fraudulent conduct, and that a claim of fraud is not supported by theoretical or conclusory allegations of reputational harm, citing Connaughton v. Chipotle Mexican Grill, Inc., 135 A.D.3d 535, 538-40 (1st Dep't 2016). The counterclaim for fraud alleged loss of reputation with commercial real estate firms, but did not specify any specific monetary harm suffered with any specific entity.

The Court also held that a misrepresentation of expected future income growth is mere puffery or expectation of future performance, neither of which can sustain a claim of fraud, citing Sidamonidze v. Kay, 304 A.D.2d 415, 416 (1st Dep't 2003).

The claim for damages under Judiciary Law § 487, on the other hand, was upheld. Documentary evidence revealed that core allegations in the complaint were demonstrably false, directly causing the expenses incurred to defend the action.

The lesson? Your client's claim for fraud will be dismissed if you do not specifically plead the details of the fraud and the damages that are a direct result of the fraud. And even though claims made in judicial proceedings are generally protected from claims of libel and slander, be forewarned that any conduct by an attorney that is intentionally deceitful in a pending litigation may be found to be a violation of Judiciary Law § 487, which constitutes a misdemeanor and subjects the attorney to treble damages.

*By Joseph Churgin, Esq. and Susan Cooper, Esq. of

SAVAD CHURGIN, LLP, Attorneys at Law

RECOGNIZING AND HONORING FIVE LOCAL JUDGES:
Hon. Craig E. Johns, Hon. John K. Grant, Hon. Richard C. Finning, Hon. William F. Franks, and Hon. Djinsad Desir

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Save the date!

Thursday, OCTOBER 24, 2019

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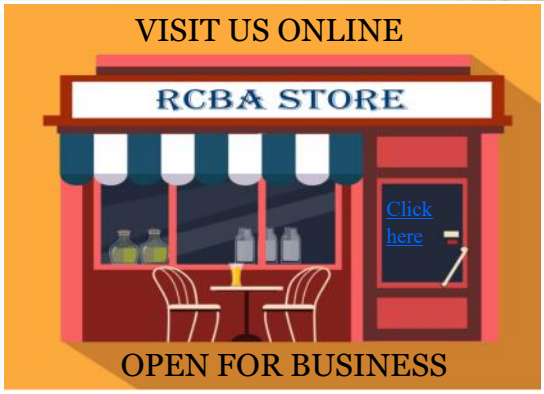

MEMO

TO ALL RCBA COMMITTEE CHAIRS & VICE– CHAIRS

The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long- a succinct piece of general interest and importance would be best.

If you are able to submit an article for the Newsletter it should be sent via email to sabrina@rocklandbar.org by the 15th of the month so that the Executive Board may review it.

Thank you!

THE PRACTICE PAGE

CLARIFYING A QUESTION ON AFFIRMATIVE DEFENSES

Hon. Mark C. Dillon *

CPLR 3018(b) provides that defendants must plead affirmative defenses of matters which, if not pleaded, would likely surprise the plaintiff. If a defendant merely denies an allegation in a complaint which requires the plaintiff to then prove the matter, may a court deem the denial the equivalent of an "affirmative defense," even though no separate affirmative defense is actually pleaded in the answer? There have been conflicting appellate decisions on this issue, but recently, the Second Department rendered an extensive analytical opinion that answers the question with a definitive "No."

This pleading issue came to a head in the context of a residential mortgage foreclosure appeal, though it could have appeared as easily in other types of civil litigations. There have been foreclosure actions where plaintiff lenders asserted allegations in their complaints that they physically possessed the loan note by a written assignment, to confer upon them the standing to commence foreclosure actions against the collateralized properties. In certain of those appeals, defendant homeowners had served answers either denying the standing-related allegations outright ("D") or denying information sufficient to form a belief ("DKI"), but without separately interposing an affirmative defense that the lenders lacked standing. If a mere "D" or "DKI" of allegations were to qualify as an implicit and cognizable affirmative defense that standing is lacking, the plaintiff lenders would be required to prove those allegations as part of their prima facie burden when moving for summary judgment. Otherwise, not. The adequacy of moving papers hung in the balance at the trial courts and on appeal. The reader can substitute allegations about standing with those about the statute of limitations, or the statute of frauds, or other legal mainstays, and the query raised here is the same.

The significance of the issue, particularly for defendants, is that several defenses are waived under CPLR 3211(e) unless set forth as an affirmative defense in the responsive pleading or as a ground for a pre-answer dismissal motion. These waivable defenses include many of the staples relied upon by defense attorneys including, among others, the plaintiff's lack of capacity to sue, standing, collateral estoppel, res judicata, the statute of limitations, and the statute of frauds.

Recently, a 3-1 opinion by Appellate Justice William Mastro in U.S. Bank National Association v Nelson, 169 AD3d 110 was rendered, which now definitively holds that affirmative defenses are not cognizable by a defendant's mere denial or "DKI" of allegations contained in the complaint. Instead, for affirmative defenses to be cognizable and preserved, they must specifically be set forth in the answer as such. The reason is found in CPLR 3018, which draws a distinction between denials, which place at issue proofs that the plaintiff must provide at trial, from affirmative defenses, which raise new defensive matter beyond the elements that plaintiffs must affirmatively plead in a complaint and then prove. Without separately pleaded affirmative defenses, plaintiffs could be surprised by defenses raised later, which CPLR 3018(b) expressly seeks to avoid. Since standing is not an element that plaintiffs must plead and prove, and is instead purely in the nature of a defense, the denial or "DKI" of allegations that incidentally implicated standing failed in Nelson to qualify as an "affirmative defense."

Justice Colleen Duffy dissented, arguing that mere denials, and "DKIs" that are to be treated for pleading purposes as denials under CPLR 3018(a), affirmatively raise defenses by putting plaintiffs to their burden of proving the matters actually asserted in the complaint.

Based on the majority holding in Nelson, the following Second Department cases, which hold to the contrary, should no longer be followed: Bank of Am., N.A. v. Barton, 149 AD3d 676, Nationstar Mtge., LLC v. Wong, 132 AD3d 825, Bank of Am., N.A. v. Paulsen, 125 AD3d 909, and U.S. Bank Natl. Assn. v. Faruque, 120 AD3d 575. If factual or legal defenses exist for defendants, counsel should robustly assert them as affirmative defenses in the answers, or in CPLR 3211 motions to dismiss, and fulfill the true purpose of CPLR 3018(a) which is to prevent surprise to adversary parties.

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* Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., and an Adjunct Professor of New York Practice at Fordham Law School.

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