PRACTICE MANAGEMENT

How a Billionaire's Book Applies to Membership at the SCBA

By Paul Devlin

Stephen Covey lists the habit of beginning with the end in mind in his classic book, "The 7 Habits of Highly Effective People." He suggests an exercise of imagining your own funeral with one person from each important role in your life giving your eulogy. What would you want them to say? Although performing this exercise may be uncomfortable, it can certainly be useful in deciding how to spend one's time. In the spirit of this exercise, I imagine the day I retire from the practice of law. I will look back on my career and think of the positive impact I have had on clients, the high-quality relationships I have forged, and I will be proud to have been part of a noble profession. The SCBA will have been an integral part of that. It will be the organization where I started and nurtured relationships with friends and colleagues that I respect. It will be the place where I learned from mentors and where I sought to help those with less experience. I will look back with fond memories of the celebrations, struggles and triumphs we experienced together.

Paul Devlin

My strategy to make my imagined retirement day a reality is to prioritize the pursuit of meaningful work and meaningful relationships. That is one of the principles by which billionaire Raymond Dalio guided Bridgewater Associates to become one of the world's largest hedge funds. He is a local who graduated from Long Island University before going on to Harvard Business School. After reading Mr. Dalio's book, "Principles," I adopted his decision-making strategy and often ask myself whether or not participating in a given activity will further my pursuit of meaningful work and meaningful relationships. The answer is always in the affirmative when it comes to participating at the Suffolk County Bar Association. Stated another way, meaningful work and meaningful relationships are the reasons I belong to the Bar Association. What is the reason you belong?

The SCBA fiscal year recently started on June 1, 2019. During this fiscal year, in my role as the co-chair of the Membership Services Committee, I plan to make significant progress towards getting current members more involved, attracting new members, and making the Bar Association a hub of activity for our entire legal community. That includes those of you who are well established in your careers, newer attorneys and law students, those of you with young children, those who are singularly focused on business development, and those of you who also enjoy socializing.

The question I posed above is not meant to be rhetorical. I am deeply interested in knowing the true reason why you are a member at the SCBA. This insight will give me and the entire Membership Services Committee the direction we need to make recommendations to the Board of Directors that will bring you more of what you value. Please take a moment now and send me a message at the below-listed email address. Tell me why you belong to the Bar Association, and anything else you feel the Membership Services Committee should know. If you are passionate about this endeavor, I hope you will join us for a series of meetings this summer. Out of these meetings will come a proposed strategic plan that we will present to the Board of Directors in September. The first meeting is scheduled for June 14, 2019, at 1 p.m. in the boardroom of the SCBA, 560 Wheeler Rd., Hauppauge, N.Y. 11788. Look out for July and August meetings on the SCBA calendar.

Note: Paul Devlin is an associate at Russo & Tambasco where his practice focuses on personal injury litigation. He is an active member of the SCBA, serving as a director on the Board of Directors and co-chair of the Membership Services Committee.

CRIMINAL

Losing Face with Foreign Languages: Case Dismissed — Facial Sufficiency Lacking

By Cory Morris

Note: This article and the ideas presented in this article would not be possible without the assistance and encouragement of Steven Burton, Esq.

Suffolk County is home to a large Spanish-only speaking[1] community who may either report crime or become the target of a criminal investigation. This article highlights a recurring issue addressed by New York Appellate Courts and regularly raised by criminal defense practitioners — the sufficiency of accusatory instruments and statements made and received by law enforcement agents.

An accusatory instrument starts the criminal proceeding. "A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution."[2] Specific facts are required in order to establish facial sufficiency and conclusory statements will not suffice.[3] Lower courts should review the sufficiency of an accusatory instrument because "facial insufficiency is a nonwaivable jurisdictional defect [such defect] can [even] be challenged for the first time on appeal."[4]

According to the New York Criminal Procedure Law ("CPL") Section 100.40(1)(c), non-hearsay allegations of the factual part of the information and/or of any supporting depositions must establish every element of the offense charged and the defendant's commission thereof. "The last requirement is also known as a prima facie case requirement, meaning that a facially sufficient information must contain enough factual allegations to establish a prima facie case."[5]

Foreign defendants

Law enforcement agents regularly receive statements from Spanish-only speaking persons who report criminal activity. Accessibility and translation issues can arise. Likewise, statements taken from Spanish-only speaking defendants are regularly obtained and utilized against the accused.

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The People bear the burden of establishing that the police conduct with reference to informing defendant of his Miranda rights before eliciting a statement from him was legal, untainted and constitutionally firm.[6] Although providing a defendant with a Miranda rights card written in Spanish or asking a Spanish-speaking detective to apprise the defendant of his Miranda rights "could [be] accomplished with minimal effort,"[7] cases are rife with circumstances where such persons are denied a meaningful opportunity to know and exercise such constitutional rights.

The Court of Appeals recently noted the "potential damaging effect on our justice system associated with claims of unlawfully procured inculpatory statements, as well as the need to ensure that our laws, and the rights and guarantees thereunder, apply fairly, regardless of the English language skills of persons entering our courts."[8] Longstanding law requires that "[s]tatements and admissions are properly suppressed if an individual is impaired to the 'extent of undermining his ability to make a choice whether or not to make a statement' "[9] "[I]f [a defendant's] English language comprehension was so deficient that he could not understand the import of his rights, his confession could not have been voluntary." If challenged, the People must establish that the defendant "grasped that he or she did not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued."

Foreign complainants

Papers filed in criminal court must comply with the provisions of the Civil Practice Law and Rule ("CPLR")[10]. CPLR § 2102(b) states "Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Where a supporting deposition or statement is not in an affidavit form and does not state the qualifications or the translator or that such translation was accurate, such statement will be inadmissible.[11] A legally sufficient accusatory instrument is necessary to prosecute a matter and, as affirmed in *People v. Brooks*, 2019 N.Y. Slip Op 50859 (1st Dep't. 2019), the People cannot answer ready as a matter of law should the People fail to comply with the provisions of CPLR § 2101(b).

Closer to home is *People v. Allen*, 2019 N.Y. Slip Op 50869 (2nd Dep't. 2019) ("*Allen*"), an appeal from the Honorable Toni A. Bean's order dismissing the accusatory instrument for legal insufficiency. In *Allen*, the defendant was charged with menacing in the second degree based solely upon the statement of a complaining witness. The signed statement, written in English, was allegedly read to the complaining witness in Spanish by a different police officer. Defense counsel in *Allen* argued that the accusatory instrument was facially insufficient because "the factual allegations contained therein were solely based upon the written English statement, which had been translated into Spanish for the complainant without a certificate of translation having been filed attesting to the accuracy of the translation." Giving the prosecution a chance to remedy the defect, The Honorable Toni A. Bean ordered:

the People to file a superseding information, which should include "as supporting documents (1) a verified affidavit from [], the non-English speaking witness, in the language of said individual, including a verification in the foreign language, (2) an English language translation, and (3) an affidavit by the translator stating his qualifications and that the translation is accurate."

For reasons unknown, the People failed to comply. Instead, "At a court conference held on May 29, 2018, the People indicated that they had no intention of filing a superseding information, whereupon the court granted the branch of defendant's motion seeking to dismiss the accusatory instrument." In affirming the lower court, the Second Department held that:

Here, as in *People v Hernandez* (47 Misc 3d 51 [App Term, 2d Dept, 9th & 10th Jud Dists 2015]), there was no indication that the complaining witness had reviewed her written English statement for its truth and accuracy. Similarly, the inclusion in the supporting deposition of the complaining witness's assertion "that the police officer-translator had read the statement to her in Spanish and that what she heard was the truth did not cure the defect, as it cannot be inferred therefrom that the written English version accurately represented what she had told the officer in Spanish or that what the officer had recited to her in Spanish competently communicated the content of the written English version, however truthful the content of the oral Spanish version may have appeared to" the complaining witness . . . Consequently, as in *Hernandez*, a certificate of translation was required to cure the hearsay defect, since the

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vided that the sentence has not yet been imposed. The other provisions become effective August 12, 2019 (ninetieth day after the effective date).

At the May 10 seminar, Acting Justice Fernando Camacho passionately addressed the audience, sharing the knowledge he has gained while presiding over youth courts for the past 15 years. He identified five categories of factors as the reasons why young people commit crimes: homelessness and family environment; substance abuse; mental health; lack of education; and gang life serving as young person's family. Judge Comacho urged Suffolk County residents to come together to create a "network of support and oversight for our youth." He stressed that at risk youth need a safe and secure home environment, and that our schools and other facilities in the community need to create "safe places" where young people can receive the support of substance abuse, mental health and trauma counselors. Communities need to create and support healthy and safe recreational activities, programs promoting social skills and accountability, jobs and job training programs and field trips. Young people need mentors and role models to provide guidance and support. Judge Comacho urged all Suffolk County residents to do what they can to help at risk youths in our community.

Many other dedicated professionals spoke at the seminar; these people are working hard to improve the services and support provided to our youth and other persons at risk of being imprisoned or currently incarcerated or recently released after having served their prison sentences. Sheriff Toulon and Assemblywoman Jean-Pierre, together with all of the seminar speakers, challenged Suffolk County residents to work together to keep our young people out of prison and to provide them with the opportunity to lead happy and productive lives. Judge Comacho and the other speakers are an inspiration for judges, lawyers, and community leaders to do what we can to promote these goals, whether in our day jobs or by volunteering. The establishment of a volunteer network, including training to enhance the quality and effectiveness of volunteer work, could help guide and place those willing to volunteer their time and talents to help make a difference. This is but one component of the greater effort to make a difference in the lives of our youth.

Note: Hon James F. Matthews has been an acting County Court Judge since 2019. He was elected a district court judge in 2014 and prior to that was a Northport Village Attorney for 10 years.

Real Property (Continued from page 31)

Thankfully, in March and April of 2019, the Appellate Division, Second Department, put to bed any misunderstandings stemming from RPAPL 1304 (3). Specifically, in two separate unanimous opinions, the Second Department clarified that a loan modification application is not an "application for the adjustment of debts" within the meaning of RPAPL 1304 (3),[5] and that a borrower's pre-action filing of a bankruptcy petition, which is considered an "application for the adjustment of debts" under RPAPL 1304 (3), does not vitiate a foreclosing plaintiff's obligation to provide the borrower with the statutory pre-foreclosure notice, but rather relieves the foreclosing plaintiff of the 90-day waiting period before commencing suit.[6]

Accordingly, practitioners beware of any summary judgment awarded to a foreclosing plaintiff having successfully argued, in part or in whole, that RPAPL 1304 (3) eliminated the obligation to send the borrower notice under RPAPL 1304 (1) and (2) may be subject to collateral attack by a motion to renew, pursuant to CPLR 2221 (e), based on "a change in law," which includes a "clarification of decisional law."[7]

Note: Justin F. Pane is a litigation attorney at Young Law Group, PLLC, where he provides advice and representation to individuals and businesses in connection with residential and commercial foreclosure actions. Justin's effectiveness as a trial and appellate court litigator is due, in part, to his 10+ years of professional experience in the real estate and mortgage banking industries, as well as to his passion and pursuit to continually embetter his knowledge and understanding of the law."

1. *See, generally, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103-108 (2d Dept 2011); *Citibank, N.A. v Conti-Scheurer*,___AD3d___, 2019 NY Slip Op 02846, *2-3 (2d Dept 2019).

2. *See,* RPAPL 1304 (3); L 2008, ch 472, § 2; L 2009, ch 507, § 1-a; L 2011, ch 62, § 104 (Part A); L 2012, ch 155, § 84; L 2012, ch 155, § 85; L 2016, ch 73, §§ 6, 7 (Part Q); L 2017, ch 58, § 1 (Part FF); L 2018, ch 58, §§ 1, 3-5 (Part HH).

3. *See, e.g., Wilmington Sav. Fund Socy. v DeCanio*, 55 Misc 3d 1215(A), 2017 NY Slip Op 50585(U), *2 (Sup Ct, Suffolk County 2017) (Whelan, J.); *HSBC Bank USA, N.A. v Teramo*, 2018 NY Slip Op 31544(U), *6 (Sup Ct, Suffolk County 2018) (Heckman, J.); *OneWest Bank. FSB v Corrales*, 2018 NY Slip Op 30488(U), *5 (Sup Ct, Suffolk County 2018) (Heckman, J.); *U.S. Bank N.A. v Hoffman*, 2018 NY Slip Op 32267(U), *5 (Sup Ct, Suffolk County 2018) (Heckman, J.); *HSBC Bank USA, N.A. v Janowitz*, 2017 NY Slip Op 32754(U), *5-6 (Sup Ct, Suffolk County 2017) (Heckman, J.).

4. *See, e.g., Wells Fargo Bank, N.A. v Astacio*, 62 Misc 3d 1219(A), 2019 NY Slip Op 50177(U), *2 (Sup Ct, Suffolk County 2019) (Quinlan, J.); *US Bank N.A. v Loguercio*, 62 Misc 3d 1209(A), 2019 NY Slip Op 50077(U), *4 (Sup Ct, Suffolk County 2019) (Quinlan, J.); *Deutsche Bank Natl. Trust Co. v Jimenez*, 62 Misc 3d 811, 829 (Sup Ct, Suffolk County 2018) (Quinlan, J.); *M & T Bank v Rice*, 57 Misc 3d 1214(A), 2017 NY Slip Op 51427(U), *3 (Sup Ct, Suffolk County 2017) (Quinlan, J.); *accord Deutsche Bank Natl. Trust Co. v Corteselli*, 2018 NY Slip Op 31936(U), *4 (Sup Ct, Suffolk County 2018) (Hinrichs, J.).

5. *See, US Bank N.A. v Lawson*, 170 AD3d 1068, 1070 (2d Dept 2019).

6. *See, Marchai Props., L.P. v Fu*,___AD3d___, 2019 NY Slip Op 02511, *3 (2d Dept 2019).

7. *Dinallo v DAL Elec.*, 60 AD3d 620, 621 (2d Dept 2009).

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written English statement was being "used to support the accusatory instrument."

The Second Department, without passing on the propriety of Judge Toni A. Bean's order, did hold that "since the People failed to properly file any certificate of translation, as they were required to do . . . the District Court properly dismissed the accusatory instrument as being facially insufficient." Judge Toni A. Bean's Order and the affirmation of the dismissal should serve as a reminder of this requirement placed upon law enforcement.

Conclusion

Criminal Law Practitioners should be inspecting the legal sufficiency of accusatory instruments. This line of cases should become more applicable as our communities become more diverse. Defense attorneys must be wary of the obligations placed upon the People in prosecuting legally sufficient accusatory instruments. Likewise, law enforcement, perhaps starting with the prosecutors tasked with prosecuting these instruments, must become equipped with the appropriate means to utilize the sworn statement(s) of persons who speak a foreign language.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CA-SAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1. Michael O'Keefe, *Habla español? Some Suffolk cops are learning to say 'sí'*, Newsday (April 6, 2019), https://www.newsday.com/long-island/suffolk/suffolk-cops-spanish-1.29383038.

2. *People v Dreyden*, 15 NY3d 100, 103, 931 NE2d 526, 905 NYS2d 542 (2010) (citing *People v Case*, 42 NY2d 98, 99, 365 NE2d 872, 396 NYS2d 841 (1977) and *People v Hansen*, 95 NY2d 227, 230, 738 NE2d 773, 715 NYS2d 369 (2000).

3. *People v. Dumas*, 68 N.Y.2d 729, 506 N.Y.S.2d 319, 497 N.E.2d 686 (1986).

4. *People v. Carlson*, 2002 NY Slip Op 50173[U], *4 (1st Dep't. 2002) (citing *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71 (1987)

5. *People v. Rivera*, 144 Misc. 2d 565, 565, 545 N.Y.S.2d 252, 252, 1989 N.Y. Misc. LEXIS 535, *1 (N.Y. City Crim. Ct. 1989) (although the information need not be artfully drawn, they must be legally sufficient)

6. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); see also *People v. DiStefano*, 38 N.Y.2d 640, 382 N.Y.S.2d 5, 345 N.E.2d 548 (1976); *People v. Berrios*, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 (1971).

7. *People v. Diaz*, 97 N.Y.2d 109, 116, 735 N.Y.S.2d 885, 761 N.E.2d 577 (2001).

8. *People v. Jin Cheng Lin*, 26 N.Y.3d 701, 718, 47 N.E.3d 718, 730 (2016) (citing *People v. Williams*, 62 N.Y.2d 285, 289, 476 N.Y.S.2d 788, 465 N.E.2d 327 (1984)).

9. *People v. Duncan*, 279 A.D.2d 887, 888, 720 N.Y.S.2d 578, 580 (3d Dep't. 2001) (citing CPL 60.45(2)(a)).

10. See *People v. Brooks*, 2019 N.Y. Slip Op 50859 (1st Dep't. 2019) (citing Uniform Rules for Trial Courts (22 NYCRR) § 200.3).

11. See *People v Edwards*, 59 Misc 3d 148[A], 2018 NY Slip Op 50787[U](1st Dep't. 2018), *lv denied* 32 NY3d 1003 (2018) (citing *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 (2012)).

Standing Up Then and Standing Down Now (A Cautionary Tale) (Continued from page 32)

Jacqueline later concurred with Dr. Desai: "You can't go back to work, Will. "And there it was. My years in the work force from 1962 to 2018 — from a 22-year-old teacher to a 78-year-old attorney. My years were stamped "PAID." I didn't quit, I didn't retire. Something of a different order obtained here. As had happened to Burt Lancaster's "Swede," ill health, a superseding event, had intervened; in my case, improbable to report, it had ultimately been a kindly deus ex machina, it had forced the issue, it had set things right.

My savior Kate drove me home upon my release. She was now the preacher. "Low sodium from now on, Dad, and no processed foods. Also, the four of us have sprung for a bike. Do you promise to use it?"

"Yes."

"How are you feeling?"

"If I felt any better, I'd have to see a doctor."

We both laughed. Giddiness, near-hysteria set in; I was that happy to be free of the hospital. I was soon on a comedic roll.

"Adolph Cukor, the honcho of Paramount Pictures, celebrating his 90th, said, 'If I knew I was going to live this long, I would have taken better care of myself.'"

Kate road-blocked the roll. "Funny, Dad, but will you take care of yourself?"

"I will."

"Are you going to write about your hospital stay?"

"More than likely. There are some folk at risk in their forties and fifties who might be interested. But I'll of course need a clearer head. My brain will have to fire on all cylinders. And I have to gain some distance from the whole thing."

We embraced in the driveway. I went in through the front door, ascended the stairway, entered the bedroom, and collapsed on the bed. In the darkness I heard a raucousness from a neighbor's house; the young 'uns were playing "beer-pong," howling, and altogether raising plain and fancy hell. A car traveled down the street, its passage announced by the thundering of its unmuffled "duel carbs." All was noisy; all was delightful. These were the sounds of life. I fell asleep smiling. I was home.

This essay is dedicated to Basavaraj Desai (cardiology), Khurram Mehtabdin (nephrology), Meenu Heda-Maheshwari (primary care), the Southside staff, the Southside out-patient rehabilitation folk, and my beloved sister-in-law (sister), Barbara Wallace, who served as a devoted home-care aide. All of the foregoing persons displayed both competence and compassion, one being no good without the other. This essay is owed to them, as is my life. Many, many thanks.

Note: William E. McSweeney is a member of the Suffolk County Bar Association.