

THE ALLEGED ESTOPPEL/LACHES DEFENSES ARE FRIVOLOUS

34. The true facts readily establish the utter spuriousness and bad faith of the so-called estoppel and laches defenses. The collateral estoppel defense is alleged in the Eighth Affirmative Defense of Respondent COLAVITA's Verified Answer (Record on Appeal, p. 89) and the identical Answer of Respondent PARISI and reads as follows:

"By virtue of the fact that Petitioners' agents have previously filed a complaint alleging the same cause of action with the New York State Board of Election (sic) which has been dismissed, Petitioners are collaterally estopped from instituting this proceeding".

35. Such alleged defense, although not stated to be on information and belief, is clearly not based on personal knowledge, and, therefore, without probative value for purposes of this application. Nor is it pleaded in the Answer of any other Respondent. Nevertheless, such baseless defense is now adopted by counsel for a number of other Respondents, none of

whom include any assertion of the facts alleged therein or supporting affidavit by anyone with the requisite personal knowledge, as a basis for the denial of a preference.

36. None of the factual allegations set forth in the aforementioned paragraph "EIGHTH" are true. The shortness of time does not permit a separate Affidavit by Eli Vigliano, Esq., my associate counsel on this matter, a lawyer with forty years standing at the bar, and Chairman of the Ninth Judicial Committee, a public interest group which grew out of Mr. Vigliano's observations of the illegal and fraudulent manner in which the 1989 Democratic judicial nominating convention was conducted. (see Affidavit of Eli Vigliano, Esq. contained in the Record on Appeal, pp. 63-73).

According to Mr. Vigliano, on November 1, 1989, he hand-delivered a letter (Exhibit "B") to Governor Cuomo's office in New York City, in which he called for an investigation based on his extensively detailed and documented allegations concerning the subject cross-endorsements contract (the Three Year Plan), as well as the serious violations at the Democratic judicial nominating convention, which he had attended in a non-official capacity. The violations constituted fatal jurisdictional defects, which rendered the 1989 Certificates of Nomination of the three judges, therein named, a legal nullity.

37. After the November 1989 election, the Governor's Office referred Mr. Vigliano's citizen's complaint to the NEW YORK STATE BOARD OF ELECTIONS. In his initial and only telephone

conversation with their Law Enforcement Counsel, Patricia Martinelli, Esq, he informed her that he had three witnesses who could corroborate his allegations, he would procure affidavits from them, if she desired, and that if she wished, he would make available to her a tape recording, which he had made of the 1989 Democratic judicial nominating proceedings. Mr. Vigliano never heard from her or anyone else connected with the agency thereafter.

38. On May 25, 1990, almost seven months later, the NEW YORK STATE BOARD OF ELECTIONS, without prior notification to Mr. Vigliano, and, by their own admission (Exhibit "C") without any investigation whatsoever, the agency closed its file, and sent a letter (Exhibit "A" to Mr. Yasgur's Affidavit in Opposition) to an address, which by that time was no longer current. The original letter was returned to the sender Board, unopened, in its original envelope, with a notation that the addressee was no longer at that address (Exhibit "D").

39. In fact, Mr. Vigliano, was never informed as to the disposition of his November 1, 1989 complaint until October 15, 1990 <sup>1</sup>, when a copy of the May 25, 1990 letter of the NEW YORK STATE BOARD OF ELECTIONS was in the hands of GUY T. PARISI,

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<sup>1</sup> Mr. Ciampoli admitted to me on October 15, 1990 (although not in open court) that he was aware that Mr. Vigliano had never received the May 25, 1990 disposition letter. Mr. Ciampoli and others I thereafter spoke to at the NEW YORK STATE BOARD OF ELECTIONS had no explanation as to why no attempt was made to ascertain the new address of Mr. Vigliano, a lawyer registered under the laws of the State of New York, with an office and home address and telephone number, listed with the New York Telephone Company.

Esq., who referred to it during argument in support of the claim that Petitioners were "collaterally estopped" "from instituting this proceeding".<sup>2</sup>

40. That any lawyer, let alone lawyers for persons and agencies occupying positions of public trust, could seriously argue that the aforesaid citizen's complaint in 1989 could estop Petitioners from initiating an Election Law proceeding based on acts in 1990 in furtherance of the 1989 illegal agreement is demonstrative of how lacking these Respondents are of any real defense to the misconduct and Election Law abuses alleged by Petitioners.

41. The very letter and determination of May 25, 1990 from Peter S. Kosinski, Esq., Special Deputy Counsel to the NEW YORK STATE BOARD OF ELECTIONS, outlined the procedure to be followed in order to initiate a judicial proceeding under the Election Law to review the conduct of judicial conventions, making it apparent that it was too late to challenge the legality

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<sup>2</sup> Mr. Ciampoli, as well as Peter Kosinski, Esq., Special Deputy Counsel, both stated that they had no explanation as to how Mr. PARISI, attorney for Respondent COLAVITA, had acquired possession of the aforesaid May 25, 1990 disposition letter of his agency, responding to what they confirmed was a "Confidential" complaint under established policy of the New York State Board of Elections. Mr. Kosinski claimed not to know the political affiliation of Patricia Martinelli, Enforcement Counsel of his agency, or whether she was related to Ralph Martinelli, former Chief of Police of the Town of Eastchester, where Respondent COLAVITA maintains his private law offices. He promised to get back to me if he could learn that information. To date, he has yet to do so.

of the 1989 judicial conventions and the judicial nominations resulting therefrom.<sup>3</sup>

Nothing in the aforesaid communication in any way suggests that such previous complaint letter would constitute a collateral estoppel to any future proceeding initiated in accord with the instructions set forth--whether such proceedings were to be brought by Mr. Vigliano or anyone else.

42. Respondents' bad faith is further demonstrated by their failure to cite any legal authority to sustain a defense of collateral estoppel or laches against citizen objectors, acting in the public interest, who initiate a Petition under the Election Law. Petitioners were under no compulsion or obligation to have brought such proceedings at any time. Hence, they cannot be barred because they did not bring such proceedings, or any other legal action, last year. Until Respondent EMANUELLI actually resigned from the Supreme Court position to which he was elected in November 1989, which did not occur until August 1990, there was no proof that he did, in fact, consider himself bound by the terms and conditions of the

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<sup>3</sup> Indeed, although Mr. Kosinski took the trouble to point out that "the time to file objections to a nomination or designation of any candidate for public office expires 10 days after the holding of such convention", in fact, his advice was erroneous, since the Election Law is even more stringent--requiring such objections within 3 days (Election Law, Sec. 6-154). It is indefensible that Mr. Kosinski, as Special Deputy Counsel to the New York State Board of Elections, should have misstated such a vital jurisdictional prerequisite which, if relied upon, would destroy a Petitioner's cause of action.

contract which had secured him the nomination.

43. Mr. Ciampoli himself conceded to me in a telephone conversation last week that the relief sought herein, namely, striking the names of the judicial candidates from the ballots, would not have been obtainable in any administrative remedy or in any other type of judicial proceeding than one brought under the Election Law, as was done in the instant case--and that required that Petitioners wait until the September 1990 judicial nominating conventions had taken place.

44. It should be noted that after those conventions and the filing of Petitioners' Objections and Specifications with the NEW YORK STATE BOARD OF ELECTIONS, that agency denied my request for a hearing on the Petitioners' complaints relative to the nomination certificates of the Republican and Democratic Judicial Nominating Conventions. Mr. Ciampoli, as well as Thomas Zolessi, Esq., general counsel to the NEW YORK STATE BOARD OF ELECTIONS, informed me that the agency's practice is not to consider any extrinsic evidence going beyond the face of the Certificates of Nomination. The validity of allegations of fraud or other abuses at the conventions are left to the Court to decide when the judicial review process is commenced.

45. The Court should further note that, in addition to the enforcement and other powers and duties specified by law, the Election Law gives the State Board of Elections broad enforcement powers, including, inter alia, the power to hold hearings, conduct investigations, initiate judicial proceedings, including

criminal prosecutions (see Sections 3-102, 3-104)--all designed "to encourage the broadest possible voter participation in elections" (Sec. 3-102, para. 13).

46. Despite the enforcement powers vested in Respondent NEW YORK STATE BOARD OF ELECTIONS, it abysmally failed to exercise them after receiving Mr. Vigliano's aforesaid November 1, 1989 complaint from the Governor's Office. And, inexplicably, it opposes the instant preference application, by urging that citizen objectors, acting pro bono, who do the job the agency fails and refuses to do, should have their Election Law proceeding summarily dismissed--simply because the Governor saw fit to direct that complaint of Mr. Vigliano concerning voting rights violations in the prior year to the agency entrusted with the obligation of enforcement of the Election Law.

47. The aforesaid bizarre and shocking behavior by a governmental enforcement body, which not only attempts to foreclose a judicial investigation of Election Law abuses it failed to investigate--but seeks sanctions against Appellants' pro bono counsel for bringing the case on for judicial review, merits not only censure and sanctions by this Court under Part 130 of the Rules, but a call to the Governor for appropriate attention.

ELI VIGLIANO

*Attorney at Law*

WESTCHESTER FINANCIAL CENTER  
50 MAIN STREET • TENTH FLOOR  
WHITE PLAINS, NEW YORK 10606  
(914) 882-2006

BY HAND

November 1, 1989

The Honorable Mario M. Cuomo  
Governor of New York  
Two World Trade Center  
New York, New York

RE: Election Fraud  
Ninth Judicial District

Dear Governor Cuomo:

On behalf of the Ninth Judicial Committee convened on October 5, 1989, we implore you to invoke your authority as Governor of this State to prevent the perpetration of an election fraud on the voters living in the Ninth Judicial District.

Enclosed herewith are the pertinent documents, prefaced by an index, to support our conclusion that your immediate intervention is required.

On August 23, 1989, I attended a meeting of the Executive Committee of the Westchester County Democratic Committee ("WCDC"). To its credit, meetings of the WCDC Executive Committee are open to enrolled Democrats. A resolution was adopted unanimously, with but one abstention, in the form annexed (Exhibit 1), on the express condition that the Executive Committee of the Westchester County Republican Committee ("WCRC") scheduled to meet the following evening adopted the identical resolution, except for employing the name "Republican" rather than "Democratic".

According to a press report Exhibit 2, WCRC Executive Committee did adopt the counterpart resolution at its meeting the following evening. We were told, prior to the meeting, that it was open only to members of the Executive Committee, and hence were unable to observe the proceedings.

The news stories relating to this subject which preceded and followed the meetings are enclosed as Exhibits 3A, B, C, D, E, and F.

*Exhibit "B"*



On September 19, 1989, I attended the Democratic Judicial Convention for the Ninth Judicial District accompanied by two members of our Committee. At about 8:30 P.M. the people who had been socializing at the bar in the rear of the room were asked to be seated. Louis Brevetti, Esq., Chairman of the WCDC Law Committee called the meeting to order, stated that he observed a quorum was present, and that the convention could then proceed to conduct its business. All that followed was performed in accordance with a prepared script (the very words used by the Chairman) in an attempt to comply with the specific provisions found in the Election Law, §6-126.

We contend that the certification of the candidates purportedly duly nominated was, and is, fatally defective for the following reasons:

- 1) The call to order was made after 8:30 P.M., more than one (1) hour after the time fixed in the call.
- 2) The number of seats available for delegates and alternates was insufficient in number, but 112, when 218 were required.
- 3) Mr. Brevetti failed to perform initially his only, and most important function, namely calling the roll.
- 4) It is extremely doubtful, based on a superficial headcount, that 55 elected delegates and/or alternates were present to constitute the required legal quorum. The failure to call the roll renders the work of the convention, as reflected in the minutes, void and unenforceable.
- 5) The failure to call the roll when the vote for the Temporary Chairman occurred likewise renders the work of the convention, as reflected in the minutes, void and unenforceable.
- 6) The roll of the convention certified by the Executive Director, Exhibit 4 shows on its face that the requirement for proportional representation found in Election Law §6-124 was violated. Votes were undoubtedly cast for you in the election held in 1986, in the 92 and 93 Assembly Districts of New York State. Parenthetically, the same fatal defects appear to affect the rolls filed for the Republican Party, Conservative Party and Right to Life Party in the Ninth Judicial District.

Based on the foregoing recitals which we can support with affidavits, clearly the Certificates of the a) Minutes and b) Nominations filed on September 25, 1989, Exhibit 5 and 6 were, and are, false and fraudulent, and constitute a violation of Election Law §17-120, a felony.

Hon. Mario M. Cuomo

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November 1, 1989

The actions of the Executive Committee, the Judicial Convention and the filing of the false and fraudulent certificates collectively, are in violation of Election Law §17-154 and 156 -- See also People v. Hochberg, 1976, 87 Misc. 2d 1024, 386 N.Y.S. 2d 740.

As you may surmise, we were not permitted to observe the workings of the Republican Convention, Ninth Judicial District held on September 22, 1989. Although repeatedly requested, we were told that it would be closed to all but Delegates, Alternates and Party officials. However, we believe that violations of the Election Law probably also occurred.

We request your assistance because the District Attorney of Westchester County is currently engaged in a contested election for the office. Additionally, the political nature of our complaint, may call for your appointing a special prosecutor. When not only the spirit of Article 6, Section 1, of the State Constitution mandating the election of Justices of the Supreme Court, is violated, but the letter is arrogantly ignored, the citizens are entitled to have the wrong redressed. Or, Attorney-General Abrams should immediately investigate.

You must also note that reports indicate that Albert J. Emanuelli, Esq. has promised that he intends to resign the office of Supreme Court Justice after only eight months and become the cross-endorsed candidate for Surrogate of Westchester County (with election virtually guaranteed) and permit County Court Judge Francis A. Nicolai to become the cross-endorsed candidate for the vacancy thereby created (with election also virtually guaranteed). Note also the blatant arrangement engineered for 1991.

In our opinion, it constitutes an election fraud for Mr. Emanuelli to hold himself out to the voters as a candidate impliedly representing that he will serve the full term (14 years), in the meantime, full well knowing that he intends to "change trains at Jamaica" for the Surrogate's Court next November. Counsel at the State Board of Elections recently informed us that the 1974 law seeking to assure truth in advertising by political candidate was struck down by the Federal Courts, and probably justifiably so on First Amendment grounds. The Federal Courts were obviously relying in such cases, on the watchdog candidate in a contested election to protect the voting public. But here we have no such protection.

Incidentally, also note that Cocktail Parties, (\$150 a head), and Breakfasts (\$50 a head), still took place last month, giving the lie to the claim that cross-endorsements would obviate the need for judicial candidates soliciting contributions with a "tin cup", from the very lawyers who will appear before them. Exhibits 7A, B, C, and D.

ELI VIGLIANO

Hon. Mario M. Cuomo

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November 1, 1989

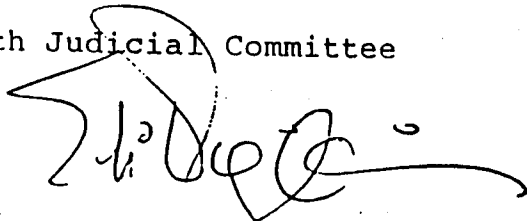
Our Committee has been formed to establish a Pre-Nomination Judicial Screening Panel patterned in the American Bar Association model and the procedure employed in New York County for 20 years. Perhaps, your Judicial Screening Panel can also furnish assistance to us. The Chairman of a New York County panel this year, Joel Bernstein, Esq. has volunteered to assist us in achieving our goal. We expect to solicit the support of the countless community service organizations vitally affected by this subject.

Based on the factual recital above outlined - which we can substantiate with evidentiary proof, oral and documentary - we respectfully request that you utilize your office of Governor of this great State, and also as a member of the Bar who took the oath of office seriously upon his admission, and acknowledged as a respected teacher of the law, to uphold its majesty, and grant us relief to which we are entitled and deserve.

Respectfully yours,

Ninth Judicial Committee

By:

A handwritten signature in black ink, appearing to read "Eli Vigliano", written over a faint circular stamp or watermark.



STATE OF NEW YORK

STATE BOARD OF ELECTIONS

P.O. BOX 4, ONE COMMERCE PLAZA, ALBANY, NY 12260

Phone: (518) 474-6220

FAX: (518) 486-4068

Melvin S. Barasch  
Chairman

R. Wells Stout  
Vice-Chairman

Evelyn J. Aquila  
Commissioner

Helena M. Donohue  
Commissioner

Thomas W. Wallace  
Executive Director

W. Michael Losinger  
Deputy Director

Thomas P. Zolezzi  
Special Counsel

Patricia Martinelli  
Enforcement Counsel

October 17, 1990

Eli Vigliano  
C/O Doris L. Sassower, P.C.  
283 Soundview Avenue  
White Plains, NY 10606

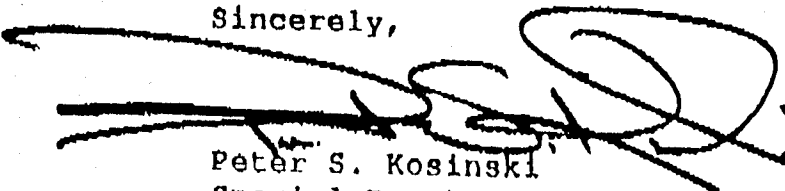
Dear Mr. Vigliano:

Pursuant to our conversation of October 16, 1990 regarding the complaint which was filed with our office regarding allegations of wrongdoing during the 1989 campaign in the Ninth Judicial District, I am enclosing a copy of the state Election Law regarding the enforcement powers of the State Board of Elections. Section 3-104 Election Law.

The two step process which is outlined in the statute provides that this office shall upon the receipt of a complaint, determine whether a substantial reason to believe a violation of the Election Law has occurred. If such substantial reason is determined to exist by this Board, it shall then conduct an investigation by this office. The determination of May 25, 1990 regarding the complaint brought to the attention of this office by yourself, was determined by this Board to not raise a substantial reason to believe a violation occurred. Thus, no investigation was conducted by this office of this complaint. ]\*

If you have any further questions regarding this matter, please contact me.

Sincerely,

  
Peter S. Kosinski  
Special Deputy Counsel

PSK/smb  
enc.

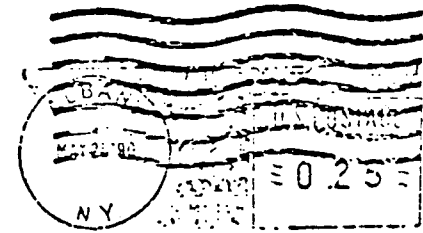
Exhibit "C"

AFTER 5 DAYS RETURN TO  
STATE OF NEW YORK  
STATE BOARD OF ELECTIONS



P.O. BOX 4  
ONE COMMERCE PLAZA  
ALBANY, NY 12260

**VOYE**  
Protect 200 Years  
Of Democracy



**ATTEMPTED UNKNOWN**

Eli Vigliano  
Attorney At Law  
Westchester Financial Center  
50 Main Street, 10th Floor  
White Plains, NY 10606

**RETURN TO SENDER**



**ATTEMPTED UNKNOWN**

Exhibit "D"-1

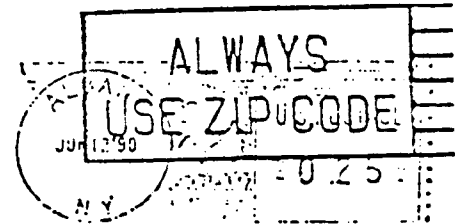
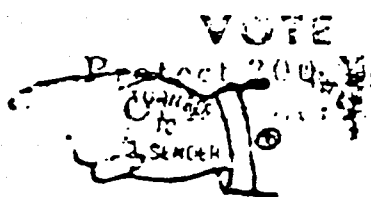
AFTER 5 DAYS RETURN TO  
STATE OF NEW YORK  
STATE BOARD OF ELECTIONS



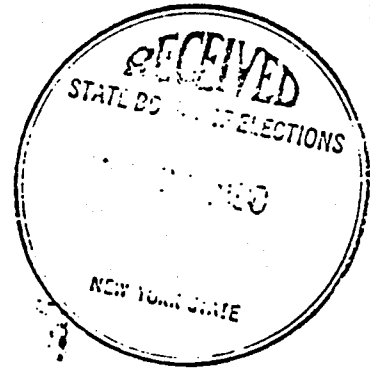
P.O. BOX 4  
ONE COMMERCE PLAZA  
ALBANY, NY 12260

RETURN TO SENDER

Eli Vigliano  
50 Main Street, 10th Floor  
White Plains, NY 10606



ATTEMPTED UNKNOWN



ATTEMPTED UNKNOWN

Exhibit "D-2"