THE SUFFOLK LAWYER

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Voiding recorded instruments

By Lance R. Pomerantz

A recent Florida case caused quite a stir among the land title bar nationwide. The court held that documents that appeared in the public records for only 73 minutes afforded constructive notice to a subsequent buyer and lender, even though their transactions occurred more than three years later. *Mayfield, et al. v. First City Bank Of Florida,* 95 So.3d 398 (2012).

Photo by Barry Smolowitz

Suffolk County Administrative Judge C. Randall Hinrichs, left, Allison Shields, Judge Vincent Martorana, Judge William Rebolini, and SCBA President Arthur Shulman at the annual SCBA Holiday Party. (See more photos on page 14)

The Mayfield Case

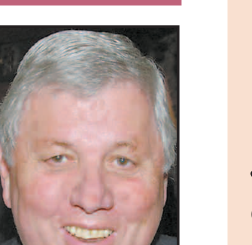
Lance Pomerantz

In 2006, Bluewater Real Estate conveyed property to Wright & Associates. In connection with the purchase, Wright & Associates gave a mortgage to First City Bank. The deed and the mortgage were soon delivered to the County Clerk's office where they each were endorsed with a "register number," and entered into the computerized recording system. Shortly after entering the documents in the computer, the clerk independently realized that she had made an error in the recording process and "voided" the deed and mortgage from the official records. After being voided, they were not discoverable by a search of the public records. The clerk intended to re-record the documents after correcting the error, but failed to do so and mistakenly recorded similar instruments concerning another parcel of property instead. As a result, the Wright & Associates documents appeared in the

(Continued on page 21)

PRESIDENT'S MESSAGE

SCBA reaches out to victims of Sandy



Arthur Shulman

By Arthur E. Shulman

As I write this article in the beginning of December, there are less than six months to go for my term of office.

I recall the 2011 summer into autumn when Long Island was visited by Hurricane Irene, an earthquake and October snow squalls. So not to be lulled into complacency by the mild winter that ensued, as summer 2012 segued into autumn, Long Island and the entire tri-state region were pummeled by an unusually late-season tropical storm followed by a freak early November snowfall.

The Bar Association and many of our members suffered through the devastation which left many of us at the very least without power, heat, telephone and internet service and long lines at gas stations, and at the worst, with destroyed or damaged homes, businesses and cars, falling trees and flooding, leaving many unable to live in their homes and work at their offices and facing financial distress. In response to this devastation, the Bar Association partnered with Touro Law School as well as the New York State Bar Association (NYSBA), to arrange for attorneys to be trained in the various legal practice areas that many of our own members as well as the public need to be counseled in to deal with problems that arose as a result of the storm.

Our bar arranged for two clinics to be held at our center in December to give advice to the public in dealing with such issues as landlord-tenant, FEMA, insurance law and other areas that needed to be addressed by both our members and the public. These clinics were staffed by volunteer members who obtained training through a free seminar put on by the NYSBA.

(Continued on page 20)

BAR EVENTS

Judicial Swearing In and Robing Ceremony

Monday, Jan. 7, 9 a.m.

Touro Law Center

Judges to be robed include:

Supreme Court Justice Elect – Richard Ambro, John J. Leo

County Court Judges Elect – John Rouse, Hon. John Iliou

Family Court Elect – Hon. Denise Molia

District Court Judges – Hon. James McDonaugh, Hon. Derrick J. Robinson, Hon. Karen Kerr

District Court Judge Elect – Richard Dunne, Janine Barbera-Dalli

Meeting of Committee Co-Chairs

Tuesday, Jan. 8, 6 p.m.

At the bar center

Suffolk County Bar Association

560 Wheeler Road • Hauppauge NY 11788-4357
Phone (631) 234-5511 • Fax # (631) 234-5899
E-MAIL: SCBA@SCBA.ORG

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All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.

of Association Meetings and Events

JANUARY 2013

2 Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room.
7 Monday	Annual Judicial Robing & Swearing-In Ceremony, 9:00 a.m., Touro Law School. District Administrative Judge C. Randall Hinrichs will preside.
	Surrogate's Court Committee, 6:00 p.m., Board Room.
8 Tuesday	Council of Committee Chairs, 6:00 p.m., Great Hall.
9 Wednesday	Education Law Committee, 12:30 p.m., Board Room
11 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room.
14 Monday	Executive Committee, 5:30 p.m., Board Room.
16 Wednesday	Elder Law & Estate Planning Committee, 12:00 p.m., Great Hall.
	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.
28 Monday	Board of Directors, 5:30 p.m., Board Room.
29 Tuesday	Solo & Small Firm Practitioners, 4:30 - 6:00 p.m., Board Room.

FEBRUARY 2013

4 Monday	Executive Committee, 5:30 p.m., Board Room.
6 Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room.
11 Monday	Surrogate's Court Committee, 6:00 p.m., Board Room.
13 Wednesday	Education Law Committee, 12:30 p.m., Board Room.
20 Wednesday	Elder Law & Estates Planning Committee, 12:00 p.m., Great Hall.
	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.
25 Monday	Board of Directors, 5:30 p.m., Board Room.
26 Tuesday	Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.

MARCH 2013

6 Wednesday	Appellate practice Committee, 5:30 p.m., Board Room.
8 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room.
11 Monday	Executive Committee, 5:30 p.m., Board Room.
12 Tuesday	Surrogate's Court Committee, 6:00 p.m., Board Room.
13 Wednesday	Education Law Committee, 12:30 p.m., Board Room.
18 Monday	Board of Directors, 5:30 p.m., Board Room.
19 Tuesday	Solo & Small Firm Practitioners, 4:30 p.m., Board Room.
20 Wednesday	Elder Law & Estate Planning Committee, 12:00 p.m., Great Hall.
	Education Law Committee, 12:30 p.m., Board Room.
	Professional Ethics & Civility Committee, 6:00 p.m., Board Room.

Our Mission

"The purposes and objects for which the Association is established shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of the members."

Join Our Leadership

The Nominating Committee of the Suffolk County Bar Association is seeking involved leaders interested in running for the following positions: president elect; first vice president; second vice president; treasurer; secretary; four (4) directors (terms expiring 2016) and three (3) members of the Nominating Committee (terms expiring 2016). The Nominating Committee is accepting résumés from that interest in these leadership positions. Résumés may be sent to the Executive Director at the SCBA, marked for the Nominating Committee.

The members of the Nominating Committee are: John L. Buonora, Ilene S. Cooper, Hon. John M. Czygier, Jr., Annamarie Donovan, Scott M. Karson, Hon. Peter H. Mayer, Matthew E. Pachman, Sheryl L. Randazzo and Ted M. Rosenberg.

– LaCova

Important Information from the Lawyers Committee on Alcohol & Drug Abuse:

Thomas More Group Twelve-Step Meeting

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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Send letters and editorial copy to:
The Suffolk Lawyer
560 Wheeler Road, Hauppauge, NY 11788-4357
Fax: 631-234-5899
Website: www.scba.org
E.Mail: scbanews@optonline.net
or for Academy news: Dorothy@scba.org

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To Advertise in The Suffolk Lawyer Call
(631) 427-7000

New administrator establishes a renewed lawyer referral & information service

By Rory Alarcon

A new firm faces the harsh reality that finding a good source of clientele is not as easy as "hanging a shingle." Fortunately, as SCBA members, we are entitled to enroll in the Lawyer Referral and Information Service ("LRIS") program, new and experienced alike.

Thanks in no small part to the efforts of administrator Edith Dixon, the LRIS is better than ever, thanks to the effort of its new administrator, Edith Dixon.

LRIS program rules

For the uninformed, the Lawyer Referral and Information Service is a service of the Suffolk County Bar Association whereby clients are referred to participating attorneys based upon their need and location in the county. To be enrolled as a participating attorney, a Bar Association member must register annually, pay a nominal fee, and demonstrate that they are competent to handle matters that they are referred. All potential clients are screened through a program Administrator at the Bar Association's office in Hauppauge. Said administrator determines the client's needs, their location, and whether the client can be assisted by a participating attorney. If there are attorneys capable of handling the matter, the client is given an attorney's name and phone number. If the client cannot be assisted by an attorney, they are referred to a local agency or service organization that can provide assistance.

If the client calls the attorney and makes an appointment for a consultation, the participating attorney charges the client $25 for a half hour consultation. At the end of every month, the participating attorney is sent a list of all clients referred to them by the LRIS. The attorney notes the clients who consulted with them and forwards $25 for each client to the Bar Association. If the participating attorney does not consult with any referred clients, then that attorney does not send any fee to the Bar Association. A participating attorney only pays the 'consultation fee' if the attorney actually has a consultation with a referred client.

Having researched various marketing methods, I have come to the firm conclusion that no other form of 'attorney advertising' is as cost-effective. Enrollment fees are determined by years in practice ($50 for those practicing five years or less, $100 for those practicing longer) and the number of practice areas that you wish to receive clients from ($30 for each category / practice area). For the equivalent of $21 per month, a veteran attorney can be listed in five areas of law. An attorney in that situation is likely to recover their cost by retaining one client per year. I dare you to find any paid form of advertising that is less expensive.

New opportunities for a better LRIS

As chair of the LRIS Committee, I am often asked "What's going on with Lawyer Referral?" I am quite happy to answer such questions by referring to Edith Dixon.

Edith was hired as the new administrator of the LRIS a few short months ago, and was eager to improve the program. During our first meeting, Edith was happy to show me a list of ideas and proposals that she wants to discuss with the Bar Association's Board of Directors, all aimed at increased attorney enrollment, marketing of the service to potential clients, and more even distribution of referrals to all attorneys. Having worked for years as a paralegal in both Manhattan and Suffolk, she understands how clients are retained and how to discuss their concerns.

Within a few months Edith and the SCBA administrative staff have instituted changes that have made the program better than ever:

- All lawyers who did not re-enroll in the program were contacted to discuss why they did not continue to enroll. Discovering that many lawyers cited "lack of referrals," Edith committed to tracking the distribution of referrals to ensure that the number of referrals per attorney is balanced throughout the county.
- Edith personally contacted attorneys delinquent in paying their registration fees and has now ceased making referrals to those attorneys.

The LRIS also provides a listing of attorneys that can be used for more than just referrals requested by the clients themselves. For example, Pro Bono organizations often have clients whose income or circumstances preclude them from receiving pro bono representation. Upon request, those organizations are referred to LRIS attorneys.

Recommendations have been made to the SCBA Board of Directors for increased exposure of the service:

- An LRIS flyer is being created for distribution. It is our intention to distribute said flyers to all local judges for distribution to pro se litigants seeking representation.
- Targeting those most inclined to require an attorney referral we are also seeking to have the flyers displayed in the local courthouses.

If you are not already enrolled in the LRIS, now is the time to do it. Edith and I reviewed the numbers together, and the sheer number of referrals has increased dramatically. If you are not already a member of the LRIS, or just want to talk with Edith about the program, please give her a call at the Bar Association during the week.

Note: Rory Alarcon is an attorney with offices in Hauppauge in Bohemia. He practices Matrimonial Law, Foreclosure Defense and Consumer Law.

Meet Your SCBA Colleague

Willam Ferris, ***an Islandia criminal attorney, practices in state and federal courts and also handles guardianships. In the Navy, he was on a guided missile destroyer in Vietnam when he decided to become an attorney.***

By Laura Lane

How did you end up in Vietnam? Were you drafted? No. I enlisted in the Navy Reserves while a sophomore in college because my Dad wanted me to be in the Navy as far back as I can remember. When I graduated from college in 1968 I also graduated from officer candidates' school. I'll never forget that Vice Admiral Cleary said he was proud that seven of us had enlisted.

Why did you enlist? I wanted to drive swift boats and I had to volunteer to go to Vietnam first. I went through amphibious training, then onto language school where I learned to speak Vietnamese and then to survival school.

Were you wounded while in Vietnam? I was caught in crossfire while on the Bode River with 51 caliber machine gun fire on both sides and rocket fire. We were sitting ducks. I was injured and hospitalized in Japan. I went back though.

Why? I didn't want my Navy career to end that way. I was not ready to leave. If I was going to leave it would be on my conditions. I went back in 1970 and worked on the USS Hoel, a guided missile destroyer, and that's when I decided to become an attorney.

What led you to make that decision? I was concerned about what was going on in our country and the decisions made by our government and all of the protests against the war. I wanted to contribute, and realized that the best way was to go to law school.

But you didn't go into government. How did you end up becoming a criminal attorney? After law school I did civil work for a firm in Queens and liked litigation. I decided that the way to go was to work for the District Attorney's office and was hired in 1978 in Queens and Suffolk County.

You were still in the Navy during this time, right? I stayed in the reserves and retired in the mid 1990s as a captain.

Do you believe that your experiences in the Navy contributed to how you work as an attorney? Yes I do. It helped me look down the road to where I want to be and know how to develop a strategy to get there. I always have a plan.

Criminal law has changed over the years with technology. DNA technology had a dramatic impact on criminal law while I was in the DA's office and it became imperative to understand it and its application to criminal law especially with respect to identification of individuals whether by blood, saliva or other cells. It was exciting.

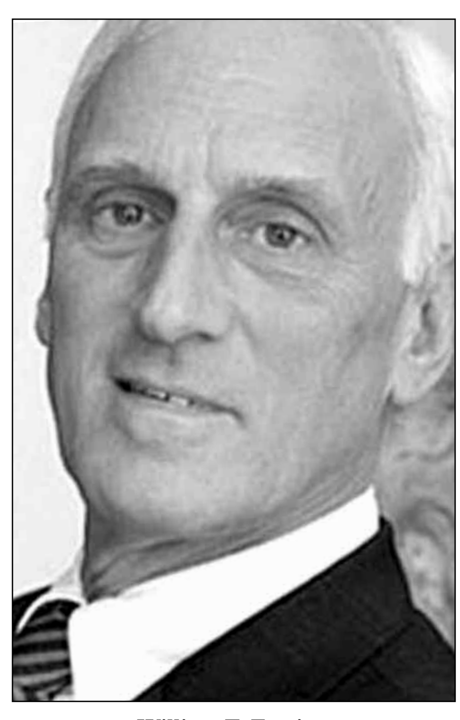
What do you like about being an attorney? I like people and I enjoy the challenge of assisting them in the legal process whether it be as a prosecutor or defense attorney.

You worked for the Suffolk County District Attorney's office from 1978 to 2001 and then went over to the other side accepting a job with Bracken Margolin Besunder, LLP. What's that like for you after so many years of being the prosecutor? I am representing the kinds of people I used to prosecute. One role of a defense attorney is to challenge the prosecutor on every level of a case. I enjoy challenging them.

What have you enjoyed in your role of training others as a prosecutor and also at the SCBA Academy? I was chosen to train others because I've tried a lot of cases and I've always liked it. I like sharing what I know and I think it is important to share my experience and knowledge with my colleagues. I enjoy training through the Academy both prosecutors and defense attorneys.

Is there anything else you enjoy as an attorney? I enjoy being creative. I learned a long time ago that if you know the rules of what you are doing, you are limited only by your imagination and creativity. I believe you should not be limited by just one theory. If there is more than one theory, use it.

Why would you recommend that someone join the SCBA? You get to share. One thing I've enjoyed is asking questions of each other on legal issues and helping each other professionally. You may get another question in another area of law and it's nice to have someone you can call. The SCBA facilitates professional relationships.



William T. Ferris

You are active in different committees at the SCBA right? I was just appointed for my second year term on the Grievance Committee. I work with some wonderful attorneys in Suffolk. Our responsibility is to review actions by lawyers and determine if they should be sanctioned or disciplined. It has been an eye-opener.

Do you have any ideas on how attorneys can avoid being in this terrible position? This feeds into my desire to provide training to avoid some of the problems attorneys can have if they are not familiar with rules in practicing. I'm also on the 18B Panel. We've increased the number of attorneys eligible to represent individuals.

VIEWS FROM THE BENCH

Primary Care physicians – limiting the duty of care

By: Hon. Stephen L. Ukeiley

During your next visit to your primary care physician ("PCP"), you may notice some significant changes. For example, mandatory electronic medical record keeping has been implemented in many offices. As a result, your PCP may spend a significant portion of your visit looking at a laptop computer.

Your PCP may also be less inclined to discuss apparently innocuous ailments not scheduled for the day's visit. With the advent of electronic medical records, PCPs have relinquished significant control over billing and reimbursements. In other words, whether you discuss the scheduled ailment or your entire list of ailments, the PCP's reimbursement for a routine physical will be the same. Business acumen, however, may only scratch the surface for the reluctance to engage in such discussions.

Medical Malpractice Claims in New York

Rising health care costs, which include malpractice claims, have obviously garnered increased attention over the past few years. New York has the highest number of medical malpractice cases and claims paid within the country. *See Med Mal Litigation in New York: Time to Change the Status Quo*, Hon. Ann Pfau, N.Y.L.J., at 3 (June 14, 2012). In 2011, approximately $627 million was paid on 1,379 medical malpractice claims in New York, for an average of $454,726 per claim. *Id.*1

Stephen L. Ukeiley

It is well established that a duty of care is required for a physician to be liable for medical malpractice. *Cregan v. Sachs*, 65 A.D.3d 101 (App. Div., 1st Dep't 2009). This is a question for the court and generally an impermissible topic for expert opinion. *McNulty v. City of New York*, 100 N.Y.2d 227 (2003); *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303 (App. Div., 1st Dep't 2007). The patient must also demonstrate the physician departed from good and accepted standards of practice and that such departure was the proximate cause of the resulting injury. *Koeppel v. Park*, 228 A.D.2d 288 (App. Div., 1st Dep't 1996).

The critical issue is whether the physician treated the patient for the ailment, and, if so, the "[e]xtent to which the [physician] advised, and the plaintiff relied on the advice." *Burtman v. Brown*, 97 A.D.3d 156, 161 (App. Div., 1st Dep't 2012). In other words, although there may be a general duty of care, a physician's duty may be limited to the specific functions performed by the physician and the patient's reliance. *Id.*, at 161-62.

Duty of Care

The issue in *Burtman* was whether the PCP was partially liable for an ailment treated by another physician, a specialist. The facts of the case, although relatively straightforward, are indicative of the difficulties many PCPs encounter during a brief office visit.

In August 2005, the plaintiff, Dr. Ruth Burtman, a licensed psychologist, visited defendant PCP Dr. Elizabeth Beautyman for a physical exam. Plaintiff was three months pregnant at the time and under the care of an obstetrical practice group. *Id.*, at 158-59. Approximately six weeks later, a mass, which was neither present nor discernible during the initial visit, was detected in the upper left quadrant of plaintiff's abdomen. *Id.*, at 160-62. The radiological report suggested the mass was a benign fibrolipoma, and, as a result, the obstetrical practice opted to take a "wait and watch" approach.

In January 2006, plaintiff again visited defendant but this time for a sprained ankle. Although a copy of the radiological report had been sent to the PCP, the PCP did *not* discuss the report or the mass with the plaintiff. *Id.*, at 158-59. A few months after giving birth, plaintiff visited another physician due to a tick bite. Several months later, the mass, which had grown to 10 cm (approximately 4 inches), was diagnosed as a malignant liposarcoma requiring a "[w]ide radical excision". *Id.*, at 159.

Following commencement of the patient's malpractice lawsuit, several of the defendant physicians moved for summary judgment. The trial court denied the PCP's motion because the "thoroughness" of her examination and whether a biopsy or other testing should have been ordered posed questions for the trier of fact. *Id.* The trial court further concluded the PCP had, at minimum, a duty to discuss the report with plaintiff and suggest a follow-up biopsy. *Id.*, at 160.

Duty of Care where another physician is treating the same ailment

On appeal, the issue was whether Dr. Beautyman, as plaintiff's PCP, had a duty to recommend additional testing despite the fact another physician was treating the mass. The Appellate Division, First Department answered in the negative.

The Appellate Division held that the

(Continued on page 22)

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Jerry Garguilo

Motion to dismiss complaint granted; tort of negligent entrustment requires that a party give or supply another person with a dangerous instrument; no duty owed by the county beyond that owed to the public at large.

In *Viedya Sabrina Ferguson, as the Administratrix of the Estate of Raymond Ferguson, Jr., deceased and Viedya Sabrina Ferguson, individually v. David Laffer, Melinda Brady, Suffolk County Police Department, Stan Xuhui Li, Eric Jacobson, Eric Jacobson, M.D., P.C., Mark C. Kaufman and Family Medical Practice of Bay Shore, P.C.,* Index No.: 18641/12 decided on November 21, 2012, the court granted the motion by defendants County of Suffolk and Suffolk County Police Department for an order dismissing the complaint.

The court noted the relevant facts as follows: on June 19, 2011 the defendant David Laffer shot and killed four people, including plaintiff's decedent, during the course of a robbery in which he stole prescription drugs from a pharmacy in Medford. The gun used by Laffer was apparently licensed by the defendant Suffolk County Police Department.

The plaintiff commenced this action for wrongful death against the moving defendants alleging that in January of 2011, a police officer investigated the defendant for the crime of grand larceny, based upon a complaint that he had stolen money from his mother. The defendant admitted that he had stolen the money and admitted that he was addicted to prescription drugs. The officer notified the pistol license bureau but the complaint alleges that the county failed to take any steps to revoke the license or confiscate the gun. Here, the plaintiff contended that she was proceeding on a theory of negligent entrustment based upon the county entrusting the defendant with a dangerous instrument and granting him a pistol license. In granting the defendants' motion, the court pointed out that the tort of negligent entrustment required that a party give or supply another person with a dangerous instrument. Here, the court found that the plaintiff had not cited any case, and none had been found in which this theory had been applied solely upon the issuance of a license or permit. The court reasoned that it had been held that the failure of the Department of Motor Vehicles to revoke a motor vehicle registration could not provide a basis for liability against the sate after a motor vehicle accident. Since the gravamen of plaintiff's complaint was that the county failed to revoke the pistol license or confiscate the weapon, which is a governmental function, and plaintiff had not alleged a special relationship, there was no duty owed by the county beyond that owed to the public at large. Further, the court pointed out that the decision whether to issue or revoke a license to possess a firearm was discretionary and may not form a basis for liability against a municipality.

Elaine Colavito

Honorable Arthur G. Pitts

Motion to dismiss based upon lack of personal jurisdiction denied; due diligence was satisfied for the purposes of CPLR §308(4) with three visits on different occasions and at different times; defendant's bare denial of service was insufficient to rebut the prima facie proof of proper service.

In *Melva Otero v. Town of Islip, Marie Carranza and Jose Romero,* Index No.: 28659/08, decided on February 7, 2012, the court denied the defendant's motion for an order pursuant to CPLR §3211(a)(8) dismissing plaintiff's complaint as against him for lack of personal jurisdiction or, in the alternative, for an order pursuant to CPLR §317 and CPLR §5015 vacating the order granting leave to enter a default judgment against him, and for leave to serve and file an answer. The court noted that according to the process server's affidavit dated Aug. 15, 2008 revealed that she made three attempts, on Friday, Aug. 1, 2008 at 7:40 p.m., Saturday, Aug. 2, 2008 at 7:13 a.m. and Tuesday, Aug. 5, 2008 at 3:33 p.m., to personally serve the summons and complaint on defendant Romero at the subject address pursuant to CPLR §308(1) or CPLR §308(2), then affixed the summons and complaint to the door and mailed a copy on August 12, 2008 to the subject address. The affidavit of service contained the statements that the address was confirmed with a neighbor and that service was made in that manner after the deponent was unable, with due diligence, to serve the witness/defendant in person, and an attempt to locate the defendant's place of employment. Here, the court found that due diligence was satisfied for the purposes of CPLR §308(4) with three visits on different occasions and at different times. The defendant's bare denial of service was insufficient to rebut the prima facie proof of proper service pursuant to CPLR §308(4) created by the process server's affidavit.

Cross-motion to dismiss the complaint granted; subject accident occurred after the enactment of the Graves Amendment.

In *Thomas C. Romero v. Concrete Accessories, Inc., The Hertz Corporation and Victor W. Brockstader,* Index No.: 45286/10, decided on Sept. 26, 2012, the court grant defendant The Hertz Corporation's cross-motion to dismiss the complaint. In granting the application, the court noted that it was undisputed that the defendant, The Hertz Corporation was the leasor of the vehicle operated by the defendant, Brockstader at the time of the subject accident. The court noted that pursuant to 49 U.S.C. Section 30106 (Graves Amendment) vicarious liability claims based upon ownership as to leased or rented automobiles regarding any action commenced after the enactment date of the section, Aug. 10, 2005 were barred. Here, the court found that the subject accident occurred after the enactment of the Graves Amendment and accordingly, the Hertz's Corporation's motion to dismiss the complaint was granted.

Motion for summary judgment denied; action commenced within statute of limitations; statute of frauds was inapplicable; and no prima facie showing of entitlement to judgment as a matter of law.

In *Cruz Angel Vega v. Brian Pizetzky, Kevin Pizetzky, and Paul Pizetzky,* Index No.: 10846/10, decided on September 12, 2011, the court denied the defendants motion for summary judgment. Here, the defendants moved for summary judgment alleging that the within action was time bared pursuant to CPLR §213(2), barred pursuant to the statute of frauds and the plaintiff's claim was without merit and unsupported by clear evidence. The defendants further moved for dismissal on the grounds that the plaintiff had failed to meet the evidentiary threshold supporting a cause of action for a constructive trust. With regard to that portion of the motion that sought summary judgment, the court pointed out that it was well settled that

(Continued on page 22)

Handcuffing defendant during bench trial ruled error

A court conducting a bench trial may not keep the defendant shackled or handcuffed without a particularized on the record finding justifying the use of restraints. This ruling which draws on cases involving handcuffs and security measures in jury trials, therefore, raises some questions about how criminal cases proceed in the criminal courts in Suffolk County.

In *People v. Best*,[1] the Nassau County District Court held a bench trial before which defense counsel objected to his client, charged with endangering the welfare of a child, was handcuffed in back. The court ordered the defendant handcuffed in front to address the defense objection. After the District Court convicted defendant for offering a twelve-year-old victim $50 to expose himself to defendant,[2] defendant appealed.

FOCUS ON
CRIMINAL COURT
SPECIAL EDITION

The Appellate Term affirmed. In reference to defendant's argument on appeal about the handcuffing in front, the Appellate Term noted, "There was no objection by the defense that such continuing restraint violated" defendant's rights. In other words, the Appellate Term required that defense counsel objection not only to the handcuffing in back, but also, after the trial court ruled that the defendant should be handcuffed in front, to the handcuffing in front. Then, the Appellate Term held that no inherent prejudice existed because a judge would not be swayed by the handcuffs the same way that a jury might be.[3]

The Court of Appeals reached the merits of the issue without comment regarding preservation, therefore suggesting that defense counsel's objection — whatever it was, and neither decision reports what it was — was sufficient to preserve the issue. The Court of Appeals held that trial court erred saying, "We hold that the rule governing visible restraints in jury trials applies with equal force to non-jury trials and that the District Court erred in failing to state a basis on the record for keeping defendant handcuffed throughout these proceedings."[4]

This holding is consistent with the United States Supreme Court's holding in *Deck v. Missouri*[5] which set forth three principles that shackling/handcuffing offends: 1) preserving the presumption of innocence; 2) ensuing defendant can meaningfully participate; and 3) maintaining the judicial process' dignity.[6] The Court of Appeals found these three principles equally offended in a bench trial setting of a restrained defendant as in a jury trial, and requires, as do *Deck* and the New York State jury trial handcuffing case, *People v. Clyde,* [7] that defendants be unrestrained in the absence of a clear, case specific, on the record determination of need for restraints.

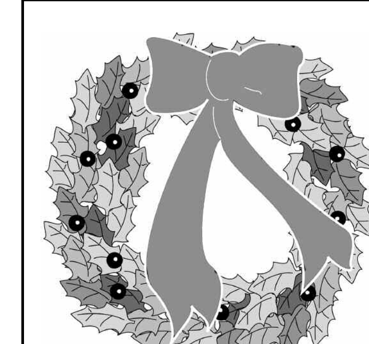
While *Deck* refers to the "guilt phase" of a criminal proceeding, the three principles underlying *Deck*, *Clyde* and *Best* stand equally applicable during conferences and more importantly, arraignments where a common and permissible argument centers about the prosecution's likelihood of success on the merits.[8] Because a particularized case-by-case justification for the restraints must be made on the record under these cases, a generalized statement about shortage of court officers to provide adequate security for an unhandcuffed arraignment would seem to fall short of the Constitutional mark.

Best is also noteworthy because the Court of Appeals disagreed with the Appellate Term's holding regarding judges' ability to overlook and remain unaffected by the restraints, be they in front or in back. The Court of Appeals said the handcuffing could even "unconsciously" affect the judge.

This reasoning stands in sharp contrast to *People v. Moreno*[9] where a judge warned that, as a fact finder in a bench trial, he would know more than would a jury because of a *Sandoval* hearing, Despite that and other warnings from the bench and Mr. Moreno's attorney's advice, the defendant proceeded to waive a jury; conviction followed. The Court of Appeals affirmed because "a Judge 'by reasons of ..learning, experience and judicial discipline is uniquely capable of distinguishing the issues and of making an objective determination.'"[10] *Best* seems to acknowledge that the presumption of *Moreno* and similar cases[11] that judges can distinguish in a way lay juries cannot may have less vitality than once thought which further suggests that *Best* points toward a reduction of physically restraining measures in the absence of case-by-case particularized findings of need.

1. — NY3d —-, 2012 NY Slip Op. 7855 [November 20,2012].
2. —- Misc.3d —-, 2012 NY Slip Op. 50826[U] [App. Term, May 9, 2011].
3. *Id.*
4. —-NY3d —-, 2012 NY Slip Op. 7855, at *1-2 [November 20, 2012].
5. 544 US 622 [2005]
6. 544 US at 630-1; *People v. Best*, —- NY3d ___, 2012 NY Slip Op. 7855, at *3.
7. 18 NY3d 145 [2011].
8. CPL 510.30
9. 70 NY2d 403 [1987]
10. 70 NY2d at 406, quoting *People v. Brown*, 24 NY2d 168, 172.
11. For example, *People v. Kozlow*, 45 NY3d 913 [2d Dep't 2007].

Thanks!!



Thank you SCBA member for sending us every year the gorgeous Christmas wreath which adorns our headquarters. We hope our members enjoyed Hanukkah, Christmas, Kwanzaa and wish you all a very happy and healthy New Year!!

Thank you SCBA member, and you know who you are, for donating the flag pole and providing us with a fresh new flag, the symbol of freedom, every year.

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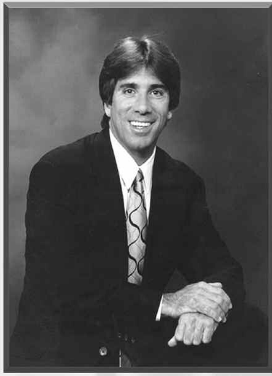

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Court must follow counsel's directions even when client disagrees

FOCUS ON CRIMINAL COURT SPECIAL EDITION

The Court of Appeals in *People v. Colville*,[1] divided the world of decisions in criminal defense into two pigeonholes: fundamental decisions, reserved to the client; and strategic decisions, reserved to the lawyer. Decisions about whether to submit lesser included offenses to the jury fall within the strategic category according to *Colville*, and a trial court's failure to follow the lawyer's desire to so submit, even in the face of defendant's objections, denies the defendant "the expert judgment of counsel to which the Sixth Amendment entitles" the defendant.[2]

Colville, however, gives nothing to enable counsel, client or court to classify particular decisions arising in the course of criminal cases as either fundamental or strategic. Thus, much like *Crawford v. Washington*[3] which established a category of testimonial hearsay without defining the characteristics of "testimonial," *Colville* reinforces or creates a dichotomous taxonomy of decision-making allocation, fundamental and strategic, without giving any indication of what facts control the classification of a particular category of decisions.

Colville clearly puts a layer of higher ranking, judge-made terms over the privately ordered contract for legal services that a lawyer and client may make. Given the fundamental/strategic dichotomy, and the reversal in *Colville*, the defendant/client's right to self-determination is all but obliterated, a point Judge Jones raises in dissent. Because the defendant has the most to lose, he should "have the ultimate authority regarding the choices he/she makes (even if against the advice of counsel).[4] The lawyer, meanwhile, can no longer duck behind the rationale, "The client went against my advice."

Moreover, *Colville* requires judges to make more inquiry into the lawyer-client relationship to insure that lawyers are not folding to client desires when strategic, as opposed to fundamental, decisions are involved. *Colville*, significantly, does not hold that defense counsel failing to cause/insist on the lesser included offenses being submitted was "ineffective." Instead, *Colville* holds that "the Court, by deferring to the defendant," denied the defendant the "expert judgment" of counsel. This language suggests that where the record reflects disagreement between counsel and client as the record did in *Colville*, the court must intercede to insure that the desire of the lawyer controls for all strategic decisions and that the desire of the client controls for all fundamental decisions. Presumably, then, the court would be involved in a second-level analysis on strategic decisions to insure that the now-judicially-enforced strategic decision is not ineffective assistance of counsel.

Colville, stands clothed in Sixth Amendment fabric but reveals the naked truth that the Court of Appeals recognizes that jury verdicts in criminal cases do not necessarily comport with the evidence, and, instead, reflect jury bargaining in a complex negotiation to arrive at a unanimous verdict. The dissent calls out the possibility that submission of lesser included offenses "signal[s] that defendant is seeking a compromised [sic] verdict."[5] The dissent also remarks that in this case, the signal may shift the jury's focus off the justification defense (complete exoneration) and onto *mens rea* (lesser sentence/culpability) leading to a higher overall conviction rate, a point that over forty years of social science research into the dynamics of plea bargaining also contends is a grave illness in the criminal justice system.[6] The majority also accepts that the lesser included offenses may shift the jury's focus and gives no reason why this undisputedly liberty-affecting decision is not "fundamental." The dissent leaves us with the weak outcome-determinative test of "the defendant has the most to lose," a legal framework as unsatisfactory here as it was in *Hanson v. Denckla*[7] with the substantive/procedural dichotomy in civil cases.

Colville therefore encourages greater judicial involvement in policing the attorney-client relationship in criminal cases, just as prosecutorial misconduct oversight encourages greater judicial involvement in policing the prosecutorial function, all of which, together provide insight into the judiciary's views of the overall quality of criminal court advocacy, particularly when the appellate judiciary chooses not to share the controlling factors by which the day-to-day players can guide conduct.

1. —- NY3d —-, 2012 NY Slip Op. 07047 [October 23, 2012]
2. *Id.* at *9 at n. 1.
3. 541 US 36 [2004].
4. 2012 NY Slip Op. 07047 at * 11.
5. 2012 NY Slip Op. 07047 at * 11.
6. See, e.g., Blumberg, Abraham S., *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession,* 1 Law & Soc'y Rev. 15 (1967); Bar-Gill, Oren & Ben-Shahar, Omri, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. of Legal Analysis 737 (2009).
7. 357 US 235 (1958).

The Suffolk Lawyer wishes to thank Criminal Court Special Section Editor Harry Tilis for contributing his time, effort and expertise to our January issue.

Harry Tilis

COURT NOTES

By Ilene Sherwyn Cooper

Ilene S. Cooper

Attorney resignations
The following attorneys, who are in good standing, with no complaints or charges pending against them, have voluntarily resigned from the practice of law in the State of New York:

Harvinder Singh Anand
Nadia Asancheyev
Mary Virginia Barta
Eileen Courtney
Virginia M. Coyne
Carol Anne Elewski
Colin A. Fieman
Leonard Grunstein
Lauren M. Hand
Hugh J. Helfenstein
Harry C. Jones III
Wallace M. Kain
Paul C. Kaufman
Irving D. Krawet
Judith Lewis
David Eugene Lovejoy
Ronald H. Mandel
Claire Lasky Pellerito
Stephen Price
Gerald Reich
Don William Schmitz
Loretta Townsend
Janee Woods Weber
Tracey Beth Wollenberg
Elliot Zemek

Attorney reinstatements granted
The application by the following attorneys for reinstatement was granted:

Avi J. Kasten
Scott M. Zucker

Attorney resignations granted/disciplinary proceeding pending:

Frederick G. Meyer: By motion, the respondent sought to voluntarily resign. The record revealed that he was the subject of a disciplinary proceeding against him that the court had authorized the Grievance Committee to institute. The respondent currently resides in Colorado and last practiced law in New York in or about December 1978. He has not practiced law in any jurisdiction since or about July 2005. The Grievance Committee took no position with respect to the application. In view of the foregoing, the respondent's resignation was accepted and his name was removed from the roll of attorneys in the State of New York, without prejudice to an application for reinstatement.

Attorneys Suspended:
Steven Machat: Application by the Grievance Committee to discipline the respondent based upon disciplinary action taken against him by the State of California. The State of California placed the respondent on probation for a period of three years, on condition that he be suspended for a period of two years and submit satisfactory proof of his rehabilitation. The discipline imposed was based on a finding that respondent had willfully failed to maintain funds entrusted to his charge. Respondent was notified of the application but failed to defend or submit a verified answer. Accordingly, under the totality of circumstances, respondent was suspended from the practice of law for a period of two years.

Howard M. Sklar: By order of the court, dated November 29, 2012, the application by the Grievance Committee to suspend the respondent and for authorization to institute a disciplinary proceeding against him was granted and the matter was referred to a Special Referee to hear and report based on respondent's failure to cooperate with the Grievance Committee, the committee's investigation into respondent's professional misconduct, the respondent's substantial admissions under oath, and the uncontroverted evidence in the record of professional misconduct.

Attorneys disbarred:
Robert I. Oziel, admitted as Robert Israel Oziel: On January 26, 2012, the respondent pled guilty to three counts of grand larceny in the third degree, a class D felony, and was sentenced to five years probation and restitution. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the state of New York.

John Arnold Reynolds: On January 4, 2012, the respondent pled guilty to the crime of scheming to defraud in the first degree, a class E felony. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past president of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.

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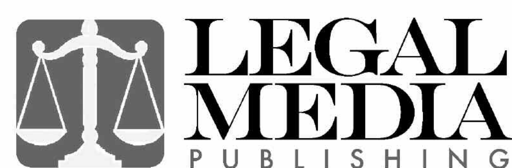

SYDNEY SIBEN'S AMONG US

On the Move…

Paul F. Millus joined Meyer, Suozzi, English & Klein, P.C. Of Counsel to the firm's Litigation and Dispute Resolution and Employment Law practice groups.

Congratulations

To SCBA Members **David R. Okrent, Nancy Ellis** and SCBA Honorary Member **Anthony V. Curto** who were recognized by Long Island Business News Leadership In Law Awards.

To **Jennifer Cona**, managing partner at Genser Dubow Genser & Cona (GDGC), Melville, who was recently honored with the Long Island Business News "Leadership in Law" Award.

To **Deborah Post**, Associate Dean for Academic Affairs and Faculty Development Professor of Law, Touro Law Center and our dear friend **Barbara Kraut**, Executive Assistant/Paralegal of Nassau County Bar Association who were also recognized for this prestigious award.

To he WWII Veteran Judges of the Eastern District of New York who were honored on December 5 by the **Federal Bar Association Eastern District**, at the American Airpower Museum at Republic Airport – **Hon. I. Leo Glasser, Hon. Arthur D. Spatt, Hon. Thomas C. Platt, Hon. Jack B. Weinstein and Hon. Leonard D. Wexler.**

To **Nancy Burner** who has been named by New York Super Lawyers Magazine, published by Thomson Reuters Legal, as one of the top women attorneys New York.

Jacqueline Siben

Karen J. Halpern, RN, Esq., Of Counsel to the firm Lawrence, Worden, Rainis & Bard, PC was presented with the Outstanding Advocate Award at the 31st Annual Conference of The American Association of Nurse Attorneys [TAANA] on October 26, in New Orleans, Louisiana. The award was based upon Ms. Halpern's representation of nurses and other health-care professionals involved in the licensure and disciplinary process, and her mentorship of other Nurse Attorneys in the organization. Ms. Halpern currently serves as the President of the New York Metropolitan TAANA Chapter and is co-chair of the National Litigation Committee.

SCBA member **Lawrence Raful** who has been appointed Director of the New York State Courts' Pro Bono Initiative. The East Islip resident is a past dean and professor at Touro Law Center in Central Islip.

Announcements, Achievements, & Accolades…

SCBA **Arthur E. Shulman** attended the recent retirement party of Supervising Judge of the District Court, the Honorable Madeleine A. Fitzgibbon at the Irish Coffee Pub in Central Islip.

Lance R. Pomerantz judged the final round of the 17th annual Yale Mock Trial Invitational Tournament held at Yale University on December 1st and 2nd. The trial pitted a team from Wellesley College against an impressive team from tiny Cornell College (Iowa). The Yale tournament is the largest intercollegiate invitational mock trial tournament in the United States.

Ruskin Moscou Faltischek, P.C. announced today that Founding Partner **Michael L. Faltischek** has been elected Vice Chair of the Long Island Association (LIA).

Richard K. Zuckerman, of Lamb & Barnosky, LLP, co-presented with Thomas Volz, Esq. on the topic "Understanding Employment Discrimination - Expanded Las and Emerging Issues" at the Winter Law Conference sponsored by the New York State School Boards Association on December 11th in Albany and December 13, in Rochester. They will also co-present this topic on January 13, on Long Island.

Sharon N. Berlin, was a panelist in a program entitled "Public Employment Relations Board Update;" **Robert H. Cohen** was a panelist in a program entitled "Living with the Tax Levy Limit - Tax Cap Part II;" and **Robert E. Waters, Esq.**, was a panelist in a program entitled "Annual Professional Performance Review: The Saga Continues," at the 2012 Annual School Law Conference sponsored by the Education Law Committees of the Suffolk and Nassau County Bar Associations' Nassau and Suffolk Academies of Law.

Sharon N. Berlin, and **Richard K. Zuckerman,** of Lamb & Barnosky, LLP, will participate on a panel about the topic "Getting Your Employees Back To Work: Municipal Employee Alphabet Soup Issues In a Nutshell (FMLA, ADAAA, GINA, HIPAA, GML & §207-a and c, CSL §§71-73)" at the NYSBA Municipal Law Section Annual Meeting, which will be held on January 24, 2013 at the Hilton New York in New York City.

To **Scott M. Karson** who was nominated to serve as Vice President of the Tenth District, effective June 1, 2013.

Condolences….

To SCBA member **David Mansfield** and his family on the recent passing of his brother-in-law Steven Kane.

To SCBA member **Richard J. Kaufman** on the passing of his mother, Elizabeth.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Johnathan N. Cartelli, Carl J. Copertino, Mauro D'iapico, Joseph DeJesu, Paul Devlin, Deborah Fairbrother, Darin Finkelstein, Peggy A. Foy, Kyle Thomas Lynch, Donna Maio, Susan McLaughlin and Peter Tufo.**

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LANDLORD TENANT

Recent appellate cases

By Patrick McCormick

Two appellate courts recently rendered decisions discussing landlord/tenant issues. The decisions, while breaking no new ground, do point out what can happen when parties fail to properly memorialize their landlord/tenant relationship and when a landlord fails to act to correct defective conditions in commercial premises.

The first case is *Joylaine Realty Co., LLC v. Samuel*[1] in which the Appellate Division affirmed the dismissal of landlord's complaint holding that repeated flooding of the commercial premises combined with the landlord's failure to take any action to correct the condition suspended tenant's obligation to pay rent.

The Appellate Division decision is short on facts and analysis, but does clearly hold "the repeated flooding of the subject premises substantially and materially deprived the defendant of the beneficial use and enjoyment of the premises, and the plaintiff failed to take any steps to correct the condition."

Without engaging in substantive analysis of the facts or applicable law, the Appellate Division simply relied upon well settled law that "[A] commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from either the whole or part of the leasehold"[2] and "A constructive eviction occurs where 'the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises."[3] Thus, finding that a constructive eviction occurred, the court confirmed that the tenant's obligation to pay rent was suspended.

Patrick McCormick

The next appellate decision comes from the Fourth Department in *Peak Development, LLC v. Construction Exchange*[4] and involved a claim related to common area maintenance (CAM). In *Peak,* the landlord sued to collect from tenant additional rent consisting of common area maintenance charges for snow removal, janitorial services and lavatory maintenance. The Fourth Department reversed summary judgment granted in favor of tenant. The tenant's lease extension expired in October 1997 and a new lease was not executed. Thus, tenant remained in possession of the demised premises as a holdover month-to-month tenant. The express terms of the lease provided for CAM charges and that such charges were to be "pro-rated on a monthly basis according to the amount of space occupied by [defendants] to the total building space."

Plaintiff purchased the property in 2003. The month-to-month tenancy continued until April 1, 2006 when a "letter lease" became effective. The specific terms contained in the "letter lease" were not discussed by the court. Defendant/tenant in moving for summary judgment relied on the lease, the lease extension and an affidavit from defendant's executive vice president that CAM charges under the lease and lease extension were not paid between September 1987 and October 1997 and argued that plaintiff waived the right to collect such charges because plaintiff's predecessor did not collect the CAM under the lease and lease extension.

The court found that the "issue of whether waiver has occurred is generally one of fact [citation omitted] and, here, defendants failed to establish as a matter of law that plaintiff's predecessor waived his entitlement to CAM charges."

As part of its decision, the Appellate Division cited to the well settled law that "a successor-in-interest to real property takes the premises subject to the conditions as to the tenancy, including any waiver of rights, that [its] predecessor in title has established if the successor-in-interest has notice of the existence of the leasehold and of the waiver"[Citations omitted]. The court also found that the plaintiff in this case "had notice of the leasehold with defendants and, in any event, possession of the premises constitutes constructive notice to purchaser of the rights of the possessor [citation omitted].

The practical impact of this decision and the facts presented is significant. If, in fact, there was a waiver of the right to collect CAM, the tenant now must locate the seller of the premises (the sale occurred about 8 years before the lower court decision) and, even if located, hope that seller or someone on behalf of the seller if the seller was a business entity, even remembers the terms of the lease and lease extension and whether there was any thought given to the right to collect CAM charges and whether such right was affirmatively waived.

Note: Patrick McCormick litigates all types of complex commercial and real estate matters. These matters include business disputes including contract claims; disputes over employment agreements and restrictive and non- compete covenants; corporate and partnership dissolutions; mechanics liens; trade secrets; insurance claims; real estate title claims; complex mortgage foreclosure cases; lease disputes; and, commercial landlord/tenant matters in which Mr. McCormick represents both landlords and tenants.

1. —-N.Y.S.2d—-, 2012 N.Y. Slip Op. 07634 (2d Dep't 2012), decided November 14, 2012
2. *Johnson v. Cabrera*, 246 A.D.2d 578, 578-579 (2d Dep't 1998)
3. Id at 579, quoting Barash *v. Pennsylvania Term. Real Estate Corp*., 26 NY2d 77,83(1977)
4. —-N.Y.S.2d—-, 2012 N.Y. Slip Op. 07458 (4th Dep't 2012) decided November 9, 2012

WHO'S YOUR EXPERT

The trial expert v. the litigation consultant

By Hillary A. Frommer

To most lawyers and clients, the "expert" is the individual who persuades a jury of a party's position with his or her superior knowledge and stature in the professional community, be it in medicine, engineering, accounting, or any other technical area. That is not the only role of an expert.

There are two types of experts in litigation: the trial expert and the litigation consultant. The trial expert is, by virtue of his or her education, training, skill or experience, believed to have proficiency and specialized knowledge in a particular subject beyond that of an average person. Utilized by both sides to advocate their respective positions, the trial expert prepares a written report and testifies at trial.

The litigation consultant, on the other hand, does not issue a report or testify at trial. Rather, the consultant provides advisory services to the lawyer and helps prepare a case for trial. Defined as "an adjunct to the lawyer's strategic thought process",[1] the litigation consultant assists in the litigation from its earliest stages by identifying important facts and issues, or the strengths and weaknesses of the case.

Hillary A. Frommer

The distinction between the two types of experts is critical for purposes of pretrial discovery. In both the state and federal courts, discovery is generally permitted of the trial expert only. In state court, expert discovery is governed by CPLR § 3101(d)(1), which mandates disclosure of: (1) the name of the expert the party intends to call at trial; (2) the subject matter "in reasonable detail" on which the expert is expected to testify; (3) the substance of the expert's facts and opinions; and (4) the expert's qualifications. On its face, CPLR § 3101(d)(1) does not apply to the litigation consultant who does not testify at trial. However, the consultant is not always (or automatically) immune from discovery. CPLR § 3101(d)(2) allows for discovery concerning the litigation consultant in certain, narrow circumstances, stating:

> Subject to the provisions in paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative (including… consultant) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Because the materials are disclosed

(Continued on page 23)

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INTELLECTUAL PROPERTY

Starbucks v. Wolf's Borough Coffee – Charred, Not Diluted

By Gene Bolmarcich

Starbucks may have been shaken *and* stirred after its third trip to the U.S. District Court for the Southern District of New York, via two temporary layovers at the 2nd Circuit Court of Appeals and another one pending over the course of over 11 years.

In December 2011, Judge Laura Swain, for the third time, ruled in favor of Wolf's Borough Coffee (dba Black Bear Micro-Roastery), a tiny Lake Winnipesaukee, New Hampshire coffee brewer (a husband and wife team plus one part-time employee), and against the plaintiff Starbucks, in what might be referred to as Goliath's marathon legal battle against David to prevent Black Bear from using the word "Charbucks" to designate one of its coffee brews.

The nearly burnt coffee flavor reminded owner Jim Clark of the famously dark-roasted taste of Starbucks coffee, so he wanted a name that would serve as a warning to his customers. Along with the word "Charbucks", the label comes with the warning "You want it dark, you got it dark." Starbucks, determined to fight to the bitter end, claims that this constitutes trademark dilution, both by "blurring" and "tarnishment," under Section 43(c) of the Lanham Act, the federal trademark statute.

By way of background, there are two types of trademark dilution. The first is "blurring," defined as an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark," while the second is "tarnishment," defined as an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark."

While this might appear to be a rare case, a fair number of trademark cases are as notoriously long and unbalanced in terms of the might of the opposing parties. The reason for this is clear – the value of a brand to most companies is often the lion's share of the value of the company itself. Failing to protect it can erode its value over time, regardless of the size of the defendant. It's the "death by a thousand cuts" theory of trademark protection.

A good example of this is the 14 year legal battle between Victoria's Secret and a small sex shop in Kentucky named "Victor's Little Secret," owned by one Victor Moseley. After being enjoined at the District Court and then losing an appeal to the 6th Circuit, Moseley took its case to the Supreme Court, which reversed the 6th Circuit and remanded the case back to the District Court.

Meanwhile in response to the Supreme Court's ruling, Congress passed the Trademark Dilution Revision Act of 2006, which amended the Lanham Act so that it now clearly favors plaintiffs in dilution cases - by eliminating the Supreme Court created requirement that a plaintiff prove "actual economic injury" to its trademark, and instead only prove a "likelihood of dilution." On remand the court ruled in favor of Victoria's Secret and the decision was upheld on appeal in a 2 to 1 ruling. Thus the 14 year saga ended. Victor's Little Secret is now "Cathy's Little Secret."

In a very similar legal setting involving the same law and the amendment thereto during the course of litigation, comes the Starbucks case. While the TDRA seemed as though it would make it easier for plaintiffs to win dilution by blurring claims, as was seen in the Victoria's Secret case, this has turned out not to be the case for Starbucks. In round one, which took place soon after the Moseley case, the District Court ruled against Starbucks because it failed to prove actual economic harm. After the TDRA, the 2nd Circuit remanded the case back for round two. This time, once again, the District Court ruled against Starbucks, finding that "Starbucks" and "Charbucks" were not similar enough to cause dilution. The 2nd Circuit found much fault with the District Court's reasoning, especially the requirement that the marks at issue be "substantially similar" as this language was nowhere in the revised statute (rather "degree of similarity" is simply one factor to consider). The court also thought that much more emphasis should have been placed on the defendant's intent which was admittedly (and quite blatantly according to the evidence of record) to poke fun at and to remind consumers of Starbucks.

Gene Bolmarcich

Now we go back to Judge Swain for her third crack at this case. This time, Judge Swain went methodically through the *non-exclusive* six-factor statutory "blurring" test. Of the six factors, five were found to be in favor of Starbucks. Only the "similarity of the marks" factor was found to favor the defendant, yet the court ruled once again in its favor. As the factors are non-exclusive, this gives judges much flexibility to decide a case as they see fit to, regardless of the way the factors may

(Continued on page 27)

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PRACTICE MANAGEMENT

Technology and client service

By Allison C. Shields

Lawyers can improve their client service by recruiting technology to help in the effort, not just to improve internal efficiency (much of which is invisible to clients), but to provide direct, *observable* benefits to clients. These include:

Client Portals

Most lawyers hate when clients call and ask them the same questions over and over, or when clients are impatient and want answers immediately, even if the lawyer is in court or otherwise unavailable. But a client waiting for a response hast the potential to become a dissatisfied client very quickly.

A client portal is a secure place where clients can go online to obtain information about their matter without having to call your office. Clients can track the progress of their matter, view a calendar with upcoming dates related to their case, send messages to the lawyers and staff working on their matter, and receive updates or review documents. Clients log in with their own individual password to the site and they can view whatever documents, messages or upcoming dates the lawyer allows them access to. The client can get information or answers about what is happening on their case at any time, from anywhere (as long as they have an internet connection), relieving the client's anxiety and improving satisfaction.

Some client portals are stand-alone services such as Basecamp (basecamp.com), and others are incorporated directly into practice management software, such as MyCase (mycase.com).

Allison C. Shields

Collaborating with Clients on Documents

Put an end to endless rounds of emails, trying to keep track of versions of documents or forgotten email attachments. Instead, collaborate directly with clients on documents either through a dedicated client portal (see above) or through the many document and file sharing programs available. All parties with access to the document will always see the most updated version of the document, or you can work together in real time and make changes as you talk; both parties will see the changes as they are made.

Eliminating Unnecessary Client Meetings

When clients have to travel to your office to meet with you, it costs them time and money (and it costs them on your bill if you travel to them). But if you don't both need to be physically in the same room to get the same benefit from the meeting, consider using technology to allow your client to meet with you from their home or office by holding a 'virtual meeting. Use a webcam, services like Skype, Facetime or Google+ Hangouts if you need to see one another, or use a screen-sharing program if you want your clients to see what you see on your computer screen.

Making Meetings Count

Sometimes in-person meetings can't be avoided. In that case, be sure your client has your full attention for the duration of the meeting. Instead of meeting in your office, where distractions from telephone calls, email and other work can interrupt the flow of the meeting, go into a conference room where you are cut off from everything else. If you must meet in your office, hold your calls, turn off your email, and do not allow interruptions from coworkers. Turn off all audible alarms on your computer. If you can, get out from behind your desk.

Make sure you have access to all of the information you might need during the meeting at your fingertips so you do not have to leave the room or ask your assistant for help. Whether you use a laptop, smartphone or tablet connected to your system, having available technology that allows you to reach your calendar, files, or the internet (for a quick check of the court's calendar for example) right there with you in the meeting can save time and demonstrate to clients that you're on top of your game – and your client's legal matter.

Streamlining Client Payments

Every lawyer hates chasing clients for money. Use technology to make that task less onerous by setting up automated electronic payment systems. If you have not done so yet, be sure your firm can take credit cards with a merchant account through your bank, or, if you travel to clients at their location, get a device that allows you to accept credit card payments right through your iPad or smartphone.

Send clients invoices via email with a link to click to allow them to pay directly from the email.

Client service means finding ways to make the legal process and working with you easier for your clients. The easier it is to work with you, the more satisfied your clients will be. How will you know if they are satisfied? They'll show their appreciation by referring other clients.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers management, productivity, client service, business development and marketing consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her

TRUSTS & ESTATES

By Ilene Sherwyn Cooper

Disclosure

In *In re Cugini,* the objectant in a contested probate proceeding filed a motion to compel the examination of two non-party witnesses, a physician. The objectant maintained that the physician examined the decedent in connection with an Article 81 guardianship proceeding and therefore, had information regarding her competency. The court held that generally the test for disclosure is whether the information sought is material and necessary. When disclosure is sought from a non-party witness, the party seeking disclosure must either satisfy the requirements of CPLR 3101(a)(3) and (4), regarding, *inter alia,* the availability of the witness and a showing of special circumstances, respectively. The court noted that although a showing of special circumstances is no longer a prerequisite for the examination of non-parties in the Second Department, they should still be considered in making a determination. To this extent, the court found, in view of the objection as to the testamentary capacity of the decedent, that the examination of the physician was material and necessary to the proceeding. Further, the court found that the evidence to be gleaned from the witness was not available from any other source. Finally, the court noted that the physician had been named as an expert witness by the petitioner. The court opined that while the examination of an expert witness is not generally permissible, when that witness is also a factual witness with personal knowledge relevant to the proceeding, the examination of the witness is authorized. Accordingly, the motion to depose the witness was granted.

***In re Cugini*, NYLJ, Aug. 20, 2012, at 19 (Sur. Ct. Richmond County)**

Ilene S. Cooper

Sealing of court records

Before the court in *In re Rappa,* NYLJ, Oct. 23, 2012, at 23 (Sur. Ct. Kings County), was an ex parte application for an order confirming the confidentiality condition of a Release and Stipulation to Dismiss, and sealing the records of the estate, including any proceeding to compromise the cause of action for the decedent's wrongful death.

In support of the application, the petitioners asserted that the cause of action for wrongful death had been resolved, and that the confidentiality provisions of the release agreement were a "vital component" of the settlement.

The court opined that the sealing of court records can only be ordered upon a showing of good cause. Such a determination must be assessed against the backdrop of the broad presumption that the public is entitled to access to judicial proceedings and court records. Accordingly, because confidentiality is the exception and not the rule, a party seeking an order to seal bears the burden of demonstrating compelling circumstances which justify restricting the public's right to open court proceedings.

Considered within this context, the court found no basis for sealing the court record. The court found that the petitioners had not demonstrated that a failure to seal the court record would inhibit the resolution of concurrently pending or related proceedings, nor had petitioners shown that the parties' reliance on the confidentiality of the file had induced changes of their position, and was essential to the settlement. Although petitioners maintained that certain aspects of the terms of settlement could disclose some unspecified strategic path to defendants in future actions, the court found this claim insufficient to sustain sealing of the record. Therefore, the petitioners' application was denied.

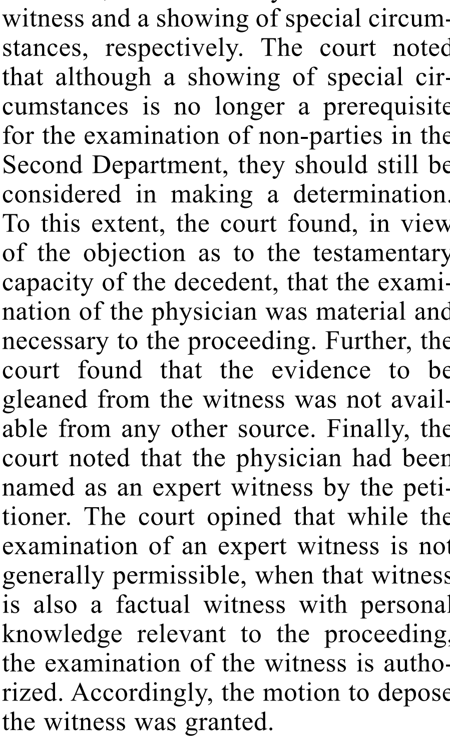
***In re Rappa,* NYLJ, Oct. 23, 2012, at 23 (Sur. Ct. Kings County)**

HIPAA authorizations

In *In re Bellante,* the court directed the petitioner to execute HIPAA authorizations so that the objectant could obtain the medical records of the decedent. At issue in the contested accounting before the court was the validity of a transfer made by the decedent of her home prior to her death. The objectant maintained that the decedent's mental incapacity and physical limitations made her incapable of executing the deed to the premises, and caused her to be subject to undue influence perpetrated by the petitioner and her brother in connection with the transfer. The court held that in the case where a patient is deceased, a physician shall be required to disclose records either in the absence of objection y a party to the litigation, or when the privilege has been waived. A waiver can be affected by a personal representative, or by any party in interest to the litigation were the court deems the interest of the personal representative to be adverse to those of the decedent's estate. (CPLR 4504(c) (2). In this context the court held that inasmuch as the capacity of the decedent at the time of the subject transfer was an issue of fact to be determined at trial, the medical records of the deceased were material and necessary to the pending litigation. Moreover, given the allegations that the petitioner was a party to the undue influence perpetrated upon the decedent, the court found that her interests were adverse to the estate. Accordingly, the court held that the physician-patient privilege could be waived by the objectant and that she was entitled to the records in issue.

***In re* Bellante, NYLJ, July 19, 2012, at 29 (Sur. Ct. Suffolk County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is Chair of the New York State Bar Association Trusts and Estates Law Section, and a member of the Board of Directors and a past-president of the Suffolk County Bar Association.



New County Court Part

Suffolk County District Administrative Judge, C. Randall Hinrichs announced that a new County Court part is being set up in Central Islip and will begin hearing cases on January 15, 2013. The new part will be located in what is now Courtroom D31. The Honorable Fernando Camacho (Court of Claims, Acting Supreme Court), the former Criminal Administrative Judge in Queens County, will preside.

The part will focus on:

- cases with indicted defendants who are eligible for Youthful Offender treatment and are charged with C, D, or E Felonies (except cases involving Sex Offenses or Gun Possession) – Co-defendants who are Y.O. eligible will also be taken into this part to keep these matters together;
- all indicted cases handled by the District Attorney's Office Insurance and Economic Crimes Bureau;
- some of the older cases in other County Court Parts.

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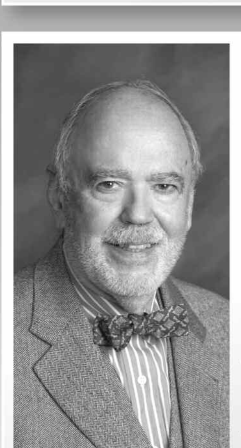

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EDUCATION

Amendment to the Dignity for All Students Act

By Candace J. Gomez

Many teachers, administrators, school board members and school district attorneys have been brought up to speed regarding the first phase of the Dignity for All Students Act ("DASA"), the legislation which took effect on July 1, 2012. DASA explicitly prohibits the harassment or discrimination of students with respect to certain non-exclusive protected classes, including, but not limited to, the student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

However, it is important for us to be prepared for the second phase of DASA. On July 9, 2012, Governor Cuomo signed legislation which expands the scope of DASA by requiring schools to take action when students experience cyberbullying. This legislation goes into effect on July 1, 2013. School policies, procedures and codes of conduct should be reviewed to ensure that they are in full compliance on or before the effective date. The legislation contains the following requirements:

Candace Gomez

- **Schools required to act when cyberbullying occurs on or off campus**
  Schools must act in cases of cyberbullying whether it occurs on or off campus, when it creates or would create a substantial risk to the school environment, substantially interferes with a student's educational performance or mental, emotional or physical well-being, or causes a student to fear for his or her physical safety.

- **Requires proper protocols are in place to deal with cyberbullying**
  The legislation requires schools to put protocols in place to deal with cyberbullying, harassment, bullying and discrimination, including assignment of a school official to receive and investigate reports; prompt reporting and investigation; responsive actions to prevent recurrence of any verified bullying; coordination with law enforcement when appropriate; development of a bullying prevention strategy; and notice to all school community members of the school's policies.

- **Sets training requirements for school employees to id & prevent cyberbullying**
  The law sets training requirements for current school employees, as well as for new teachers and administrators applying for a certificate or license, on the identification and mitigation of harassment, bullying, cyberbullying and discrimination.

Note: Candace J. Gomez is an attorney with the law firm of Lamb & Barnosky, LLP in Melville, NY. She practices in the areas of education law and civil litigation. Ms. Gomez is a member of the Suffolk County Bar Association and also serves as a member of the New York State Bar Association President's Committee on Access to Justice.

REAL ESTATE

Listing a house post-contract, what gives?

By Andrew Lieb

You are the buyer's attorney in a fully executed purchase contract for a property located in Sayville, New York. The original closing date was set for November 15, 2012. An extension of the closing date was requested for December 15, 2012 and granted. Thereafter, and due to a multitude of factors such as a boundary line issue requiring affidavits from neighbors, and then, a flood in the basement requiring a re-inspection, there was a further extension of the closing that was agreed to by the seller's attorney for January 15, 2013.

As, you are all aware, real estate agents get extremely aggressive at pushing everyone to close their deals. So, the seller's real estate agent has been calling everyone, the seller, buyer, attorneys and lender hourly to get "their" closing date scheduled. Now, the seller's real estate agent said that they are going to renew their listing on the multiple listing service and start showing the house again. This is in the face of the fact that we are in contract and the contract has not been terminated pursuant to its terms.

This deal does not involve a buyer's real estate agent. The agent is not a dual agent and there are no broker's agents involved.

Rules

The Code of Ethics and Standards of Practice of the National Association of Realtors (Effective January 1, 2012) is as follows:

- Standard of Practice 1-6: REALTORS® shall submit offers and counter-offers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)
- Standard of Practice 1-7: When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/93)
- Standard of Practice 1-8: REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated.
- Standard of Practice 1-15: REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/09)

Andrew Lieb

- Standard of Practice 3-6: REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. (Adopted 5/86, Amended 1/04)
- Pre-Preamble: While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Regulations Affecting Brokers and Salespersons: §175.9 Inducing breach of contract of sale or lease: No real estate broker shall induce any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu thereof a new contract with another principal.

Application

So, there is a regulation expressly on point, which precludes the inducement of a breach of contract. Nonetheless, real estate agents, which pursuant to Real Property Law §443(1)(a) means "a person who is licensed as a real estate broker, associate real estate broker or real estate salesperson" often see themselves as realtors before they see themselves as real estate agents and mistakenly believe that the Code of Ethics trumps New York State Laws and Regulations and further have not read their own Code of Ethics, but instead heard the Standards of Practice discussed at a training by a realtor organization. They are wrong in thinking that the Code of Ethics trumps the law as it merely has the control of a contract that cannot modify express laws and regulations and moreover, the Code of Ethics, if read expressly states to in the Pre-Preamble section that "in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence".

The property should not be shown until the contract is formally terminated. If the real estate agent shows the property, the buyer's attorney should place a call to the real estate agent's broker-of-record, the individual responsible for the agent's license pursuant to the Department of State, and request that such wrongful activities are stopped immediately. Should the conversation not be fruitful, a formal cease and desist letter would be appropriately directed to the broker-of-record followed by an application for a Temporary Restraining Order in our Courts and a complaint to both the local board of the National Association of Realtors and to the Department of State concerning the real estate agent's acts of untrustworthiness pursuant to the regulation. Do not be pressured, know your client's rights and protect them.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as Co-Chair to the Real Property Committee of the Suffolk Bar Association and served as this year's Special Section Editor for Real Property in The Suffolk Lawyer.

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CONSUMER BANKRUPTCY

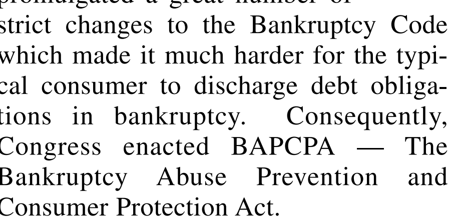
Is another wave of bankruptcy reform ahead?

Senator-elect Elizabeth Warren may push for change

By Craig D. Robins

Craig D. Robins

For eight years leading up to 2005, the banking and credit card industries lobbied Congress incessantly, urging them to believe that American consumers who sought bankruptcy relief were essentially deadbeats. That year, Congress bought into this perception and promulgated a great number of strict changes to the Bankruptcy Code which made it much harder for the typical consumer to discharge debt obligations in bankruptcy. Consequently, Congress enacted BAPCPA — The Bankruptcy Abuse Prevention and Consumer Protection Act.



This bankruptcy reform was designed to pull every last dollar out of hardworking but suffering middle class families who appeared to have an extra dollar or two to spare — at least on paper, according to a series of controversial calculations called the bankruptcy Means Test — a new eligibility requirement for those seeking Chapter 7 relief. This law was a major victory for the banks, and unfortunately created an inequitable situation for many consumers.

A respected Harvard University bankruptcy law professor at the time, who I deemed a hero to the typical middle class families I usually represent in my Long Island bankruptcy practice, was a very outspoken critic of these proposed laws. That was Elizabeth Warren, who was this country's foremost authority on the sociology of Americans who file bankruptcy.

Warren became known for her critical opinions of the practices of the banking and credit card industries, and I have written about her previously in this column. In 2000 she co-authored a book, *The Fragile Middle Class* and *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*, in 2003.

In the latter book, she stated, "This year, more people will end up bankrupt than will suffer a heart attack. More adults will file for bankruptcy than will be diagnosed with cancer. More people will file for bankruptcy than will graduate from college. And, in an era when traditionalists decry the demise of the institution of marriage, Americans will file more petitions for bankruptcy than for divorce."

Some commentators have said Warren has become the countries most respected and resonant voice on consumer issues since Ralph Nader's zealous quest to protect consumers in the 1970s.

Warren Goes to Washington

Now it looks like the Senate Banking Committee is about to get a serious dose of bankruptcy expertise from the protector of the middle class. Ms. Warren defeated her Republican rival last month in one of the most expensive and most watched Senate campaigns of the year – for the Massachusetts seat previously held by the late Ted Kennedy. It is expected that Warren will land a seat on the high-profile Senate Banking Committee.

More importantly, as a staunch advocate of protecting the consumer, an ardent critic of the banking industry and an outspoken critic of BAPCPA, there is a high likelihood that Ms. Warren, now as a lawmaker, will take the initiative to introduce legislation to reform the problems and inequities created by the Bankruptcy Reform Act of 2005. There is no doubt that Ms. Warren will bring her liberal, pro-consumer views to the Senate.

Warren created the U.S. Consumer Protection Bureau, a federal agency established in 2010, not only to prevent risky mortgage practices, but also to stop credit card companies from continuing to engage in unfair and predatory business practices.

A great many bankruptcy judges across the country, including several in our own district, have officially and unofficially expressed their frustration with many aspects of the new bankruptcy laws. Sometimes their personal opinion is that many parts of the law are a disaster.

In addition to making it harder for the middle class to get bankruptcy relief, BAPCPA is flawed and poorly drafted. This has resulted in many decisions which have caused judges to stray from a strict interpretation of its hastily drafted words, which can result in an absurd result and instead, focus on a more commonsense analysis. BAPCPA was drafted primarily by lobbyists, rather than bankruptcy professionals. A significant problem continues to be a lack of consistency among courts in different jurisdictions for enforcing its provisions.

Warren has pledged to stand up for the little guy against the financial forces of Wall Street. I predict that when Warren goes to Washington, the likelihood is that we will see her introduce some substantive pro-debtor legislation to amend the Bankruptcy Code, in which she will seek to reform some of the ill conceived and poorly drafted aspects of BAPCPA. She will also likely address issues concerning student loan debt relief, mortgage debt relief, as well as the debt burden on consumers.

Ms. Warren's election to the Senate is wonderful news for bankruptcy attorneys and middle-class Americans alike.

Editor's Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

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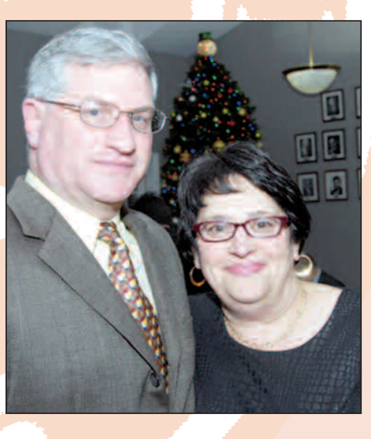
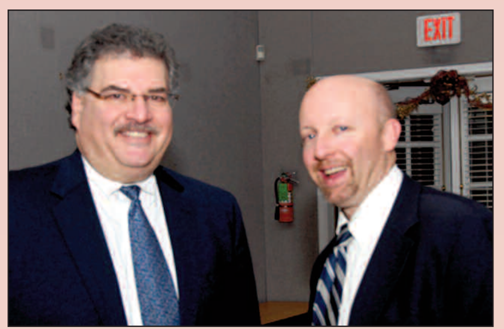
SCBA celebrates the holidays in style

Photos by Barry Smolowitz





FREEZE FRAME

Thanking retiring judges for their dedication and service

There was a retirement party held at the Oar in Patchogue for Judge James F.X. Doyle. Enjoying the evening with Judge Doyle, third from left, were SCBA President Art Shulman, Judge James Quinn, and Thomas O'Rourke.

SCBA President Art Shulman thanked retiring Judge Madeleine A. Fitzgibbon for her service to Suffolk County at a retirement party held in her honor at the Irish Coffee House.

The retirement party at the Oar was also for retiring Judge Gary Weber, center, who was joined by SCBA President Art Shulman, left, and SCBA First Vice President Bill Ferris, III, who thanked Judge Weber for his service.

FREEZE FRAME

Photo courtesy Alan Costello

SCBA member Alan Costello and his wife Sibyl are proud to announce their first grandchild, Thomas James Czech, born Nov. 20, at 4:31 a.m., 9 lbs. 12 ozs., 21 3/4 inches. Mom and baby are fine and thriving.

TRUSTS AND ESTATES

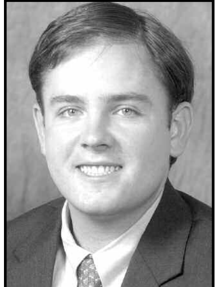
The slayer rule

By Robert M. Harper

As articulated by the Court of Appeals in *Riggs v. Palmer*, the so-called "slayer rule" provides that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[1] Although forfeiture does not occur in cases involving accidental killings, self-defense, and disabilities that negate a culpable mental state, the maxim articulated in *Riggs* has been utilized to preclude a person who intentionally kills another from taking as a beneficiary of his or her victim's estate. Additionally, relying upon *Riggs*, at least two Surrogate's Courts have held that, under the slayer rule, intentional killers forfeit their rights to inherit not only from the estates of their victims, but also the estates of people who were not their victims in certain circumstances.

This article discusses the circumstances in which the expanded application of the slayer rule to preclude intentional killers from taking as beneficiaries of the estates of people other than their victims is justified.

There are only two reported cases in which New York courts have referenced the slayer rule as a basis for denying an intentional killer the right to inherit from the estate of someone other than his or her victim. In each of those two cases, *Matter of Edwards* and *Matter of Macaro*, the Surrogate's Court was confronted with circumstances in which an intentional killer (or someone acting on his behalf) sought to receive his deceased victim's property, indirectly, as a beneficiary of the estate of one of the victim's legatees or distributees. Noting that *Riggs* generally is utilized to preclude an intentional killer from inheriting directly from his or her victim's estate, the Surrogate's Courts held that the slayer rule precluded an intentional killer from taking his or her victim's property, both directly as a beneficiary of the victim's estate and indirectly through the estates of the victim's legatees and beneficiaries.


Robert M. Harper

Suffolk County Surrogate John M. Czygier, Jr.'s recent decision in *Matter of Edwards* is highly instructive. There, after choking his mother-in-law Dianne Edwards ("Dianne") to death, Brandon Palladino ("Brandon") was convicted of Manslaughter in the First Degree and, ultimately, sentenced to prison for a term of 25 years.[2] Adding insult to injury (or, more accurately, death), however, Brandon's relatives took steps to ensure that he received a substantial portion of Dianne's estate, as a beneficiary of his deceased wife Deanna Palladino's ("Deanna") estate.

Dianne died, testate, bequeathing her entire estate to her daughter, Deanna. Although Deanna survived Dianne, she died of an accidental drug overdose in February, 2010, leaving no will. Under normal circumstances, Brandon, as Deanna's surviving spouse (with no issue), would inherit Deanna's entire estate, including any bequests that she received from Dianne.[3]

Of course, the circumstances in *Edwards* were not normal, and Dianne's surviving relatives argued that, under the slayer rule, Brandon forfeited any interest in Dianne's estate that he otherwise might have had. Since Brandon killed Dianne, the critical question in *Edwards* was whether the slayer rule precluded Brandon from inheriting Dianne's property, not as a direct beneficiary of Dianne's estate, but, indirectly, through Deanna's estate.

Surrogate Czygier answered that question affirmatively, finding that Brandon could not inherit from Dianne, even indirectly as a beneficiary of Deanna's estate. In doing so, the Surrogate explained that "one who takes the life of another should not be allowed to profit from his wrongdoing[.]" But for Brandon's wrongdoing, there "would be no inheritance to be obtained through his wife Deanna." As a result, considering Brandon's wrongdoing and his conviction for Manslaughter in the First Degree ("intentionally causing serious physical injury to an individual resulting in such individual's death"), Brandon forfeited any right he otherwise might have had to inherit Dianne's property as Deanna's sole distributee.

Former Westchester County Surrogate Albert J. Emanuelli reached a similar conclusion in *Matter of Macaro*. In *Macaro*, the decedent died, intestate, survived by eight nieces and nephews, including the respondent.[4] Prior to the decedent's death, the respondent had been convicted of Manslaughter in the First Degree and Murder in the Second Degree in connection with the deaths of his father, Ray Macaro, Sr. ("Ray"), and a paternal aunt, Regina Deine ("Regina"). The convictions were affirmed on appeal.

Following the decedent's death, the fiduciary of the decedent's estate sought to have the respondent disqualified as one of the decedent's distributees. The fiduciary argued, among other things, that the slayer rule precluded the respondent from taking as a beneficiary of the decedent's estate, as Ray and Regina would have been distributees of the decedent's estate had the respondent not killed them and had they survived the decedent.

Although Surrogate Emanuelli acknowledged that *Riggs* and its progeny "have generally been applied only where the killer was seeking a share . . . of his victim's estate," the Surrogate held that the respondent could not inherit from the decedent's estate. "Indeed, [Surrogate Emanuelli concluded that] to hold otherwise would subvert the long-standing public policy of the courts in New York ... 'simply . . . that he shall not acquire property by his crime, and thus be rewarded for its commission.'"

The application of the slayer rule has been extended beyond those situations in which intentional killers seek to take as beneficiaries of their victims' estates. Indeed, as *Edwards* and *Macaro* demonstrate, the slayer rule has been utilized to deny intentional killers the right to inherit property belonging to their victims, whether directly as beneficiaries of the victims' estates or indirectly through the estates of the victims' legatees or distributees. The extension of the slayer rule is consistent with standards of common sense and decency.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in estate and trust litigation. Mr. Harper serves as Co-Chair of the Bar Association's Member Benefits Committee and a Vice-Chair of the Governmental Relations and Legislation Committee of the New York State Bar Association's Trusts and Estates Law Section.

1. *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889).
2. *Matter of Edwards*, NYLJ, Apr. 13, 2012, at 35 (Sur. Ct., Suffolk County).
3. EPTL 4-1.1(a)(2).
4. *Matter of Macaro*, 182 Misc.2d 625 (Sur. Ct., Westchester County 1999).

PRO BONO

Pro bono attorney of the month - Jessica S. Sparacino

By Maria Dosso

The motivation for and benefits of doing pro bono work is commonly advocated by the attorneys who get involved in the Pro Bono Project. In addition to helping to make a difference, this month's honoree, Jessica D. Sparacino, credits her pro bono contribution with helping her to gain practical skills and valuable legal experience.

A graduate of Villanova University, Sparacino worked full time as an Affirmative Action Analyst at Jackson Lewis LLP, while attending Touro College Jacob D. Fuchsberg Law Center earning her J.D. in 2008.

After her admission to the bar, she continued at the firm working in the area of employment law and then joined a firm where her work involved lobbying and a criminal law practice. Finding that this was not her calling, she set out to take the "leap of faith" and launched a family law practice, with her husband's moral support.

After attending a CLE Matrimonial "Boot Camp" sponsored by the Suffolk County Bar Association and the Pro Bono Project, Sparacino agreed to accept a pro bono matrimonial case. She is very positive about the training she received through the Bar Association and feels that as a result, she was prepared to take on pro bono cases and bolster her professional experience in her private practice. "I encourage new attorneys to get started this way, getting the necessary training and the practical experience of taking on a pro bono case with the help of a mentor," she said.

Jessica S. Sparacino

Sparacino believes this professional path helped her to network with other attorneys and gave her the self confidence she needed to start her own firm. Sparacino's firm, Sparacino & Sparacino PLLC, located in Northport, focuses on matrimonial and real estate law, including divorce and family mediation, matrimonial and family law, real estate transactions, foreclosures, small claims, estate planning and administration, and general practice. Jessica is also a real estate broker, an impartial hearing officer for the New York State Education Department (ACCES-VR), and a certified divorce mediator.

Although a family law practice can be emotionally exhausting, Sparacino thoroughly enjoys the practice and wouldn't have it any other way. Her pro bono matrimonial cases have all been different in terms of the clients' circumstances and the cases' complexity, but she observes, "I always found the clients I have worked with to be extremely appreciative. One client still sends me friendly updates on how she's doing. It's so rewarding to know you made a difference in someone's life."

Sparacino has been so inspired by doing pro bono work that she has applied her valuable background in real estate to her most recent pro bono contribution. We are fortunate to have Sparacino on the dedicated panel of attorneys serving on the Pro Bono Foreclosure Settlement Project. She has also found this work to be interesting and rewarding while expanding her general knowledge and legal practice.

When asked what she would say to her colleagues about doing pro bono work, Sparacino enthusiastically recommends the experience. "Absolutely do it!" she says. "It's been a great experience giving back, especially working for people who some of the most appreciative."

And there's been a collateral benefit to her practice as her satisfied pro bono clients have referred paying clients to her. "Especially for new attorneys, there is no better way to get the experience, build relationships, and network with other attorneys," she added.

Sparacino is a member of the Suffolk County Bar Association, the New York State Bar Association, and the Suffolk County Women's Bar Association. She is also the Philanthropy Chair of the Long Island Villanova University Alumni Chapter. She especially enjoys working in the firm with her husband and partner, Frank J. Sparacino, Jr. They reside in Northport with their two dogs, enjoy traveling, and are avid cruisers.

For her dedication and generosity to people in need, we are proud to award Jessica D. Sparacino the honor of being named Pro Bono Attorney of the Month.

For more information on how you can serve your community in one of our pro bono initiatives, please call Maria Dosso, Esq, Director of Communications and Volunteer Services at Nassau Suffolk Law Services (631) 232-2400 x 3369.

Note: Maria Dosso, Esq. is the Director of Communications and Volunteer Services at Nassau Suffolk Law Services. She has worked at Law Services for over 25 years, first practicing in the areas of disability, consumer debt, public benefits and housing law. Currently she manages the Legal Support Center for Advocates, a community education and advocates' consultation service, and coordinates the agency's public relations initiatives and pro bono/volunteer projects.

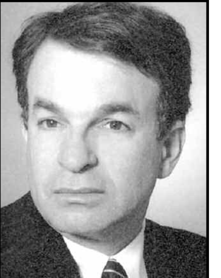
VEHICLE AND TRAFFIC LAW

Appeal of permanent denial of license/privilege application letter

By David A. Mansfield

The Department of Motor Vehicles intention to enact the emergency regulations discussed in the previous article regarding re-licensing or restoring driving privileges for clients previously convicted of multiple alcohol and drug related driving conviction incidents under 15 NYCRR Part §136.5(a)(3) and §136.5(b)(2) will result in a permanent denial of the application LETTER. Your client will receive a Part §136.5 Letter which will set forth the reason for the action of the Department of Motor Vehicles.

The commission of a revocable offense causes the commissioner to review the applicant's entire lifetime driving record. This is a revolutionary approach where the previous scope of review was far more limited. The lifetime driving record equates to the lifetime motor vehicle record preceding the date of the revocable offense under 15 NYCRR Part §136.5(b)(2). Lifetime review is applied to those clients who are currently revoked and have three or four alcohol or drug related driving convictions or incidents. A finding of a chemical Test Refusal without a criminal conviction for an alcohol or drug related driving offense (arising out of the same incident and zero tolerance §1192-a findings), count toward meeting this threshold.


David A. Mansfield

The permanent denial letter was issued after the expiration of a five year permanent revocation imposed as a result of the most recent conviction of driving while intoxicated. The Department of Motor Vehicles terminology for individuals in this category is a "persistently dangerous driver" under Parts §136.5(a) and §136.5(b)(3).

Your client has an option: If he/she has unusual, extenuating and compelling circumstances, they may file a letter with the Driver Improvement Bureau of the Department of Motor Vehicles within 30 days of the date of the denial letter. The Driver Improvement Bureau will review it and advise you of the results. The preferred method is to file an appeal with the Appeals Board within 60 days of the date denial letter. You may submit unusual or extenuating or compelling circumstances as part of the appeal.

The unusual or extenuating and compelling circumstances would have to be beyond a mere hardship of the denial of a driver's license or privilege.

You may want to document the extensive efforts of rehabilitation, change in circumstances, and that the client may have previously served a five year revocation without incident.

Should your client be denied by the Appeals Board, their option is to seek judicial review by filing a CPLR Article §78 litigation in State Supreme Court within four months of the date of the adverse determination.

Future articles will deal with the "TVB cliff" scheduled for April 1, 2013, and further discussion of impact of the regulations regarding relicensing of repeat offenders.

Note: David Mansfield practices in Islandia and is a frequent contributor to this publication.

COMMERCIAL LITIGATION

Latest from Court of Appeals - Scope of Duty Owed by a Realtor to a Seller

By Leo K. Barnes Jr.

In our June 2009 column entitled *Caveat Broker: Avoiding Unenforceable Agreements to Agree*, we reviewed the prerequisites to a viable and enforceable brokerage commission agreement.

This month we explore the scope of exclusivity owed by a broker to a seller in light of the recent decision by the Court of Appeals in *Douglas Elliman LLC v. Tretter*, 2012 WL 5833609 (2012).

In *Douglas Elliman LLC v. Tretter*, plaintiff Douglas Elliman Real Estate (Douglas Elliman) brought suit against defendants Franklin and Sheila Tretter (the Sellers) for failure to pay a broker commission on the sale of their cooperative apartment. According to the decision, the Sellers retained Prudential Douglas Elliman Real Estate to sell their apartment located in Manhattan, wherein Barbara Lockwood served as the broker for the listing. The brokerage agreement stated that the Sellers would be required to pay a 6 percent commission on the sale of the apartment. After the brokerage agreement was signed, Lockwood prepared the listing and began to show the apartment at open houses and by appointment. In November 2008, a potential purchaser made an offer on the apartment, which was accepted by the Sellers, subject to the cooperative board's approval.

Leo K. Barnes

During one of the open houses at the seller's apartment, Lockwood met Taurie Zeitzer. After the initial bidder's offer was accepted, and while the bidder was providing the required information to secure the cooperative board's approval, Lockwood communicated with Zeitzer and her husband via email and showed the Zeitzers five other properties, including four properties listed through other agencies. In addition, Lockwood discussed 12 other apartments with the Zeitzers.

Ultimately, the Sellers' deal with the initial bidder fell through in late November 2008. A few weeks later, Lockwood again showed the apartment to the Zeitzers. Subsequently, the Zeitzers made an offer of $1.4 million, and in December 2008 the Sellers accepted the offer and entered into a contract with the Zeitzers (the Buyers) for the purchase of the apartment.

Prior to the Sellers and the Buyers reaching an agreement, Lockwood sent the Sellers a deal sheet which listed a $70,000 brokerage commission (5 percent of the $1.4 million). Douglas Elliman later confirmed in writing that the brokerage fee on the deal sheet was correct and that it would reduce its brokerage commission from 6 percent to 5 percent if the Sellers sold the apartment to the Buyers, which ultimately occurred. Further, the contract between the Sellers and the Buyers listed "Prudential Douglas Elliman (Barbara Lockwood)" as the broker, and stated that it was the Sellers' sole responsibility to pay the broker's commission.

The $70,000 commission was due and payable at closing, however, Lockwood was unable to attend the closing and the $70,000 was placed in escrow. After the $70,000 was not turned over, Douglas Elliman filed suit against the Sellers to recover its broker commission on the sale. In their Answer, the Sellers alleged that Douglas Elliman was not entitled to a commission because Lockwood had breached her fiduciary duty to the Sellers by acting as a dual agent of the buyers.

The Sellers moved to dismiss the Complaint, and Douglas Elliman cross-moved for summary judgment on its claim to obtain the commission. The trial court denied both motions finding that there

(Continued on page 22)

The Law Library at Central Islip Federal Courthouse

Come enjoy spacious seating and Wi-Fi with panoramic views of Long Island and the Great South Bay. Located on the 10th floor of the Central Islip federal courthouse, the Jacob M. Mishler Law Library is open to the public.

The library maintains a comprehensive collection of primary and secondary sources, focusing on federal and New York jurisdictions. The library also provides free Wi-Fi and computer terminals with internet access. Printing is available for 10 cents per page. While attorneys may not borrow books, materials may be photocopied for 35 cents per page. Library staff is available to answer questions and assist with research.

The library is open Monday through Friday from 8:30 am to 4:45 pm and is closed for all federal holidays and occasional inclement weather. The Law Library is located at 1060 Federal Plaza, 10th Floor, Central Islip. Contact the library at (631) 712-6190.

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RESTAURANT REVIEW

When a reservation at Daniel is impossible (like . . . always) go to Bar Boulud, Daniel Bouloud's casual bistro

By Dennis R. Chase

Sometimes, you are inexplicably, yet quite nearly forced to throw caution to the wind . . . to celebrate the exuberance of an as yet undefinable sublime moment and forget you cannot just grab a reservation at Daniel (even on a Thursday night) but with a mere telephone call. We were experiencing such a moment having just thoroughly enjoyed opening night of The New York Philharmonic in Avery Fisher Hall at Lincoln Center reeling from the transcendent performance of the inimitable Itzhak Perlman.

Perlman, led by an ever spirited Alan Gilbert, Conductor, performed selections from Rimsky-Korsakov, Massenet, Tchaikovsky, Williams, and Sarasate. Whilst still savoring the once in a lifetime opportunity to meet the humble genius that is Itzhak Perlman, we were apprehensive, nervous, and, truth be told, downright giddy. Perlman, intent on making us feel at ease, regaled us with some of his favorite jokes while we attempted to praise him on his performance. We left the "green room" well after the balance of the crowd left the building, but the Main Plaza was still packed with completely enthralled revelers dressed in their best formal attire.

The night was clear, the stars bright, and the weather warm as we drifted through the Plaza perplexed as to why we had not previously made dinner reservations for this perfect of perfect evenings. As we stepped across Broadway, we phoned Daniel with extremely limited expectations and unsurprisingly, not a table was to be had. As we nonetheless Googled one of the premier restaurants in the City, we stumbled across another one of Daniel Boulud's creations . . . Bar Boulud. As if destiny were a beacon to the awestruck and completely famished, we happened to be standing directly in front of the famed establishment. While seemingly ridiculous, we again phoned ahead for reservations and were more than willing to wait at the bar for an hour to secure a table. Upon entrance, however, a few kind and courteous words to our hostess rewarded us with immediate seating. One has to wonder, did Itzhak call ahead? Please allow for the delusional thinking; nothing but magic was in the air.

Although touted as a casual bistro, the design of Bar Boulud is nothing short of breathtaking. The tunnel-shaped room, much longer than wide, with a dramatic vaulted ceiling, evokes the sheer essence of a wine cellar. On one wall, above honey-colored wood booths hang framed crimson blots that represent wine stains. Boulud describes them as follows, "It is made by my Brazilian friend Vik Muniz. The concept arose one day when I went to visit him in his studio and brought many prized wines to share with him. After a drink or two he began to experiment with the patterns wine forms when it stains a linen napkin." The results Boulud calls "tâches de vin," and only begin to describe the avant-garde nature of the interior's design. All the furniture is handcrafted with white oak, the same materiél from which wine barrels are meticulously produced. The backlit gravel wall harkens the "terroir" of the vineyard. (Terroir can be very loosely translated as "a sense of place," which is embodied in certain characteristic qualities, the sum of the effects that the local environment has had on the production of the agricultural product, here, wine) while the flooring is a rough-hewn Burgundian farmhouse stone.

We are here, however, for the food.

Boulud wanted to create a relaxed atmosphere where diners could enjoys the best Charcuterie has to offer. Charcuterie is the branch of cooking devoted to prepared meat products, such as bacon, ham, sausage, terrines, galantines, pâtés, and confit, primarily from pork. Charcuterie is part of the *garde manger* (literally, "keeper of the food") chef's repertoire. Originally intended as a way to preserve meats before the advent of refrigeration, they are prepared today for their flavors derived from the preservation processes. Make a selection from one of the four choices of *jambon* (ham) Boulud has to offer, although recommended is *d'italie prosciutto san daniel* or *d'hongrie,* a free range European Mangalista ham.

If terrines are your preference, then a nod to Frank Bruni of *The New York Times* is quite in order. Bruni describes Bar Boulud as "a terrine machine, a pâté-a-palooza, dedicated to the proposition that discerning New Yorkers aren't getting nearly enough concentrated, sculptured, gelatinous animal fat, at least not of a superior caliber." Highly recommended is *boeuf pot au feu,* a delectable beef cheek terrine, prepared with leek, confit, carrot, mustard, and wonderfully crunchy and tart cornichons. Be very tempted by the chef's signature pâté grand-père, a coarsely ground country pâté, foie gras dressed with truffle juice and port.

If soups or salads are your fancy, nothing here disappoints. The *soupe de* potiron is a steaming bowl of locally grown roasted squash soup with crispy farro, spaghetti squash, and pumpkin oil. Equally satisfying is the *garbure* a hearty "gascon style" soup prepared with savory duck consommé, duck confit, root vegetables, and colza oil. Salad quick picks are easy with *betteraves et* cresson with freshly roasted red beets, crispy water cress, blue cheese, and walnut cream anointed with delicate banyuls vinaigrette. Or a simple, yet elegant, *salade* d'automne combining crisp endives, pear, celery, shaved market chestnuts and dressed with white balsamic vinaigrette. Garnitures include pommes frites, cauliflower gratin, super green spinach, mushroom fricassee, vegetable jardinière, and, never to be missed, bacon roasted Brussels sprouts.

Bar Boulud
1900 Broadway (between 63rd & 64th Streets)
New York, New York 10023
212.593.0303
www.danielnyc.com/barboulud.html
Executive: Olivier Quignon

Main courses include traditional bistro fare such as, *steak frites,* a black angus New York strip steak with heavenly french fries and a creamy laitue au fromage blanc, but also surprise with more interesting dishes like *venaison roti,* with roasted Cervena venison, cranberry braised red cabbage, glazed pumpkin drizzled with apple Ceylan cinnamon jus. Also different and appealing is the *daurade*, a sautéed white sea bream served with roasted baby artichoke, wilted dandelions, and glazed celery.

The menu at Boulud is endless and this review cannot even begin to scratch its quite formidable surface. Try, however difficult it may be, to save a bit of time and room for an impressive wine list and a tantalizing dessert menu. Recommended are the *pomone* with concord grape poached apples, granny smith mousse, peanut praliné biscuit, and peanut butter-green apple ice cream or the *grenadille* with abinao chocolate sabayon, raspberry confit, cookie dough, and passion fruit-raspberry ice cream.

Bar Boulud is not Daniel, but it is also not at all pretentious. While slightly more costly than other local fare, the food, atmosphere, and incredibly friendly, knowledgeable service make the experience very well worth your time. Try not to rush your way through the incredibly enormous menu, take your time, enjoy the wonderfully crunchy French bread and a bottle of wine, and remember you can always return . . . and you will.

Note: Dennis R .Chase is the current President Elect of the Suffolk County Bar Association and the current President of the St. John's University School of Law Alumni Association-Suffolk County Chapter. Mr. Chase is the managing partner of The Chase Sensale Law Group, L.L.P. The firm, with offices conveniently located throughout the greater metropolitan area and Long Island, concentrates their practice in Workers' Compensation, Social Security Disability, Short/Long Term Disability, Disability Pension Claims, Accidental Death and Dismemberment, Unemployment Insurance Benefits, Employer Services, and Retirement Disability Pensions.

FUTURE LAWYERS FORUM

Pro Bono Storm Relief Center at Touro Law Center

By Maria Veronica Barducci

In the aftermath of hurricane Sandy, Touro Law Center opened its doors to its Hurricane Emergency Assistance and Referral Team Center (TLC-HEART). Comprised of disaster-relief trained students and volunteer attorneys, the center offers assistance to members of the community, including students and staff members, who are in need. It offers assistance in assessing eligibility and completing application forms for the wide range of emergency assistance available to storm victims, such as food stamps, government loans and grants. The Center also offers referrals for free consultation and provides advice on storm-related legal issues, including: unemployment, insurance, consumer complaints and landlord-tenant matters.

Additionally, Touro Law has a Public Advocacy Center which houses a dozen not-for-profit interest law groups. They provide assistance with issues involving senior citizens, employment, disability, family law and domestic violence. The agencies within the Public Advocacy Center have agreed to help provide additional resources and support for the victims of hurricane Sandy.

Maria Veronica Barducci

In conjunction with the Public Advocacy Center, Touro Law has joined forces with other associations on Long Island and New York. They are coordinating with the New York State Bar Association, the Suffolk County Bar Association and federal, state and local officials in Nassau and Suffolk County. Congressman Steve Israel has also joined the efforts of Touro Law by announcing that he will call on the Consumer Financial Protection Bureau to appoint a Federal Insurance Oversight Monitor to ensure that consumers are not being taken advantage of.

Dean Patricia Salkin outlined in a press conference held a few days after the storm, that "based on the experiences from other natural disasters in the state and across the county, the immediate pro bono assistance of trained lawyers and supervised law students is in immediate demand and will be a necessary component of rebuilding for many months to come." Hopefully TLC-HEART can be a valuable resource for anyone in the affected community who is in need, might that be now or in a few months.

If you or anyone you know is in need of assistance you can contact TLC-HEART at (631) 761-7198 or at tlcheart@tourolaw.edu. The telephone hotline will be answered live Monday through Thursday from 9:00am to 6:00pm and on Friday from 9:00am to 3:00pm. A voicemail message can be left 24/7.

Note: Maria Veronica Barducci is a third-year, full-time student at Touro College Jacob D. Fuchsberg Law Center with an interest in International Law. She graduated from St. John's University in 2010 with a Bachelor of Arts in English and Italian.

BOOK REVIEW

Bligh, Reconsidered

By William E. McSweeney

"As the sole object of Government in Chartering this Vessel in our Service at a very considerable expense is to furnish the West Indian Islands with the Bread-Fruit & other valuable productions of the East, the Master & Crew of her must not think it a grievance to give up the best part of her accommodations for that purpose." (Italics added.)

Thus writes the independently wealthy Joseph Banks to the British Admiralty. In early 1787 the renowned and influential naturalist sets forth preconditions to his underwriting of a projected expedition devoted to the gathering of flora, principally Artocarpus incisa, breadfruit, from Pacific Islands, this for the purpose of introducing them to the west, where it was hoped they would propagate. Banks's letter makes clear that, of taxonomist Carolus Linnaeus's two Kingdoms, Animalia and Vegetabilia, the healthy arrival of the latter was to be given preeminence.

Dubious preeminence aside, such transplantation would appear to be a noble goal — our own premier agriculturist Thomas Jefferson wrote that "…no greater service can be rendered any country than to introduce a new plant to its culture" — were it not that the Admiralty's real hope was that cheap high-energy food sources, represented by the breadfruit, could serve an ignoble purpose: the nourishment of African slaves on colonial plantations in the Caribbean.

The Bounty: The True Story of the Mutiny on the Bounty
By Caroline Alexander.
Charts, illustrations, and photographs.
491 pp., Viking, New York, NY.
ISBN: 0-670-03133-X.

While this hope was patently evil, a companion evil, this one insidious, inhered in the project — an evil whose gestation occurred at the time of Elizabeth I. In the seventeenth century she had granted royal charters to private trading companies, these to serve principally the state's interests — the setting up and administering of colonial governments, the organizing of fair trade agreements between nations, the controlling of customs duties; by dint of these operations, the trading companies in effect made foreign policy. But the inevitable desire to maximize profits soon enough trumped the desire to serve government interests, to the point where these ever-expanding, essentially state-sanctioned, monopolies considered any public responsibilities as being merely incidental. Worse, these sovereign-chartered corporations were steadily approaching in terms of power the sovereign who had granted them their charters. Thus was begun the national governments by corporations.

William E. McSweeney

By the time, then, that Banks wrote his letter, not only did corporations impose influence over government, wealthy individuals did. But the Admiralty was either ignorant or heedless of the letter's implication. Always with an eye toward defraying the crown's costs — that which had motivated Elizabeth's granting of charters — the governing board of the world's most powerful navy therefore acceded to a private citizen's terms and conditions; thus, even before the ship assigned to the expedition had stood out to sea, its master and crew had preemptively been stripped of the "best part of her accommodations." This meant, among other things, that the ship's commander would be deprived of the great after-cabin, this to be given over to the stowage of breadfruit, and would be relegated to a humble bunk abeam of the ship's pantry, a relegation unlikely to confer dignity or authority on the commander, one unlikely to inspire respect from his crew. In effect, then, the Admiralty, in an act virtually guaranteeing the devastation of ship's morale, had itself imperiled the voyage.

The ship's master chosen for this already-compromised expedition was a 33-year-old Lieutenant, a career Navy man, a fore thinker, one who understood the especial importance at sea of a diet rich in citrus fruit and green vegetables; one who humanely did away with the punishing alternate of four hours on, four hours off, instead instituting three watches, thereby assuring each man a full eight hours' sleep; one who, in a final health measure, insisted that each of his 46-man ship's company keep immaculate his vessel, his clothing, and his person — all to be done as a means of preventing deadly infection. (In this last he was in advance of medical doctors of the time, who autopsied in the morning, operated in the afternoon, with no intervening scrubbing of their hands with carbolic or soap.)

The skipper was a superior navigator, ever-generous with his time and knowledge when instructing young able-bodied seamen; on the passage to the Pacific, he would prove to be generous as well with what little money he had, advancing as needed sums to the master's mate. The Lieutenant considered flogging proof of command failure, and would use it only as a last resort. Who was the Lieutenant? If the sailors among you guessed the enlightened James Cook, you're close. The man chosen by the Admiralty to command the Tahitian expedition of 1787 was Captain Cook's ablest protégé, William Bligh.

To those of us brought up on the Bligh of Nordhoff and Hall, and, derivatively, the Bligh of Metro-Goldwyn-Mayer, the man revealed in Caroline Alexander's excellent *The Bounty: The True Story of the Mutiny on the Bounty* is a surprising figure. Even our most basic knowledge of him, our unseverable conjoining of the man's rank and surname, has been wrong; he wasn't "Captain Bligh," he was Lieutenant Bligh.

And what a world of difference this one-grade inferiority in rank was to hold! Had the mercantile undertaking been instead a strategic one, had priority or prestige attached to the voyage, then His Majesty's Ship given over to it would have been majestic, a formidable, heavily armed sloop of war, a ship whose measurement would have far exceeded the 85-foot length-over-all of the humble cutter, meagerly armed, that was the Bounty. Had the ship been a warship, then it would perforce have been skippered by a captain. A captain would have been entitled to, assigned, a detachment of Marines, itself to be berthed within the waist of the ship, thus serving belowdecks as a firewall between command quarters and the forecastle; abovedecks, it would have served as the captain's bodyguard, and altogether would have imposed power on a commander's orders. A long list of would-have-beens! In the event, the lowly, ultimately luckless, lieutenant could look to no Marines. The voyage enjoyed no prestige; the skipper possessed no power. Indeed, vis-à-vis his crew, Bligh's position was analogous to that of today's bus-driver: real responsibility, titular authority.

On December 23, 1787 the Bounty weighed anchor off Spithead, Portsmouth, and made sail for Tahiti. The passage was an arduous one, with the little ship continually blown off course by unfavorable winds, ever-battered by mountainous waves, its pumps manned constantly throughout all watches. Yet greater trouble lay ahead, upon the ship's raising of the storied island, that which Bligh poetically characterized as "the Paradise of the World."

Tahiti — ever the delight to sailors, with its beckoning Palms; gentle lagoons; abundance of fish, fruit, and game; uninhibited native women: all collectively forming a sirens' chorus, encouraging desertion among ship's crew. And a chorus which has proven irresistible to some, timelessly unto our own day: in the 1930s and 1940s the realistic Irving Johnson, skipper of the brigantine "Yankee," and alert to the island's temptations, wisely held layovers at Tahiti to a strict time limit, thereby keeping ship's company intact. In the late 1950s the romantic Sterling Hayden, skipper of the schooner "Wanderer," unwisely allowed a long layover, thereby losing some of his crew to the island's enchantments.

Ominously, Bligh's layover, from the time the Bounty dropped anchor in Matavai Bay on October 27 to the time it weighed anchor from that same bay on April 5, was to exceed five months. These months were spent in the overhauling and re-fitting of the ship; the gathering of wood and water to be stowed in its hold; the harvesting of breadfruit and other plants, these ultimately numbering 1015, to be stowed principally in the great after-cabin.

That many among the crew now and again frolicked and detoured from their labors was manifested by their wistful gaze shore-ward, on the eve of their leave-taking, to a point beyond the moon-reflecting sea. "Some of the Bounty's men," writes Alexander, "looked up from their work on the ship…across the water to the rustling skirt of palms and the dense canopies of fragrant trees they now knew so well…and dreaded the day of departure. Not just a life of ease, but friends, lovers, common-law wives, in some cases their future children would be left behind."

As against the open, paradisiacal existence the men had known was the prospect of their returning to sea, on a ship with scant rations; a ship whose already-cramped quarters were being further cramped by the ever-expanding space given over to accommodate breadfruit; a ship whose abovedecks scope of movement averaged a mere two linear feet per man; a ship, finally, the service to which, as to all ships, imposed on its common seamen those eternal concomitants of life at sea, celibacy and discipline. Small wonder it was said among sailors of the time

(Continued on page 21)

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AMERICAN PERSPECTIVES

First Amendment Games?

By Justin Giordano

The First Amendment's free speech and its significance

The U.S. Constitution's first 10 amendments are known as the "Bill of Rights." The importance of these first ten amendments lies in their objective, namely to protect the individual from their government. More specifically, the individual is to retain all rights that the constitution does not specifically grant to the state. All other rights remain with the "people" and with the individual.

Lest one forget the American constitution was framed at a time when governments, whatever their forms (be they monarchies or other centrally controlled nation-states) essentially retained control over the individual granting him/her only the morsels that it chose to dispense in terms of individual rights. The average individual, especially not one in the privileged class, was thus considered no more than one of the faceless, lacking in rights members of the masses, which constituted their nation's populace and whose primary purpose was to serve the nation-state.

To a great extend these remains the case in many modern day, so-called developed nations. For example the foundation of French law still holds to the principle that an accused individual is guilty until he is proven innocent, while the American foundational counterpart clearly affirms that the accused in innocent until proven guilty. Needless to say, that the modern day French legal system has seen a torrential infusion of modifications since its Napoleonic Civil Code was introduced over two centuries ago. The result is that, in its effective application, almost the same amount of safeguards protecting the wrongfully accused individual are in place under French criminal law as there are under American criminal law.

Justin Giordano

The overarching point being made in the above paragraph should be obvious - the first amendment of the U.S. Constitution is the first amendment for a reason. The framers considered it vital. One of the rights that the first amendment protects is the right to free speech as well as free expression, although free expression of ideas can be more easily restricted than free speech per se. For example, if one believes that taking hallucinogens is a component of that individual's religious or other beliefs the expression of that belief or even speech can be restricted if state or federal law makes it illegal.

The American embassy in Benghazi, Libya, was attacked on Sept. 11, 2012 by what is now been confirmed as terrorists affiliated directly or indirectly with Al Qaeda or other Libyan based affiliates. The reports that have come out indicate that a terrorist group claimed responsibility for the attack that killed the American ambassador to Libya along with three other Americans including two former Navy Seals. However, the Obama administration claimed for a number of weeks following the attack that the assault in Benghazi was the result of a spontaneous reaction by a mob to an internet video clip that defamed Islam and its prophet. The U.S. Ambassador to the United Nations, Susan Rice, went on no less than five major networks Sunday morning news shows the week following the attack claiming in no uncertain terms that the Benghazi assault was the direct result of the video clip in question.

The President himself, while correctly underscoring that the content of the video was repugnant to Americans, also alluded to the incident as being a consequence of the video clip in his address at the U.N. approximately three weeks after the September 11, 2012 event.

There is no question from all accounts that the video in question was repulsive in terms of its content, defamatory and was made with the intent to cause injury to one of the world's major religions. The video in question was produced by an individual named Mark Basseley Youssef, an elusive, rather shady character who may have run afoul of the law in the past and even currently.

However, Youssef's character is not at issue in so far as the First Amendment. Youssef, under the orders of the Justice Department, was arrested literally in the middle of the night in September 2012. He was subsequently indicted on a number of apparently minor charges including using a false name and procuring false identification, which enabled him to presumably get involved in other nefarious activities throughout his allegedly not always law abiding career, and on November 7, 2012 he pleaded guilty to four charges and will be incarcerated for one year.

The issue is not whether Youssef should have received a year of jail time. After all, procuring and using false identification should not be considered a light matter and thus his sentence could be validly argued to be equitable and not out of the norm.

However, what is disturbing here is whether selective enforcement is on display vis-à-vis the procurement of false identification. There are approximately 11,000,000 or more individuals that are currently residing and/or working in the United States that have no proper documentation, or plainly put are here illegally. Many of them have procured social security cards under false pretences, as well as other documents along those lines. Similarly many underage individuals often obtain false identifications intended to make them pass as old enough to enter nightclubs, purchase liquor, and for other such purposes.

It's plainly obvious that the intensity with which the Justice Department pursued this case stands in stark contrast, to put it mildly, to how the department has dealt with the vast majority of other flagrant cases involving the procurement of false Ids.

This invariably raises the question of whether this is case of the government trying to cover for its mistake(s) by trampling on the first amendment? The assistant prosecutor in charge of prosecuting Youssef stated that the defendant "was not here because of the content of the movie." Fair enough, however the same prosecutor also added at the sentencing hearing that the defendant betrayed the actors that played in the infamous movie by not informing them about his past, as well as dubbing over some of the lines that they spoke. Again this is all fine and good as it goes to the character of the defendant, which is all part of due course in a sentencing hearing, but the question that beckons is why was the so-called movie brought up if the defendant had just pleaded guilty to procurement of false identifications and related crimes?

The First Amendment is not merely a lofty principle to be lauded when it's politically convenient. In fact it's intended to come into play in the exact opposite situation, namely to protect odious (as was the case here), highly unpopular speech. Simply put, if the average citizen is given the impression that the government will cavalierly deal with matters that may have first amendment implications then the Bill of Rights itself will be severely diminished in its efficacy, to the detriment of every inhabitant in the nation.

Note: Justin A. Giordano is a Professor of Business & Law at SUNY Empire State College and an attorney in Huntington.

President's Message

(Continued from page 1)

NYSBA President Seymour James was proactive in assisting not only our bar but all of the downstate bar association presidents as well in coordinating our response to this disaster. Thanks are also due to Barry Smolowitz, Jane LaCova and Touro Law School for their efforts in assisting me and the SCBA in responding to the needs of our members and the community at large. Many of our Academy of Law programs had to be canceled during this period of disruption but we are resilient and fortunately we have been able to reschedule most of these programs.

I sent a letter prepared by our Real Property Committee in Nov. on behalf of the SCBA to many of our elected officials requesting that the government extend the Mortgage Debt Relief Act of 2007 beyond its then scheduled expiration date of Dec. 31, 2012. I received positive responses from some of our elected officials, including Sen. Chuck Schumer, who indicated that such an extension is included in the Senate Tax Extender Package and that they would support such legislation. As this extension is crucial to our clients as well as those of our members who handle real estate short sales, bankruptcies, mortgage foreclosures and other related areas of the law, and because of the impact that failure to extend would cause, I am hopeful that this extender bill will receive bipartisan support.

On Nov. 20, 2012, NYSBA Pres. Seymour James sent a letter, which was signed by myself and many other local Bar Association presidents, to our U.S. Senators and 29 members of the House of Representatives from New York, requesting that our congressional delegation protect the public's access to justice which would be harmed if sequestration, capping spending in this vital area, is implemented in the new year. Hopefully members of both political parties will reach a bipartisan agreement on this matter.

On November 28, 2012, I had the privilege of sending out a letter to the National Council of Bar Presidents (NCBP), nominating our very own past president Scott Karson for the prestigious 2013 NCBP Fellows Award which is presented by the ABA Division for Bar Services to a past president of a local Bar Association. This award has been in existence since 2006 and no one from New York has ever won before. Based upon Scott Karson's qualifications, his extensive involvement in our bar, the NYSBA and the ABA, I cannot think of a better candidate for such an award and hopefully the NCBP agrees with me.

On Friday, Dec. 7, the SCBA held its annual holiday party and as usual, a large crowd attended to take part in the merriment with many past bar presidents and members of the judiciary joining us. A special thank you to our fabulous caterer, Fireside, in providing the great food and drink that evening and to our DJ Lennox Bernard in creating the ambience that only a great mix of music played throughout the evening can deliver.

All of you are invited to join me at the SCBA Judicial Swearing-In and Robing Ceremony which will be held on Monday, Jan. 7, 2013, at 9 AM in the auditorium of Touro Law Center at which time all of our new or reelected judges will receive either their first robes or plaques commemorating their reelection. For the past 12 years or so, I have had the pleasure of attending these ceremonies overlooking from the balcony while videotaping the event so that the SCBA could produce a DVD to be provided to each of the judges sworn in. This year my view of the event will be significantly different in that I will be on the dais presenting our new or reelected judges with their robes or plaques.

The judges in Suffolk County are among the most qualified and distinguished members of the judiciary anywhere in New York State and have always been strong supporters of the Suffolk County Bar Association, as demonstrated by their participation in many of our events and serving on our various committees, and deserve our support.

At a recent Board of Directors meeting, approval was given for the expenditure of funds necessary to completely redecorate the attorney's lounge located on the second floor in the Central Islip Courthouse. I asked Donna England and Bill Ferris of our Executive Committee to move as soon as possible with the purchase of the new furniture for the lounge. Once done, the attorney's lounge will be a welcome place for our members to repose between court appearances.

I hope everyone was able to have a warm, safe and happy holiday season. May we all be blessed in the New Year with good health, prosperity and fair skies.

Bligh Reconsidered

(Continued from page 19)

that serving before the mast, with all its demands and deprivations, was like being in jail, with additionally, a fair chance of drowning.

On April 28, 1789, as dawn broke, mutiny erupted. Bligh was seized, bound, and brought up on deck, there to face the leader of the mutineers, master's mate Fletcher Christian. At the mate's command, Bligh and 18 men loyal to him were put aboard a launch, a deckless launch of 23 feet length-over-all, a beam of seven feet, a draft of three feet. When fully loaded, with Bligh and his loyalists, with bread, pork, rum, wine, and water, the launch displayed a scant seven inches of freeboard and this in a calm morning sea. From his humble craft, Bligh shouted a conditional reassurance to those men held against their will: "Never fear, my lads; I'll do you justice if I ever reach England!" In divergent directions, both craft made sail.

Justice would be delayed. Courts-martial and the judicial weighing of disputatious accounts from scores of "evidences" (read witnesses), these would occur in some indefinite future. For now, Bligh's big "if," the attaining of England began. What's never been in dispute, the timeless source of admiration among all of the world's sailormen, is Bligh's unexampled seamanship and leadership in the aftermath of the mutiny.

Quickly summarized, but long endured, the launch's journey measured 3,618 miles and took 48 days — these miles, this time-span, covered in an open boat with starvation rations. From Tofua, in the Friendly Islands, to Coupang, Timor, a Dutch settlement, Bligh navigated flawlessly, losing none of his men to the sea. The only casualty was quarter-master John Norton, killed by natives while foraging on Tofua in the early days of the eastward passage; after this incident, the pragmatic Bligh decided the launch would make no more landfalls.

Bligh would return to England, where he would proffer ship's log and depositions to the Admiralty, and thereafter be assigned to another breadfruit expedition, this one to be successful. Ten accused mutineers would soon enough be captured, in their turn be brought to England, and would face court-martial. The captains who presided were themselves veteran sea-goers, all of them understanding that a sailing ship is no democracy. They weren't swayed by those few of the Bounty's crew who spoke of outbursts of temper, intemperate language, and a strict accounting of foodstuffs on the part of a commander, himself solitarily responsible for the safety of his ship and those who served her.

Though they didn't voice his words, the captains were governed by the spirit of Lord Byron. As always, the succinctness, the accuracy, the truth of poetry encapsulates all. The romantic poet gave the lie to the pretext of shoddy treatment by their commander as reason for his crew's mutiny:

> "Young hearts, which languish'd for some sunny isle,
> Where summer years and summer women smile;
> Men without country, who, too long estranged,
> Had found no native home, or found it changed,
> And, half uncivilized, preferr'd the cave
> Of some soft savage to the uncertain wave."

Four among the accused would be acquitted; six convicted; three of these hanged.

Bligh would be adjudicated as faultless, not seen by the Admiralty as the cruel martinet otherwise portrayed in the contemporary press, but indeed seen as a dutiful commander worthy of respect by all, a conclusion which would be ratified in years to come. In the spring of 1797 the infamous Nore mutiny occurred, wherein

> "…mutineers…demanded that certain unpopular officers be removed from thei ships…they peremptorily sent ashore a stream of disfavored commanding officers…in varying degrees of popular disgrace…William Bligh was not among these 'offenders.'"

To the contrary, Rear Admiral Bligh had been among those officers delegated to urge the seamen to return to duty, and the effort was successful. Concessions made by the Admiralty included the removal of more than one hundred officers whom the seamen most resented. Tellingly, Bligh's name was not included on the list.

At age 64, he would die, ashore, on December 7, 1817. The inscription on his headstone would pay tribute to

> "…the celebrated navigator who first transplanted the Bread Fruit Tree…to the West Indies, bravely fought the battles of his country; and died beloved, respected, and lamented…"

Two decades after the mutiny, by happenstance an American sealer, the Topaz, raised a mischarted Pitcairn Island. There the ship's captain and crew met the sole unadjudicated survivor of the mutiny, John Adams, and met as well numerous mutineers' widows and their children. Among these last was Thursday October Christian, son of the mutiny's leader. Clearly, the sins of his father hadn't been visited upon him. The young man was robust, handsome, living in abundance and tranquility with his own wife and family. From Adams, the captain heard of that short life subsequently lived ashore by the principal mutineer, the former deep-water sailor whose days on Pitcairn were to be bound, as Shakespeare would have it, "in shallows and in misery."

After taking aboard the Bounty many of their Tahitian wives, as well as many native men, the mutineers raised Pitcairn, purposely wrecked the ship upon its coastal rocks, and, aboard small launches, gained the island. Though the colony ultimately prospered, within a year its leader descended into madness. "Christian himself," Alexander writes,

> "was never the same after the mutiny. He was sullen and morose and (according to Adams) 'having, by many acts of cruelty and inhumanity, brought on himself the hatred and detestation of his companions, was shot by a black man whilst digging in his field, and almost instantly expired.'"

So ended the lives of Bligh and Christian. And of that which formed the matrix within which their dual story originated? The breadfruit? Notwithstanding Bligh's ultimate success at transplantation, those trees introduced to the West Indies would produce only one-sixth the amount of fruit of those indigenous to Tahiti; even had the transplants proven more fecund, it would not have mattered. The Admiralty would witness a reversal of expectations — fittingly, given the ignobility of its goal. Subsumed within the greater cruelty of slavery was a lesser cruelty. For, in the event, the suffering endured aboard the Bounty, as well as that endured aboard subsequent ships similarly

Embarked, would count for nothing: the slaves refused to eat the hard-won products of all these hazardous voyages. To the slaves, a bland fruit; to the voyagers, a bitter irony.

Exhaustively researched, elegantly written, *The Bounty: The True Story of the Mutiny on the Bounty* is a compelling narrative.

Note: William E. McSweeney, a member of the SCBA, lives in Sayville, hard by Great South Bay. His written work has appeared in "Sail" magazine and "Long Island Boating World." In 1963 he fell in love with sailing, having been introduced to it by his beloved father-in-law, Jack Shortell: warrior in the China-Burma-India theater; electrician; carpenter; mason; reader; writer; raconteur; sailorman extraordinary.

Voiding recorded instruments

(Continued from page 1)

county land records for only 73 minutes.

In 2009, Bluewater Real Estate conveyed the same property to Mr. and Mrs. Mayfield. In connection with the purchase, the Mayfields gave a mortgage to Old National Bank.

First City Bank commenced foreclosure proceedings against Wright & Associates in 2010. The Mayfields and their lender were also named as defendants. The Mayfields claimed bona fide purchaser status and moved for summary judgment on that basis.

The relevant Florida recording statute provides that instruments delivered to the clerk for recording "shall be deemed to have been..officially recorded, at the time she or he affixed thereon the consecutive official register numbers *and at such time shall be notice to all persons*" (emphasis supplied).

Based on this unambiguous language, the court felt constrained to find in favor of the foreclosing lender. Mindful, however, of the harshness of this result, the court pointed out that the appellants may have a remedy against the clerk, who could not claim sovereign immunity.

The policy debate

Much of the ensuing debate framed the issue as if it were merely an indexing error: shouldn't the earlier lender bear the responsibility of ascertaining that its mortgage is properly indexed? This analysis misses the point.

Assuming, *arguendo*, that such a policy makes sense when an instrument is misindexed, the earlier lender in *Mayfield* would have carried this burden had it verified that its mortgage was indexed during the 73 minutes it appeared of record. Moreover, the outcome would have been no less unfair.

Clearly, the analytical framework should focus on the authority of the clerk to "void" or otherwise remove statutorily recorded instruments from the record and its obligations to the various stakeholders in the process. The *Mayfield* opinion does not address this aspect.

Can it happen here?

Faced with an identical fact pattern, a New York court might follow the Florida lead and rely on RPL §317 to validate the recording (every instrument is considered recorded from the time of delivery to the recording officer). However, there is no New York statute or regulation of general application that authorizes "voiding" or removal of land records. Likewise, no reported case directly addresses the issue.

The New York State Attorney General has opined that the county clerk may remove erroneously recorded documents from the record (Inf. Op. No. 95-45). The scenario presented to the A. G. involved the inadvertent recordation of a document that was not tendered to the clerk for that purpose. Nevertheless, the cases cited in the Informal Opinion concern internal clerical errors made by adjudicative administrative agencies. Hence, their applicability to the public record-keeping function of the County Clerk is questionable.

Suffolk and Nassau Counties are subject to separate statutory provisions setting out procedures for correcting indexing errors. Both directives require the preservation of the original entry and the notation of the correction alongside (*see* RPL §316-A, ¶9 (Suffolk) and Nassau County Administrative Code §19-24.0).

While authority to remove properly recorded documents lacks clear definition, any removal in Nassau or Suffolk should, at a minimum, trigger the obligation to "correct" the index. Such correction should alert a subsequent purchaser that something is amiss.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely-read land title newsletter Constructive Notice. For more information, please visit www.LandTitleLaw.com.

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Bench Briefs (Continued from page 4)

constructive trust claims were governed by CPLR §213(1)'s six year statute of limitations, which begins to run upon the occurrence of the wrongful act giving rise to the duty of restitution and not from the time the facts constituting fraud were discovered. The subject property was purchased in 1999, and the decedent died on Nov. 19, 2009. The alleged wrongful conduct occurred after her death when defendants sought possession of the property. The instant action was commenced on March 23, 2010, which according to the court was clearly within the time restraints of CPLR §213(1). The defendant further sought dismissal alleging that the plaintiff failed to proffer a written instrument in violation of the statute of frauds. However, the court noted that such ground was without merit as the statutes of frauds did not bar a cause of action for a constructive trust, since by its very nature a constructive trust did not require a writing. With regard to defendant's contention that plaintiff failed to meet their evidentiary threshold to support a cause of action for a constructive trust, the court reminded the defendants that on a motion for summary judgment it is the movant who must first make a prima facie showing of entitlement to judgment as a matter of law prior to the plaintiff being required to present evidence raising a triable issue of fact. The court found that defendant failed to meet such burden.

Honorable William B. Rebolini

Motion to dismiss denied; plaintiff to be afforded opportunity to proceed through discovery.

In *Miranda M. Malone and Kaitlyn P. Malone, infants, by their father and natural guardian, James P. Malone v. County of Suffolk, Richard Dormer, former Commissioner of the Suffolk County Police Department, Haven Drugs, Inc., Vinoda Kudehadkar, as Owner, Chairman and/or Chief Executive Officer, Stan Xuhui Li, M.D., and certain doctors who prescribed narcotics to David Laffer, currently unknown but identified as John Does 1-5, Abbott Laboratories and John Does 6-10, manufacturers and distributors of prescription narcotics, including hydrocodone, and Ralph Taccetta,* Index No.: 4112/12, decided on Nov. 6, 2012, the motion by defendant Stan X. Li., M.D., for an order dismissing the amended verified complaint was denied. The court noted that the plaintiff sought to recover damages of pain and suffering of the decedent and wrongful death, against Dr. Li upon allegations that he prescribed approximately 2,500 narcotics pills to David Laffer between 2009 and 2010 and that Dr. Li knew or should have known that prescribing narcotics to a drug addict would increase David Laffer's dependency on said narcotics and therefore result in drastic attempts to procure said narcotics by David Laffer, including robbery of pharmacies/drug stores and the murder of those inside and that Dr. Li recklessly disregarded his obligation and duty not to over prescribe narcotics to a narcotics abuser. The court noted that it appeared that the plaintiff made no claim that Dr. Li was liable in medical malpractice, and to the extent that such a claim was asserted, however, the absence of a doctor patient relationship between plaintiffs and defendant precluded a cause of action based on medical malpractice. In denying the motion, the court noted that at this stage in the proceedings, plaintiffs should be afforded the opportunity to proceed against Dr. Li to explore through discovery proceedings the level of his alleged involvement, if any, in Laffer's addiction and whether Dr. Li knew or had reason to know that Laffer presented a risk of harm to himself or others.

Motion to dismiss granted; no showing of special duty owed

In *Antonio Mejia, as the Administratrix of the Estate of Jennifer Mejias, deceased and Antonio Mejias, Individually v. David Laffer, Melinda Brady, Suffolk County Police Department, Stan Xuhui Li, Eric Jacobson, Eric Jacobson, M.D., P.C., Mark C. Kaufman and Family Medical Practice of Bay Shore, P.C.,* Index No.:10778/12, decided on November 16, 2012, the court granted the motion by Suffolk County Police Department for an order dismissing the complaint against it. In granting the motion, the court noted that to establish that there existed a special relationship between plaintiff's decedent and the police sufficient to supply the requisite special duty of care, plaintiff was required to allege facts sufficient to show that there was (1) an assumption by the SCPD, through promises or actions, of an affirmative duty to act on behalf of the plaintiff's decedent; (2) knowledge on the part of the SCPD's agents that inaction could lead to harm; (3) some form of direct contact between the SCPD's agents and the injured party; and (4) that party's justifiable reliance on the SCPD's affirmative undertaking. Here, absence of factual allegations in the complaint addressing the foregoing factors demonstrated that, as a matter of law, plaintiff could not demonstrate that SCPD owed a special duty to the plaintiff's decedent.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an Associate at Sahn Ward Coschignano & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Views from the Bench (Continued from page 4)

trial court erred by imposing a duty on the PCP to examine the mass or, alternatively, to speak with plaintiff regarding the condition. *Id.* at 161. Relying on precedent from multiple judicial departments, the Appellate Division unequivocally concluded that a PCP has no duty to "oversee" the treatment of another physician treating the same condition. *Id.*, 97 A.D.3d at 160-62.

In fact, the *Burtman* Court highlighted the risks of taking a proactive approach, or creating the appearance of such, regarding an illness treated by another physician. For example, in *Maggio v. Werner* summary judgment was denied because it was unclear whether defendant physician "[u]ndertook to advise plaintiff" about a mass found in the patient's breast. 213 A.D.2d 883 (App. Div., 3d Dep't 1995).

More recently, the Appellate Division, Third Department denied summary judgment after the PCP, who had been actively treating the patient for 13 years, relied on the patient's statements that his chest pains had diminished and assumed the patient's cardiologist would refer the patient to a gastroenterologist. *Daugharty v. Marshall*, 60 A.D.3d 1219 (App. Div., 3d Dep't 2009).

Primary care physicians may avoid discussing and treating ailments under another physician's care. Otherwise, the PCP may be liable for another physician's malpractice should it be demonstrated the PCP had a duty to care and failed to act in accordance with good and accepted standards of practice. Accordingly, notwithstanding a PCP's instincts to treat and inquire regarding all of the patient's ailments, other than recommending the patient visit a specialist, less may clearly be more when it comes to liability.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and a member of the Board of Directors of the Suffolk County Women's Bar Association and the Executive Committee of the Alexander Hamilton American Inn of Court. Judge Ukeiley is a frequent lecturer and author of numerous legal publications, including The Bench Guide to Landlord & Tenant Disputes in New York©. Beginning in January 2013, he will be joining the faculty at the Touro College Jacob D. Fuchsberg Law Center as an adjunct professor.

Note: The information contained herein is for informational and educational purposes only. This column should in no way be construed as the solicitation or offering of legal or other professional advice. If you require legal or other expert advice, you should consult with an attorney and/or other professional.

1 The national average payment per claim for the same time period was $334,559. *Id.*

Scope of Duty Owed by a Realtor to a Seller (Continued from page 17)

were triable issues of fact whether Lockwood was acting as a dual agent for both the Buyers and Sellers. Both parties appealed, and the Appellate Division, First Department modified the order by granting Douglas Elliman's motion for summary judgment holding that "the evidence demonstrated 'as a matter of law that Ms. Lockwood did not act as a dual agent' with the concomitant 'duty to disclose her divided loyalties and obtain the parties' consent thereto'" because

> Ms. Lockwood had a signed exclusive agency agreement with the [sellers]. She had no similar agreement with [the buyers], and she received no remuneration from them. Ms. Lockwood's actions indicate that she wanted this transaction to close, and Douglas Elliman's submissions support the conclusion that she ultimately obtained permission to reduce her own commission to bring the parties to an agreement. The negotiated contract was signed by both [parties], it listed Ms. Lockwood as the agent, and it explicitly stated that the sellers were exclusively responsible for her fee.[1]

On appeal, the court rejected the Seller's argument that Lockwood was not permitted to show the Buyers any other apartments because the parties entered into an exclusive seller's agreement and affirmed, holding that absent a specific agreement to the contrary, Lockwood had no duty to refrain from offering other properties to the Buyers. The court elaborated that "A contrary holding would 'unreasonably restrain' brokers from cultivating potential clients at open houses for their principals." The court found that such a narrow interpretation runs counter to the holding in *Sonnenschein v. Douglas Elliman-Gibbons & Ives*, 96 N.Y.2d 369 (2001) "which sought to formulate a rule consistent with the nature and fundamental requirements of the real estate marketplace in New York (internal quotations omitted)." The court concluded that Douglas Elliman established it entitlement to the commission as a matter of law, and the statements and conduct cited by the Sellers did not raise any triable issue of fact.

Note: Leo K. Barnes, Jr. is a member of Barnes & Barnes, P.C. in Melville, and can be reached at LKB@BARNESPC.COM.

1. *Douglas Elliman LLC v. Tretter*, 2012 WL 5833609 (2012), quoting *Douglas Elliman LLC v. Tretter*, 84 A.D.3d 446, 448-449, 922 N.Y.S.2d 74 (1st Dep't 2011).

Who's your expert? (Continued from page 8)

under CPLR § 3101(d)(2) only pursuant to a court order, the statute instructs the court ordering the disclosure to "protect against the disclosure of the mental impressions, conclusions or legal theories of the representative concerning the litigation."

The Federal Rules of Civil Procedure similarly limit discovery to the trial expert. Rule 26(b)(3)(A) exempts from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's … consultant…)" unless: (1) the materials are otherwise discoverable under FRCP § 26(b)(1), the general rule addressing the scope and limits of discovery; or (2) the requesting party demonstrates a substantial need for them to prepare its case, and cannot obtain their substantial equivalent without undue hardship.[2] If a court orders discovery of a litigation consultant's materials then, under Rule 26(b)(3)(B), it must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of that consultant.

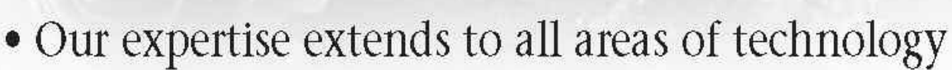
Discovery disputes frequently arise when parties seek documents prepared by or sent to a litigation consultant as such materials are rarely produced without opposition. In those circumstances, courts engage in a fact-based inquiry to determine whether a litigation consultant's materials are in fact discoverable under the applicable rules. Indeed, CPLR § 3101(d)(2) and FRCP 26(b)(3) raise numerous factual questions: was the litigation consultant's work product prepared solely in anticipation of litigation or for trial? Do the materials sought contain the litigation consultant's mental impressions, conclusions or any legal theories? Is the requesting party's need for that material substantial? Can the requesting party obtain substantially the same information from other sources? What constitutes undue hardship?

For example, in *Oakwood Realty Corp. v. HRH Constr. Corp.*, the Appellate Division affirmed the trial court's decision ordering the plaintiff to return a report prepared by the defendant's litigation consultant, upon finding that it had been prepared in anticipation of litigation and thus, was exempt from disclosure under CPLR § 3101(d)(2). Similarly, in *Skolnick v. Skolnick*,[3] the respondent was alleged to have forged certain checks that were the subject of that turnover proceeding. The respondent sought to obtain documents that the petitioner had provided to a handwriting expert, and communications between petitioner's counsel and the handwriting expert. The court denied that discovery, concluding that the handwriting expert was retained as a litigation consultant and the subject materials were prepared in anticipation of litigation. In *Christie's, Inc. v. Zirinsky*,[4] the plaintiff sought from the defendants' engineer, who had been the defendants' "long-time consultant," certain letters between the defendants, defense counsel, and the engineer. The defendants argued that the materials were immune from discovery because the engineer was a non-testifying litigation consultant. The court found, however, that merely naming the engineer as a litigation consultant did not automatically render the materials immune from discovery. The court also stated that the fact that letters between the engineer and the defendants were routed to the defendants' counsel did not protect them from discovery, because the documents must be prepared "primarily if not solely for litigation" in order for such immunity to attach.[5] Importantly, the court ordered an *in camera* inspection of the documents at issue—and the documents were thus potentially exposed to the plaintiff - because it could not determine on the record before it, whether the letters had been prepared in anticipation of litigation.

Although the statutes recognize a clear distinction between the expert as litigation consultant and as trial expert, can the same individual wear both hats? Stay tuned.

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

1. *Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747 [2d Dept 2008].
2. Fed R Civ P §§ 26(b)(3)(A)(i) and (ii).
3. 2010 NY Slip Op 33074(U) [Sur Ct Nassau County 2010]; *see also Concorde Art Assoc., LLC v Weisbrod Chinese Art, Ltd*, 17 Misc3d 1124[A] [Sup Ct NY County 2007] [court denying the defendant's request for a report prepared by the plaintiff's expert upon finding that it was prepared in anticipation of litigation, because it was done before the action commenced and on counsel's recommendation, and because the defendant failed to show a substantial need for the report or that it could not obtain the same information from other sources].
4. 17 Misc3d 1123[A] [Sup Ct NY County 2007].
5. *Id.*



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WINTER CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during December 2012 and January and February 2013.

REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website (www.scba.org).

RECORDINGS: Most programs are recorded and are available, after the fact, as on-line video replays and as DVD or audio CD recordings.

ACCREDITATION FOR MCLE: The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

N.B. - AS PER NYS CLE BOARD REGULATION, YOU MUST ATTEND A CLE PROGRAM OR A SPECIFIC SECTION OF A LONGER PROGRAM IN ITS ENTIRETY TO RECEIVE CREDIT.

NOTES:
Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.

Tuition & Registration: Tuition prices listed in the registration form are for discounted pre-registration. At-door registrations entail higher fees. You may pre-register for classes by returning the registration coupon with your payment.

Refunds: Refund requests must be received 48 hours in advance.

Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.

Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA,, please let us know.
Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501©)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

Financial Aid: For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, please call the Academy at 631-233-5588.

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL DMV UPDATE

Wednesday, January 9, 2013 on the East End (Rescheduled Date)

This program is a must-attend for all attorneys who represent motorists on issues related to license revocations and suspensions and similar matters.
Presenter: David Mansfield
Time: 5:00–7:30 p.m. (Sign-in from 4:30 p.m.)
Location: Seasons of Southampton Refreshments: Light supper

ANNUAL BANKRUPTCY LAW UPDATE

Thursday, January 10, 2013

Prominent faculty covers key issues:
- Filing of a Single Real Estate Asset Case in Bankruptcy Court
- Issues Involving Chapter 7 Bankruptcies
- The Role of the Chapter 7 Trustee
- Case Law Update

Faculty: Christine Black, Esq.; Kenneth P. Silverman, Esq.; Marc Pergament, Esq.
Program Coordinator: Richard Stern
Time: 6:00 – 9:00 p.m. Location: SCBA Center – Hauppaugel
Refreshments: Light supper
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

ANNUAL FAMILY COURT UPDATE

Part Two: Wednesday, February 5, 2013

Topics to be covered in this segment include:
- Custody and Visitation
- Basic Pleadings and Analysis
- Custody and Visitation from the Judicial Perspective
- Custody and Visitation from Attorney for the Child's Perspective
- Reunification of Families Involved with Sexual Abuse
- Special Findings in Proceedings Dealing with Immigrant Youth
- Determination of Objections of Child Support Orders; Confirmation Proceedings; Incarceration in Child Support Cases

Faculty: Hon. John Kelly; Hon. Caren LoGuercio; Hon. Richard Hoffman; Jennifer Mendelsohn, Esq.; Danielle Schwager, Esq.; Michael T. Fitzgerald, Ph.D.
Coordinators: Hon. John Kelly; Hon. Isabel Buse; Hon. John Raimondi
Time: 6:00 – 9:00 p.m. Location: SCBA Center – Hauppaugel
Refreshments: Light supper
MCLE: 3 Hours (2 professional practice; 1 ethics)

Matinee

ANNUAL ELDER LAW UPDATE

Thursday, February 14, 2013

Gain insight into all the developments affecting the practice of elder law in this annual presentation by SCBA's own guru on the topic.
Presenter: George Roach (Grabie & Grabie, LLP // Former SCBA President)
Appreciation for Underwriting Support: St. Charles Cemetery
Time: 2:00 – 5:00 p.m. Location: SCBA Center – Hauppaugel
Refreshments: Valentine's Day Snacks
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

Presented in Conjunction with the SCBA District Court Committee

LANDLORD-TENANT PRACTICE UPDATE

Tuesday, February 26, 2013 (Rescheduled Date)

Recent changes in landlord-tenant law and their impact on matters involving both residential and commercial properties will be covered. Hon. Stephen Ukeiley generously donated copies of his book, The Bench Guide to Landlord & Tenant Disputes in New York, to the Academy, a 501c-3 organization; the book may be purchased from the Academy at the discounted price of $25 for as long as the supply lasts. Purchasers may have their copies signed by Judge Ukeiley prior to the program.
Presenters: Hon. Stephen Ukeiley (Suffolk District Court); Hon. Scott Fairgrieve (Nassau District Court); Victor Ambrose, Esq. (Nassau-Suffolk Law Services); Warren Berger, Esq.; Marissa Luchs Kindler, Esq. (Nassau-Suffolk Law Services); Michael McCarthy, Esq.; Patrick McCormick, Esq. (Campolo, Middleton & McCormick, LLP); Deputy Sheriff Sargent David Sheehan (Suffolk County Sheriff's Dept.)
Coordinator: Hon. Stephen Ukeiley (Academy Advisory Committee)
Time: 6:00 – 9:00 p.m. Location: SCBA Center – Hauppaugel
Refreshments: Light supper
MCLE: 3 Hours (professional practice)

ANNUAL MATRIMONIAL LAW UPDATE

Monday, March 4, 2013

Gain insights into the developments and challenges facing matrimonial lawyers at this annual update featuring a foremost practitioner in the area..
Presenter: Vincent F. Stempel, Jr., Esq. (Garden City)
Coordinators: Linda Kurtzberg, Arthur Shulman, Debra Rubin
Time: 6:00 – 9:00 p.m. Location: SCBA Center – Hauppaugel
Refreshments: Light supper
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

SEMINARS & CONFERENCES

Evening Seminar

BEHIND THE CURTAIN? – Advanced Standing Issues in Securitized Mortgage Foreclosure – Part Two

Monday, January 14, 2013

This program continues the discussion of how securitized mortgage transactions have affected the real estate world and the ramifications for foreclosure actions...when it is unclear who owns the defendant's loan. You will gain from the discussion even if you did not attend Part One of the program. Topics include:
- Overview of Structured Finance
- What Is a Securitized Mortgage Transaction?
- Document Flow in a REMIC ((Real Estate Mortgage Investment Conduit) Transaction
- Document Flow in a GSE (Government Sponsored Entity) Transaction
- The Polling and Servicing Agreement
- Recordable & Possessory Interests in the Loan
- Statutory and Case Law Requirements for Foreclosing a Mortgage in New York

Faculty: Hon. Jeffrey Arlen Spinner (Suffolk); Hon. Peter Mayer (Suffolk);Charles Wallshein, Esq. (Macco & Stern)
Coordinator: Richard Stern, Esq. (Macco & Stern)
Appreciation for Underwriting Support: Title Resources Guaranty Company
Time: 6:00–9:00 p.m. (Sign-in from 5:30 a.m.) each evening
Location: SCBA Center Refreshments: Light supper
MCLE: 3 credits (2 professional practice; 1 ethics)

Evening Seminar

REPRESENTING VETERANS

Thursday, January 17, 2013

This important program will be presented FREE (optional donation to offset costs). Instruction will cover some of the key legal issues – e.g., debt, family matters, criminal charges, the need for services – that active military personnel and returning veterans may face. Topics include:
- Overview of the Soldiers & Sailors Relief Act and USERRA
- Matrimonial & Family Law Actions
- Foreclosures and Evictions
- Advocacy in Veterans Court (Criminal)
- Services Available to Veterans

Faculty: Hon. Allan Mathers; Hon John J. Toomey, Jr.; Louis England, Esq.; Hon. John Raimondi; John Gresham, Esq.; Thomas Ronayne
Coordinators: Hon. Peter Mayer and Ted Rosenberg, Esq.
Time: 6:00–9:00 p.m. (Sign-in from 5:30 a.m.) each evening
Location: SCBA Center Refreshments: Light supper
MCLE: 3 credits (professional practice)

Evening Seminar

CHOOSING A TRUSTEE & RELATED TOPICS

Wednesday, January 23, 2013 (Rescheduled Date)

This program will provide attorneys with valuable strategies for counseling families on managing and sustaining monetary and other potential estate assets. Post "fiscal cliff" ramifications, if any, will also be addressed. Topics include:
- How to Choose a Trustee (potential candidates; trustee qualities; trust objectives, etc.)
- Fiduciary Liability (Prudent Investor Act; standards of conduct; investment strategies, etc.)
- Family & Wealth Sustainability (wealth trends; defining wealth; family dynamics; children and philanthropy, etc.)

Presenters: Charles J. Ogeka, Esq. (Ogeka Associates, LLC); Kevin

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H. Rogers (BNY Mellon Wealth Management) David J. DePinto, Esq. (Of Counsel–Lazer Aptheker Rosella & Yedid, PC)
Coordinator: Eileen Coen Cacioppo, Esq. (Academy Curriculum Co-Chair)
Appreciation for Underwriting Support: BNY Mellon Wealth Management (Daniel Shaughnessy, Senior Director)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: SCBA Center
Refreshments: Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Evening Seminar

THE PJI: INSIGHTS & STRATEGIES

Wednesday, January 30, 2013

Any lawyer whose practice involves jury trials – from the relatively simple to complex litigation – will not want to miss this information-packed seminar on the use of Pattern Jury Instructions and verdict sheets. The program will cover general considerations and practical aspects of a civil jury charge and delve into such matters as:

- Missing Witnesses/Documents
- Emergency Situations
- Assumption of Risk
- Proximate Cause

Coordinator: Hon. James Flanagan (Academy Officer)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: SCBA Center
Refreshments: Light supper
MCLE: 3 credits (1.5 professional practice; 1.5 skills)

Extended Lunch 'n Learn

MANAGING HIGH CONFLICT FAMILIES AFTER A DIVORCE

Friday, February 1, 2013

Some parents who have engaged in high conflict litigation over custody and visitation issues have difficulty implementing their parenting plan. They continue a pattern of acrimony and dissension that is potentially detrimental to their own self interests and to the interests of their children. This program will focus on parenting coordination and other approaches to resolving conflicts. Topics will include:

- The Legal Basis for These Approaches
- Current Case Law
- The Need for Judicial Review
- When Various Approaches are Appropriate and When Caution Should Be Used
- The Role of Parenting Coordinators and When They Overstep Their Bounds

Faculty: Robert Cohen, Esq.; Hon. John B. Collins; Neil S. Grossman, Ph.D.; Jeannemarie Mansetti, CSW; Steve Schlissel, Esq.
Time: 12:30–3:10 p.m. (Sign-in from Noon)
Location: SCBA Center Refreshments: Lunch
MCLE: 3 credits (2 professional practice; 1 ethics)

Lunch 'n Learn

E-Discovery: RECENT DEVELOPMENTS IN LAW & TECHNOLOGY RELATED TO PREDICTIVE CODING

Wednesday, February 6, 2013
(Rescheduled Date)

Predictive coding takes electronic-discovery to a new level. It is a method whereby a human identifies whether or not a random selection of documents are responsive to an e-discovery demand; the computer program then takes these responses, "learns" what to search, and gives each document a "relevance score." The end result is the identification of the documents that need to be produced. This seminar will shed light on the use of predictive coding, which has been adopted as an acceptable method of obtaining ESI (electronically stored information), and examine the ground-breaking decision by Judge Peck in Monique Da Silva Moore v. Publicis Groupe.
Presenters: Experts from DOAR Litigation Consulting
Glenn P. Warmuth, Esq. (Stim & Warmuth, PC)
Coordinator: Glenn P. Warmuth, Esq. (Academy Officer)
Appreciation for Underwriting Support: Doar Litigation Consulting
Time: 12:30–2:10 p.m. (Sign-in from noon)
Location: SCBA Center Refreshments: Lunch
MCLE: 2 credits (professional practice)

Lunch 'n Learn

A MOCKERY OF A CLOSING

Friday, February 8, 20132 (Rescheduled Date)

This "Closings 101" course features a skilled faculty who will conduct a hypothetical real estate closing where things go awry. The demonstration will include stop-action tips for how to have prevented the problems from arising and, when necessary, how to do quick fix-its to stop setbacks and keep the deal intact. It's a must-attend for the novice – and even the experienced – real estate lawyer!
Presenters: Lita Smith Mines, Esq.; Audrey Bloom, Esq.; Joseph O'Connor, Esq.; Gerard McCreight, Esq.; Peter Steinert, Esq.; Peter Walsh, Esq.
Coordinator: Lita Smith-Mines, Esq. (Academy Officer)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center
Refreshments: Lunch
MCLE: 2 credits (1.5 professional practice; 0.5 ethics)

Evening Seminar

ACCIDENT RECONSTRUCTION

Wednesday, February 13, 2013

Learn how to more effectively investigate a vehicular accident in this thorough program covering

- Accident Reconstruction Techniques
- Hardware Design Analysis Techniques
- A Review of and Methodology for Selecting the Lead Area of Expertise

Faculty: Representatives of ARCCA; Others TBA
Coordinator: Hon. James Flanagan (Academy Officer)
Time: 6:00–9:00 p.m. (Sign-in from noon) Location: SCBA Center
Refreshments: Lunch
MCLE: 3 credits (1.5 professional practice; 1.5 skills)

JANUARY 2013 REGISTRATION FORM

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Bankruptcy Law Update	$120	$50	$140	Yes	Yes	3 cpn	3 cpn	$150	$140	$20
Family Court Update - Part Two	$85	$60	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$35
Elder Law Update	$125	$50	$150	Yes	Yes	3 cpn	3 cpn	$150	$140	$20
Landlord-Tenant Practice	$ 90	$75	$100	Yes	Yes	3 cpn	3 cpn	$110	$100	$20
Matrimonial Law Update	$125	$50	$150	Yes	Yes	3 cpn	3 cpn	$150	$140	$30
PROGRAMS & CONFERENCES										
Securitized Mortgage Foreclosures - Part Two	$85	45	$95	Yes	Yes	3 cpn	3 cpn	$100	$95	$45
Representing Veterans	Free // Optional $25 Donation			Yes	N/A	N/A	N/A	$95	$85	$15
Choosing a Trustee	$95	$65	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$20
The PJI	$95	$65	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$25
Managing High Conflict Families	$35	$25	$45	Yes	Yes	1 cpn	1 cpn	$95	$85	$15
E-Discovery: Predictive Coding	$50	$25	$65	Yes	Yes	2 cpn	2 cpn	$95	$85	$15
A Mockery of a Closing	$65	$45	$85	Yes	Yes	2 cpn	2 cpn	$100	$95	$20
Accident Reconstruction	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	TBA	TBA	TBA

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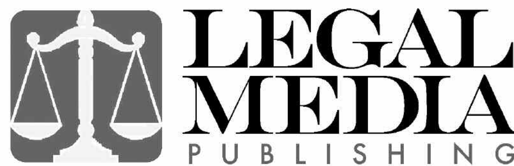

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Winter CLE *(Continued from page 28)*

Silverman, and March Pergament will discuss, among other things, filing a single asset real estate case in bankruptcy court, Chapter 7 issues, and case law developments. This program is a true must-attend for our times.

Litigation

Litigators will find a bonanza of cutting-edge offerings in the Academy's Winter Syllabus. Just a few are **"The PJI: Practical Insights & Strategies"** on the evening of January 30; **"Cross Examination (Civil and Criminal)"** on the evening of February 28; **Vehicular Accident Analysis** on the evening of February 13; and **"Handling a Motor Vehicle Case"** on the evening of March 14. Hon. James Flanagan coordinates the first three of these offerings; Pat Meisenhimer, the March 14 program.

Also of importance is a luncheon program on **"Recent Developments in Law and Technology Related to Predictive Coding"** scheduled for February 5. Attorney Glen Warmuth and representatives of DOAR will explain how new computer applications can aid in the quick and efficient identification of key documents in the e-discovery process.

Other programs scheduled this winter are the SCBA Labor & Employment Law Committee's ambitious **Annual Law in the Workplace Conference** (March 9 at Touro Law Center); **Representing Veterans** (free, with optional donation, on January 17) coordinated by Hon. Peter Mayer and Ted Rosenberg; **Cloud Computing** (a law practice management lunch 'n learn on March 12) featuring Allison Shields, Barry Smolowitz, Guido Gabriele III, and Glen Warmuth; the East End version of David Mansfield's **DMV Update** (January 9, 5:00 p.m. at Seasons of Southampton); and the Academy's annual **Bridge-the Gap Weekend for New Lawyers** (March 22 and 23) chaired by Bill Ferris and Steve Kunken.

Various publicity pieces, including the CLE Spread in this publication, provide program details, and practitioners are always welcome to call the Academy (631-234-5588) for information. SCBA members are also urged to let the Academy know of other CLE topics they would like to see covered.

Note: The writer is the executive director of the Suffolk Academy of Law.

Starbucks vs Wolf Borough Coffee *(Continued from page 9)*

point. The case is now on appeal yet again at the 2nd Circuit.

Starbucks brief in this appeal focuses on the fact that the District Court found that "the distinctiveness, recognition and exclusivity of use factors weigh in Plaintiffs['] favor." Nevertheless, Starbucks argues, the District Court expressly disregarded those factors after mistakenly concluding that they were relevant only to the threshold inquiry of whether the Starbucks mark is sufficiently famous to be eligible for protection against likely dilution and downplayed them as factors used to determine the likelihood of dilution.

The doctrine of trademark dilution has had a very tortured history. Courts have been unable to find common ground on which to provide much guidance if any to trademark owners. There seems to be reluctance on the part of many judges to apply the law as it is written. The radical departure of dilution, which focuses on the weakening of a mark's selling power, from traditional trademark law, which is grounded in consumer protection from confusion in the marketplace, is possibly to esoteric a notion for most jurists. Needless to say, the final outcome of this long saga is highly anticipated.

Note: Gene Bolmarcich, Esq. is a trademark attorney and Principal of the Law Offices of Gene Bolmarcich in Babylon, NY, with a national clientele. He operates a virtual trademark registration service at www.trademarksa2r.com. He can be contacted at gxbesq1@gmail.com.

ACADEMY OF LAW NEWS

CLE Course Listings on pages 24-25

Re-Imagine Your Practice with CLE

The color of springtime is in the flowers;
the color of winter is in the imagination.
– Terri Guillemets (The Quote Garden)

By Dorothy Paine Ceparano

The economy, changes in legislation, new case law, and myriad other factors can make a lawyer's practice thrive or falter. One moment, it can be hard to serve all the potential new clients, and the next, the lack of new business can be depressing and unsettling. But the one positive thing, in good times or bad, is that – with a little learning – lawyerly skills are transferrable. This winter, why not use CLE to re-imagine your practice buffered with enhanced skills and expanded areas of expertise?

The Academy's Winter Syllabus (January through March) holds numerous opportunities for "re-imagination." We invite practitioners to peruse our syllabus for practice enhancement opportunities.

Elder Law

The piece de resistance in the field of elder law CLE remains George Roach's **Annual Elder Law Update.** New and experienced attorneys alike flock to this program for access to Mr. Roach's on-point tips and insights accumulated and fine-tuned over the course of the preceding year. The 2013 program will take place, as always, on February 14, from 2:00 to 5:00 p.m.

Those seeking elder law instruction should also keep in mind the January 23 (6:00–9:00 p.m.) seminar on **"Choosing a Trustee & Family Wealth Sustainability"** featuring the always well-received David DePinto and skilled lawyers from BNY Mellon. Topics will include fiduciary responsibility, talking to family members about wealth, planning for charitable giving, investment strategies, and much more.

Finally, a lunch program on March 21 features financial planner Henry Montag and elder law attorney Robert Barnett in a discussion of **Post -Medicaid Regulations and Trusts in Elder Law Planning.**

Matrimonial & Family Law

The Academy's winter syllabus is replete with classes on matrimonial and family law.

Part Two of this year's Annual Family Court Update is scheduled for the evening of February 5; Hon. John Kelly and Family Court Magistrates Isabel Buse and John Raimondi have organized a program covering domestic violence, perspectives of the attorney for the child, JD's and PINs petitions, and other issues for family court lawyers.

On February 1, an extended lunch 'n learn class will deal with **"Managing High Conflict Families After a Divorce."** Organized by psychologist Neil Grossman, Ph.D., the program will feature Robert Cohen, Steve Schlissel, Hon. John Collins, and Jeanmarie Mansetti, CSW, in a discussion of the difficulties that can affect implementation of parenting plans; topics will include parenting coordination and similar approaches, current case law, the need for judicial review, and similar issues.

Finally, as always, March brings the Academy's **Matrimonial Mondays Series.** This year's series includes an **Update** by Vincent Stempel on March 4 and three focused seminars: **"An Advanced Look at the Language Required in Divorce Stipulations for QDROs and Other Retirement Plans,"** featuring Bill Burns and Tom Campagna, on March 11; **"Direct and Cross Examination of a Forensic Accountant,"** featuring Louis Carcone, CPA, David Gresen, CPA, Garry Tabat, and Peter Galasso, on March 18; and **"Cross Examination: A Primer for the Family Lawyer,"** featuring Stephen Gassman, on April 1. Linda Kurtzberg, Arthur Shulman, and Debra Rubin are the series coordinators. All of the programs run from 6:00 to 9:00 p.m.

Real Estate

A diverse assortment of real property programs are offered this winter.

On February 8, a lunchtime program entitled **"A Mockery of a Closing"** features an experienced faculty in a hypothetical closing at which everything that can go wrong does. Employing a stop-action format, the instructors will explain how advanced planning or quick thinking can stop the deal from falling apart. Presenters include Lita Smith-Mines, Audrey Bloom, Gerard McCreight, Joseph O'Connor, Robert Steinert, and Peter Walsh.

The annual **Landlord-Tenant Update,** organized by Hon. Stephen Ukeiley, is scheduled for the evening of February 26 (6:00–9:00 p.m.). Speakers, in addition to Judge Ukeiley, are Hon. Scott Fairgrieves, Hon. Andrea Schiavanni, Victor Ambrose, Marissa Luchs-Kindler, Wanye Berger, Michael McCarthy, Patrick McCormick, and Deputy Sheriff Sargent David Sheehan. A limited number of Judge Ukeiley's book on Landlord-Tenant Practice will be available for purchase (reduced cost) at the program, and the instructional portion of the evening will be preceded by a book signing.

On February 27, an extended lunch 'n learn will feature Peter Walsh in a treatment of **Asset Purchase Agreements.** You will gain insights, strategies, new concepts, and key language for your agreements.

Finally, on March 7, another extended lunch 'n learn will focus on **"1031 Exchanges and Other Tax Deferral Strategies."** The faculty for this program – the always popular Michael Brady and Joseph Insalacco, CFP – will bring you up to date on these exchanges and show you how they can serve the interests of those you represent.

Foreclosure & Bankruptcy Law

Despite minor improvements in the real estate world, foreclosures still abound. **Part Two** (evening of January 14) of **"Behind the Curtain: Standing Issues in Securitized Mortgage Foreclosures"** continues the discussion of securitized transactions and explains the mechanics of document transfers in structured finance mortgage-backed securitizations. The program will address how securitization has made the plaintiff's lack of standing a viable defense and identify the transactional mistakes to look for. The audience is invited to join the presenters – Charles Wallshein, Hon. Peter Mayer, Hon. Jeffrey Arlen Spinner, and others TBA – in an open discussion of vital and complicated issues. Attendance at Part One of the program, presented in November, is not a pre-requisite for participation in this segment.

Bankruptcy law is given a cutting edge treatment in the Academy's **Annual Bankruptcy Update** scheduled for the evening of January 10. Presenters Richard Stern, Christine Black, Kenneth

(Continued on page 27)

ACADEMY *Calendar* of Meetings & Seminars

Note: Programs, meetings, and events at the Suffolk County Bar Center (560 Wheeler Road, Hauppauge) unless otherwise indicated. Dates, times, and topics may be changed because of conditions beyond our control. CLE programs involve tuition fees; see the CLE Listings pages in this publication and the SCBA online calendar for course descriptions and registration details. For information, call 631-234-5588.

JANUARY

Date	Day	Event
4	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
9	Wednesday	**DMV Update–**East End Presentation**.** (David Mansfield, Presenter). 5:00–7:30 p.m. at The Seasons in Southampton. Light supper from 4:30 p.m.
10	Thursday	**Bankruptcy Update.** 6:00–9:00 p.m. Light supper from 5:30.
14	Monday	**Advanced Standing Issues in Securitized Mortgage Foreclosures.** Part II. 6:00–9:00 p.m. Light supper from 5:30.
15	Tuesday	Academy Curriculum Planning Meeting. All SCBA members welcome. RSVP if you plan to attend.
17	Thursday	**Representing Veterans.** Presented by the SCBA Military Law Committee. 6:00–9:00 p.m. Light supper from 5:30.
23	Wednesday	**Choosing a Trustee; Fiduciary Liability; Family & Wealth Sustainability.** 6:00–9:00 p.m. Light supper from 5:30.
30	Wednesday	**The PJI: Strategies for Trial Lawyers.** 6:00–9:00 p.m. Light supper from 5:30.

FEBRUARY

Date	Day	Event
1	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
1	Friday	**Managing High Conflict Families After a Divorce.** Noon–3:00 p.m. Lunch from 11:45 a.m.
5	Tuesday	**Family Court Update–Part Two.** 6:00–9:00 p.m. Light supper from 5:30.
6	Tuesday	**E-Disclosure: Recent Developments in Law & Technology Related to Predictive Coding.** 12:30–2:10 p.m. Lunch from noon.
8	Friday	**Real Estate: A Mockery of a Closing.** 12:30–2:10 p.m. Lunch from noon.
13	Wednesday	**Accident Reconstruction.** 6:00–9:00 p.m. Light supper from 5:30.
14	Thursday	**Elder Law Update** (George Roach, Presenter). 2:00–5:00 p.m. Snacks and sign-in from 1:30.
26	Tuesday	**Landlord-Tenant Update** (with book sighing). 6:00–9:00 p.m. Light supper from 5:30.
27	Wednesday	**Asset Purchase Agreements.** Noon–3:00 p.m. Lunch from 11:30 a.m.
28	Thursday	**Cross Examination.** 6:00–9:00 p.m. Light supper from 5:30.

Check On-Line Calendar (www.scba.org) for additions, deletions and changes.

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