Inside this issue:

Sabrina Charles-Pierre, Editor

ROCKLAND COUNTY BAR ASSOCIATION NEWSBRIEF

www.rocklandbar.org September 2017

President's Post

The close of summer is upon us as August comes to an end and I look back on this summer and feel grateful for the sunshine and the bit of down time here and there. I hope that you all had an opportunity to rest and relax; spending must needed time with friends and loved ones. We all need a bit of recharge, wouldn't you agree?

As September approaches, I want to inform you of some new changes our Bar will encounter in the Courts this Fall. Administrative Judge of the 9th Judicial District, Alan Scheinkman, will be implementing a new Trial Assignment Part (TAP) in Supreme Court, Rockland County starting September 11, 2017. This is a separate part specifically designated for trial ready Civil, Commercial and Matrimonial cases. I was fortunate enough to meet with Judge Scheinkman in the hopes of gaining a better understanding of TAP and its procedures. I learned that, as always, when you file your RJI, your case will be assigned to an IAS Judge that will handle the case from inception up until the Note of Issue is filed. Once the parties file their Note of Issue, the case will be assigned to TAP where the attorneys will have an opportunity to conference the case before the Hon. William Sherwood, the Judge who will preside over this part. Should your case not settle, you will be given a date for trial, with either your IAS Judge or, should your IAS judge not be available, then to another Judge in rotation to preside over the trial. It is the hope that TAP will increase our already efficient trial management and to assist in any backlog of trials that the Lawyers and Judges are experiencing. TAP will be brand new for Supreme Rockland, and the Judges, Attorneys and Part Clerks understand the delicacy of implementing a new procedure. As always, our Judges and Court personnel are here to assist us throughout this transition. Speak with your IAS Judges to help gain clarity with your cases and, of course, contact us at the Bar Association and we will always be happy to help you in any way that we can.

I look forward to heading into the Fall with you.

Sincerely yours,
Andrea F. Composto, Esq.

ROCKLAND COUNTY BAR ASSOCIATION

1893 – 2017

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THURSDAY, OCTOBER 26, 2017

6:00 P.M. – Patriot Hills Country Club

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2017 Souvenir Journal
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Deadline for Advertising: October 2, 2017

COMMERCIAL LITIGATION ISSUES OF INTEREST **September 2017**

Submitted by Paul Savad, Esq.
Chair, Commercial and Corporate Law Committee,
Joseph Churgin, Esq., and Susan Cooper, Esq., of
SAVAD CHURGIN, LLP, Attorneys at Law

The answer you filed in a residential foreclosure action against your clients disputes the amount owed and that the plaintiff bank is the holder of the note. You obtained a preclusion order against the bank after the bank delayed disclosure, failed to appear for a court-ordered mandatory settlement conference, and refused to appear for a court-ordered deposition. The Appellate Division affirmed the preclusion order, which prevents the bank from offering proof of your clients' indebtedness, or that the bank is the current holder of the note. You now move for summary judgment discharging and cancelling the unpaid mortgage, because the bank cannot prove material elements of its foreclosure action. The bank argues that the dismissal of the action with prejudice is a drastic remedy disproportionate to its discovery failures, and would result in a windfall to your clients.

Will you win your motion for summary judgment discharging and cancelling the mortgage?

The answer is *yes*.

In *Citibank, N.A. v. Bravo*, 2013-0582, NYLJ 1202782750320, at *1 (Sup. Ct. Tompkins Co., March 7, 2017), the plaintiff bank sued to foreclose a mortgage on the defendant's residence. During the course of the litigation, the bank refused to appear for deposition, cancelled depositions at the last moment, missed a court-ordered mandatory settlement conference, failed to comply with a court-ordered deposition deadline, and created confusion and delay with an unclear effort to substitute counsel.

Although the homeowners had demanded that the bank produce a particular individual for deposition, the bank simply refused to produce that individual, instead of complying with CPLR 3106(d), which required the bank to give notice at least 10 days before the deposition that another individual would be produced, with the description or title of the substituted deponent. The bank produced no one.

As a result of these failures, an order was issued against the bank precluding it from offering any evidence of the indebtedness, or that the bank is the current holder of the note. The Appellate Division affirmed the order of preclusion at 140 A.D.3d 1453 (3d Dep't 2016), finding that the bank "had engaged in a pattern of conduct which gave rise to an inference of willfulness sufficient to warrant the trial court's imposition of the sanction of preclusion,"

The motion court thereafter granted the homeowners' motion for summary judgment, rejecting the bank's argument that a dismissal of the action with prejudice was a drastic remedy, and would give the homeowners a windfall while causing substantial prejudice to the bank. The Court explained that dismissing the action without prejudice would impermissibly allow the bank to avoid the adverse impact of the preclusion order, quoting *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999): "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."

The Court acknowledged that the dismissal was a drastic remedy, but noted that the course was charted when the Appellate Division affirmed the preclusion order based on the bank's own willful failure to provide disclosure, even as the Appellate Division cited its own decisions holding that preclusion is a drastic remedy.

The lesson? Be meticulous about complying with court-ordered discovery, as the "drastic remedy" of preclusion and dismissal is a proper remedy for a pattern of willful violation of court orders. If you intend to produce a deposition witness who is a representative of a party other than the witness noticed by your adversary, be sure to comply with the 10-day notice provided in CPLR 3106(d).

IT'S DUES TIME!

This is a friendly reminder that it is time to pay your 2017-18 RCBA Membership Dues.

Annual Dues for 2017-18 for regular Members is $185.00.

Please send in your Membership Renewal Form now if you have not done so already.

After September 30, 2017 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.

RCBA

News from the Executive Director

RCBA STAFF UPDATE

Below please find a break-down of major areas of responsibility for the RCBA Staff:

ASSIGNED COUNSEL COORDINATOR – MANUELA GOMEZ
LAWYER REFERRAL SERVICE COORDINATOR – MANUELA GOMEZ
CLE COORDINATOR – SABRINA CHARLES – PIERRE
ADVERTISING/NEWSLETTER – SABRINA CHARLES – PIERRE
EXECUTIVE DIRECTOR – NANCY LOW – HOGAN, Ph.D.

Contact us anytime at 845 634-2149. Direct lines: Assigned Counsel – 845 634-1761; Lawyer Referral Service – 845 708-5719

This article was recently published in the May 2017 issue of the National Association of Criminal Defense Lawyers Champion magazine.

Twelve Myths About Trying Criminal Cases

By Daniel E. Bertolino

I have been trying criminal cases, first as a prosecutor and then as a defense attorney, for the better part of 40 years. I have lost cases I should have won, and I've won my share of "losers". I have attended countless "how to" seminars and I've read scores of articles and books[1] on "the art of trying cases". I have watched many other lawyers trying criminal cases over the years. The one lesson I've learned from a lifetime of exposure to criminal trial work is that nothing works all of the time.

And yet there are some techniques that have a better chance of succeeding in the courtroom, and some which, despite their popularity, are simply not effective or advisable.

Here are twelve myths about trying criminal cases, which may prompt the reader to question the conventional wisdom.

1. **Use the "Shotgun" or "Buffet" Approach, to Keep Your Options Open**

We have all seen defense attorneys who cannot resist the temptation to advance at trial every conceivable defense they can think of, even those that are mutually exclusive.

The reason that this approach does not work is that it does not pass the "living room test". In other words, if something does not work in your own house, it probably will not work in the courtroom either. Imagine that your neighbor knocked on your door and said that your son had thrown a baseball through his picture window. When you confront your son about the allegation, would the following explanation by your son be effective? "Dad, first of all, I have the right to remain silent. Second, I don't have to prove that I *didn't* throw the baseball. *They* have to prove that I *did* throw it. What's more, I could not have been the one who threw the baseball, because I

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[1] See e.g., Herbert J. Stern & Stephen A. Saltzburg, *Trying Cases to Win In One Volume* (2013)

was not even at our neighbor's house at the time. But if I *was* at our neighbor's house at the time, then I was not the one who threw the baseball. And if I *was* the one who threw it, then I did it accidentally."

Jurors spend most of their lives in the informal setting of their home, and not in a courtroom where much of what transpires is foreign to them. Inconsistent, mutually exclusive arguments are rejected by lay jurors, and the lawyer who advances such arguments is immediately perceived as untrustworthy. The jury knows that the lawyer knows the truth. When you give the jury three different versions of the truth, you give up your credibility as well. When your credibility is lost, so too is the case. Pick your strongest defense and hammer it.

2. Make Sure You Have a Good Appellate Issue

There are many reasons to try criminal cases, among them that the client is facing very little jail time, that the district attorney has a proof problem, that the defendant has already served most if not all of the time he is facing after trial, that the client really is factually innocent, etc. Having a good appellate issue, however, is rarely a reason to try a criminal case.

First, the appellate court may disagree with your assessment that the pre-trial "error" is an error at all. Second, even if the appellate court does agree with you that the ruling of the trial court after a suppression hearing was indeed error, it is likely that the error will be characterized as "harmless" if there was otherwise overwhelming evidence of guilt. For example, the New York Court of Appeals recently ruled that a defendant's pre-Miranda statement, while in custody, in response to a detective's question, should have been suppressed. The Court said: "However, the error in failing to suppress the statement was harmless beyond a reasonable doubt in light of the overwhelming evidence against defendant and there being no reasonable

possibility that his statement contributed to the verdict (see *People v. Rivera*, 57 NY2d 453, 456 [1982])."[2]

Third, the chances of convincing the appellate court to issue a stay of execution of the judgment and sentence pending appeal are minimal. The client forced to serve out a sentence will find little solace in a later successful appeal.

Fourth, the overwhelming majority of cases appealed are affirmed. Thus, appellate issues are statistically insignificant in dictating a trial lawyer's strategy. Trying a case because you expect to be vindicated on appeal is usually a formula for disaster.

Of course, a good trial lawyer will always be conscious of preparing a proper record in the event that an appeal becomes necessary. In fact, there are those rare cases which require a trial just to get the issue before the appellate court, to advocate for new law, or a change in existing law. In some jurisdictions, a defendant can plead guilty and still pursue an appeal, but most judges will condition a plea on an appellate waiver.

3. Sometimes it is Best to Waive or Defer Opening Statement

Except in the rarest of circumstances[3], you should never waive or defer your opening. Doing so sends a loud and clear message to the jury that your client is probably guilty, because you (his advocate and his voice) cannot even get up and put together a few sentences on his behalf.

Although the judge will tell the jury that opening statements are not evidence, a good opening statement can have the same impact on the jury as the evidence itself. The doctrines of primacy and recency dictate that people tend to remember the first and last things they hear.

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[2] *People v. Romero*, No. 120, NYLJ 1202756244617, at 1 (Ct. of App., Decided April 28, 2016)

[3] One such exception might be in a multiple defendant case, where strategy might make a waiver or deferral of an opening statement advisable.

Thus, it is rarely advisable to waive or defer an opportunity to speak directly to the jury about the case on behalf of your client.

Delivered correctly, the opening statement is not so much a statement at all, as it is an argument -- and it is rarely a good idea to relinquish any opportunity to argue your case to the jury, particularly where you can speak to them in a monologue, usually without interruption.

No one is ever impartial about anything any longer than he or she has to be. Always make an opening statement.

4. Closing Statements Are Much More Important Than Opening Statements

Studies have shown that jurors make up their minds quickly about who should win and who should lose in the courtroom, and those decisions almost never change. First impressions are so crucial that jurors frequently have already made up their minds in the early stages of the trial, sometimes as early as jury selection. Opening statements, best delivered as thinly-veiled argument, can be a powerful opportunity to convince the jurors that the eventual verdict should be Not Guilty.

As will be discussed below, summations rarely change the minds of the jurors. Their minds have already been made up, either during jury selection, or during the opening statements.

For this reason, nothing should be held back during opening statements[4]. Nothing should be saved for summation. No ambushes. No surprises. Such tactics only work on T.V. and in the movies.

5. Use a Warm-up Before Your Opening Statement

We have all heard opening statements that begin like this:

> "Ladies and Gentlemen, at this time, I am privileged to be able to address you by way of an opening statement. As

[4] It is indeed the rare case that an attorney finds it necessary to hold something back during the opening statement, but one such case would be where the lawyer believes that the prosecutor will use the opening for discovery.

> the judge has told you, opening statements are not evidence. You will only receive the evidence from the witnesses who testify and from the exhibits that are introduced into evidence and accepted by the court. The opening statement is like the table of contents to a book or the trailer to a movie. You will not get the same detail from the opening statement that you will get from the evidence itself . . .", and so on.

The jury has no more interest in watching the lawyers do warm-ups, than we do to see football players do theirs when we're in the stands at the game. They are eager for the fight to commence.

Never use a warm-up before your opening statement. If you do, you will put the jurors to sleep. Further, you do not want to emphasize to the jury that your opening statement is not evidence. You would actually like them to believe that every word you say is critical to the case.

An opening statement should begin with your theme, with no introduction or warm-up whatsoever. In a recent trial charging a husband with the attempted rape of his wife, it was the district attorney's theory that the defendant was of the mindset that he was entitled to have sex with his wife whenever he felt like it, whether she was willing or not. With no warm-up or introduction whatsoever, the prosecutor stood up and started her opening statement as follows: "You're my woman and I'll do with you as I please". It was a powerful hook, and exactly the right way to begin an opening statement.

6. It is Best to Write Out Your Entire Opening and Closing Statements

Writing out your entire opening and closing statements means that you run the risk of reading what you have written, thereby making you sound stilted, impersonal, insincere, and rehearsed. No presentation to any audience in any setting should ever be read. It is only necessary to know *what* you want to say . . . not every word verbatim.

Use bullet points to be sure to hit all of the topics you know you want to address. Bullet points allow you to make each of your points naturally, without appearing to be rehearsed.

7. Use a Script of Questions and Answers for Direct Examination

There is no need to write out the specific questions and answers for a direct examination. A skilled direct examination elicits narrative responses that allow the witness, and not the lawyer, to be the focus of the questions. Once you have determined each of the subject areas for the witnesses' examination, write out only the answers you expect to elicit. Not only will the answers immediately call to mind the question needed to elicit that answer, but this technique will also permit a more natural flow of questions that give credibility to the witness, rather than the lawyer. For example, if you write down "8:00 p.m." or "red light" or "bleeding from the mouth and nose and ears", you will immediately know what the question is that will elicit that response and will avoid slavishly following a set of notes that often leads to a stilted examination.

8. There is Only One Purpose for Cross-Examination

If the criminal trial is a war between the prosecution and the defense, the jury sees cross-examination as the real battlefield where the case is won or lost.

Although it is true that the primary purpose of cross-examination is witness impeachment, it is by far not the only purpose for cross. Skilled cross-examination is also essential to bolstering your own defense theory and predicating your summation.

In many instances, cross-examination can enable you to jump aboard your adversary's bandwagon, and ride it as far as you can go in the same direction. Sometimes adverse witnesses offer testimony that is favorable to the defense, or at worst, neutral.

Skilled cross-examination can also be used to limit the effect of the adverse witness' testimony, to make the point that the testimony does not matter, or that it is not at odds with the defense theory of the case.

Finally, all cross-examination is geared toward the singular goal of arguing your case to the jury. Although the argument is frequently made by assaulting the credibility of the witness, more often you can also argue your case by bringing forth what the witness did *not* say on direct examination that may help your case, or by demonstrating that what the witness said on direct has not hurt your position.

9. Use Only Leading Questions on Cross-Examination

While it is important to control a witness on cross-examination, a cross need not be limited to leading questions, which seek to elicit only "yes" and "no" answers. Jurors will think that the lawyer who confines a witness to a "yes" or "no" answer is being unfair to the witness, and is also afraid of what the witness may say. Asking every question in the same way also contributes to boredom and devalues the examination. This damages the credibility of the attorney, and with it the defense itself.

10. Never Ask "Why" on Cross-Examination

Although it is usually a bad idea to allow a witness on cross-examination to explain anything, there are those instances when there is no answer that will hurt you. Asking "why?" in that circumstance is safe and appropriate. If a police officer neglects to include in a police report a crucial part of the investigation, there is really no good reason for his having failed to do so. In that case, asking the officer why that crucial item does not appear, is not a question which will hurt the cross-examiner. What possible reason could there be to omit it? The absolute prohibition against "why" questions deprives the cross examiner of a powerful weapon that can

be wielded with devastating effect if used with care and selectively. Sometimes there is no explanatory answer that will help the witness or hurt the cross-examiner.

11. Never Waive Cross-Examination

It is difficult for most trial lawyers to pass up an opportunity to cross-examine any witness, and yet, it is sometimes advisable to leave a witness' testimony alone, for fear that any cross-examination at all will bring out evidence damaging to the defense. If the witness did not hurt you on direct, but there is a very real likelihood that he or she will hurt you on cross, then it is best to waive cross-examination altogether. Although the jury expects every lawyer to cross-examine every opposing witness, if a witness called by your adversary could have hurt you badly but for some reason did not, it is best to get that witness off the stand quickly, rather than risk a disastrous result by engaging in cross-examination.

12. Use Your Closing Argument to Persuade the Jury

While a powerful closing argument may occasionally give a juror who is reluctant to convict, a reason for holding out, it is generally impossible to persuade anyone of anything at the end of the case, because the jurors have already made up their minds early in the case, sometimes as early as jury selection or during opening statements. And yet, closing arguments are important, not because it is possible to change a juror's mind about the case, but rather, simply to equip the jurors who have already decided in favor of the defense, with the ammunition they will need to rebut the opposing arguments of other jurors during deliberations. After many days or weeks of trial, jurors are not sitting with open-minded expectation, waiting to hear the final arguments of the attorneys, before making up their minds. In all likelihood, the jurors made up their minds when the case first started, and it is unlikely that jurors will change a long-held position taken against you at the outset merely because they have now also listened to your

closing argument. But we do know that those same jurors may change their minds when confronted by their fellow jurors. We know this because of the relatively insignificant number of mistrials that are occasioned by hung juries.

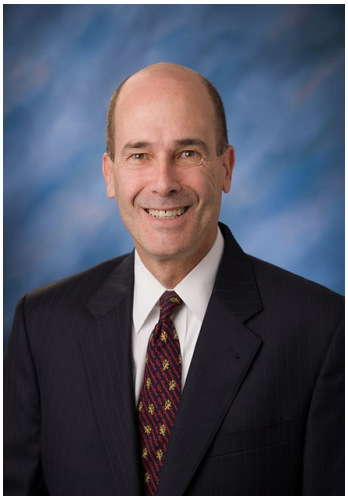
Thus, the purpose of the closing argument is to show the jurors who are friendly to your position how to deal with and argue against the other jurors in the final struggle that will take place in the jury room.

Conclusion

Conventional wisdom isn't always so wise. Sometimes we do things in the courtroom just because that's the way it's always been done. The conventional way, however, is often ineffective. Challenge the myths and you'll have more success trying criminal cases.

DANIEL E. BERTOLINO is an experienced trial lawyer, and former Rockland County Senior Assistant District Attorney, whose area of practice is primarily criminal defense work. He represents individuals charged with every level of criminal offense, from "A-I" felonies to misdemeanor and petty Penal Law offenses.

Dan also practices in the fields of general civil litigation, real estate, business law, and wills and estates.



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for those who left us in 2016-17

FRIDAY, SEPTEMBER 15, 2017

9:00 AM-10:30 AM

Ceremonial Courtroom #2

Rockland County Courthouse

The Honorable Robert M. Berliner, JSC, Presiding

Upcoming EVENTS

2017 CALENDAR
RCBA MAJOR EVENTS
Mark Your Calendar!

~

September 15 - RCBA Memorial Recognition Ceremony

October 26 - Annual Dinner

December 14 - Holiday Party

Intellectual Property Attorney Opportunity -

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MEMO

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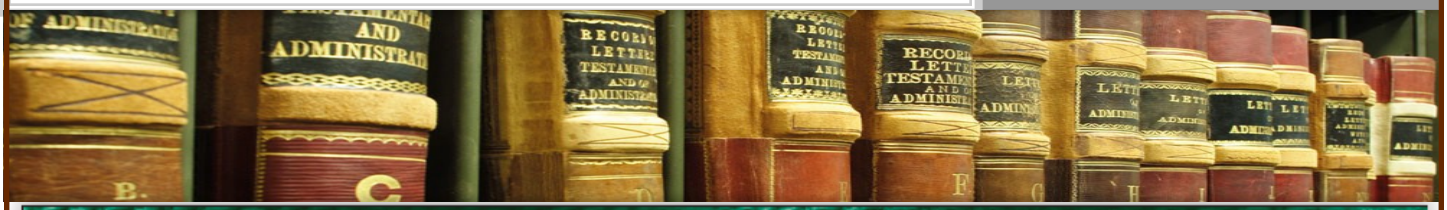
The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long - a succinct piece of general interest and importance would be best.

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!

Monthly Newsletter



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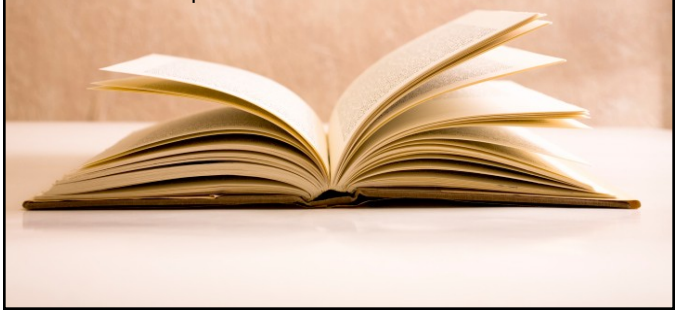

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CLE CORNER

2017 CLE Title	Date and Time
ESI in Non-Commercial Litigation	September 12- 6pm-9pm
Convicted Hedge Fund Thief	October 2 - 12pm-2pm
Immigration	November 3 - 12pm-3pm

CLE REQUIREMENTS

Newly admitted attorneys must complete 32 credit hours of accredited "transitional" education within the first two years of admission to the Bar. Sixteen (16) credit hours must be completed in each of the first two years of admission to the Bar as follows: 3 hours of Ethics and Professionalism; 6 hours of Skills; 7 hours of Practice Management and/or areas of Professional Practice. Experienced Attorneys must complete 24 credit hours of CLE during each biennial reporting cycle: 4 credit hours must be in Ethics and Professionalism. The other credit hours may be a combination of the following categories: Ethics and Professionalism, Skills, Practice Management or Professional Practice.

COMMITTEE CORNER

Assigned Counsel Committee Meeting on September 14, 2017 @ 12:30pm @ RCBA Offices

Criminal Law Committee Meeting on September 14, 2017 @ 5:15PM @ RCBA Offices

Commercial & Corporate Law Committee October 17, 2017 @ 5:30pm @ Savad Churgin, LLP
55 Old Turnpike Road, Suite 209, Townhouse Office Park, Nanuet, New York 10954

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New City, Rockland Law Office seeks attorney with experience in Personal Injury, Workers' Compensation, Dental/Medical Malpractice, Nursing Home Neglect. Prefer minimum of 5 to 10 years plus experience in some or all of these areas. Deposition and Trial experience a plus. Salary and Benefits to be discussed. Call 845.598.8253.

MATRIMONIAL ATTORNEY WANTED

Attorney Wanted: New City Law Office seeking an attorney with matrimonial and family law experience, full time, trial experience a plus, Spanish speaking a plus, admitted to Southern District of NY a plus. Call 845.639.4600 or fax 845.639.4610 or E-mail: michael@demoyalaw.com

IMMIGRATION ATTORNEY WANTED

Immigration Attorney Wanted: New City Law Office seeking an attorney with immigration experience, full time, trial experience a plus, Spanish speaking a plus, admitted to Southern District of NY a plus. Also willing to assist with family law/ bankruptcy/collections and loan modifications a plus. Call 845.639.4600 or fax 845.639.4610 or E-mail:

WORKERS' COMP. ATTORNEY WANTED

Perez & Morris LLC, a national client based law firm, seeks an experienced workers compensation attorney (at least one year) to handle NY workers compensation cases out of our Rockland County, NY office. We offer a competitive salary and benefit package. Email your resume to mdonohue@perez-morris.com.

LEGAL ASSISTANT WANTED

Entry level position available for part-time bilingual assistant. Located in New City, NY.
Please call 845 709-6800

ATTORNEY WANTED

New City, Rockland County, NY Law Office seeks attorney with some experience to handle all aspects of our Workers' Compensation cases in a busy and friendly small personal injury/malpractice law firm. Salary and Benefits to be discussed. Call 845-598-8253. E-mail: vcrownlaw@aol.
Applicants can learn more about the Law Firm of Valerie J. Crown by visiting our website: valeriecrown.com

ASSOCIATE ATTORNEY NEEDED

3-5 years litigation experience for busy Rockland County firm. Please forward resume to phaabas@barpc.com or fax to 845-359-5577

TO MY FAMILY COURT AND MATRIMONIAL COLLEAGUES

I am closing my New City office Effective August 31, 2017. I am " semi-retiring." I am writing to advise my colleagues that I will be available for per diem work. My telephone number is 845-641-8100. My email address is CBilottaEsq@aol.com. Thank you for considering me. Cassandra Bilotta

WANTED FOR PURCHASE

Looking to purchase a microcassette recorder in either new, used or refurbished condition.. Please contact: Alden B. Smith @ 845-634-7265 or email: alden@aldensmithesq.org

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