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# GOLDFEDER'S MODERN ELECTION LAW

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*First Edition*

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*By*  
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*To Alice*

# INTRODUCTION

This book is designed to be user-friendly — for the bar and bench, and for candidates as well. I try to present the arcane and hypertechnical provisions of New York’s Election Law in a lucid manner. Sometimes that is relatively easy. For example, the number of petition signatures required for a candidate in a political party primary is fairly straightforward. Sometimes, on the other hand, the law is so convoluted that an intelligible presentation is very demanding. An example of this is explaining how to fill a vacancy when a public official dies in the middle of her term. The federal or state constitution might be implicated, as well as a county or city charter. A review of both the Election Law and the Public Officers Law is also necessary. And the analysis all depends on the office involved, and which day in which year of her term the official dies. In short, the scenarios are difficult to comprehend, let alone present. I hope I have succeeded in explaining the complicated issues as well as the simple ones that election lawyers routinely confront.

I also had to decide which topics to cover, and which to treat in greater depth. I hope that I have addressed the most critical and recurring legal issues, and in a way that will be useful for practitioners as well as judges and hearing officers who decide election cases. By necessity, I have not covered every possible problem that might arise.

Unlike previous works on the subject, I have made numerous references to ethical considerations that election lawyers face. I have also included a full chapter that presents a series of hypotheticals. I hope this will be helpful.

Read the text, but also read the footnotes. I have relied on notes to cite supporting cases and provide commentary. I did this so that the flow of the text would not be interrupted. But there is a great deal of rich material in the footnotes that should not be missed, and is required reading to appreciate fully the meaning and nuance of the law. The notes also provide an excellent foundation for those who wish to reform our laws.

This is our first edition. I will revise it annually, adding cases, articles and commentary to make sure that the bench and bar have

the most up-to-date version and interpretation of New York's Election Law. This book is the product of my own intellectual prism and my own experiences as an election lawyer, but, in this age of interactive communication, I want to hear from you. Please send me your questions and comments. I will be pleased to receive them all. You can reach me at *Goldfeder@law.fordham.edu*.

\* \* \* \*

I am often asked how I became an election lawyer. The simple truth is that my long-time interest in politics and my desire to use my legal skills in a meaningful way intersected over twenty-five years ago. It was during the 1981 primary campaign for the Mayoralty of the City of New York. I was volunteering for an insurgent candidate who wished to go head-to-head with incumbent Mayor Ed Koch. My candidate, then-Assembly Member Frank Barbaro, wanted to eliminate the other insurgent candidates. I was asked to lend my legal skills, such as they were at the time, to the effort. The Barbaro campaign's legal team, led by the great and wonderful Paul Asofsky, wanted to knock Melvin Klenetsky, another anti-Koch candidate, off the Democratic party primary ballot. Our position was that Klenetsky was not a "real Democrat"; that he and his group of newly-registered Democrats were "raiding" the party, and did not adhere to its core principles. There is a provision in the Election Law that allowed us to pursue this cause of action.

Needless to say, I had not studied Election Law in law school. Prior to *Bush v. Gore*, the subject was not part of the usual law school curriculum. But I started learning it at the feet of a master. Paul was actually a tax lawyer, and a very smart and careful election lawyer on the side. However, Paul was more than a smart lawyer. He was a terrific mentor. And mentors in this profession are very important to young lawyers.

In our attempt to knock Klenetsky off the ballot, I spent many days and nights in the dingy, dirty New York City Board of Elections, scrutinizing "buff cards" (buff-colored voter registration cards); questioning him and his group about their beliefs; arguing to a referee who had little understanding or interest in the great political battle we were waging. We did this at a long bridge-table in a cavernous room, around which six or eight of us sat and worked; we had to yell to be heard because we were surrounded

## INTRODUCTION

by a dozen or so other tables of lawyers and candidates, each making their own pleas to stay on the ballot or knock off an opponent.

We lost our case. Koch trounced Barbaro and Klenetsky in the primary, and went on to win a second and then third term. I was hooked, though. It was an exhilarating and intellectually challenging experience. And I could practice my profession in support of candidates and elected officials I personally supported.

My election law career naturally developed over the years. I was fortunate enough to become counsel for many candidates, from local to statewide office to President of the United States, and had the privilege of appearing before smart, dedicated referees, Supreme Court and Appellate Division Justices, Judges of the Court of Appeals, and federal judges as well. I was also a candidate for party and public office myself — feeling the thrill of victory and the heartbreak of defeat. I hope that my own political experiences made me a smarter, more empathic election lawyer.

I have also had the distinct privilege of having excellent colleagues in the small but supportive election law bar. In addition to Paul Asofsky, I have learned my profession from many colleagues and adversaries to whom I owe a great deal of thanks. I am particularly grateful to my friend and mentor Dudley Gaffin. I also wish to thank Henry Berger, Frank Bolz, Jack Carroll, Marty Connor, Ray Dowd, Carol Feinman, Tom Garry, Leo Glickman, Arthur Greig, Frank Hoare, Craig Kaplan, Douglas Kellner, John Klotz, Carl Landicino, Larry Laufer, Robert Levinsohn, Larry Mandelker, Aaron Maslow, Randy Mastro, the late Bob Muir, Mike Reich, Steve Richman, Steve Russo, Joe Sandler, John Siegal, Tom Spargo, Tom Tedeschi, Paul Wooten, and Stanley Zalen. The late Appellate Justice, Samuel J. Silverman, for whom I served as Law Secretary almost thirty years ago, taught me many lessons about being a lawyer, including the importance of a short declarative sentence. (I hope this book does not let him down.) Four non-lawyers — Mike Nieves, Arnie Linhardt, Bobby Berlin and Lois Marbach — also taught me invaluable lessons, not the least of which was that the election lawyer is not necessarily the smartest guy in the room.

I would not have had the opportunity to write this book, however, were it not for my terrific students at Fordham Law School. Teaching “Election Law” for the last several years has been intellectually rewarding and deeply satisfying. It may sound trite, but truisms

usually do: I have learned much more from my students than they can imagine. Teaching has made me smarter; it has also made me more humane. And it gives me the opportunity to help train and guide our profession's new lawyers. My experience at Fordham also allows me to think through the important issues I have faced as a practitioner. I am deeply grateful to Dean William Michael Treanor of Fordham Law School, Associate Dean Matthew Diller, and former Dean John Feerick. They have given me a great opportunity that I continue to cherish.

As I was putting the finishing touches on this book, I was asked to use my skills and expertise in a wholly new way. New York State Attorney General Andrew Cuomo asked me to serve as his Special Counsel, and I was delighted and honored to accept this assignment.\* It is now my privilege to teach and write about the Election Law and let my former colleagues continue its practice. Attorney General Cuomo has given me a unique opportunity to help bring greater integrity to our government. I thank him for the chance to serve the people of the State of New York.

Finally, I am indebted to Paul Kenny, currently the Chief Clerk of the Appellate Term of the Second Department, but previously the election law guru of the Supreme Court, Kings County, who helped me conceptualize several issues in this book; Aaron Maslow, my esteemed colleague who is an election law genius, who generously read and improved my manuscript; Richard Maltz, one of New York's best legal ethicists, who guided me through my responses to the hypotheticals I pose in Chapter 10; and former students Jeff Margolies, Esq., and Vincent Volino, who helped make sure my citations were current and correct. I would not be human if I did not want to blame someone else for any errors in this book; but I cannot. If they exist, they are mine. But, remember what I said when I started this Introduction: I want your comments; if you think that there are corrections to be made, please let me know. I want the Second Edition to be even better.

Of course, as is the prerogative of every author, even those who write treatises for lawyers and judges, I want to thank my loving and wonderful family. I thank my wife Alice Yaker for her love, patience and support. She impressed me when we were students in

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\* Of course the views expressed herein are mine and not those of the New York State Department of Law.

## INTRODUCTION

law school together, and she continues to impress me in many ways, not the least of which is in providing great leadership in women's health care. As the Executive Director of SHARE, a group that provides free support services for women with breast or ovarian cancer, she is truly making a difference in real people's real lives. And she has always been there for me personally and professionally. I am truly lucky. I am also grateful to our daughter Carly Meyer, an erstwhile pastry chef, who has just taken the bar and is joining our profession; our son Peter Meyer, the owner of Lincoln Street Coffee in Newton, Massachusetts; daughter-in-law Larissa Nekhlyudov, physician, researcher and assistant Professor at Harvard Medical School; and our two grandsons, Jonah and Andrew, about whom I never stop talking.

Enough, already. Read the book, and use it. I hope it helps.

New York City  
August 2007

# TABLE OF CONTENTS

	Page
Introduction .....	v
<hr/>	
Chapter 1 Getting on the Ballot—Introduction .....	1
Chapter 2 Is the Candidate Eligible to Run? The Residency Issue .....	6
Chapter 3 Getting on the Ballot: The Petitioning Process .....	13
A. Timing is Everything .....	13
B. The Petition as a Legal Document .....	16
C. The Requirements .....	17
1. Party and Symbol .....	17
2. The Candidate’s Name .....	17
3. Public Office or Party Position .....	19
4. Residence .....	20
5. The Committee to Fill Vacancies .....	21
6. The “Signature Section” of the Petition .....	23
7. Statement of Witness .....	25
D. Rules for Petitioning .....	27
1. When Petitions May Be Circulated .....	28
2. The Signer Must Sign Her Own Name .....	29
3. The Signer Must Sign Her Name in the Presence of the Subscribing Witness .....	30
4. Dates and Addresses of the Signers .....	34
5. Correcting Errors .....	35
6. The Subscribing Witness Statement Must Be Fully and Accurately Completed .....	36
7. Duplicate Signatures .....	39
8. The Role of the Candidate .....	40
9. The “Cover” Sheet .....	42
10. Filing an Acceptance .....	45
Chapter 4 Staying on the Ballot: Objections, Board Hearings and the Judicial Process .....	46
A. The General Objection .....	48
B. Specifications of Objections .....	50
C. The Administrative Hearing at the Board of Elections .....	50
D. Supreme Court .....	52
1. Disqualifying a Candidate .....	52

TABLE OF CONTENTS

2. Protecting One’s Candidacy .....	54
3. Proper Procedure .....	56
E. The Trial .....	59
F. Appeals .....	62
Chapter 5 Getting on the Ballot: Alternative Methods .....	64
Chapter 6 Sudden Death, Convictions, Disqualifications and Other Extraordinary Situations.....	69
A. Governor or Lt. Governor.....	72
B. Attorney General or Comptroller.....	73
C. Assembly Member or State Senator.....	75
D. Member of Congress.....	77
E. United States Senator .....	79
F. Other Offices.....	79
G. Vacancy in Designations or Nominations .....	80
Chapter 7 Party Time in New York.....	83
A. Welcome to the Party.....	85
B. All Politics Isn’t Local Anymore (Again).....	85
C. If You’ve Got it, Flaunt it.....	87
D. Crashing the Party .....	88
Chapter 8 Money.....	94
Chapter 9 Election Day .....	105
A. Pre-Election Day Protection .....	108
B. Election Day Protection .....	111
1. The Polling Site: Personnel .....	112
a. The Election Inspector.....	112
b. Chairperson of the Election Inspectors .....	113
c. The Polling Site Coordinator .....	114
d. The Poll Clerk .....	114
e. Interpreter.....	114
f. Additional Personnel.....	115
g. The Police.....	115
2. The Polling Site: Prescriptions and Proscriptions.....	116
a. Hours.....	116
b. Materials Needed.....	116
c. Campaigning.....	117
d. Election Materials.....	118
e. The “Guard Rail” .....	118
3. The Poll Watcher.....	118
a. Her Role .....	118
b. Eligibility .....	120
c. Come Early; Stay Late: The Poll Watcher’s Job .....	120
(i) 5:45 am.....	120
(ii) Where is Everybody? .....	120

TABLE OF CONTENTS

(iii) She’s Winning Already? .....121

(iv) Okay! Time to Vote! .....121

    (a) Verifying Voter Registration .....121

    (b) What Happens if the Voter’s Name is Not in the  
        Voter Registration Book? .....122

    (c) Is an ID Required? .....125

    (d) Challenged Voters .....126

    (e) Voters Needing Assistance.....126

    (f) Machine Breakdowns .....127

    (g) Voter Intimidation and Improper Campaigning .....129

    (h) Closing the Polls.....129

    (i) Keep in Touch! .....131

    C. Post-Election Day .....131

Chapter 10 Some Hypothetical Ethical Issues for Election  
    Lawyers.....136

Table of Cases .....151

Statutes and Other Authorities .....159

Table of Names.....165

Subject Index .....167

**PART II**

Forms, Rules and Reports ..... 1

**PART III**

NYS Election Law..... 1

NYS Board of Elections Rules and Regulations.....335

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About the Author.....Back

# CHAPTER 1

## GETTING ON THE BALLOT—INTRODUCTION

The rules that govern how a candidate gets on the ballot have become more liberalized in the last few years, and are fairly straightforward.<sup>1</sup> The Election Law sets out the requirements and the state and county Boards of Elections supplement the law with their own rules.<sup>2</sup> A candidate should consult political party rules as well.<sup>3</sup>

The candidate must start with the obvious first issue — identifying the election in which she hopes to run. There are several kinds of elections.

Is she running in a general election, which is held in New York on the Tuesday after the first Monday in November?<sup>4</sup> This is an election in which voters actually *elect* a candidate to office. There are two ways of obtaining a place on the ballot in a general election: by designation of an established political party (either in a primary or by a party convention), or by nomination of an “independent body.”

Is the candidate running in a special election?<sup>5</sup> It is “special”

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<sup>1</sup> Election Reform Act of 1992 (L 1992, ch 79); Ballot Access Law of 1996 (L 1996, ch 709).

<sup>2</sup> See 9 NYCRR Part 6200; New York State Board of Elections, <http://www.elections.state.ny.us>.

<sup>3</sup> Party rules are required to be filed with the Board of Elections. N.Y. Elec. Law §2-114 (McKinney).

<sup>4</sup> 2 U.S.C. §7 (1934); N.Y. Const. art. III, §8; N.Y. Const. art. IV, §1; N.Y. Const. art V, §1. Not all elections are held on this date of course. See N.Y. Elec. Law §§15-104, 15-106 (McKinney). See N.Y. Const. art. XIII, §8 (requires election of “city officers, including supervisors and of county officers” in odd-numbered years). See also William Greenawalt and David Koeningberg, *Move Village Elections to November*, NY State Bar Association Journal (November/December 2006).

<sup>5</sup> N.Y. Elec. Law §6-114 (McKinney). There is, from time to time, some consternation as to whether or when a special election will be called to fill a vacancy for public office. When there is a vacancy in the state Legislature, for example, the Governor has discretion as to how to exercise his powers under Public Officers Law §42(3). *Alessi v. Pataki*, 21 A.D.3d 1141 (3d Dep’t. 2005) (Governor set the special election on the date of the primary election). A proclamation announcing a vacancy and the date of a special election also triggers certain statutory deadlines for party caucuses and, for New York City municipal offices, petitioning. Potential candidates should, therefore, pay careful attention as to the timing of the proclamation because, if caught unaware, precious time for an already truncated petition period can be lost. See *Nieves v. Centeno*, NYLJ, Oct. 22, 2002, at 20, col 6 (Sup. Ct. Kings Co.), where the court held that the proclamation was “issued” as of the date signed by the Mayor even though it was not received by the City Clerk for three days. New York City Charter §25(b)(1).



*The Thrill of Victory*

because the candidate elected on that day takes office immediately, and only for the remainder of the term of the public official who has vacated the office.<sup>6</sup> In these elections there are no primaries, and established political parties designate a candidate to compete in the special election through party procedures.<sup>7</sup> Independent bodies may petition to place its candidates on the election ballot as well.

Is she running in a political party's primary election? This is an election in which voters enrolled in an established political party designate (or nominate) a candidate to run in the general election. It is also an election in which voters enrolled in an established political party elect party officers.

Is she running in a non-primary "procedure" by a political party to nominate its candidate for public office? This is a nominating convention or caucus held pursuant to the rules of the state party or party committee<sup>8</sup> to designate its candidate in state-wide elections<sup>9</sup> or special elections.<sup>10</sup>

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<sup>6</sup> In certain circumstances, the individual elected in a special election serves only until the next general election; the candidate elected at the general serves for the remainder of the term. *See, e.g.*, New York City Charter §25; N.Y. Pub. Off. Law §42(4-a) (McKinney).

<sup>7</sup> The statute providing for special elections without a primary election has been upheld, finding no constitutional rights have been violated. *Dorfman v. Berman*, 186 Misc.2d 415 (Sup. Ct. Albany Co. 2000). *See also Maldonado v. Pataki*, 2005 WL 3454714 (E.D.N.Y. 2005); *Shapiro v. Berger*, 328 F.Supp.2d 496 (S.D.N.Y. 2004).

<sup>8</sup> Candidates (and party leaders) must pay careful attention to the rules of the party or party committee. It cannot be sufficiently stressed that the law relating to such nominations, as well as the pertinent party rules, must be strictly adhered to. Otherwise, the nomination is in danger of being nullified. *See, e.g., Gage v. Hammond*, 309 A.D.2d 1061 (3d Dep't. 2003) (the court held that both the notice of the meeting and the filing of the certificate of nomination were improper).

Having said that, candidates should be alert to the fact that political party rules can sometimes be misleading, and attention to custom and practice is also necessary. For instance, according to the rules of the Democratic Party of New York County in effect in 1992, in the event of a vacancy in a public office that crossed county lines the party nomination for a special election was to be filled by the chair of the New York County Committee and the chair of the County Committee of the other county. In that year, Congressman Ted Weiss represented a district that was primarily in Manhattan but also included a large swath of Western Brooklyn. He died a day before the September primary (and won re-nomination). As a result, a special election was called to fill the remainder of his term. Despite the fact that the rules permitted two individuals, the chairs of the New York and Kings County Committees, to select the Democratic nominee, the rules permitted and custom "required" that all of the county committee members representing the congressional district from New York County should meet to designate the party nominee. That was done. Thus, when the two Chairs formally met, their "decision" had been preordained by the county committee meeting of approximately one thousand party committee members in Manhattan. West Side Assembly Member Jerrold Nadler won the nomination at the New York County Committee meeting, and went on to be elected.

<sup>9</sup> N.Y. Elec. Law §6-104 (McKinney). The fact that the law allows a party to designate a

The Election Law defines a political party as an entity that received at least 50,000 votes for Governor in the prior gubernatorial election.<sup>11</sup> In 2007, there are five political parties in New York: Democratic, Republican, Independence,<sup>12</sup> Working Families and Conservative. The Liberal Party lost its status as a political party in 2002 when its candidate for Governor failed to receive a sufficient number of votes. An “independent body,” a group that has not met the requirements of a political party (or, like the erstwhile Liberal Party, has failed to continue to satisfy the requirement to be a party), lacks the ability to nominate a candidate for the general election in a primary or at a convention. Instead, it must choose a name and symbol for itself and petition to get on the ballot in the general election.<sup>13</sup> The name and symbol of the group cannot be similar to an established party’s name or symbol, or that of another independent group that has previously filed a petition in a particular race.<sup>14</sup>

Thus a candidate can seek a place on the general election ballot by winning an established party’s designation or by obtaining an independent group’s ballot line in November. Only in certain circumstances, such as for elections for state-wide office or nomination in a special election, may a candidate become a political party’s designee for the general election through a state convention or party caucus.<sup>15</sup> Except for these circumstances, then, the general route is

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candidate for state-wide office through a convention procedure, obviating the necessity of petitioning, does not mean that a candidate who was not designated and must petition to obtain ballot status has had any rights violated. *McMillan v. New York Board of Elections*, 234 F.3d 1262 (2d Cir. 2000). Furthermore any member of a political party—whether or not designated as the official candidate—may use the name and emblem of that party on the petitions she circulates when seeking a place on the party’s primary election ballot. *Donohue v. Neild*, 2002 WL 32071700 (Sup. Ct. Albany Co. 2002).

<sup>10</sup> Candidates should not assume that the method of nomination chosen by party leaders is correct, and should independently ascertain whether a nomination may be had by caucus, not a primary. *See, e.g., O’Brien v. Seneca County Board of Elections*, 22 A.D.3d 1036 (4<sup>th</sup> Dep’t. 2005) (court held that the nomination procedure was a nullity in that the elected office was a county office for which nomination must be by primary election, not caucus); N.Y. Elec. Law §§6-110, 6-119 (McKinney); *cf.* N.Y. Elec. Law §6-108 (McKinney).

<sup>11</sup> N.Y. Elec. Law §1-104(3) (McKinney).

<sup>12</sup> The Independence Party is not to be confused with voters who identify themselves as “independents,” having chosen to enroll in no political party when they register to vote.

<sup>13</sup> N.Y. Elec. Law §6-138 (McKinney).

<sup>14</sup> If the Board of Elections with whom the petition is filed considers that the name or symbol improperly mimics an existing party’s name or symbol, or that of another independent body’s already-filed petition, the Board will permit the filer to modify it. If the offending name or symbol is not properly changed in a timely manner, the Board will do so. The object is to ensure that the voters are not confused. *Id.*

<sup>15</sup> The other major exception concerns candidates for Justice of the Supreme Court, who

through a party primary, whose winner is automatically placed upon the general election ballot.

In order for the candidate to run in an established party's primary election, she must be properly enrolled as a member of the party and eligible to run in the primary.<sup>16</sup> One exception to this rule is when the party authorizes a non-enrollee to be its candidate pursuant to properly adopted and filed rules. This procedure is colloquially named a Wilson-Pakula, after the authors of the relevant provision of the Election Law.<sup>17</sup> Another exception is a candidate for Judge: she may run in a primary election without being enrolled.<sup>18</sup>

Whether a member of the party or a legally authorized non-enrollee, candidates in party primaries must petition to get on the ballot, as must candidates from independent bodies seeking a place on the general election ballot — and most of the legal issues and controversies in New York involve this process. Accordingly, much of this book will address the petitioning process.

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are nominated for the general election by the political parties at judicial conventions. This procedure was recently declared unconstitutional in *Lopez-Torres v. New York State Board of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d. Cir. 2006), *cert. granted*, 75 U.S.L.W. 3417 (U.S. Feb. 20, 2007) (No. 06-766). The United States Supreme Court granted certiorari, and the convention system remains in place pending the high court's ruling.

<sup>16</sup> N.Y. Elec. Law §6-120 (McKinney). New York is, for the most part, a “closed primary” state. An excellent discussion of the various kinds of primaries is found in *Tashjian v. Republican Party of Connecticut* 479 U.S. 208 (1986). In *Tashjian*, the Supreme Court of the United States held that a political party's right of association, as protected by the First and Fourteenth Amendments of the Constitution of the United States, barred the state from prohibiting a party from inviting non-members who were not enrolled in another political party to vote in its primary election. The Independence Party of New York has opted to do just that. It should be noted that *Tashjian* does not extend to non-enrollees who are members of another established political party. *See also* *Clingman v. Beaver*, 544 U.S. 581 (2005) (where a party allows non-enrollees who are not members of another party to vote in its primaries, the free associational rights of members of the other parties are not violated).

Whether or not a party chooses to invite independent non-enrollees into its primary, a state is forbidden to *compel* a political party to do so. *California v. Jones*, 530 U.S. 567 (2000) (banning state imposed blanket primaries).

These cases have no bearing on whether a state can require or allow certain offices to be voted upon in non-partisan elections, where party enrollment is irrelevant.

<sup>17</sup> N.Y. Elec. Law §6-120 (McKinney). Of course, for a non-enrollee to be the candidate of a political party, the correct authorizations must be completed properly and filed timely. *See, e.g., Gross v. Hoblock*, 6 A.D.3d 933 (3d Dep't. 2004).

<sup>18</sup> N.Y. Elec. Law §6-120(4); *Grancio v. Coveney*, 96 A.D.2d 917 (2d Dep't. 1983).