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Immigration 'Fix' Eases Path to Green Card

By David M. Sperling

A proposal to fix a notorious snag in immigration law could open the door for hundreds of thousands of illegal immigrants to obtain a green card in the United States. The proposal, announced by the Obama administration on Jan. 6, would fix a bureaucratic Catch-22 that has kept immigrant spouses and children of U.S. Citizens in illegal status.

The new rule, which is expected to take effect in about a year, will now allow certain undocumented "Immediate Relatives" of U.S. Citizens to apply for a provisional waiver for "unlawful presence" in the United States. The term "Immediate Relatives" include spouses of U.S. Citizens, children (unmarried and under 21) of U.S. Citizens, and parents of adult U.S. Citizens. 22 CFR § 42.21.

The law now requires immigrants who "entered without inspection" (EWI) to return to their home countries to attempt to obtain legal status through consular processing. However, that route was fraught with so many risks that the vast majority of EWI entrants chose to stay in the United States illegally rather than face the possibility that they would be stranded in their home countries and separated from their families if the visa waiver was denied.


David M. Sperling

The problem arose because of the perverse consequences of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, also known as IIRAIRA. This harsh law imposed 3- and 10-year bars to re-entry for anyone who was "unlawfully present" in the United States for six months or more and then departed. INA Sec. 212(a)(9)(B). (Foreign nationals who overstay their visas and subsequently marry U.S. Citizens are not subject to these restrictions. They can simply apply for "adjustment of status" in the United States to obtain a green card. INA Section 245(a).)

Any EWI immigrant married to a U.S. Citizen would have to return to his or her home country and demonstrate "extreme hardship" to the spouse (or U.S. Citizen or Legal

(Continued on page 23)

Judicial Swearing-In and Robing Ceremony

Supervising Judge of the District Court Madeleine A. Fitzgibbon swore in re-elected District Court Judges John Iliou, Gigi A. Spelman, newly elected District Court Judges David A. Morris and Vincent J. Martorana at the Judicial Swearing-In and Robing Ceremony held at Touro Law Center on Jan. 9.


Photo by Barry Smolowitz

PRESIDENT'S MESSAGE

SCBA Sponsors Judicial Swearing-In and Robing Ceremony

By Matthew E. Pachman


Matthew Pachman

While the job of SCBA president is certainly time consuming, there are, besides the satisfaction of representing lawyers and our profession, some nice benefits. For example, on January 9 I was privileged to be a part of the 2012 Judicial Swearing-In & Robing Ceremony. The following is an excerpt of the remarks I made that day:

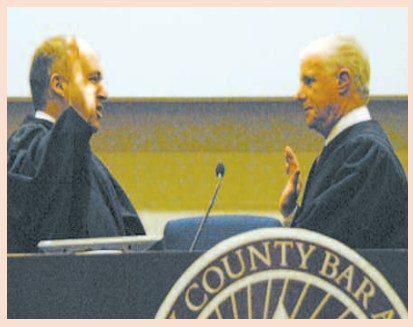
Good morning. On behalf of our Officers, Directors and members, we thank you for joining us for the 2012 Judicial Swearing-In & Robing Ceremony.

Historically, January symbolizes the beginning of a new year with new dreams and expectations. It marks the commencement of continued terms of re-elected judges and first terms of those newly elected.

The development of the close relationship and alliance enjoyed today with our bench is the result of the joint efforts of the Suffolk County Bar Association and the members of the judiciary. We are all lawyers who are devoted to elevating the quality of the legal system including the bench and the advocates who appear before it.

It is in this tradition that the Suffolk County Bar Association has, over the years, sponsored this ceremony. What began as a modest program has grown to what we see today. It is the hope of the members of our association that justices and judges being sworn in today realize the hopes, and aspirations of bringing excellence, honor, distinction and most of all revitalized respect to the legal system, to the judiciary, and to the entire legal profession.

INSIDE...
FEBRUARY 2012
FOCUS ON ELDER LAW AND ESTATE PLANNING



BAR EVENTS

Cohalan Cares for Kids
Thursday, Feb. 2, 6 to 8 p.m.
Bar Center
An evening of wine and cheese and music to benefit the Cohalan Court Children's Center. Wine tasting by Martha Clara Vineyard and music by Gerard Donnelly, Esq. and Rafael Penate, Esq. Tickets are $50. Hosted by the SCBA

Law in the Workplace Conference
Friday, February 10, 8:30 a.m.–4:00 p.m.
Bar Center
22nd annual labor-employment law conference for lawyers, HR professionals, labor and management representatives from public and private sectors. This year's focus is on trends in employment discrimination. Tuition: $175. Call the Academy (631-234-5588) to enroll.

Courting Justice
Tuesday, February 28, 6 p.m.
Bar Center
Filmmaker Ruth Cowan will speak at a screening of *Courting Justice,* a film that tells the story of women who became judges in South Africa's fledgling democracy. Co-sponsored by the Bar Association and Suffolk Academy of Law. Complimentary admission; reservations requested.

Pro Bono Recognition Night
Thursday, March 22, 6 p.m.
SCBA Pro Bono Attorneys recognized at annual din-

FOCUS ON
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SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2011-2012

SCBA Calendar

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

FEBRUARY 2012

1 Wednesday ProBono Foundation, 7:30 a.m., Board Room.
Judicial Screening Committee, 5:30 p.m., Board Room.

2 Thursday SCBA is hosting "Cohalan Cares for Kids", featuring a wine tasting by Martha Clara Vineyards. Come join the fun for an evening of wine, cheese, music and good cheer to benefit EAC., 6:00 p.m. to 8:00 p.m., Great Hall.

6 Monday Executive Committee, 5:30 p.m., Board Room.
Insurance & Negligence - Defense Counsel Committee, 5:30 p.m., E.B.T. Room.

7 Tuesday Joint Matrimonial & Family Law/Family Court Committees, 1:00 p.m., Justice Bivona's Courtroom, 3rd Floor, Supreme Court, Central Islip.
Appellate Practice Committee, 5:30 p.m., Board Room.

8 Wednesday Education Law Committee, 12:30 p.m., Board Room.

10 Friday Law in the Workplace - Full day conference, Great Hall & Board Room.

14 Tuesday Commercial & Corporate Law Committee, 6:00 p.m., Board Room.

15 Wednesday Surrogate's Court Committee, 5:30 p.m., Board Room.

22 Wednesday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
Environmental Law Committee, 12:30 p.m., Board Room.

23 Thursday ADR Committee, 6:00 p.m., Board Room

24 Friday Celebrating Black History month, 12:45 p.m., Central Jury Room, Central Islip.

27 Monday Board of Directors, 5:30 p.m., Board Room.

28 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.

29 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

MARCH 2012

5 Monday Insurance & Negligence - Defense Counsel Committee, 5:30 p.m., E.B.T. Room.

6 Tuesday Joint Matrimonial & Family Law/Family Court Committees, Justice Bivona'a Courtroom,1:00 p.m., 3rd Floor. - Supreme Court.
Appellate Practice Committee, 5:30 p.m., Board Room.
Commercial & Corporate Law Committee, 6:00 p.m., E.B.T. Room.

12 Monday Executive Committee, 5:30 p.m., Board Room.

13 Tuesday Labor & Employment Law Committee, 8:00 a.m., Board Room.

14 Wednesday Education Law Committee, 12:30 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."

Support One of Our Own Serving in Afghanistan

Please show your support for SCBA member Assistant District Attorney Bethany Green who is serving in Afghanistan, by dropping her a line or two. Being away from family and friends is particularly difficult during the holiday season. It would be great if SCBA members took a few moments to thank Bethany for her service and wished her well.

Please send your cards and letters to Bethany at:

US Mail
Bethany Green
HHC82nd CAB, Task Force Poseidon
Bagram Airfield
APO, AE 09354

Bethany Green worked in the domestic violence bureau.

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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Litigating College Expenses

By John E. Raimondi

The issue of payment of college expenses is an area that is frequently litigated in the Family Court and Supreme Courts of New York State. As many matrimonial and family court attorneys are aware, New York State is one of only three states and two jurisdictions in which a child support obligation continues to the age of twenty-one for the support of a child. The states and jurisdictions where child support runs to the age twenty-one years are Indiana, Mississippi, New York, Puerto Rico and the District of Columbia. In the states of Alabama, Colorado, Nebraska and Wyoming, child support runs to the age of nineteen and in the remaining states, child support runs until age eighteen.

As to the issue of college payment and expenses, Section 413 [1][c][7] of the Family Court Act and Domestic Relations Law Section 240 [1-b][c][7] states that "Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interest of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider."

The issue of college loans was recently addressed in the Orange County Family Court matter of *Yorke v. Yorke*, 83 A.D.3d 951, 922 N.Y.S.2d 115 (2011). In *Yorke*, the Appellate Division Second Department held that "In determining the parents' respective obligations towards the cost of college, a court should not take into account any college loans for which the student is responsible (see matter of *Kent v. Kent*, 29 A.D.3d 123, 133-134, 810 N.Y.S.2d 160). Therefore, any loans for which the child is responsible should not have been deducted from college costs prior to determining the father's pro rata share of those costs." The Appellate Division further stated "In addition, the Family Court erred in applying the total amount of scholarships, grants, and the student loans for which the child is not responsible (hereinafter collectively financial aid). First, the Family Court should have calculated the total cost of attending college, including tuition, and room and board. Next, it should have determined the percentage of that total cost which was covered by financial aid. That percentage should then have been applied to the tuition portion. Finally, the father's share of the net tuition, after deducting the pro rata financial aid, should have been calculated based upon his percentage of responsibility (see *Kennedy v. Kennedy*, 62 A.D.3d 755, 756, 880 N.Y.S.2d 97)."

John E. Raimondi

Another interesting case regarding college payment was the Kings County matter of *French v. French*, 13 A.D.3d 624, 787 N.Y.S.2d 115 (2004). In *French*, the Support Magistrate found that the mother demonstrated a sufficient change of circumstances and directed the father to pay towards the college expenses of the party's child. The Appellate Division Second Department held that the Support Magistrate applied the incorrect standard of change in circumstances in directing the father to pay towards the college expenses of the child.

The Appellate Division stated that "While a court may order a parent to contribute to the child's educational expenses (see Family Court Act Section 413 [1][c][7]; Domestic Relations Law Section 240 [1-b][c][7]), a court does not have unfettered discretion in making such an award (see *Saslow v. Saslow*, 305 A.D.2d 487, 758 N.Y.S.2d 825 [2003]). "

In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties; the best interests of the children, and the requirements of justice" (*Chan v. Chan*, 267 A.D.2d 413, 414, 701 N.Y.S.2d 114 [1999], quoting *Manno v. Manno,* 196 A.D.2d 488, 491, 600 N.Y.S.2d 968 [1993]; see *Matter of Wieser v. Wieser*, 253 A.D.2d 467, 676 N.Y.S.2d 655 [1998]; *York v. York*, 247 A.D.2d 612, 669 N.Y.S.2d 362 [1998]. Said matter was remitted back to the Kings County Family Court for a new hearing with the court to consider the credit that the father is to receive while the child is away at college.

Where the child or children reside away at college, courts have repeatedly held that a credit must be given to the non custodial parent. See *Reinisch v. Reinisch*, 226 A.D.2d 615, 641 N.Y.S.2d 393 (1996). In *Reinisch,* the Supreme Court of Westchester County awarded the plaintiff wife spousal maintenance and also ordered the husband to pay a proportionate share of the college expenses of the parties children. The Appellate Division Second Department held that the trial court erred in ordering the husband to pay child support and college expenses without reducing the child support obligation or crediting the husband towards the college costs when the children lived away at college.

The Appellate Division Second Department held that "However, it was improper to direct the non-custodial father to pay child support and contribute to the expenses of the children's college education without including any provision reducing the level of support or crediting the father for the amount contributed to the costs of their college education during periods when the children live away from home while attending college and therefore, the judgment has been modified accordingly. (see, *Guiry v. Guiry*, 159 A.D.2d 556, 557)."

Another interesting and frequently cited case regarding college expense is the matter of *Jablonski v. Jablonski*, 275 A.D.2d 692, 713 N.Y.S.2d 184 (2000). In *Jablonski,* the husband and wife divorced and the husband appealed from the Queens County Supreme Court's decision which distributed the marital property, imputed income to the husband, directed the husband to pay 65 percent of the children's college expenses and directed the husband to pay 65 percent of the wife's attorney's fees. The Appellate Division Second Department held that the non-custodial parent's child support obligation is to be reduced while the children are living away from home while attending college.

The Appellate Division Second

(Continued on page 24)

Meet Your SCBA Colleague

Derrick J. Robinson, **a New York State Assistant Attorney General, grew up during the Civil Rights era. He graduated from law school committed to working for the public's interest. Mr. Robinson overcame quite a bit to get to where he is today.**

By Laura Lane

What would you say was one of the biggest challenges that you faced? I overcame some of the limitations people expected from young African American males through determination, hard work, sweat and confidence. During the Civil Rights era we believed we had rights that couldn't be taken away from us. And I always felt that change within the country had to come by working within the system. The seed was planted for me to become an attorney as early as my junior high school years.

With your father in the military you moved around a great deal as a child. Do you think this shaped you in any way? It made me appreciate being the new guy on the block. And I had many teachers that were inspirational. They encouraged me to pursue my dreams and told me that our whole society would prosper.

Did this help you overcome other obstacles? Yes, and also all of the support and love from my family who always emphasized education. I encountered some systemic obstacles like the difficulty of getting into law school, and navigating law school. Many of the other law school students came from professional families where they experienced a different upbringing than I did. I was the new kid on the block again. But this was never an insurmountable obstacle. I had some very good mentors in law school and they were very valuable.

You mentor elementary and high school students, right? Yes. That's as a result of the mentoring I received. It has become something that I've taken to heart.

In 1970 while a sophomore at Howard University you joined 86 other students in a voter education and registration drive in Alabama. What do you remember from that experience? We may have been one of the last waves of Freedom Riders. I went to Mobile and I didn't know the south at all – I was from New Jersey. Here I am going to community meetings, knocking on doors and going in the backwoods. I knew the dangers. I was there for several weeks and it was a very satisfying experience.

If you knew it was dangerous why did you go? I grew up in an era where we were committed to doing things like this; the risks were justified because it was for the greater good. I grew up during a period of social change.

And later in your life you continued on this same path. As a new attorney you volunteered for VISTA in the Southwest Legal Aid Center. I worked there for a year and got just what I was looking for – to practice law in the public interest and get out into the community.

Even today you remain active in the community. Yes. I speak to community members on topics that I believe will protect them like internet safety, consumer protection matters that involve deceptive trade practices, consumer frauds, identity theft, student loans and mortgage modification schemes. I'm always anxious to do these presentations. I enjoy them and they are satisfying. It is above and beyond what I do between 9 and 5.

You spent 25 years working for the Suffolk County Attorneys Office. I was impressed by the quality of law I was exposed to and the wide range. I eventually worked to ensure that the ground water was protected in Suffolk and work like this has always been important to me. I went on to work for a year as a municipal law attorney in private practice and then went back into government working as the Chief Deputy Town Attorney for the Town of Brookhaven before joining the Office of the Attorney General. I've always been committed to working in the public interest.

Why form the Amistad Black Bar? When I came to Long Island I quickly became aware of the degree of isolation you can encounter. I was the founding president of Amistad which was formed to help identify other minority lawyers on Long Island so we could network with each other and develop the collegiality that is necessary to become successful. I believe my goals have come to fruition in large part because of the support we have received from the SCBA for which we are deeply grateful.

When did you join the SCBA and why? It was around 1993 and in part I joined due to the encouragement from other attorneys in the SCBA.

Photo courtesy of Derrick J. Robinson

Derrick J. Robinson

Would you recommend that others join? Yes I would. Being active in the SCBA has been one of the best things I did for my career. On the professional level I enjoy and benefit greatly from CLE programs that the Academy offers. I've enjoyed working on committees and they have given me the opportunity to learn, share and participate in the development of those particular areas of law. On a personal level the warm collegiality that the SCBA offers is genuine. It is not closed or elitist. The members are a great group of people.

PRO BONO

Pro Bono Attorney of the Month: Margarett Williams

By Nancy Zukowski

Nassau Suffolk Law Services is pleased to honor Margarett Williams, an attorney who is serving the legal community as an advisor and mentor to junior attorneys while also representing needy Suffolk County residents in pro bono matrimonial matters, one of the most emotionally challenging areas of the law.

Ms. Williams is the Assistant Dean of Career Services at Touro College Jacob D. Fuchsberg Law Center. Yet, she finds time to devote to pro bono matrimonial cases through Nassau Suffolk Law Services' Pro Bono Project, which is supported in part by the Suffolk County Bar Association. The story of how she came to practice law is one of finding her passion and following it with perseverance.

Ms. Williams put herself through Adelphi University, attending classes at night, and graduated summa cum laude in 1995 with a B.A. in Psychology. Prior to attending law school, she spent almost 17 years in corporate Human Resources and Training in a $1.5 billion corporation, and during that time obtained certification in Human Resource Management from Cornell University. Working during the day, she attended the evening program at Touro Law Center from 2001 until 2005. She practiced employment law after graduation, but quickly began pursuing her interest in family law. Ms. Williams practiced matrimonial and family law at the firm of Winkler, Kurtz, Winkler and Kuhn in Port Jefferson Station and credits Jim Winkler, her mentor at the firm, for inspiring her to do pro bono cases based on his active involvement with the Pro Bono Project.

When she returned to Touro Law Center (first as the Director of Employer Relations), she knew that continuing with her pro bono matrimonial work was the right thing to do.

Explaining how her volunteer service enhances her work in the Career Services Office at Touro Law Center, Ms. Williams says, "It keeps me involved in the practice of law, so that when I counsel my students I can do an even better job of discussing the realities of practice, including respect for the court, clients, and ethical issues. Furthermore in matrimonial law, you touch on other legal issues like pensions (governed by ERISA), real estate issues, foreclosures and bankruptcies. This adds to the things I can speak to students about. I am constantly taking CLE classes, reading cases in *The New York Law Journa*l and keeping up on the latest developments in the law."

Ms. Williams also loves the fact that this work allows her to do good in the world with every case she handles. All her pro bono clients have been women, most of them survivors of abusive relationships who are frightened and have lost hope. Each matrimonial case is different and the clients often need more than just legal assistance. Her psychological training and personal insight allow her to truly empathize with her clients and encourage

Margarett Williams

them at a time when they need it most. Ms. Williams was divorced for 16 years before she remarried and knows what it's like to face difficulties alone. While representing them, she discusses ways in which they can empower themselves.

She credits most of her success to the support she receives from her husband, Richard Eisenberg, Esq., who is very supportive "even when I spend hours on weekends writing motions and agreements, or talking hysterical clients 'off the ledge." Ms. Williams is also grateful to her boss, Dean Lawrence Raful, who is supportive of her pro bono work.

One negative realization that this work has revealed to her is that there are more people than she could have imagined who are in need of free legal services, especially in civil matters where there is no right to free counsel as there is in criminal matters. She always advises her students to do pro bono work in order to gain experience, but adds that "donating valuable time to do the work is extremely gratifying. You cannot earn a living taking pro bono cases, but you can improve the world one little piece at a time."

For her empathy, wisdom, and inspiring dedication to the underserved of our community, it is our privilege to honor Margarett Williams as Pro Bono Attorney of the month.

Note: Nancy Zukowski is a volunteer paralegal for Nassau Suffolk Law Services with a paralegal certificate from Suffolk Community College. Ms. Zukowski is also a freelance writer and has extensive professional experience in health insurance claims and health care advocacy and has interned at Nassau Suffolk Law Services, Queens Housing Court, and at private law offices in Suffolk. She is also a member of the Self Advocacy Association of New York.

The Pro Bono Project welcomes attorneys who would like to lend a hand, especially in the areas of bankruptcy, matrimonials, family law and guardianships. Please call Maria Dosso. Esq. at (631) 232-2400 x 3369 for more information.

We wish to Acknowledge those who contributed to the
SCBA Scholarship Fund

Donors	Purpose
The Chase Sensale Law Group, LLP	In memory of Jerome Chase, (U.S.M.C., retired)

IF YOU NEED HELP

WE ARE HERE FOR YOU!

The Lawyer's Assistance Foundation

The Foundation is a group of lawyers, who volunteer to help others in need. Their work is totally confidential, they do not ask questions or make judgement. They are here for you, if you need help. You are not alone.

The Foundation has been in existence for years. During that time, we have helped attorneys who have had professional turmoil, due to illness, depression, drug or alcohol addiction. We have worked in their offices, maintained their health insurance, and seen them through detox to recovery to re-entry into the professional world.

It is our pledge to assure every lawyer in Suffolk County, whether a member of a firm or a sole practitioner, that in their time of need, we will be there, no questions, no judgements.

It is my hope, that our members, who are not a part of our Foundation, will understand the importance of our work and will help us with a contribution, no matter how large or small.

Our goal is to put out our hand to help our fellow lawyers.

Donna England
Managing Director

Don't Count the Irish Out!

By Edwin Miller

Edwin Miller

Note: This is a true story. The name of the judge has been withheld for personal reasons.

A Tragic Accident

He was a Catholic priest from Londonderry, Northern Ireland. The year was 1972. He was a parish priest on Long Island. On a Saturday night he had been out to dinner with one of his parishioners when he was severely injured in an automobile accident. He was a passenger.

In the hospital, he expressed his desire to another priest that he wished to make out his will. The priest was a friend of my partner, and my partner, Bernard J. Campbell, Esq., who is now deceased, went to the hospital. The priest told my partner his desires, the will was prepared and executed, and he named my partner as the Executor. The priest died a week later from his injuries.

The Search for Support

In a wrongful death case, the cause of action belongs to the survivors for their loss of support. The priest, of course, was not married and had no children. However, he had an elderly widowed mother in Londonderry that he was supporting, and a sister that he was partially supporting. His sister was a qualified secretary but because she was Catholic in Northern Ireland, the discrimination against Catholics was so severe that the only employment she could obtain was a part time sales girl in a bakery!

The Obtaining of a Preference

In 1973, in Suffolk County Supreme Court, it took from 3 1/2 to 4 years after Note of Issue to reach the Ready Day Calendar. There was a preference available if a party was 75 or more (now 70). The priest's mother was 78, but she was not the plaintiff. The executor, who was the plaintiff, was only 52. We reasoned, however, that since the mother was the "real party In Interest," a preference should be given. Research did not produce any law on this point in New York. However, a motion was made to Special Term for a preference based on the "real party in interest" theory. The motion was denied since the plaintiff was not yet 75. An appeal was taken and the Appellate Division, Second Department adopted the "real party in interest" argument, reversed Special Term, and granted the preference.[1] The case is still good law.

The Receipt of Surprising News

In preparing the case for trial, our office had worked closely with the family's solicitor in Northern Ireland. He sounded like the veteran Irish actor Barry Fitzgerald. We had planned for the mother and sister to travel from Ireland to testify at the trial. About two weeks before the scheduled trial date, we received a call from the carrier to open negotiations. Of course, they low-balled the case, but we insisted that the priest was indeed supporting his elderly widowed mother and partially supporting his sister. The insurance representative then told us that the support of the mother was limited since she had died! We were shocked. We asked him when she died and how he knew this. He told us that his company had sent an investigator to Ireland and that she died about two months ago! We told him that we would have to get back to him and we immediately called "Barry Fitzgerald" in Northern Ireland. We told him what the carrier told us and asked if it was true. He said it was, and "God rest her soul." We asked him why he didn't call us immediately. He said that he didn't think it was important! After a few choice words, he promised to fully cooperate with us in finishing this case.

The Irish Come to New York

The priest's sister and brother came to New York for the trial. The sister was a dead ringer for the Irish actress Maureen O'Hara. Our photographer took one look and immediately fell in love with her. The only obstacle was his wife and four children. After some preliminary negotiations, the trial commenced and continued for three days. During one of the conferences the judge, who everyone assumed was of Italian heritage, remarked how the sister reminded him of his own deceased mother, who was also of Irish heritage! The case was finally settled for $60,000, the sister and brother were very satisfied, and returned to Londonderry, without the photographer!

We were once asked if we practiced International Law, and we answered, "sometimes."

Note: Edwin Miller has been practicing law in Suffolk County for more than 50 years. He is a partner in the firm of Campbell & Miller, Esqs. at 94 Maple Avenue, Smithtown, New York. He has a general practice with an emphasis on litigation.

1. Campbell v. Kelly, 42 A.D.2d 601, 345 N.Y.S.2d 448 (2d Dep't. 1973).

The Suffolk Lawyer wishes to thank Elder Law and Estate Planning Special Section Editor Steven Kass for contributing his time, effort, and expertise to our February issue.

Steven Kass

CONSUMER BANKRUPTCY

Effect of Consumer Bankruptcy on Frequent Flyer Miles and Rewards Points

By Craig D. Robins

Note: This is the second part of a two part series. The first appeared in the Jan. 2012 issue of The Suffolk Lawyer.

Most consumers these days have an assortment of frequent flyer miles and credit card rewards points, whether they earn them from airlines for flying, or acquire them from banks for credit card spending.

These miles and rewards points can have a substantial value to the consumer as they can be used to obtain expensive plane tickets or months of hotel lodging. They can also be used to purchase goods, or gift certificates redeemable in a variety of retail stores.

I once represented an executive who previously earned six figures, but was now without a job. He had over 800,000 American Express Membership Rewards points – enough to redeem on airlines for several international first class trips, among other things. What happens to these valuable points and miles when a consumer files for bankruptcy relief? Can they be protected?

Craig D. Robins

We start by looking at what kind of assets they are. A consumer who files for bankruptcy must list all assets in the bankruptcy petition. However, there is an issue as to whether frequent flyer miles are an asset that must be listed.

All frequent flyer programs have fairly comprehensive terms and conditions that uniformly indicate that the miles and award points have no monetary value whatsoever. These programs also state that miles are personal and cannot be assigned, traded, willed or otherwise transferred, except with consent of the program.

In addition, most programs state that membership terminates upon a member filing personal bankruptcy. Also, all airline programs vigorously prohibit the sale of award tickets.

Many frequent flyer loyalty programs and point programs, such as the popular American Express Membership Rewards program, expressly state that miles or points are not property of the member, and are not transferable by operation of law to any person or entity. Some actually state that the miles are owned by the program.

If a program states that the miles have no value and that they are not owned by the consumer, I would argue that the consumer does not have an asset that must be listed in the bankruptcy petition.

In my 26 years of practicing bankruptcy, and having attended many thousands of meetings of creditors in bankruptcy court, I have never once seen any case where a trustee has even asked about frequent flyer miles. This is true for two reasons.

First, trustees recognize that it would be very difficult to administer miles as an asset considering they are very illiquid, and secondly, even if they did have value, most consumers who file for bankruptcy, and who have frequent flyer miles, would have miles worth so little in relative terms, that it would not be viable for the trustee to administer them as an asset.

However, let's suppose a creative and aggressive Chapter 7 trustee did learn that a debtor had a substantial cache of miles. Keep in mind that a trustee certainly could not sell an airline ticket. Could the trustee compel the debtor to redeem those miles for gift certificates, which the trustee could then try to sell?

I would argue that if the frequent flyer program stated that the miles were not the property of the debtor, then the miles never became an asset of the bankruptcy estate, and the trustee has no right to control that asset.

A trustee would also have great difficulty pursuing them because of the standard provision in most frequent flyer programs that the debtor's membership in the program terminates upon the filing of bankruptcy. Technically, upon filing bankruptcy, all miles would then be lost.

However, I believe the frequent flyer programs include this provision to protect the consumer from creditors, similar to a spendthrift provision, rather than punish a consumer for filing bankruptcy. Thus, it is unlikely that an airline's frequent flyer program would terminate benefits to a consumer for filing bankruptcy, absent any med-

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BENCH BRIEFS

By Elaine Colavito

HONORABLE W. GERARD ASHER

Motion for a new trial granted; verdict rendered by the jury was contrary to the weight of the credible evidence.

In *Pedro Pena and Olga Pena v. Automatic Data Processing, Inc.,* Index No.: 7894/06, decided on October 4, 2011, the court granted the defendant's motion for a new trial. In rendering its decision, the court noted that the key issue was whether plaintiff Pedro Pena, a general employee of Randstad, was in the special employ of defendant, Automatic Data Processing, Inc., at the time of the alleged incident. On March 24, 2011, the jury rendered a verdict that plaintiff Pedro Pena was not a special employee of defendant. By way of this post-trial motion, defendant contended that the evidence presented at trial established that a special employment relationship existed and that the charge given to the jury on the issue of special employment did not give the jury sufficient guidance as to the significance and weight that should be given as to who controlled and directed the manner, details and ultimate result of plaintiff Pedro Pena's work. Plaintiff contended that the jury reasonably concluded on sufficient evidence that plaintiff was not a special employee and that defendant failed to satisfy the heavy burden imposed to set aside a jury verdict. The court pointed out the criteria for settling aside a jury verdict as against the weight of the evidence did not involve a question of law, but rather required a discretionary balancing of many factors. Here, the court found that all indicia showed that a special employee relationship existed between Pedro Pena and ADP and the evidence submitted at trial was replete with information in support of same. As such, a new trial was ordered on the grounds that the verdict rendered by the jury was contrary to the weight of the credible evidence.

Elaine Colavito

Motion for summary judgment denied; plaintiff failed to submit sufficient evidence to establish its entitlement to summary judgment.

In *Ptronics, Inc v. L. Jackson Builders, Inc., L. Jackson Carpentry, Lars Jackson and John Burgois,* Index No.: 32434/09 decided on March 10, 2011, the court denied plaintiff's motion for summary judgment.

The plaintiff commenced this action to recover payment for work performed at a property located in Westchester County**.** However, the court noted that the plaintiff failed to submit copies of the contract, change orders or invoices to the defendant in support of the motion. Instead, the plaintiff submitted only summaries of the change orders apparently prepared by the plaintiff. In addition, the plaintiff failed to submit affidavits from anyone with personal knowledge of the facts. In this regard, the plaintiff submitted affirmations from its president and vice president, which were unsworn to an unnotarized. The court stated that affirmations may only be used by an attorney or a physician authorized to practice in the state who is not a party to the action. Thus, the purported affirmations were of no probative value. Further, the affidavit of Rick Scarpetti, a contractor who apparently worked on the project, was also improper because it was not notarized. As such, the court concluded that the plaintiff failed to submit sufficient evidence to establish its entitlement to summary judgment.

HONORABLE PAUL J. BAISLEY, JR.

Defendants' motion for an order vacating the default judgment granted; defendants had a reasonable belief that their interests in the action were being represented by their retained counsel, and proffered a potentially meritorious defense.

In *Ismar Grande, Elvia Cardenis and Kayla Grande, an infant, by her parents and natural guardian Elvia Cardenis v. La Hacienda Del Rio, Inc., Angel Sorto, Edgar Reyes, Southside Restaurant, Inc. And 1620 New York Avenue, LLC,* Index No. 38625/08, decided on November 17, 2011, the court granted the defendants'

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SIDNEY SIBEN'S AMONG US

On the Move…

Lynn Poster-Zimmerman, has moved her offices to 775 Park Avenue, Suite 335, Huntington, NY 11743, (tel: 631-673-6905; fax: (631-673-6947, lynnpzim@aol.com).

Murray D. Schwartz has joined Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP as a partner in the Corporate and Commercial group.

Charles H. Wallshein, Esq. has become associated with Macco & Stern, LLP.

Kim M. Smith, has mover her firm to 1727 Veterans Memorial Highway Suite 206, Islandia, NY 11749, tel: (631) 849-5790, ksmith@eldestlaw.com.

Congratulations…

Congratulations to SCBA member **Adam Oshrin** appointed to Vice Chairman of the Smithtown Planning Board. He has served as a member of the Board since 2008.

Alan E. Weiner, CPA, JD, LL.M., has been selected as the 2012-2013 Chairman of the IRS Garden City (Long Island, NY) Tax Practitioner Liaison Committee. He is the founding tax partner and now Partner Emeritus at Holtz Rubenstein Reminick (Long Island and New York City). This committee consists of Internal Revenue Service officials and tax practitioners and provides an informal dialogue between the government and tax return preparer community.

To SCBA member **Stacy Posillico**, her husband Joe and son Anthony on the birth of baby Elizabeth Margaret, born November 23, 2011, 7 pounds, 12 ounces and 20 inches long.

Jacqueline A. Siben

Arthur "Jerry" Kremer, a partner at Ruskin Moscou Faltischek, P.C. has been elected as an officer of the Council of Governing Boards (CGB) for the 2011-2012 term. The CGB is the advocacy organization of 3,000+ Independent Sector, higher education Trustees, in New York State serving the Commission on Independent Colleges and Universities (CICU).

Announcements, Achievements & Accolades…

In February, Islip sole practitioner **James F. Gesualdi** will serve as a panelist at an international symposium, "The Future of Zoos," sponsored by the Institute for the Study of Human-Animal Relations at Canisius College and the Buffalo Zoological Gardens. Mr. Gesualdi will lead the panel on "The Future Regulatory Environment". For more information: http://www.canisius.edu/ishar/symposia.asp

The law firm of **Futterman, Lanza & Block, LLP** will hold a free two-hour seminar, "Medicaid Planning & Asset Protection," on January 17, 2012 at the law office, located at 222 East Main Street, Suite 314, in Smithtown. The morning seminar runs from 10 a.m. to noon, and the evening seminar is from 6 to 8 p.m.

SCBA former Director, **Annamarie Donovan**, has again been invited to visit the University of Oxford in England in March, 2012 for a four-day program entitled "Women's Interests." This is the eighth consecutive year that Ms. Donovan has been invited to speak at Oxford and the sixth year she will be attending. She will participate in the Oxford Round Table where discussion will focus on the issues of gender inequality and topics such as, sexual harassment and its consequences, and effects of equality legislation.

Condolences….

The Board of Directors sends its heartfelt sympathy to **Dennis Chase** (SCBA First VP) and his family on the passing of his uncle Jerome Chase (U.S.M.C., retired).

The SCBA was saddened to learn of the passing of **Joe Fox** who worked as Judge Arthur M. Cromarty's law clerk for 27 years. Joe passed away at 90 years young and we send our heartfelt sympathy to his family and to his friends and colleagues who knew and worked with him.

Our heartfelt sympathy to SCBA member **Daniel DeLuca** on this passing of his mother, Anita.

The members of the SCBA Board of Director send heartfelt sympathy to SCBA member **Pearl Murphy** and her family on the passing of her husband George L. Murphy.

The colleagues of New York State Administrative Law Judge **Morton J. Siegel** mourn his passing on Dec. 11 after an extended illness.

To the family of the **Honorable Ralph F. Costello,** a former Legal Aid attorney, District Court Judge and Supreme Court Justice whose legal career spanned more than 40 years. The Honorable Costello passed away in January.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Jeena Belil, Rosa Prestia Cascardo, Anthony Ciaccio, Robert J. Dallas, Michael B. Drechsler, Paul Jay Edelson, Bryan J. Farrell, Edward A. Flood, Ashleigh Garvey, Heath Goldstein, Glenn L. Kantor, Michael F. Kelly, Jennifer L. Koo, Thomas P. Milton, Megan O'Donnell, John T. Ryan, James Tierney, Stephen L. Uckman, Judith Walsh and Richard M. Zgoda.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **John C. Almberg, Garrett Guttenberg, Lisa M. Hughes, and Scott B. Mac Lagan.**

On the Move – Looking to Move

This month we feature two employment opportunities and three members seeking employment. If you have an interest in the postings, please contact Tina at the SCBA by calling (631) 234-5511 ext. 222 and

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You Don't Need to Rob a Bank!

By Steven A. Kass

I had just finished my seminar on Elder Law and Estate Planning, and asked the audience if they had any questions. After I had fielded and answered a few questions on rudimentary planning, I was asked a question that came out of left field. The gentleman stated that he was at the seminar to learn how to help his father protect his assets. His father had served our country in wartime, and indicative of members out of the Depression and the Greatest Generation, had scrimped and saved, and sacrificed luxuries to put his children through college so they could have a better life then he had. The man started off by asking about "rule of halves planning" and I confirmed that yes, even in the catastrophic situation of needing nursing home care, that his father could save a percentage of assets though it is not always as simple as 50 percent to the children and 50 percent to the nursing home. The man then asked why couldn't his father simply go into a bank with a gun and a note that he was there to rob the bank, and then after being arrested, just plead guilty so that he could spend the next 20 years in prison (or his earlier demise) where he'd get a bed, three meals a day, daily activities, and all the medical care he needed...all for free without any payback for the care given!

I knew that the man made a great point about our society and the way that we treat criminals, and all the cases of prisoners' rights I had read (you remember of course the case where the prisoner sued because he ordered chunky peanut butter but was given creamy peanut butter instead!). I wanted to recommend that his father consider a Federal Repository so that his father could be in a Club Fed as opposed to a local prison. I wanted to make a comment about conjugal visits and that his father would sacrifice never being able to sit down with the family again at home for a holiday meal. But I knew that I could not answer in such a fashion or condone such planning. Instead, I calmly spoke about the loss of liberty his father would face, the anguish the family could face from a trial, and the potential that the son could be an accomplice by helping his father with the scheme. I then recommended that his father meet with me or any of my colleagues that practiced in the areas of Elder Law and Estate Planning, so that his father could learn directly of his legal options to protect his assets and what documents should be a part of his Elder Law and Estate Planning, such as....

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Steven A. Kass

Medicaid, Eligibility Rules and Planning

The Medicaid Program on Long Island is administered by the County Department of Social Services (it is called the Human Resources Administration in the Five Boroughs). Medicaid has many programs to help individuals pay for medical care and treatment; the two main areas of Medicaid that are sought by Clients of Elder Law Practitioners are benefits in the community (i.e., the person's home or an assisted living facility that has beds under the Assisted Living Program), or in a nursing facility.

Applicants/Recipients must maintain their assets under the resource level, which for 2012 is $14,250.00 for a single person and $20,850.00 for a couple (See GIS 11 MA/027). An application for benefits must be submitted to the Department of Social Services together with all supporting information and documentation as required by the County. See 10ADM-05 - Revised DOH-4220: Access NY Health Care Application and Release of DOH-4495A: Access NY Supplement A.

For persons applying for care in the community, there is no Lookback Period and no Transfer Penalty Rule. A client can thus effectively transfer his assets to his family, and apply for Medicaid benefits to be effective the next month. The client is thus able to protect 100 percent of his assets (subject to the type of planning implemented and how the new Estate Recovery Law is implemented). The Medicaid Redesign Team appointed by Governor Andrew Cuomo recommended that a Transfer Penalty Rule apply for applicants for Community Based Home Care as allowed by OBRA 1993 (Pub.L. 103-66, 107 Stat. 312, enacted August 10, 1993), but that recommendation was not included in the law and it remains to be seen if it will be sought in the future.

For persons applying for chronic care in a nursing facility, there is a five year lookback pursuant to Soc. Serv. Law 366(e)(1)(vi), and a Transfer Penalty Rule. A Transfer Penalty is computed by dividing the total of the uncompensated transfers during the Lookback Period by the Regional Rate. As of the date of the writing of this Article the 2012 Regional Rate for Long Island was not published; the Long Island Regional Rate for 2011 was $11,445.00 (See 11 MA/001 - Medicaid Regional Rates for Calculating Transfer Penalty Periods for 2011). Based upon how Transfer Penalties are computed, in the event that there are no exempt transfers (see below), a client in a crisis who never implemented Medicaid Planning can still protect a portion of her assets so that all are not paid to the nursing home before Medicaid eligibility can be secured (i.e., promissory note planning). While this type of planning is commonly referred to as "Rule of Halves Planning" or "Half a Loaf Planning," the exact amount that will be preserved will be based upon factors such as the amount and types of assets in the name of the person needing care, their income and the costs of care.

Of course in all situations when care in a nursing home is needed, there are the available exempt transfers to a spouse, disabled or blind child, and if there is a homestead, to a spouse, blind or disable child, minor, live-in caregiver child who resided with the parent for the two years

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2012 NEW YORK MEDICAID DESK REFERENCE

Resources:

Resource Allowance for an Individual
$14,250.

Resource Allowance for a Couple
$20,850.

Resource Disregards
IRAs (subject though to income rules), Homestead (up to $758,000 in equity), Automobile, Personal Property, Pre-Paid Irrevocable Burial-Funeral, $1,500 Burial Allowance (by bank account or life insurance), Burial Space.

Services Provided:

Community Based Home Care
Care in the community (i.e., home), based upon a person's needs as determined by the Medicaid Agency.

Three Month "Look Back Period," but no Transfer Penalty Rule.

Income Allowance for an Individual: $792 + $20 disregard if recipient is over age 65
Income Allowance for a Couple: $1,159 + $20 disregard if recipient is over age 65

Spousal Refusal Required; No guaranteed level of assets or income to be retained by spouse not on Medicaid.

Nursing Home Care
All levels of custodial and skilled care in a nursing facility.

Income Allowance for an Individual, the "Monthly Personal Needs Allowance": $50.
Spousal Monthly Minimum Maintenance Needs Allowance ("MMMNA"): $2,841.
Minimum Community Spouse Resource Allowance ("CSRA"): $74,820.
Maximum Community Spouse Resource Allowance ("CSRA"): $113,640.

FIVE YEAR Look Back Period and Transfer Penalty Rules apply.
2011 Local Regional Rates: **Long Island** $11,445. **New York City** $10,579.
(The 2012 Rates were not available as of the writing of this Desk Reference, but will be posted on the Elder Law and Estate Planning Committee Blog on the SCBA Website)

Spousal Refusal Required If Non-Applying Spouse Has Assets or Income over the MMMNA or CSRA.

Lombardi (Nursing Homes Without Walls) OR Nursing Home Transition Diversion Waiver
Designed for persons who need a higher level of care at in the community than under Community Based Home Care. "Three Month Look Back Period", but no Transfer Penalty Rule. Same income budgeting as for Community Based Care.

Assisted Living Program
Only in participating Facilities that participate in the program. Three Month Look Back, no Transfer Penalty Rule.

Note: The above is merely informational and not legal advice. It is based upon New York Law and Rules as of January 6, 2012. Future changes in Law or Rules may render the above information inaccurate.

Medicaid Managed Care for Senior Citizens

By Janna P. Visconti

The Medicaid Redesign Team enacted significant changes to the Medicaid programs in New York State in April of 2011. Some of the changes are being phased in gradually, and their effect is just beginning to be felt. This article will focus on the requirement to enroll in Medicaid managed care and Medicaid managed long term care as it affects senior citizens.

Most people on Medicaid in New York under age 65 will be required to enroll in a plan with a Medicaid managed care organization (MMCO). Once enrolled, the recipients will access their Medicaid benefits through the plan's parameters. They will be required to use doctors and other health care providers in the plan. New York Social Services Law §364-j and new Subpart 360-10 of Title 18 of NYCRR (effective 12/28/2011), provide exemptions and exclusions from mandatory enrollment. People in the exempt category can opt to join a plan, but cannot be forced to join. People in the excluded category are not permitted to join a plan.

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Senior citizens who receive Medicare and also qualify for Medicaid benefits are called dual eligibles, and they are currently *exempt* from enrollment in the MMCO's. *See* N.Y. Soc. Serv. Law § 364-j(3)(c)(v). A new optional plan, called Medicaid Advantage, combines Medicare and Medicaid coverage into one plan. Medicaid Advantage does not provide long term care such as home health aides or nursing home benefits.

In April, 2011, the State submitted a waiver request to the Federal government (Center for Medicare & Medicaid Services), to require all dual eligibles that require a personal care attendant at home (for over 120 days) to enroll in a Medicaid managed long term care plan (MLTC Plan). Since there are more than 40,000 people in this category in New York City alone, the conversion cannot be accomplished instantaneously. Conversion will begin in New York City and gradually spread to the rest of the state. Until the new waiver effectuated in a particular county, enrollment in Medicaid managed long term care programs remains voluntary.


Janna P. Visconti

Voluntary managed long term care is not new to Suffolk County; Guildnet provides, among other services, in-home long term care services to blind and disabled persons eligible for nursing home level Medicaid services, and who are expected to require long term car for at least 120 days. Guildnet is partially capitated, which means that it provides only a portion of the services to which the recipient is entitled. It does not provide Medicare-covered services (such as hospitalization, physician services and diagnostic testing), or long term nursing home stays.

The waiver plan provides that effective April, 2012, dual eligibles living in Manhattan, who need a home health aide will be required to enroll in a MLTC Plan Mandatory participation will spread outward to the Bronx, Kings, Queens, and Richmond Counties, and then to Nassau, Suffolk, Rockland, Orange and Westchester Counties over a three-year period completed in six phases. Mandatory enrollment is scheduled to reach Suffolk County in January, 2013, in Phase II of the conversion. Consumer directed personal assistance program cases are included in the conversion plan, beginning in July, 2012 for New York and Bronx Counties. Individuals who are already enrolled in a Medicaid Advantage Plan will enroll with a MLTC Plan in November, 2012. Persons receiving services from nursing homes, traumatic brain injury waiver programs, nursing home and transition waiver programs, assisted living programs, and dual eligibles that do not require community long term care services are excluded from the mandatory conversion until sufficient managed care plans can be implemented to service these populations, expected after June, 2014. See http://www.health.ny.gov/health_care/medicaid/redesign/docs/2011-11_draft_enrollment_plan.pdf

New Regulations effective December 28, 2011

A new section 360-10 of Title 18 NYCRR repeals Subparts 360-10, 360-11, Sections 360.12, 360-6.7 in order to consolidate all managed care regulations and publish them on one location. It also addresses individuals receiving services through Family Health Plus (FHP), who now must enroll in a Medicaid Managed Care Organization (MMCO) to receive health care services. Note that an MMCO is distinguished from a MLTC Plan, primarily because, at this time, only an MLTC Plan provides for long term care: home health aides.

Who is required to enroll in an MMCO?

Most Medicaid recipients statewide must enroll in an MMCO, unless they are eligible for an exemption or exclusion. In addition, all FHP recipients must enroll in an MMCO in order to receive services, unless they participate in a FHP premium assistance program. The exemptions from mandatory enrollment are as follows (enrollment is optional): Social Services Law §364-j(3)(b) and (c).

(i) Individuals for whom MMCO is geographically inaccessible;
(ii) Pregnant women involved in a prenatal program with a non MMCO doctor
(iii) Persons with a chronic medical condition being treated by a specialist who is not associated with an MMCO;
(iv) Individuals who cannot be served by an MMCO due to a language barrier
(v) Residents of alcohol or substance abuse program or facility for the mentally retarded;
(vi) Individuals receiving services from an intermediate care facility for the mentally retarded, or who have characteristics and needs similar to such persons;
(vii) Persons with a developmental or physical disability who receive home and community-based services or care-at-home services through existing waivers, or who have characteristics or needs similar to such persons;
(viiii) Native Americans;
(ix) Medicare/Medicaid dual eligibles, *not* enrolled in a Medicare TEFRA program (where employer-provided insurance is primary); and
(x) Certain disabled, or previously disabled persons between the age of 15 and 65, meeting income and resource guidelines stated in § 366(1)(a) (12) and (13).

In addition, there are 14 categories of people who are *excluded* from participating in an MMCO. They include people already receiving services provided by a long term home health care program, Medicare eligible persons participating in a capitated demonstration program for long term care; persons living in nursing homes or receiving hospice services at the time of enrollment. The full list can be found at Soc. Serv. Law § 364-j(3)(d).

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REAL ESTATE

Top 11 Real Estate Laws of 2011

By Andrew Lieb

Now that 2012 is here it is important to be aware of changes in the law in order to properly represent our clients. This is not a list about the best events from 2011, but, instead, a list that highlights the new legal landscape that you face as real estate practitioners. Being familiar with these laws, regulations and opinions may help you to better address your clients' matters, save your license and make you money.

Property Tax Caps

Local government is now prohibited from raising property tax levies by more than the lesser of 2 percent or the rate of inflation (excluding New York City). An exception to this cap occurs if local government enacts a law or resolution explicitly overriding the cap by a two thirds vote. Currently, New York property taxes are the second highest in the country and are 96 percent higher than the national median.

Marriage Equality

Same-sex couples may now marry and as an incident thereto may now be deeded title as tenants by the entirety. Yet, while New York now provides same-sex couples with many new rights, the practitioner must be mindful that the Defense of Marriage Act prevents same-sex married couples from realizing the full extent of rights enjoyed by opposite-sex married couples because it prohibits the availability of federally recognized rights.


Andrew Lieb

Mortgage Modifications

Mortgagees/servicers who participate in the federal Home Affordability Modification Program (HAMP) and accept a borrower's application for a loan modification under that program must fully abide by the rules of the program in New York. Specifically, the Appellate Division held in *Aames Funding Corp. v. Houston* that a foreclosure sale would be stayed until the borrower was fully evaluated under the HAMP program. Practitioners should therefore familiarize themselves with all HAMP rules, which can be learned by accessing the Making Home Affordable Handbook.

Electronic Recording

Real estate recordings are going digital. County clerks will begin accepting documents in electronic format on September 22, 2012. Don't fret; you can still bring the clerk your paper versions if you please. Yet, the justification for the bill argues that "owners of real property, real estate professionals and local government taxpayers would benefit from the more accurate and efficient land records system that this bill would facilitate" so you should consider the upside of going digital.

MERS' Foreclosure Obstacle

Where Mortgage Electronic Registration Systems, Inc. (MERS) is nominee and mortgagee for purposes of recording, it cannot assign the right to foreclose upon a mortgage to a plaintiff in a foreclosure action absent MERS's right to, or possession of, the actual underlying promissory note. So says the Appellate Division in Bank of New York v. Silverberg where a foreclosure was dismissed for lack of standing as a result of MERS' involvement. The decision coupled with the introduction of governmental electronic recording seems to signal the end of mortgagees' practice of outsourcing their recordings to MERS in New York.

Ethical Seller's Concession Rules Reinforced

The New York State Bar Association is at it again by clarifying its Opinion #817 which addressed the duty to disclose in a transaction involving a Seller's Concession and a corresponding Gross-Up. Opinion #822 states that "all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession" in order for the practitioner to comply with Ethics Rule 8.4(c).

Expanded Hardship Criteria for Real Property Redemptions

The Suffolk County Code has been amended to expand the definition of "immediate family" to include grandchildren residing with the applicant where an applicant seeks to enlarge its time period to redeem its tax foreclosed property past 6 months based upon an illness to a member of its "immediate family."

Elimination of Recommended Attorney Lists by Title Agencies

In analyzing Insurance Law §6409(d), the New York State Insurance Department opinioned that a residential real estate broker may not refer its clients to attorneys on an "approved" or "recommended" list if the attorneys, in turn, refer those clients to the broker's affiliate title agent. Yet, the opinion clearly states that it is premised upon the assumption that "attorneys that do not make the referral quota are removed from the list," so a list is likely permissible so long as membership within the list is objectively independent from referral. Nonetheless, affiliated real estate brokerage and title companies are now eliminating their use of these recommended attorney lists.

On-Bill Recovery Loan Program

As part of the Power NY Act of 2011 and beginning January 30, 2012 homeowners can take out low-interest loans from NYSERDA

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Fellows of The New York Bar Foundation Honor Newly Appointed Chief Administrative Judge A. Gail Prudenti

On January 13, 2012, the Fellows of The New York Bar Foundation in the Tenth Judicial District held a breakfast reception honoring New York newly-appointed Chief Administrative Judge A. Gail Prudenti. The reception was held at Touro College Jacob D. Fuchsberg Law Center in Central Islip.

Hon. A. Gail Prudenti

Established in 1950, The New York Bar Foundation is a nonprofit, philanthropic organization that receives charitable contributions from individuals, law firms, corporations or other entities and provides grants to further its goals of promoting and advancing service to the public, improvements in the administration of justice, legal research and education, high standards of professional ethics and public understanding of legal heritage. The Foundation makes grants to financially support law-related programs of legal services organizations, nonprofits, bar associations and other organizations throughout New York State.

The Fellows of The New York Bar Foundation are members of the bench and bar who are elected to the Fellows on the basis of outstanding professional achievement, dedication to the legal profession and commitment to the organized bar. Each Fellow makes a commitment to financially support the goals and objectives of The Foundation through charitable contributions. Fellow also assist the Board in identifying potential grant projects and other causes that may benefit from The Foundations assistance.

-- Scott M. Karson
Fellow
The New York Bar Foundation

Medicaid and Promissory Notes

The challenges continue

By Jennifer B. Cona

Jennifer B. Cona

Asset protection planning via a promissory note has now been employed for several years in the Medicaid context. The technique has been modified over the years as the various county Departments of Social Services and the State Department of Health look for ways to challenge promissory notes. While the strategy is sound and is, in fact, the only way to preserve assets when advance planning has not been undertaken, there have been some unexpected consequences.

By way of background, with the passage of the Deficit Reduction Act of 2005 ("DRA") (42 U.S.C. §1396p), the federal government sought to eliminate transfer of asset strategies just prior to or immediately after an individual's placement in a long-term care facility. Under the DRA, the penalty period based on a transfer of assets does not begin until the facility resident is "otherwise eligible" for Medicaid benefits *but for* the asset transfer. 42 U.S.C. 1396p (c)(1)(D)(ii). In other words, a Medicaid applicant must be both residing in a long-term care facility and below the resource limit, currently $14,250, before the penalty period clock will begin to run. This means that the resident must spend-down all of his/her remaining assets (to below the applicable resource limit) before the penalty period will begin on any asset transfers made in the past five (5) years, regardless of when such transfers were actually made.

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However, the federal law specifically permitted planning with a promissory note by outlining an exception. The DRA calls for the inclusion of funds used to purchase certain notes and loans as "assets" with respect to transfer of asset penalties *unless* the note or loan: 1) has a repayment term that is actuarially sound; 2) provides for payments to be made in equal amounts during the term of the loan, with no deferral or balloon payments; and 3) prohibits the cancellation of the balance upon the death of the lender. 42 U.S.C. 1396p (c)(1)(I). By following these specific requirements as well as the requirements set forth in the state Administrative Directive (06 OMM/ADM-5, III (3) and IV (6), the use of promissory notes became the only means by which assets could be preserved at such a late stage.

To illustrate: Mr. Jones transferred a total of $420,407.96 to his daughter on September 30, 2011 as a part-gift/part-loan transaction. The health care facility daily rate was $425 (a typical rate on Long Island) and Mr. Jones' monthly income totaled $1,854. To determine the monthly loan re-payments, Mr. Jones calculated the actual monthly cost at the facility private pay rate for each month (30 or 31 days) less his monthly income. He then calculated the average of the monthly payments during the term of the penalty period (number of months) and factored in an interest rate of five percent.

Here, the average monthly loan re-payment amount was $10,908.40 per month. This is the amount which Mr. Jones' daughter pays back to him each month and which he then turns over to the long-term care facility. The term of the loan is 20 months beginning in October 2011. As such, $208,907.96 will be the total loan amount and $211,500 will be the total gift made to Mr. Jones' daughter, which amount is free and clear to her. After 20 months, the loan will be re-paid, the gifted money will be protected and Mr. Jones will be eligible for Medicaid benefits.

A small detail but key to the asset pro-

(Continued on page26)

Taking it Back

New York expands estate recovery in Medicaid cases

By Michael L. Pfeifer

Michael L. Pfeifer

When a Medicaid recipient passes away, New York State has a right (and an obligation under federal law) to recover from the person's estate up to the amount of medical expenses paid on the individual's behalf.[1] Until recently, the state could only recover from a testate or intestate estate. Trusts, life estates, joint accounts and annuities with proper beneficiary designations were all excluded from estate recovery. However, as of April 1, 2011, that changed with an amendment to Social Services Law, § 369(6).

Specifically, the statute was amended to read:

> For purposes of this section, an individual's "estate includes all of the individual's real and personal property and other assets passing under the terms of a valid will or by intestacy. Pursuant to regulations adopted by the commissioner, which may be promulgated on an emergency basis, an individual's estate also includes any other property in which the individual has any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests; provided, however, that a claim against a recipient of such property by distribution or survival shall be limited to the value of the property received or the amount of medical assistance benefits otherwise recoverable pursuant to this section, whichever is less.

Emergency regulations were promulgated effective September 8, 2011[2] and 11 OHIP/ADM-8 was issued to implement the new statute. However, the emergency regulations expired on December 6, 2011. Moreover in 11 MA/028, social service districts were directed not to pursue expanded estate recovery until new regulations are promulgated. New regulations are being circulated and will be issued sometime in the future. According to an email from T. David Stapleton, Esq., Chair of the Elder Law Section of the New York State Bar Association:

1. the Department of Health will issue the new regulations through the standard rule making procedure, which requires a 60 day comment period before the regulations become final;
2. the new regulations will be effective for decedents dying on or after July 1, 2012;
3. under the new regulations Notice of Claims must be filed within seven (7) months from the recipient's death for property passing outside of the probate estate and seven (7) months from the date of fiduciary appointment for property passing by probate; and
4. as in the emergency regulations, there will be no grandfathering of life estates, trusts, etc. that were created prior to the date of the statute and/or implementing regulations.

The New York Chapter of the National Academy of Elder Law Attorneys (NAELA) has hired Rene H. Reixach, Esq. to pursue litigation, one of the grounds being that the statute constitutes an unconstitutional "taking" of private property under the 5th Amendment to the U.S. Constitution.

The rest of this article will focus on what the aforesaid emergency regulations and implementing ADM said about estate recovery. Although, I believe we can expect some changes in the new regulations, I also believe that a good part of the emergency regulations will survive. Where I have become aware that changes might be made, I have advised the reader.

Before I address the changes to the law, let me address what has not changed. Assuming that the Medicaid benefits were correctly paid, the state can only recover for medical benefits paid to someone 55 years or older or who was permanently institutionalized and owned real property subject to a valid Medicaid lien.[3] There also is no recovery if the individual is survived by a spouse, minor child (under age 21), blind child or disabled child.[4] The state may only recover for medical expenses paid within 10 years of the person's death.[5] The state may only recover up to the amount of medical assistance provided.

We should also note that the new law does not affect the initial decision as to whether the Medicaid applicant is eligible. If the applicant was eligible before the statute became law, he or she will be eligible afterward. The statute only affects what happens after the Medicaid recipient's death.

Under the emergency regulations and the implementing ADM, in general, recoveries were prohibited if any of the following were still living:

1. a surviving spouse;
2. a child under 21 years of age; or
3. a child who is certified blind or disabled.

Please note that the above-referenced individuals do not have to be beneficiaries of the estate for recovery to be prohibited. Once the spouse and/or exempt child pass away, the Medicaid agency may pursue recovery.

If a homestead is involved, the Medicaid agency cannot recover against the homestead as long as the following persons continue to reside in the home:

a. a sibling with an equity interest who lawfully resided in the home at least one year prior to the Medicaid recipient's institutionalization; or
b. a child who provided care to the parent, who lawfully resided in the home at least two years prior to the Medicaid recipient's institutionalization.

Once the sibling and/or caretaker child is no longer residing in the home, the homestead is no longer exempt from estate recovery.

According to the estate recovery statute, the Medicaid agency may pursue recovery from any property in which the individual "has any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests…"[6] This leads one to the obvious question of what interest a person has "at the time of death." It is hornbook law that an individual does not have any interest in property at the time of death. Although the estate recovery statute refers to the recovery of property interests "at the time of death," the regulation refers to the recovery of "interest[s] in property immediately prior to death."[7] It is the author's belief that the issue of whether the Medicaid agency can recover against the value of one's interest in property "immediately" before death will be litigated by the New York Chapter of NAELA.

Jointly held bank accounts are recoverable. The Medicaid recipient is presumed to have owned 100 percent of the account, a presumption that can be rebutted with appropriate evidence. Jointly owned securities are recoverable to the extent of the Medicaid recipient's per capita share.

Life estates are recoverable. However, the table found in Attachment V of 96 ADM-8 will no longer be used to compute the value of the life estate. Instead, the appropriate section of the Internal Revenue Service's "Table S" based upon the Section 7520 interest rate must be used. Although, it is beyond the scope of this article, I will mention briefly that the use of this method of calculation adds another layer of uncertainty to advising our clients. In August 2006, the Section 7520 rate was 6.2 percent. By using the "Table S" method with an interest rate of 6.2 percent, the life estate would be worth .36544 of the fair market value of the real property assuming that the life estate holder had been 80 years old. However, in January 2012, the Section 7520 rate will be 1.4 percent. This will yield a value for the life estate of .10792 of the value of the property. Using the forgoing range of Section 7520 rates and assuming the real estate is worth four hundred thousand dollars; the value of the life estate for an 80 year old could range from to $43,168 to $146,176 depending on what the Section 7520 rate is when the person dies. How do you properly advise the client how much she can expect the Medicaid agency to recover when there is such a wide range of evaluation for a life estate?

Revocable trusts are entirely recoverable. "In the case of an irrevocable trust funded in whole or in part with the assets of the Medicaid recipient or the recipient's spouse, any principal and accumulated interest that was required to be paid to or for the benefit of the Medicaid recipient under the terms of the trust agreement is included in the decedent's estate and is subject to Medicaid recovery."[8] This leads to the question of what happens if you have an irrevocable trust that gives the right of "use and occupancy" or a life estate to the grantors. Although neither the regulations, nor the ADM, address that issue, informally we have been advised that the Medicaid agency will only recover from the life estate if it is contained in the deed. If the life estate or use and occupancy is only within the four walls of the trust; there will be no recovery.

The remaining balance of an annuity is subject to recovery regardless of whether the state was named as a beneficiary.

Life insurance is not recoverable unless the person's estate was named as the beneficiary.

Retirement accounts were not specifically mentioned in the emergency regulations and the ADM. However, according to David Stapleton, they are expected to be included in the new regulations. The immediate question is who pays the income taxes on a retirement account that was liquidated to satisfy the State's right of recovery. The recovery of retirement accounts could put beneficiaries in the position of paying taxes on money they do not receive. Also, as David Goldfarb and Rene Reixach have pointed out, retirement plans are protected under ERISA, EPTL and CPLR provisions. I expect that the issue of recovery of retirement accounts will be part of the NAELA litigation if it is not resolved by negotiation by members of the Elder Law Section of the NYSBA and NAELA with the Department of Health. This issue could also be resolved by the legislature in the form of an amendment to the statute.

No matter what happens, you can expect that expanded estate recovery is probably here to stay. It is more important than ever to keep the estate recovery rules in mind when giving our clients Medicaid planning advice.

Note: Michael L. Pfeifer is the principal attorney of the Law Office of Michael L. Pfeifer, P.C. The firm concentrates in the areas of elder law, special needs planning and estate planning in Garden City. Mr. Pfeifer has been practicing law since 1987. He is a Co-Chair of the Elder Law Committee of the Nassau County Bar Association. Mr. Pfeifer is an advisor for Life Worc's pooled trusts. (Life's Worc is a private, 501(c)(3) not-for-profit agency that provides comprehensive support for individuals with developmental disabilities.) He is a frequent lecturer to other attorneys, accountants and community groups, which include continuing legal education seminars for the New York State Bar Association and Nassau County Academy of Law. He has taught adult education courses in elder law throughout Nassau County. He is also a contributor to the Elder Law Attorney, published by the New York State Bar Association.

1. Social Services Law, § 369(6)
2. 18 NYCRR 360-7.11
3. Social Services Law, § 369(2)
4. Social Services Law, § 369 (2)(b)(ii)
5. Social Services Law, § 104
6. Social Services Law, § 369(6)
7. 18 NYCRR § 360-7.11 (a) (1)
8. 11 OHIP/ADM-8, page 8

Join Our Leadership

The Nominating Committee of the SCBA is soliciting recommendations and expressions of interest from members interested in holding the following positions: President Elect, First Vice President, Second Vice President, Secretary, Treasurer, four (4) Directors (terms expiring 2015) and three (3) members of the Nominating Committee (terms expiring 2015).

The Nominating Committee is accepting résumés from those interested 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: Derrick J. Roberson, Rosemarie Tully, James R. Winkler, Ilene S. Cooper, Hon. John M. Czygier, Jr., Scott M. Karson, Sheryl L. Randazzo, Ted Rosenberg, and Hon. Peter H. Mayer.

– LaCova

FOCUS ON
ELDER LAW & ESTATE PLANNING
SPECIAL EDITION

The Home - Preserving a Step up in Basis Without a Written Instrument

By David R. Okrent

David R. Okrent

So you thought you gave it away, did you? Well, for tax purposes the Internal Revenue Code [hereafter referred to as "IRC"] states that if a transferor transfers something while you are retaining the right to possession or enjoyment of, or the right to the income from, that which has been transferred for either: (1) the transferor's life; (2) any period not ascertainable without reference to the transferor's death; or (3) any period that does not in fact end before the transferor's death, then the property will be included in the transferor's estate for estate tax purposes under IRC§ 2036(a)(1). This is not new law and has been effectively used by the Internal Revenue Service [hereafter referred to as the "IRS"] for many years to pull gifted assets back into an estate for estate tax purpose where it can establish, based upon the surrounding facts, that at the time of the transfer was made there was an implied understanding that the transferor would continue to retain rights to income from, or use of the property transferred for no or inadequate compensation, most recently the IRS in the family limited partnership context.

For many years practitioners have been transferring homes to family members or trusts while, whether in the deed instrument, trust instrument or a separate agreement, in writing, or retaining a life estate. The benefit for Medicaid purposes was to shorten the ineligibility period associated with such transfer. For tax purpose it can preserve property tax exemptions and step up in basis (assuming the value of the property is worth more than its basis at the time of death, otherwise it is a step down in basis, see IRC §1014) on the death of the Life tenant. Now with the introduction of the expanded definition of an estate for Medicaid Recovery Purposes, especially with respect to retained life estates, can we get our step up in basis without a written retained life estate, i.e. an "implied life estate?" This article will not address whether or not the life estate needs to be in writing for Medicaid eligibility, transfer penalty or recovery purposes, however this author is not aware of any case in which Medicaid did acknowledge the existence of a Life estate where there was no writing!

FOCUS ON ELDER LAW & ESTATE PLANNING
SPECIAL EDITION

It is clear for tax purposes, because of IRC §2036 and the case law developed out of it that a life estate does not need to be in writing for tax purposes. IRC§ 2036(a)(1), applies to lifetime transfers of property under which the transferor retained the possession or enjoyment of, or the right to the income from, the property transferred for either: (1) life; (2) any period not ascertainable without reference to the transferor's death; or (3) any period that does not in fact end before the transferor's death and requires the property to be include in the estate for estate tax purposes.

Since no writing is available to evidence the retained rights, what facts need to be present to cause the transferred asset to be pulled back into the estate? In most instances the facts that are relevant revolve around the use of the property before, at the time of and after the transfer and determine if there was an apparent understanding that the transferor was going to continue to use the property. The most recent cases came from litigation involving family limited partnerships where the patriarch or matriarch established a limited partnership and gave away interest in it, however during the course of the partnership the transferor maintained control and use of the partnership assets in a manner consistent with the clear intention to continue to enjoy possession or enjoyment of, or the right to the income from, the property transferred for their life.

Although there are many recent cases on this issue, perhaps the one most relevant to elder law attorneys is *Reichardt Est. v. Comr.*, 114 T.C. 144 (2000) in which Tax Court held that assets the decedent transferred to a family limited partnership established after he was diagnosed with terminal cancer were included in his gross estate under IRC § 2036(a). The facts that the decedent comingled partnership and personal funds, deposited some partnership income in his personal account, used the partnership's checking account as his personal account, and lived rent-free in the home he transferred to the partnership all contributed to the court's conclusion that the decedent and his children had an implied agreement that decedent could continue to possess and enjoy the assets and retain the right to the income from the assets he conveyed to the partnership. In fact, the court found that nothing changed in the decedent's relationship to the assets after he transferred them except for legal title. The court also rejected the estate's contention that the decedent sold the property to the partnership in exchange for full and adequate consideration in the form of partnership interests.

Another interesting case on point is *Linderme Est. v. Comr.*, 52 T.C. 305 (1969) where the Tax Court included in the decedent's gross estate under IRC § 2036(a)(1) the full value of residential real property the decedent had transferred by lifetime gift to his children (two of the three of whom were unaware of the unrecorded deed of gift) because there was an understanding between the decedent and the donees that the decedent would continue to occupy the property as his residence. The court reached this conclusion despite the fact that the decedent vacated the property to enter a nursing home 19 months before his death. Although , IRC § 2036(a)(1) does not apply if the retained interest actually ended before the transferor's death, actual occupancy by the transferor did end before death, but the donees failed to occupy the property until after the donor's death, and the court concluded that the decedent retained the right of occupancy until death.

A similar result can also be found in Rev. Rul. 75-259, 1975-2 C.B. 361 where

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TAX LAW

Offshore Voluntary Disclosure

IRS extends the 2011 program

By Eric L. Morgenthal

Eric L. Morgenthal

It's official. The once "limited time" Offshore Voluntary Disclosure program, a/k/a The 2011 OVDI is now open-ended. On January 9, the IRS announced it would be extending the 2011 initiative indefinitely until further notice. The parameters of the program remain nearly identical except for the raising of the standard penalty rate from 25 percent to 27.5 percent on the highest collective offshore balance during the eight-year disclosure period. What has yet to be announced is whether the disclosure procedure will also be the mechanism for addressing deficient Foreign Account Tax Compliance Act (FATCA) reporting obligations first being instituted this spring.

Clearly, the Internal Revenue Service (IRS) has the power to enforce federal tax laws set forth in Title 26 of the U.S. Code, the Internal Revenue Code (IRC). [1] And it also has the authority to issue regulations (either legislative or interpretive) to support those tax laws. Through Revenue Notices, Rulings, Private Letter Rulings and the Internal Revenue Manual, the IRS can promulgate guidelines for the assessment and collection of federal tax. But through these offshore disclosure programs, a new standard for the interpretation and administration of tax law has emerged… the Frequently Asked Question (FAQ).

Generally speaking, the practitioner community received the announcement of the indefinite OVDI extension with applause. However, it has also raised the ire of many frustrated tax advisors who have to begin to wonder…are IRS web-based FAQ's becoming the new (and parallel) IRC?

When the 2009 Offshore Disclosure program was introduced, information was disseminated through a listing of FAQ's to establish the guideposts for navigating through the process. The program was new and as time passed, the listing expanded to address questions raised by the practitioner community. But a limiting factor to the application of all FAQ's was a basic and resounding principal…that the IRS, through this (or any other program) was not authorized to ever collect any more in tax than they would otherwise have been entitled to under the statute (IRC) as passed by Congress. To many, this does not appear to have been the case. A recent scathing report released by the Taxpayer Advocate accuses the IRS of "bait and switch." Particularly when the IRS weighs the OVDI penalties for civil wrongs against the statutory assessments for "willful" tax crimes to substantiate draconian assessments. Granted, taxpayers now have the right to withdraw from the Voluntary Disclosure program. But once they have stepped forward, they are already on radar and withdrawal would force them to face the uncertain potential of even greater penalties outside the program at their own peril.

For income tax returns, the statute of limitations on assessment typically doesn't commence until the return is filed. But for the FBAR filing deadline, the six-year assessment statute instead typically begins from the time of the omission (the due date of the tax return), even if never filed. The applicable criminal statute carries a five-year period of exposure. Therefore, the IRS is prescribing a voluntary disclosure period through the

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COURT NOTES

By Ilene Sherwyn Cooper

Attorney Reinstatements Granted:

The application by the following attorneys for reinstatement was granted:

Adam P. Warner

Attorney Resignations Granted:

Dennis Masino: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee regarding charges of professional misconduct alleging, *inter alia,* that he misappropriated and failed to maintain funds entrusted to his charge, as well as fabrication of documents and misrepresentation of the status of an action Respondent acknowledged his inability to successfully defend himself on the merits against any charges predicated upon his misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Trevor K. Rupnarain: By affidavit, respondent tendered his resignation. The record revealed that he pled guilty to one count of criminal facilitation in the fourth degree, a Class A misdemeanor, in satisfaction of a charge of grand larceny, a felony. As revealed in the transcript, his resignation from the bar was a condition of his plea. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Ilene S. Cooper

Martin S. Vasquez: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee regarding charges of professional misconduct alleging, *inter alia,* that he failed to safeguard client funds, and failed to cooperate with the Grievance Committee. In addition, the record revealed that respondent pled guilty to two counts of offering a false instrument for filing in the second degree, which conviction arose out of several real estate transactions. Respondent acknowledged his inability to successfully defend himself on the merits against any charges predicated upon his misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured:

Edward Jeffrey Grossman: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all 13 charges against the respondent, and the Grievance Committee moved to confirm. The respondent opposed the motion and cross-moved to disaffirm the report. The charges against the respondent alleged, *inter alia*, that he aided a nonlawyer in the unauthorized practice of law, and was thereby guilty of fraud, dishonesty and deceit. Based on the record, the court granted the Grievance Committee's motion. In assessing the appropriate measure of discipline, the court noted the letters and testimony attesting to the respondent's good character. Accordingly, under the totality of circumstances, the respondent was censured for his misconduct.

Attorneys Suspended:

Mitchell P. Ferraro: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all 3 charges against the respondent, and the Grievance Committee moved to confirm. The charges against the respondent alleged, *inter alia*, that he engaged in an impermissible conflict by simultaneously representing differing interests in real estate transactions. In determining the appropriate measure of discipline, the court noted that the respondent had been distracted from his work due to family pressures, however, on the other hand, the court also acknowledged comments by the Special Referee who found that the respondent offered no remorse or character testimony and was "completely oblivious." Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of two years.

Stephen K. Malone: The Grievance Committee moved to suspend the respondent, without opposition. The motion emanated from two complaints against the respondent, including his failure to cooperate with the Grievance Committee. Accordingly, the respondent was immediately suspended from the practice of law, and the matter was referred to a Special Referee.

Attorneys Disbarred:

Leonanous A. Moore, admitted as Leonanous Australia Moore: Application by the Grievance Committee to impose discipline upon the respondent based upon disciplinary action taken against him, upon his default in the State of Georgia. The discipline if Georgia stemmed from the respondent's failure to maintain escrow funds entrusted to his charge. In view thereof, the respondent was disbarred in the State of Georgia. In view of respondent's default and failure to assert any defenses to the charges asserted, the application by the Grievance Committee was granted and the respondent was 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 a member of the Board of Directors and a past-president of the Suffolk County Bar Association.

PRACTICE MANAGEMENT

Reading Resolutions for 2012

By Alison Arden Besunder

Alison A. Besunder

As attorneys, we are constantly struggling to keep up with the many competing demands upon our time by the practice of law. Every December brings with it the surprise that the year is already over. January is an opportunity to use the fresh start of the New Year to set business resolutions and goals for the year ahead. Ongoing attention to practice management is a critical component to continuing to provide quality client service.

On that note, I have a few suggested books for your winter reading list to help you form a strategic business plan and development goals.

The E-Myth Revisited (Michael E. Gerber, Harper Business, 1995). Building upon the first E-Myth book published in 1985 called "*The E-Myth: Why Most Small Businesses Don't Work and What to Do About It*," the "*E-Myth Revisited*" seeks to answer the question: "What do the owners of extraordinary businesses know that the rest don't?" The book's central thesis is that business owners should be working "on" their business not just working "in" their business. The E-myth is about four ideas that (the author claims) "will give you the power to create an extraordinarily exciting, and personally rewarding, small business." These ideas are: (1) entrepreneurship is not the reason people start businesses, and the "Entrepreneurial Myth" is the most important reason small businesses fail; (2) the "Turn-Key" Revolution is changing the way we do business in the U.S.; (3) the Business Development Process, when systematized and applied by a small business owner, has the power to transform any small business into an incredibly effective organization. The converse of the Business Development Process is Management by Luck, which leads to stagnation and, inevitably, failure; and (4) the Business Development Process can be systematically applied by any small business owner in a method that incorporates the lessons of the Turn-Key Revolution, which leads to a predictable way to produce results and growth in any small business and allow it to flourish.

Wait a minute (I hear you say). I'm a lawyer. What does any of this have to do with practicing law? How can the lessons of a small business book help me stem the never-ending onslaught of cases, client phone calls, and court deadlines?

The E-Myth Attorney: Why Most Legal Practices Don't Work and What to Do About It (Michael Gerber, Robert Armstrong, Sanford M. Fisch) (John Wiley & Sons, Inc. 2010) answers that question.

The E-Myth Attorney takes the lessons of the E-Myth (revisited) and applies them to lawyers and the practice of law. The authors, Robert Armstrong and Sandy Fisch, transformed their estate planning practice and developed their legal enterprise the American Academy of Estate Planning Attorneys through the E-Myth methods. The central idea is that a legal practice should be a business that is bigger and separate from the attorneys in the practice, which can be designed and created just like any other business. The idea is to become not only a legal technician but savvy business leaders. As the authors themselves say in the book, and as many of you may be muttering now, it's different for you and your practice because ... In order for the E-Myth principles to work, urge the authors, lawyers must clear away the old ideas that their practice area is somehow different because the old way of thinking keeps most attorneys stuck in the daily grind of (as Michael Gerber says) "doing it, doing it, and doing it." The E-Myth Attorney urges that the real key is to start thinking of your legal practice as a business that provides legal services. The book is about business and how lawyers can transform their law practice into a thriving business that ultimately has a life apart from the lawyer who is running it.

The 29% Solution (Ivan R. Misner, PhD and Michelle R. Donovan) (Greenleaf Book Group, LLC 2008). The 29% Solution asks a different question: "What do Santa Claus, the Easter Bunny, and 'six

(Continued on page 23)

Remembering Bernie Braun

Bernie (Bernard Braun, Esq.) passed away on November 13th practicing his beloved law even until the very last week of his life when he was delighted to have successfully settled a longstanding case for a client.

Bernie Braun

Bernie graduated NYU Law School in 1953, after serving in the U.S. Maries during WWII. He was born in Brooklyn in 1927 and was married to the late Renee Slavin Braun for 35 years. He is also the father of the late Meryl Braun and leaves behind his companion of 20 years, Marsha Schneider, his daughter Lisa Kenigsberg, son-in-law Aaron Kenigsberg and six grandchildren. Bernie was admitted in New York in 1954 and became an active member of our Bar Association in 1956. He served on the Grievance, Fee Disputes, Professional Ethics and Insurance Plaintiff's Committees and he leaves behind many colleagues and friends who will retain fond memories of the many contributions he made to his profession and community. After an exemplary life, Bernie was given the rousing send-off he so richly deserved.

Bar Association Hosts Installation of Judges

By Sarah Jane LaCova

The Suffolk County Bar Association sponsored a judicial swearing-in and robing ceremony on January 9, 2012 at Touro Law Center in Central Islip. A standing-room only crowd of dignitaries that included members of the bench, colleagues, families and well wishers were in attendance. And to pay homage to the occasion the Suffolk County Court Ceremonial Unit marched in to present the colors and formally stood at watch throughout the proceedings.

Matthew E. Pachman, President of the Suffolk County Bar Association and host of the ceremony, welcomed the assemblage remarking that January symbolizes the beginning of a new year with new dreams and expectations. It also marks the commencement of continued terms of re-elected judges and first terms of others.

At the outset President Pachman thanked Dean Lawrence Raful for allowing the Bar Association to hold its annual ceremony in the auditorium of Touro Law Center, which he deemed a perfect venue. He then introduced Acting Supreme Court Justice Stephen M. Behar who is also a Deacon at Mary Immaculate R.C. Church in Bellport and following the Pledge of Allegiance and the National Anthem sung beautifully by SCBA member John Zollo, Deacon Behar gave the Invocation, reiterating our commitment to freedom and justice for all, the theme that unites our noble profession of law and makes us the true guardians of justice.

President Pachman then turned the microphone over to Suffolk County District Administrative Judge C. Randall Hinrichs who presided over the ceremony. In his opening remarks Justice Hinrichs extended hearty congratulations to the newly appointed New York State Chief Judge, the Honorable A. Gail Prudenti. He said we are very fortunate that Justice Prudenti, with her past legal experience, administrative skills as well as dedication and commitment to the law will no doubt bring to her new position the same passion to furthering the interests of the court system.

Photo by Barry Smolowitz

Participating in the Robing Ceremony were SCBA President Matt Pachman, newly elevated Supreme Court Justices Joseph A. Santorelli and John B. Collins, Acting County Court Judge James P. Flanagan and District Administrative Judge C. Randall Hinrichs.

Justice Hinrichs added that the relationship between the Bench and Bar in Suffolk County continues to be strong. He believes the continued tradition of welcoming the new and existing members of the judiciary to the bench at the beginning of each year is emblematic of the relationship shared by the bar and bench. He quoted Thomas Jefferson who observed that "The most sacred of duties of government is to do equal and impartial justice to all citizens." He went on to express he pride felt for our judiciary which is based on the outstanding qualifications of the men and women who were being sworn in.

Presiding Justice Hinrichs called up the sponsor for re-elected to a 14 year term Justice Paul J. Baisley, Jr., Suffolk County's former Administrative Judge and now Supervising Judge of the Guardian Part, the Honorable H. Patrick Leis III. Justice Leis also sponsored former Court of Claims Judge and newly elected to the Supreme Court, the Honorable Joseph C. Pastoressa. Justice Hinrichs sponsored the newly elected Justice John B. Collins saying he has had a long and distinguished career in the District Attorney's office and served as Suffolk's Chief Trial Prosecutor and former member of the SCBA's Judicial Screening Committee.

Anthony Pancella III, Babylon Town Republican Chair, and an old friend of elevated Justice Joseph A. Santorelli was his sponsor just last year when he was re-elected to the District Court Bench. Mr. Pancella spoke of Justice Santorelli's love of his family and church adding that he brings to the Supreme Court Bench a variety of public service experiences.

As a long standing tradition, President Pachman presented newly elected Justice John B. Collins with his first judicial robe. Gavels, as a memento of the occasion, were presented to Justices Baisley, Pastoressa and Santorelli. Presiding Justice Hinrichs administered the Oath of Office to the incoming Justices.

Next to the podium was New York State Court Chief Judge A. Gail Prudenti who sponsored and administered the Oath of Office to her long and dear friend Suffolk's Surrogate John M. Czygier, Jr. Judge Czygier filled the vacancy for the position of Surrogate in Suffolk County left when Justice Prudenti was appointed to the Appellate Bench for the Second Judicial Department. He then ran and was elected for a ten year term and was re-elected for another term this past November. Judge Czygier also serves Suffolk County as an Acting Supreme Court Justice.

Judge John J. Toomey, Jr. was sponsored by his daughter Kerry Toomey-Stogsvill who spoke with pride about her father, calling him a man of conviction and devotion to the rule of law. Judge Toomey was elevated to the County Court having served as the first Presiding Judge of the Veterans Court when it was launched in February 2011. The Supervising Judge of the Criminal Terms of the Courts within the County of Suffolk, 10th Judicial District the Honorable James C. Hudson administered the Oath of Office to Judge Toomey.

Newly elected District Court Judges Vincent J. Martorana and David A. Morris were sponsored by son and father respectively. They regaled the audience with wonderful stories and their pride shown through as did their emotions. Not a dry eye in the audience. President Pachman presented them with their judicial robes and they in turn had an opportunity to respond thanking their political leaders, parents, family and friends.

Re-elected District Court Judge John Iliou was sponsored by his good friend Supreme Court Justice Andrew A. Crecca. Judge Gigi A. Spelman re-elected for another six year term was sponsored by the Chair of the Huntington Republican Club Toni Tepe.

Supervising Judge of the District Court Madeleine A. Fitzgibbon administered the Oath of Office.

Concluding the ceremony, Presiding Justice Hinrichs thanked the justices and judges who took time from their busy schedules to join their colleagues to show their support and share their colleague's recognition and honor. This was truly a day of thanks and acknowledgement. He said the judges being sworn in are the best of the best and will do the citizens of Suffolk County proud.

Note: Jane LaCova is the executive director of the SCBA.

COMMERCIAL LITIGATION

Lawrence v. Kennedy - Lessons for the Unwary

By Leo K. Barnes Jr.

In *Lawrence v. Kennedy*, —- N.Y.S.2d ——, 2011 WL 5107234, 2011 N.Y. Slip Op. 21377 (Nassau Sup. Ct. 2011), plaintiff Lawrence S. Lawrence, a New York attorney, moved for summary judgment in lieu of complaint against defendants Michael F. Kennedy and his former law firm Lawrence and Walsh, P.C. In response both defendants moved to dismiss the complaint against them.

According to the decision, plaintiff, a New York attorney, was the founding partner of defendant law firm Lawrence and Walsh, P.C. (the "Firm"), which was established in 1972. In 2008, an agreement was reached between the plaintiff and the Firm as follows: (1) plaintiff would relinquish his status as a member of the Firm, and (2) in exchange for relinquishing his status plaintiff would remain at the Firm as an employee acting in an "of counsel" capacity.

Two agreements were executed in January 2008 to effect this agreement between the parties, namely a "Stock and Related Asset Purchase Agreement" and an Employment Contract. In these agreements plaintiff conveyed his 50 percent ownership interest in the Firm to the Firm itself, and in exchange plaintiff was offered a 4 ½ year term employment contract with the Firm, which would end in June 2012.

Leo K. Barnes Jr.

The employment contract set forth that the plaintiff would assume the "responsibilities, duties and authority" customarily associated with his "of counsel" position, and that he was to devote "substantially all of his business time, attention, expertise and efforts to the business and affairs of the Firm in the same manner as past practices." As compensation, plaintiff would be entitled to $418,300 in fixed salary to be spread evenly over the employment contract term, and was entitled to receive performance based salary amounts calculated in accordance with a pre-determined formula set forth in the agreement. The agreement set forth, however, that the plaintiff "irrevocably waives" a right to enforce the agreement against any individual members of the firm and that plaintiff can look solely to the Firm for recovery.

In addition, the employment agreement contained a clause stating that the agreement "shall be deemed an instrument for the payment of money, provided, however, that this provision shall not constitute a waiver of any defenses or counterclaims the Firm may have to enforcement of this provision." It further provided that the Firm could terminate plaintiff "for cause" and that plaintiff could be terminated upon plaintiff's death or disability for 90 days. If the Firm were to terminate the plaintiff for death or disability, the Firm would remain responsible "for accrued, performance-based salary earned up to the date of termination," and fixed salary amounts "for the remainder of the Term…" If the Firm were to default in paying plaintiff's fixed salary and that default remained uncured for more than 30 days, then the entire unpaid, fixed salary amount would at plaintiff's option become immediately due and owing.

After the agreements were executed, plaintiff continued to work for the Firm until September 2010 when plaintiff suffered a stroke. Thereafter, plaintiff was unable to perform his employment duties under the contract due to neurological ailments the plaintiff suffered from. Soon thereafter, plaintiff's daughter informed defendant Michael Kennedy ("Kennedy"), the managing member of the Firm, that plaintiff could not return to the Firm due to medical issues associated with plaintiff's stroke.

When plaintiff's daughter asked about the Firm's obligation under the employment contract, Kennedy stated to plaintiff's daughter that the Firm had "some real concerns and issues with respect to …[the plaintiff's] conduct" and that

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Judicial Swearing-in and Robing Ceremony

Photo by Barry Smolowitz

HEALTH & HOSPITAL LAW

Medicare Subrogation in Light of *Bradley v. Sibelius*

By James G. Fouassier

It is interesting to observe how regulators respond to court decisions which limit the application of regulations in ways that do not sustain the positions of the agencies charged with their implementation and enforcement. One such situation concerns the effect of federal regulations establishing Medicare's right to secondary payment subrogation, sometimes referred to as the "Medicare lien" but more formally as the Medicare Secondary Payer Act, or "MSP."

Readers may recall that those regulations give Medicare and, by extension, Medicare HMOs, now known as "Medicare Advantage" plans, the right to collect for services for which Medicare is not the "primary" payor. **1** In many circumstances in which a claimant is Medicare eligible (usually because he or she is over the age of 65 but certain disabilities and chronic conditions such as end stage renal disease also may result in Medicare eligibility), the claimant also has coverage or payment available from some other source, such as commercial insurance, workers' compensation or "no fault." In such cases those other payor sources may be prior in responsibility to Medicare.

In addition, federal law subrogates Medicare to any settlement or judgment for personal injuries, including workers' compensation settlements. (As an aside, those laws also establish a direct cause of action against tortfeasors independent of any subrogation rights.) Like New York's Lien Law section 189 and Social Services Law section 104-b, federal law provides for a direct right of action to recover from the party responsible for making payment in violation of the "Medicare lien," even if payment to the victim already was affected. Keep in mind that the Medicare lien is not recorded anywhere; the recipient is deemed to be on constructive notice by virtue of the statute and regulations and is expected to notify the Center for Medicare and Medicaid Services ("CMS") of a settlement or verdict. Medicare may recover double the amount of the lien, plus penalties, if it has to pursue its subrogation rights, a remedy it likely will invoke if there is evidence that a violation of the lien was conscious and intentional rather than inadvertent. The Medicare lien is first in priority over any state and contractual liens, up to 100 percent of the value of the lien. For the Medicare lien generally, *see 42 USC 1395y(b)(2);* subrogation pursuant to the MSP Act is established at *1395y(b)(2)(B)(ii); 42 CFR 411.20; 411.37(c).*

On a claim for the wrongful death of her father asserted pursuant to Florida law, Carvondella Bradley, on behalf of the estate and ten surviving children, sought damages against a nursing home. The claim was settled prior to suit for the sum of $52,500, the full amount of the home's liability policy. Critically, no allocation was made between the estate and the wrongful death claimants. Medicare already had paid $38,875 on the bill for the hospital admission allegedly precipitated by the home's negligence. Bradley's attorney gave proper notice to the Secretary of the Federal Department of Health and Human Services, of which CMS is a part, of the settlement amount and all costs. Refusing to recognize that the medical expense claims were settled for less than 100 percent the Secretary demanded full payment of the settlement amount less attorneys' fees and costs, or $22,480, within 60 days.

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Within the 60 day period counsel filed a probate proceeding in the Florida courts to fix the shares of the distributees and claimants. Although the Secretary was noticed she neither appeared nor participated in any way. Applying Florida law the probate court determined that the total value of all of the claims, had all been collected, was $2,538,875. Based upon an equitable apportionment of the ratio of the medical expenses to the full value determination the court fixed the allowable medical expense recovery at $787.50.

The Secretary refused to accept the determination of the probate court. CMS asserted that based on language in chapter 7, section 50.4.4 of the "Medicare Secondary Payor Manual" the ruling was not "on the merits," and argued that the probate court's decision merely was advisory and in any event was superseded by federal law. Presumably in fear of accruing interest and the possibility of litigation the estate paid Medicare under protest, pursued its administrative appeals and then filed suit in the Federal District Court. The District Court held that the Secretary's interpretation was reasonable but, on appeal and upon a *de novo* review, the Eleventh Circuit reversed. *Bradley et al. v. Sebelius*, 621 F. 3d 1330, 2010 US App LEXIS 20091 (9-29-10).

The Circuit Court pointed out that that the estate and the survivor claims legally are distinct. While the Medicare Secondary Payor rules may apply to the estate's claims they will not vest against the survivor's claims, since the latter are not the property of the Medicare beneficiary. In addition, given that the settlement was undifferentiated the family acted prudently in seeking apportionment under state law, which not only is a requirement of state law but also the exclusive way in which to make such a determination, as nothing in federal law or regulation allows the Secretary to do this. "Out of an abundance of caution," however, counsel notified the Secretary of the proceeding, yet HHS declined to appear and participate:

> "At this point, the conflicting claims to the fund had never been made the subject of any court proceeding. Counsel properly turned to the Florida probate court for a proration, filing an application . . . . to adjudicate the rights of the estate and the rights of the children *vis-à-vis the rights of the Secretary*....". The Secretary declined to take any part in the litigation although at all times her position was adverse to the interests of the surviving children. The probate court made the allocation, finding that the secretary should recover the sum of $787.50. Yet, still, the Secretary, citing no statutory authority, no regulatory authority, and no case law authority, merely relied upon the language contained in one of the many field manuals and declined to respect the decision of the probate court." (621 F. 3d at 1338; emphasis added)

While acknowledging that policy statements, manuals and enforcement guidelines usually are entitled to deference, the appellate court disagreed that the Medicare Manual had the force of law, as it was not promulgated pursuant to the federal Administrative Procedures Act (5 USC sec. 551 *et seq.*). Deference must be extended on a case by case basis. Perhaps with a grasp of the obvious, the court also pointed out that even if the manual were entitled to deference just how was a determination by a court "on the merits" ever to be made when a claim is settled before any court intervention? In any event, the court went on to hold that in the case at bar was as a matter of law a "court order on the merits" when the Florida probate court, cognizant of the Secretary's position, established the value of Medicare's interest.

The court also noted that the position of the Secretary would have a chilling effect on settlements generally, compelling claimants to go to trial to maximize recoveries in the face of large Medicare "liens," with the real possibility of frequent defendants' verdicts resulting in no recoveries for anyone.

Most interesting from my point of view is the statement of the court found in footnote 23. While declining to suggest what course of action the Secretary should have undertaken the court observed that:

> "Under both the statute and the regulations, the Secretary could have sought recovery from the liability carrier for the nursing home. 42 USC 1395y(b)(2)(B)(ii). She could also have tried to obtain a recovery from the nursing home as tortfeasor. *Id.* The Secretary also has a right of subrogation which [by failing to participate in the probate proceeding] she failed to exercise. 42 USC 1395y(b)(2)(B)(iv)." 621 F. 3d at 1340; insert mine.

The implication is clear: when the Secretary is on notice that a court proceeding may affect the eventual determination of the Secretary's right to recover pursuant to the MSP Act any Medicare expenditures made by a personal injury claimant or his or her distributees, she fails to appear and/or intervene at her peril.

One would expect that the Secretary would issue some form of acquiescence or acknowledgement, be it a change in procedure, a modification of the text of the manual or some other indication of her intention to comply. Instead, on December 5, 2011, representatives of CMS issued a written memorandum to all Medicare Advantage organizations and prescription drug plan sponsors alluding to "recent decisions," effectively restating the positions the Secretary had taken in *Bradley,* and concluding with the following:

> "Notwithstanding these recent court decisions, CMS maintains that the existing MSP regulations are legally valid and an integral part of the Medicare Part C and D programs".

This statement is particularly disturbing not only because it expresses the policy of CMS to continue to subject personal injury claimants to the same recovery processes effectively precluded by *Bradley* but also because the memorandum is addressed to the privately run Medicare Advantage plans. These Medicare HMOs also may assert Medicare "liens" and seek subrogation. **2** We may expect that Medicare Advantage programs, administered by for-profit commercial insurance companies, will be at least as aggressive as the CMS and likely more so.

Practitioners are advised to pay particular attention to a critical distinction pointed out, for example, in *Benson v. Sebelius*, 771 F. Supp. 2d 68, 2011 US Dist LEXIS 30438 (3-24-11), in which the Federal Court for the District of Columbia acknowledged the rationale of *Bradley* but declined to follow it:

> "Because the rulings in *Denekas* [*Denekas v. Shalala*, 943 F. Supp. 1073] and *Bradley* were limited to situations in which the plaintiffs had not claimed medical expenses in their wrongful death settlement, and because the plaintiffs' wrongful death settlement [in the case at bar] does appear to have included medical costs, the cases are inapposite." 771 F. Supp 2d at 75.

Query - You routinely give particulars respecting your client's special damages, including medical expenses, in response to demands for the same. How might this affect a later determination of the extent and amount of a Medicare lien 1) if you settle for less; or 2) if you go to verdict for less; or 3) if no part of your recovery is attributed to any specials; or 4) if all of your recovery is attributed to your specials?

Note: James Fouassier, Esq. is the Associate Administrator of Managed Care for Stony Brook University Hospital. He is a past co-chair of the Association's Health and Hospital Law Committee. His opinions and comments are his own. He may be reached at james.fouassier@sbumed.org.

1. But see *Trezza v. Trezza*, *http://www.courts.state.ny.us/reporter/3dseries/2011/2011_51237.htm* , 2011 NY Slip Op 51237 (Sup Ct Kings Co; 6-23-11), which attempts to resolve an "apparent" conflict between General Obligations Law 5-335(a) and the lien established by 42 USC 1395mm (e)(4) and 42 USC 1395y(2)(B) to secure reimbursement of Medicare funds expended for medical bills. (*See, also*, 42 CFR 411.20 *et seq.*) Finding that Congress did not intend a "private right of action" in creating the Medicare Act the court held that there was no statutory right of reimbursement established by federal law. Instead, the law only established subrogation rights for Medicare HMOs that elected to include them in member contracts. Since GOL 5-335(a) conclusively holds that a personal injury settlement does not include compensation for health care costs and the second paragraph of GOL 5-335(a) expressly excuses a settling party from the effects of any such subrogation provision in his or her member agreement, the Medicare HMO had no enforceable subrogation claim against the proceeds of the action.

2. *Id.*

TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Pre-Action Disclosure

The petitioner, the co-executor of the estates of a deceased husband and wife, filed an application with the court requesting an order permitting pre-action disclosure pursuant to CPLR 3102 (c). Specifically, the petitioner sought the deposition of the attorney-draftsman of the decedents' wills for ultimate use in a construction proceeding of the instruments. The petitioner further requested an order that neither the examination nor the construction proceeding would trigger the *in terrorem* clauses in the wills.

In support of the application, the petitioner alleged that the draftsman was 86 years old, and although in good health, his testimony might not be available at the time the construction proceedings were actually commenced. The court opined that pre-action disclosure is available despite the fact that the commencement of a proceeding may not be imminent. Accordingly, the court held that under the circumstances examination of the attorney-draftsman would be allowed.

However, the court denied that portion of the relief requesting an order that the examination would not trigger the *in terrorem* clause in the instruments, concluding that because the provisions of EPTL 3-3.5 create a safe harbor for construction proceedings, they implicitly permit any relevant discovery related to that proceeding without triggering the clause.

***In re Estate of Spiegel,* NYLJ, Oct. 31, 2011, p. 30 (Sur. Ct. Nassau County).**

Turnover of Files to Former Client

Before the court in *In re Estate of Llewellyn,* was a discovery proceeding instituted by the preliminary executors of the estate seeking an order directing former counsel for the decedent to turn over certain property belonging to the decedent, and to appear for a deposition regarding the identity and location of any other such property.

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Specifically, the property sought by petitioners included legal files and documents amassed by counsel in connection with their relationship with the decedent. Although counsel had also represented the decedent's wife, petitioners represented that they were not seeking any documents regarding counsel's representation of the wife alone, or any documents protected by the attorney-client privilege.

In considering the application, the court relied on the opinion by the Court of Appeals in *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn,* 91 NY2d 30 (1997), holding that, subject to narrow exceptions, upon termination of the attorney-client relationship, an attorney must afford the client presumptive access to the attorney's entire file on the represented matter. The court noted that the narrow exceptions referred to by the court were documents that might violate a duty of nondisclosure owed to a third party or otherwise imposed by law, and a limited range of documents intended for internal office review, and use, such as an attorney's view of the client or tentative impressions of the subject matter of the representation.

Accordingly, based upon the foregoing, counsel was directed to provide petitioners with all personal property in their possession or control within the limitations established by the Court of Appeals, and to provide a privilege log for those items withheld. Further, the court directed that counsel appear to be deposed regarding the existence, identity and location of any property of the decedent not yet in petitioners' possession or control.

***In re Llewellyn,* NYLJ, Oct. 31, 2011, at 18 (Sur. Ct. New York County).**

Marriage Found Void/Elective Share Denied

Prior to his death, the decedent's purported spouse filed a notice of election against the decedent's estate. The executor of the decedent's estate instituted a proceeding to determine the validity of the election. Jurisdiction was obtained over the distributees of the post-deceased spouse, i.e. his spouse and children, who opposed the relief requested by the petitioner. The petitioner moved for summary judgment, and the respondents opposed.

The petitioner maintained that the decedent's post-deceased spouse was not legally divorced from his prior spouse when he married the decedent, and therefore, his marriage to her was void. Specifically, the documentary evidence submitted by the petitioner demonstrated that at the time the decedent's post-deceased spouse married her on January 12, 1996, he was still married to his first wife, and that his divorce from her did not become final until June 6, 1996.

While the respondents conceded that the subject marriage took place prior to the judgment of divorce being issued, they maintained that there may have been a marriage between the decedent and her post-deceased spouse after the June 6 date. To this extent, respondents offered evidence, including the decedent's death certificate, and correspondence from the Veteran's Administration and Social Security Administration, recognizing that the decedent was married at the time of her death. In any event, respondents argued that there was discovery yet to be had on the issue, and therefore, summary judgment was premature.

The court opined that where there are essentially two competing claims that a marriage was valid at a given time, each supported by proof, there is a presumption that the second marriage is valid, and that the prior marriage was dissolved. However, this presumption is rebuttable upon a proper showing. To this extent, the court noted that the respondents had conceded that the decedent had married her post-deceased spouse at a time when he was still embroiled in a contested divorce, which did not end until judgment was entered in June, 1996. Further, the court noted that the accountant for the couple had submitted an affidavit stating that he had prepared their returns and listed their filing status as "single," as both had indicated to him on multiple occasions that they were not legally married.

Based on the foregoing, the court held that the petitioner had rebutted the presumption afforded the respondents that a valid marriage existed between the decedent and her post-deceased spouse at the time of her death. Further, the court concluded that the respondents had failed to create a genuine issue of material fact that a marriage was subsequently entered into by the parties. The court rejected such claims as based on nothing more than supposition, conjecture, and self-serving statements that were insufficient to refute the uncontroverted documentary evidence in the record.

***In re Newman,* NYLJ, Nov. 1, 2011, at 26 (Sur. Ct. Suffolk County).**

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 a member of the Board of Directors and a past-president of the Suffolk County Bar Association.

REAL ESTATE

The "Necessity" of the Private Road Statute

By Lance R. Pomerantz

"An ancient and archaic provision of the Highway Law which is unique and rarely utilized" has resulted in a controversial decision from the County Court of Franklin County. *Matter of Preserve Assoc. LLC v. Nature Conservancy Inc.*, 2011 NY Slip Op 21417 (County. Ct., Franklin County) ("*Preserve Associates*").[1] The Highway Law provisions at issue (§§300, et seq.) are informally known as the Private Road Statute. Many practitioners believe that the Private Road Statute merely provides a mechanical framework for the opening of a road when an easement by necessity already exists as a matter of law. Others think of it as an anachronism of doubtful constitutionality. As this case demonstrates, the Private Road Statute is not only alive and well, but can play a pivotal role in high-stakes land development planning.

The Statutory Provisions

The Private Road Statute provides a mechanism by which a private landowner may file an application with the local highway superintendent seeking to open a road across a neighboring parcel in order to gain access to the petitioner's parcel (Highway Law §300). Once the application is filed, the highway superintendent is required to convene a jury "for the purpose of determining upon [*sic*] the necessity of such road, and to assess the damages by reason of the opening thereof."[2] The jury must be comprised of "resident freeholder[s] of the town" (Highway Law §304).

An early version of the Private Road Statute was held to be unconstitutional because the New York State Constitution in effect at that time did not provide for compensation to the aggrieved neighbor. *Taylor v. Porter & Ford*, 4 Hill 140 (1843). In response to *Taylor*,[3] the Constitution was amended to add Article 1, Section 7(c):

> "Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited."

This provision survives in the present-day State Constitution.

The Case at Bar

In *Preserve Associates*, the landowner was attempting to gain access to a 1282-acre parcel it owned in fee and was part of a 5800-acre waterfront parcel the landowner was seeking to develop. According to the County Court decision,

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"no judge presided over the trial. The parties, through counsel, stipulated to procedures to be followed during the proceedings. Witnesses testified, evidence was presented, and the jury viewed the site of the road proposed by [the applicant]." The jury determined that the private road was necessary and assessed damages of $10,000. The jury also determined that the applicant could install an underground electric line beneath the private road. The aggrieved neighbor moved the County Court to vacate or modify the jury determination, the only relief allowed under the Private Road Statute (Highway Law §312).

The neighbor had argued to the jury at trial that a 1920 deed established a right of way for the benefit of the applicant's parcel, which made the opening of a new road unnecessary and, as a result, rendered the Private Road Statute inapplicable to the current situation. **The court determined that the mere existence of an alternate means of access did not preclude a jury determination on the question of necessity**. "The jury heard the witnesses and reviewed the documentary evidence [the 1920 deed] and determined, by a preponderance of the evidence, that [the applicant] proved its case for necessity."

With respect to the underground electric line, the court found that the statutory language only addressed the laying out of the private road. "The Court concedes that there is little case law available dealing with article XI of the Highway Law, in general, and nothing at all on this particular issue. This Court is unwilling to create and provide greater rights to [the applicant] than the legislature has, to date, deemed necessary. … As such, this Court finds that the jury lacked the authority to grant Respondent the right to lay underground electric lines beneath the private road." That portion of the verdict was vacated, but the Court confirmed "every other provision of the jury's verdict." Highway Law §314 ("For what purpose private road may be used") spells out that the road "shall be for the use of such applicant… but not to be converted to any other use or purpose than that of a road…" From the decision, it appears that the parties did not address the effect of §314 in this context.

Common Law "Way of Necessity"

At common law, the conveyance of a portion of the grantor's land such that either portion was rendered landlocked (i.e. had no direct access to a public highway) gives rise to an implied "easement by necessity" over the portion that retained highway access. *New York Life Insurance and Trust Company, et al., v. Milnor,* 1 Barb. Ch. 353 (1846). "A 'way of necessity' arises suddenly where there

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MEDICAL MALPRACTICE

Mental Health Providers and Potential Duty to Non-Patients

By Caroline A. Sullivan

Note: This is part two of a two part series.

In the mental health context, the courts have also previously held that a physician's duty does not extend to the general public. In a case with a similar fact pattern to *Fox,* the Court of Appeals again confronted the question of whether a physician could be liable to members of the general public for a violent attack committed by his patient. In *Eiseman v. State of New York* (1987), a university college student was raped and murdered by an ex-felon with a history of drug abuse and criminal conduct.[1] The family of the victim commenced a lawsuit against a prison physician alleging that he inaccurately completed a health report by indicating that there was no evidence of emotional instability. The court held that even assuming that the physician did not accurately complete the health report that was sent to the university, the doctor's duty was only to his patient and in no way extended to all the students of the college individually. The court noted that the duty owed by one member of society to another is a legal issue for the courts, and that the foreseeability of injury does not determine the existence of that duty.[2] In deciding that there was no duty, the court recognized the absence of a physician-patient relationship and held that the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient. He did not undertake a duty to the community at large. Further, the court noted that there was no evidence that the physician was aware or should have been aware that this form would be relied on by the decedent or other students as his representation of his patient's medical history.[3]

Caroline A. Sullivan

Likewise, in the *Fox* decision, following the rationale of *Purdy*, and *Eiseman*, the court recognized that Mrs. Fox's family could not have a viable cause of action for medical malpractice. In treating Mr. Marshall, the defendants did not undertake a duty to the community at large, only to their patient. While the court recognized that under certain circumstances the law implies a duty of care by a doctor to non-patients in a medical malpractice context, there was no sufficient relationship between Mrs. Fox and the defendants or Mrs. Fox and Mr. Marshall on which liability could be based.[4] The court concluded that under the circumstances, the extension of a physician's duty of care beyond a narrow class of potential plaintiffs, such as immediate family members, cannot be supported under any analysis of duty. It noted that medical professionals should not be singled out to be subjected to liability to a limitless class of potential plaintiffs. The court concluded that regardless of any sense of outrage evoked by the actions of Mr. Marshall, society's interest would not be best served by concluding that a doctor who treats a patient, within a context of mental health, undertakes a duty to the public at large.[5]

The court dismissed the medical malpractice causes of action against the various defendants. However, it should be noted that the court found that there was a viable cause of action for negligence against the defendants as there was a question as to the control the defendants had over Mr. Marshall. In doing so, the court cited several cases that held the duty of a psychiatrist or mental health practitioner could be extended beyond the doctor-patient relationship. For example, in *Schrempf v. State of New York*, the plaintiff's husband was stabbed and killed by a mental patient who had been released from a state institution and was still receiving outpatient care for the facility.[6] The patient had been admitted for treatment at the facility on six occasions; three of the admissions involved commitments as an inpatient, three were on outpatient status, and the last admission was voluntary.

Plaintiff argued that the state had been negligent in the care and treatment of the patient by releasing him and allowing him to remain on outpatient status, especially after his psychiatrist had reason to believe he was not taking his medication. While the Court of Appeals dismissed the case, it did not set forth a bright line rule. Rather, the court held that the decision to release the patient and for failing to intervene when it became known that he was not taking his medication was as exercise of professional judgment for which the state could not be held liable.[7] Likewise, in the 1996 case of *Winters v. New York City Health & Hosps. Corp.,* the First Department held that a question of fact existed as to whether the defendant hospital's decision to release a psychiatric patient who later killed the decedent was based on professional medical judgment for which it could not be liable for negligence.[8] As it was not clear whether a careful psychiatric examination of the patient was performed, defendant's motion for summary judgment was denied.

In the 2002 case of *Rivera v. New York City Health and Hospitals Corporation*, the Southern District of New York cited both *Schrempf* and *Winters*, in holding that a psychiatrist or mental health practitioner owes a duty not only to patients and the narrow category of individuals the physician could expect to be affected by the treatment, but to the outside public as well.[9] In *Rivera*, the plaintiff was pushed into the path of a subway train by a mentally ill outpatient who had been examined by a physician that same

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Part One of this article discussed the recent Second Department case, *Fox v. Marshall*, and the court's reluctance to extend a physician's duty to anyone other than his or her patients except in limited circumstances.

TRUSTS & ESTATES

Filing Probate Objections

By Robert M. Harper

The taking of pre-objection examinations, pursuant to Surrogate's Court Procedure Act ("SCPA") § 1404, is one of the first steps in a will contest. At the conclusion of the exams, there remains much work to be done, most notably the timely filing of objections. This article discusses when objections to probate must be filed; the potential consequences of failing to timely file objections; and the recourse that may be available to an attorney who finds him or herself in the unenviable position of having to file untimely probate objections.

The time period for filing objections

Under SCPA § 1410, probate "objections must be filed on or before the return day of the process or on such subsequent day as directed by the court..."[1] However, if a party takes pre-objection examinations pursuant to SCPA § 1404, probate objections must be filed "within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court." In Suffolk County, the parties typically fix the date by which objections to probate must be filed in a stipulation that is so-ordered by the Surrogate.

The failure to timely file probate objections may prove fatal to a potential objectant's case, as evidenced by the Third Department's decision in *Matter of Esteves*.[2] In *Esteves*, the petitioner, the nominated executor, offered the decedent's Last Will and Testament for probate. The respondents, two of the decedent's children, appeared in the proceeding and conducted 1404 examinations through counsel. Their counsel served the respondents' objections to probate on the petitioner's attorney and mailed the objections to the Surrogate's Court, Columbia County, for filing on the tenth day after the examinations concluded. The objections were not received by the Surrogate's Court until the eleventh day after the examinations ended.

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Shortly thereafter, the petitioner's attorney wrote a letter to the Surrogate's Court, requesting that the objections be rejected as untimely. After considering the letter that the respondents' counsel wrote in opposition to the petitioner's request, the Surrogate's Court rejected the objections as untimely; admitted the propounded will to probate; and issued Letters Testamentary to the petitioner.

On appeal, the Third Department affirmed, noting that the objections were not received by the Surrogate's Court until more than 10 days after the 1404 examinations concluded. The Appellate Division found that the objections were untimely, as "papers are not deemed filed until received by the Clerk of the Court;" probate objections "must statutorily be filed within 10 days of an SCPA 1404 examination, unless otherwise ordered by the court or agreed upon by stipulation;" and there was no court order or stipulation setting another due date for the objections. Accordingly, the Third Department held that the objections were properly rejected by the Surrogate's Court.

In light of *Esteves*, attorneys should take great care to ensure that their clients' probate objections are received by the Surrogate's Court by the deadline for filing objections, whether it be the 10-day period prescribed by the SCPA; a date ordered by the court; or some other date to which the parties have stipulated. Yet, even in those unfortunate circumstances when an attorney has failed to timely file probate objections on behalf of a client, the attorney may be able to avoid further embarrassment by making a motion to permit the untimely filing of objections.

The filing of untimely objections

Cases decided in 2011 demonstrate that the Surrogate's Court has discretion to authorize the untimely filing of probate objections.[3] This discretion is premised upon the obligation of the Surrogate's Court "to determine that a will offered for probate is valid."

In *Matter of Gross*, the petitioner moved for summary judgment dismissing the objections to probate. It then came to light that the objections, which were timely served upon the petitioner's counsel, had not been filed with the Surrogate's Court. As the petitioner's counsel refused to consent to the late filing of the objections, the objectants moved for an order extending their time to file the objections.

In granting the objectants' motion, New York County Surrogate Nora S. Anderson concluded that there was "no basis upon which to deny" it. The petitioner had notice of the objections; proceeded with the litigation in due course, participating in discovery; and moved for summary judgment dismissing the objections. In addition, there was ample reason to permit "further inquiry into the circumstances surrounding the execution of the will," since the propounded instrument disinherited two of the decedent's three children and was drafted by the sole beneficiary's neighbor and attorney.

Accordingly, Surrogate Anderson granted the objectants' motion for an order extending their time to file objections.

Attorneys should take every step possible to ensure that their clients' objections to probate are timely filed with the Surrogate's Court. However, to the extent that the court does not timely receive the probate objections, an attorney may be able to remedy the situation by successfully moving to extend the time period for filing the objections.

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 Suffolk County 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. SCPA § 1410.

2. *Matter of Esteves*, 31 A.D.3d 1028 (3d Dept 2006).

3. *Matter of Gilmore*, 2011 N.Y. Misc. LEXIS 366 (Sur. Ct., Nassau County Jan. 21, 2011); *Matter of Gross*, 2006-4234, NYLJ 1202536863104 (Sur. Ct., New York County Dec. 12, 2011).

PRACTICE MANAGEMENT

Don't Let Clients Flounder – Be Their Guide

By Allison C. Shields

Have you ever heard stories about college fraternities blindfolding their pledges, driving them to a remote location and dropping them off with no money, maps, or other equipment, leaving them to find their own way back to campus?

Don't do the same to your clients.

Without clients, your law firm can't survive, regardless of your technical legal excellence. The more comfortable you can make your clients, the better the attorney-client relationship will be. And the better the experience your clients have with your firm, the more loyal and satisfied they'll feel, and that translates into more work and more referrals for your firm.

Your clients come to you to solve a legal problem or to take advantage of an opportunity. They look to you not only for your legal expertise, but also for your guidance and reassurance. When discussing client-focused practices and systems with lawyers, I often look to the dictionary definition of a client.

The secondary definition is the definition we're most used to, "a person who engages the professional advice or services of another." But the primary definition of "client" is *one that is dependent upon another*.

Your clients are dependent upon you - not just for your technical legal advice, but for your ability to guide them through the legal process. Much of the friction that arises in the attorney-client relationship arises not as a result of the lawyer's handling of the legal matter itself, but as a result of the lawyer's failure to be a good guide for the client. While the client may appreciate that you get down to the business of tackling their legal problem, don't overlook the value of leading the client through the process and providing them with the tools and information to understand that process.

Allison C. Shields

You have been through the process many times with many different clients, but the legal system may be a completely new and foreign experience for a client. It is often emotional, anxiety-producing and confusing. Clients value lawyers who have a good 'bedside manner,' who understand their business, who are trustworthy, and who reduce their anxiety and provide peace of mind. Being a good guide for your clients accomplishes many of those aims.

How can you improve your guiding abilities? As always, good communication and setting expectations with the client at the beginning of the engagement are essential to creating the proper tone for the engagement and establishing your role as guide and leader.

Outline the process

What better way to build trust than to outline the process for the client at the beginning of your work together? The client's trust in your abilities and your advice will be reinforced at each stage of the engagement. Create a basic document that outlines each step in the process that the client's matter will go through. This is even easier if you are billing in stages, because you can provide the client with a reference that will tell the client what stage of the process you're in and will let the client know when new fees are due.

Define expectations

Difficulties arise between lawyers and clients when there is a misunderstanding or lack of agreement about the scope of the work to be performed and the manner in which that work is performed. These items should be spelled out in detail in your representation agreement.

Make it easy for the client to get answers

In addition to your business card or individual contact information, provide the client with other information they may need, including the names of others in the firm with whom the client will have contact (such as your secretary, paralegal, associate, calendar and billing departments) and why and when to contact those individuals.

Develop 'FAQs'

You probably get asked the same questions over and over from different clients (or even from the same client at different points in the process). Start creating a list of those "Frequently Asked Questions" - or FAQs - along with appropriate answers to those questions so that you aren't caught off guard.

Put it in writing

The more tools and materials that you provide to a client to take with them from your office, the fewer repeat questions you'll get. If you can reduce your process outline and frequently asked questions to writing (whether in print, online, or both), you'll be providing clients with valuable information that they can refer back to again and again - and reduce the frequency with which you'll be asked the same questions.

Create a flowchart

Some clients are more visual learners and providing a long explanation or a lot of text will turn them off. Flow charts are a visual representation of the steps involved in the client's legal matter. And those flow charts also have the added benefit of showing clients which steps may need to be repeated during the process and how those decisions are made.

For clients, navigating the legal process can feel like being dropped in the middle of the wilderness with no tools or equipment. Create client loyalty and a great client experience by being an effective, compassionate guide for your clients and providing them with tools and information so they never feel lost.

Note: Allison C. Shields is the founder of Legal Ease Consulting, Inc., which offers management, productivity, business development and marketing consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com.

LANDLORD TENANT

Enforcing Rent Acceleration Clauses

By Patrick McCormick

A recent decision by Nassau County District Court Judge Scott Fairgrieve reminds us that a landlord's ability to accelerate rent and to thereafter obtain a judgment for such accelerated rent is not a simple process.[1] Initially, it is well settled that a lease that provides for the payment of rent in installments may also accelerate the date upon which all rent under the lease is due by providing that the entire rent reserved for the balance of the lease term shall become immediately due and payable upon a default in the payment of rent installments.[2] Such lease clause is commonly referred to as an "acceleration clause." Similarly, the absence of an acceleration clause precludes the acceleration of the balance of rent due under a lease.[3]

However, a lease acceleration clause that is found to impose a penalty will not be enforced.[4] The Court of Appeals in *Fifty States Management Corp. v. Pioneer Auto Parks, Inc*.[5] stated "…in rare cases, agreements providing for the acceleration of the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles. In the vast majority of instances, however, these clauses have been enforced at law in accordance with their terms [citations omitted]. Absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties…. Generally, where a lease provides for acceleration as a result of a breach of any of its terms, however trivial or inconsequential, such a provision is likely to be considered an unconscionable penalty and will not be enforced by a court of equity." Thus, where a lease did not obligate landlord to re-rent the demised premises after a default and to apply the rent obtained upon re-renting to the benefit of the prior tenant, a rent acceleration clause was deemed to impose a penalty and was not enforced.[6]

Patrick McCormick

Assuming the landlord properly drafts a rent acceleration clause that does not result in a penalty, how is the clause enforced? Judge Fairgrieve's recent decision reminds us that it cannot be enforced in the District Court.[7]

In *Pfeiffer v. Larrea*, the lease contained an enforceable acceleration clause that provided:

> The whole amount of rent is due and payable when this Lease is effective. Payment of rent in installments is for Tenant's convenience only. If Tenant defaults, Landlord may give notice to Tenant that Tenant may no longer pay rent in installments. The entire rent for the remaining part of the Term will be due and payable.

Even though the acceleration clause provided all rent was due upon signing, Judge Fairgrieve, citing to the Appellate Division decision in *Ross Realty v. V & A Iron Fabricators, Inc.*, noted the purpose of summary proceedings is to provide a simple procedure to recover possession of leased premises and refused to enforce the acceleration clause. The court in *Ross Realty v. V&A Iron Fabricators, Inc.*[8] held that the District Court did not have jurisdiction to grant a judgment for accelerated rent because accelerated rent that results from a tenant's default "was no longer in the nature of rent, but was in the nature of contract damages" and this was not recoverable in a summary proceeding.[9] Also citing to the Appellate Division Decision in Ross Realty, the New York City Civil Court reached the same result in *930 Fifth Avenue Corp. v. Sherman*.[10]

This jurisdictional issue in obtaining a judgment for accelerated rent is not the only circumstance in which courts have addressed future rent obligations and, therefore, should not come as a surprise. For instance, in *Ruppert House Co., Inc., v. Altmann,* a settlement stipulation entered in a residential non-payment proceeding that provided that the landlord could move for the issuance of a warrant of eviction upon tenant's default in paying the judgment amount or future rent was held not enforceable.[11] Again, noting that summary proceedings are designed for quick resolution of housing disputes, the court held that it was against public policy to permit a landlord to evict a residential tenant for non-payment of future rent not sought in the petition even though such obligation was agreed to by the tenant in a stipulation.

Thus, when presented with an acceleration clause that is enforceable because it does not impose a penalty, a landlord's action to enforce the clause and obtain an award of damages should not be brought in the District Court, but instead should be brought in the Supreme Court, New York's Court of general jurisdiction.

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 he represents both landlords and tenants.

1. *Pfeiffer v. Larrea*,33 Misc.3d 1212(A), 2011 N.Y. Slip Op. 51909(U) (Oct. 21, 2011).

2. *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.,* 46 N.Y. 2d 573, 415 N.Y.S.2d 800 (1979); *Olim Realty Corporation v. Big John's Moving, Inc*., 250 A.D.2d 744, 673 N.Y.S. 2d 439 (2d Dep't 1998).

3. *Beaumont Offset Corp. v. Zito*; 256 A.D.2d 372, 681 N.Y.S.2d 561 (2d Dep't 1998); *210 West 29th Street Corp. v. Chohan* 13 A.D.3d 613, 786 N.Y.S.2d 322 (2d Dep't 2004).

4. *Ross Realty v. V & A Iron Fabricators, Inc*. 5 Misc.3d 72, 787 N.Y.S2d 602 (App. Term 2004).

5. 46 N.Y. 2d at 577.;

6. *Ross Realty v. V & A Iron Fabricators, Inc*. 5 Misc.3d 72, 787 N.Y.S.2d 602 (App. Term 2004).

7. *Pfeiffer v. Larrea* 33 Misc.3d 1212(A), 2011 N.Y. Slip Op. 51909(U) (Oct. 21, 2011).

8. 42 A.D.3d 246, 836 N.Y.S.2d 242 (2d Dep't 2007).

9. 42 A.D.3d at 249.

10. 17 Misc.3d 1126 (A), 851 N.Y.S.2d 71 (N.Y.C. Civ. Ct. 2007).

11. *Ruppert House Co., Inc. v. Altmann* 127 Misc2d 115, 485 N.Y.S.2d 472 (N.Y.C. Civ. Ct. 1985).

Mental Health Providers and Potential Duty to Non-Patients *(Continued from page 1)*

morning. Plaintiff sued several health care providers of the patient arguing that they were negligent and careless in the medical and psychiatric treatment rendered to the patient and that they failed to practice according to generally accepted medical and psychiatric standards.

The defendants argued that as a bright line rule, providers of health care and other services for the mentally ill owe no duty of care to the general public arising from the care of an outpatient who is receiving treatment on a voluntary basis. However, the court held that there is no such bright line rule, and that the existence of a duty of care to the general public arising from the treatment of an outpatient turns on the facts. The court noted that while a defendant generally has no duty to control the conduct of a person to prevent him from causing harm to others, where a special relationship may exist between the defendant and a third person such that the defendant is required to control the third person to protect others, such a duty has been imposed. The court compared the duty of a mental health practitioner to that of a physician and noted that the mental health practitioner has the same general duty of physicians to exercise "professional judgment" and treat patients using a "proper medical foundation." However, the court held that with mental health professionals, in certain circumstances the duty is owed not only to patients and the narrow category of individuals the physician could expect to be affected by the treatment, *but to the outside public as well* (emphasis added).[10]

Citing *Winters* and *Schrempf*, the court in *Rivera* held that a mental health provider may be liable for failing to control a ***voluntary outpatient*** who later harms a member of the public. The court acknowledged that where the individual involved is a voluntary psychiatric outpatient, the institution's control over the patient, and thus its duty to prevent the patient is more limited. However, *the duty does not disappear*, and the institution may be held liable if the failure to place the patient on inpatient status resulted from something other than an exercise of professional judgment (emphasis in original).[11] In the absence of such a bright line rule, the court denied the mental health providers' motion to dismiss.

Subsequent cases have continued to hold that a physician or health care provider does not have a duty to a person who is not his or her patient, unless there is a special relationship. For example, in *Pingtella v. Jones,* the Fourth Department held that the defendant psychiatrist owed no duty of care to his patient's son.[12] In *Pingtella*, the defendant psychiatrist was treating his patient on an out-patient basis. The patient stabbed her son, and later killed herself. The court initially noted that although a physician's duty of care has been extended to patient's family members, the courts have been especially circumspect in doing so. In order for the defendant to have a duty to the son, there would have had to been a special relationship between the defendant and his patient such as would require the defendant to control the patient for the benefit of the child. As the patient did not seek treatment from the defendant to prevent injury to her son, but to improve her mental health, the court could not find such a relationship existed. Further, the court noted that the defendant had no control over his patient's conduct and that she had no history of violence.[13] Like the court in *Fox,* the court held that in the absence of the doctor-patient relationship, the defendant could not be liable to the plaintiff.[14]

Whether a mental health care provider or facility has a duty to a third party who is injured by a patient is a difficult question. The *Fox* decision illustrates however, that there is a cognizable cause of action for negligence under circumstances where the defendant has the necessary authority or ability to exercise control over the patient's conduct such as to give rise to a duty to protect a member of the general public.[15] As the degree of control the defendants had over Marshall was unclear, the court held that there was a cause of action for negligence against the SLS defendants and SLS employees.

However, the absence of a doctor-patient relationship between the decedent and the SLS defendants and the psychiatrist precluded a cause of action for medical malpractice. The general rule is that for medical malpractice causes of action, only in limited circumstances will a duty be extended to a specific individual, such as an immediate family member, The physician's duty will not extend to the general public. In this regard, the court noted that "while moral and logical judgment are significant components [in determining the duty owed by one member of society to another], [the courts] are also bound to consider the larger social consequences of [their] decisions and to tailor [their] notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree."[16] The court also noted that a greater risk of liability would negatively impact the medical treatment of mental health patients, and speculated that mental health care providers may be reluctant to undertake treatment of those who are in most need of their services, or opt for unnecessary confinement of their patient.[17] While the previous decision in *Rivera,* seemed to impose a greater duty on the mental health care provider, the decision in *Fox* appears to narrow the duty by holding that unless the victim is an immediate family member, a physician will not be liable for medical malpractice.

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1. 70 N.Y.2d 175, S 18 N.Y.S.2d 608 (1987)
2. Id. ("Foreseeability of injury does not determine the existence of duty."); *Ellis v. Peter*, 211 A.D.2d 353, 627 N.Y.S.2d 707 (2d Dept 1995) ("Here there is no duty and thus we do not reach the issue of whether the wife's tubercular condition was a foreseeable result of the physician's alleged failure to diagnose the disease in her husband.").
3. Id.
4. *Fox v. Marshall*, — N.Y.S.2d —, 2011 WL 3505902, 2011 N.Y. Slip. Op. 06214 (2d Dept 2011)
5. Id.
6. 66 N.Y.2d 289 496 N.Y.S.2d 973 (1985).
7. Id.
8. 223 A.D.2d 405, 636 N.Y.S.2d 320 (1st Dept 1996).
9. 191 F.Supp.2d 412 (S.D.N.Y. 2002).
10. Id.
11. Id., citing *Webdale v. North General Hosp.*, No. 111310/99, slip op. (S. Ct. N.Y. Co. June 13 200). ("Defendants' contention that there is no duty, as a matter of law, in the voluntary outpatient context, is simply erroneous…, as is the suggestion that the duty does not run to the public at large, but only in favor of the patient or the patient's relatives…".)
12. 305 A.D.2d 38, 758 N.Y.S.2d 717 (4th Dep't 2003).
13. Id.
14. Id. Note however, in *Fox v. Marshall*, the Court did note that in the case of an immediate family member of the patient, the Defendant could be liable to the Plaintiff. Fox, supra.
15. Fox, supra.
16. Id. Citing *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 505 N.E.2d 922 (1987).
17. Id.

BOOK REVIEW

They Would Always Have Paris

By William E. McSweeney

"If you are lucky enough to have lived in Paris as a young man, then wherever you go for the rest of your life, it stays with you, for Paris is a moveable feast."
— Ernest Hemingway.

In 1833 Oliver Wendell Holmes, then attending Paris's prestigious *Ecole de Medicine* wrote to his father in Boston, setting forth the impressions he had both of France and of his fellow medical students: "I have lived," he wrote,

> "among a great and glorious people. I have thrown my thoughts into a new language. I have received the shock of new minds and new habit. I have drawn closer the ties of social relations with the best formed minds I have been able to find from my own country…. I hope you do not think your money wasted."

The money was scarcely wasted on the scholar that was Holmes, though some of it might indeed have been diverted from its intended purposes—tuition, books, and lodging. At day's end, Holmes and his colleagues delighted in such *divertissements* as *cafes*, cognac, and music halls. These arguably corrupting influences on their young are precisely what faraway parents feared!

They needn't have worried. The men and women profiled in David McCullough's outstanding volume *The Greater Journey: Americans In Paris* had in common one overriding goal: education—in its narrowest sense, in its broadest sense, the latter being *l'apprentissage de la vie.* And what a group of men and women they were!

The Greater Journey: Americans In Paris
By David McCullough
Simon & Schuster
558 pp. illustrations and index
ISBN#978-1-4165-7176-6

At the threshold, consider their bravery. Their passage to France involved weeks of continual battering by the ever-menacing waves of the Atlantic, aboard sailing vessels that perpetually leaked and were lashed by spindrift, in quarters that were dank and cramped; they ate food that was barely edible, were rained on coldly from sky and sea, suffered seasickness to the point of the dry heaves. And yet this was the lesser journey!

Upon attaining Paris, they undertook the greater journey, the Conradian one, the journey within: the discovery of self-purpose, the imposition of self-discipline, the attainment of self-satisfaction; but unlike Joseph Conrad's narrator, Marlow, he who entered into the Heart of Darkness, they—in the City of Light—entered into the Heart of Light.

Les Americains, grand-pere Bill et son petit-enfant Daniel, Paris, summer of '09.

Architecture, art, drama, literature, music, science—all flourished within the great capital. Yet even to be oblivious to these enhancers of life, to be merely passive, to merely absorb the city-as-city, was to nonetheless be enriched. The new arrivals marveled, variously, at the sparkling, meandering Seine, now and again overarched along its Parisian course by magnificent *ponts*; at the green spaciousness of its *jardins publics;* at the stone solidity of its wide-open *places;* at the low mansard-topped buildings—a whimsical *mélange* of the commercial and residential—buildings so low that they

enabled the bright sunlight to stream evenly throughout every *quartier* of the city; and at the ubiquitous towering memorial monuments, the heroic statuary, all attesting to *l'histoire, la gloire* of this ancient civilization. As for the active, the ambitious: Paris's beauty was the osmotic dividend to be drawn by those pilgrims with affirmative purpose, those who had come to study within its *quartiers.* None stated it better than Philadelphia-born artist Cecilia Beaux. "The immense value to the student in Paris," she wrote, "lies in the place itself."

Stretching across the decades of the mid- to late-nineteenth century, concluding with *L'Exposition Universelle* of 1900, the cavalcade of ambitious Parisian sojourners that McCullough profiles is nothing if not a fascinating lot: Holmes and his brethren, who deepened their knowledge of medicine, and discovered *cafes* and cognac; writer James Fenimore Cooper, who enjoyed his celebrity as novelist of the American frontier, a subject ever-fascinating to Parisians; and, in counterpoint to the settled Cooper, the struggling Samuel B. Morse, fine artist and future inventor, who worked assiduously, principally to define himself. Novelist Henry James, fine artists Mary Cassatt and John Singer Sargent, sculptor Augustus Saint-Gaudens, architect Louis Sullivan: all spent their formative years in Paris; more, all were fully formed by Paris. All would be forever changed,

(Continued on page 27)

COMMITTEE CORNER

News & Notes From SCBA Committees

Insurance & Negligence – Defense Counsel
Robert E. Schleier, Jr., Chair

The Hon. William J. Condon was the guest speaker at our Dec. meeting. He provided insight into the relationship and interaction between criminal and civil matters. We discussed issues facing the trial lawyer as well as evidentiary matters. We further discussed cases of interest. This was a fell attended and well received presentation.

At our next meeting the Hon. Daniel Martin spoke with our committee about trial practice in his part and evidentiary issues. He led an informative presentation about recent case law and trial practice in his part. Also addressed were issues that come up during direct and cross examination.

Immigration Law Committee
Victoria L. Campos, Chair

The purpose of this first meeting was to talk about the committee's goals, brainstorm about possible topics for CLE's and get acquainted with each other.

A decision was made to work closely with the Long Island Hispanic Bar Association, and Criminal Law Committee to put together a CLE program. We are also going to contact the Embassy for El Salvador to offer our legal services for the upcoming TPS renewal, maybe do a one day service clinic.

As the Chair, I am contacting the Suffolk Womens Bar to see if we can join eforts to present a CLE on how Immigration law can help victims of domestic violence and/or juvenile cases.

Among Us (Continued from page 7)

refer to the reference number following the listing.

Firms Offering Employment

Suffolk county firm with areas of practice consisting of: commercial litigation; personal injury; land use; condemnation tax certiorari; contested estates; real estate; seeking associate with 3-5 years' experience in any of the above areas.

Reference Law #24

Small western Suffolk personal injury defense firm seeks associate with 8-10 years of experience. Extensive personal injury background necessary. Some trial and Labor Law experience helpful. Emphasis on high quality work. Must be organized and possess excellent deposition and writing skills.

Reference Law #22

Members Seeking Employment

Experienced Family Law attorney, some Matrimonial Law experience, seeking full-time, part-time employment, per diem assignments, court appearances, drafting, etc.

Reference Att#40

Recent law school graduate awaiting admission to the New York State Bar with legal experience in corporate, litigation, real estate, personal injury, and immigration law, seeks an entry-level attorney position in any area of the law. Fluent in Greek and Albanian.

Reference Att#41

Recently admitted attorney seeking part-time or contract employment. Experienced in immigration law. Capable of learning new areas of the law quickly. Strong writing and communication skills. Self-motivated with ability to multi-task.

Reference Att#42

Keep on the alert for additional career opportunity listings on the SCBA Website and each month in *The Suffolk Lawyer*.

Reading Resolutions (Continued from page 14)

degrees of separation' have in common?" Answer: People all around the world believe in them, but they aren't true. What is true, according to Ivan Misner, is that there are some people who are better connected than others. That's important, because it means that "connecting" is a skill that can be acquired, honed, and improved. *The 29% Solution* helps the reader to develop networking skills, increase their connections, and become part of what Misner estimates are the roughly 29% of people who are (actually) separated from the rest of the world by just six degrees. Connecting in this sense means more than simply collecting "contacts," "friends," "tweets," and "likes" on the various social media outlets that abound. Instead, *The 29% Solution* advocates identifying key networking contacts and devoting your time and energy to those contacts that will yield the most connections and results targeted to your business and goals. *The 29% Solution* identifies 52 weekly networking success strategies, perfect for embarking on the year ahead.

Last but not least, although not a book, an honorable mention for a worthy read on practice management and development goes to the article "Demystifying the Numbers: Financial Tools to Keep Your Firm Moving Forward," by Thomas D. Begley, Jr. and Vincent J. Russo in the Summer 2002 issue of the NYSBA Elder Law Attorney (Vol. 12, No. 3) (available at *www.nysba.org* for Elder Law Section members). The article suggests identifying — in writing! — budgetary and marketing goals for a firm, as well as using your accounting programs and data to generate ratios and numerical indices available to monitor your firm's past performance and progress in achieving its goals. The article adeptly identifies useful guidelines for analyzing a law practice's performance throughout the year, not just at the end of the fiscal year.

Note: Alison Arden Besunder is the founding attorney of the Law Offices of Alison Arden Besunder P.C., where she practices estate planning, elder law, and related guardianship and estate litigation. Her firm assists clients in New York City, Brooklyn, Queens, Nassau, and Suffolk. Ms. Besunder is also of counsel to Bracken Margolin & Besunder LLP in Islandia, New York.

Immigration 'Fix' (Continued from page 1)

Permanent Resident parent) to obtain the waiver to legally re-enter the United States.[1] Since the "extreme hardship" standard was often arbitrary and there were no guarantees about the outcome, the spouse or other family member could be stuck without any way to return home to their loved ones.

The new proposal would allow Immediate Relatives to apply in advance for the I-601 waiver of "unlawful presence" in the United States. Upon approval, the immigrant could then return to his or her home country for what would likely be a pro-forma visa approval.

The proposed rule would primarily benefit EWI spouses of U.S. Citizens. EWI children do not begin to accrue "unlawful presence" until they turn 18 years old and thus most would not require a waiver. Very few parents of U.S. Citizens would have a qualifying relative (spouse or parent) needed for a waiver. However, the proposal is subject to change, and could include EWI immigrants who are not Immediate Relatives – such as spouses and children of Legal Permanent Residents (LPRs), or adult children of U.S. Citizens.

I personally know hundreds of immigrant clients who have been stuck in this Catch-22, and who now will have a pathway to LPR (green card) status. In my practice, I almost never recommend that EWI spouses of U.S. Citizens return to their home country for consular processing. A spouse would have to wait at least five months and perhaps more than a year outside the United States for the waiver to be adjudicated. Unless the qualifying U.S. Citizen relative had a severe medical condition or some other extraordinary hardship, it was very possible that the U.S. Embassy would deny the case.

Although the administration states that the same "extreme hardship" standards for waivers will be employed in the United States, it has been my experience that these waivers are usually granted in bona fide cases. In any event, if a waiver is denied in the United States, it can always be appealed and the family is able to stay together.

The new proposal is part of a policy shift in the Obama administration that many skeptics say is timed to coincide with the president's re-election campaign. President Obama had promised to push through a comprehensive immigration reform bill in his first year of office. In fact, the president has significantly accelerated the pace of deportations — nearly 400,000 in each of the last three years. There are an estimated 11 million illegal immigrants in the United States.

Within the past six months, the administration has started implementing a new policy that puts greater emphasis on deporting recent arrivals, violent criminals, "fugitives" (those who did not obey a removal order) and other foreign nationals considered risks to public safety.

A memo issued last year by Immigration and Customs Enforcement (ICE) Director John Morton gives officials – from agents on the street to government attorneys — wide latitude on "prosecutorial discretion." In effect, this means that ICE is not likely to deport a long-time illegal immigrant with no criminal record and U.S. Citizen children. Similarly, ICE is not pursuing those young immigrants with clean records who would otherwise qualify for the proposed DREAM Act.

What does this mean for attorneys who do not practice immigration law?

To be eligible for a waiver, an immigrant must prove "good moral character" – a nebulous term of art that is often determined solely on the basis of the individual's criminal record.

Criminal-defense attorneys *must* inquire into the legal status of their clients. All non-citizens, including those with green cards, are subject to deportation for even relatively minor crimes. There is, for example, no waiver for drug convictions except possession of 30 grams or less of marijuana. Any conviction involving "Sexual Abuse of a Minor" – even Forcible Touching — is an "Aggravated Felony" for which there is no relief from deportation.

A landmark Supreme Court ruling in April, 2010, obligates criminal-defense attorneys to advise a non-citizen client of immigration consequences of accepting a guilty plea if such a conviction could lead to deportation. *Padilla v. Kentucky*. 130 S. Ct. 1473 (2010).

Immigration law is such a complex field that no criminal-defense attorney can be expected to know all the immigration consequences of a guilty plea. However, attorneys must and should advise non-Citizen clients that a guilty plea to certain offenses could lead to deportation, whether or not the defendant ever serves any jail time.

The last major immigration reform took place in the Reagan administration. Since then, millions of illegal immigrants have entered the United States, settled down and raised families. Pursuant to the 14th Amendment, children born in the United States are, by definition, U.S. Citizens.

Until Congress takes action on the volatile issue of immigration reform, administrative fixes such as prosecutorial discretion and the proposed in-country waiver for immediate relatives of U.S. Citizens are providing stopgap relief. But sooner or later, the federal government will have to pass a comprehensive immigration package that is fair and humane to the millions of hard-working, law-abiding immigrants who now have no legal status but may be the parents or spouses of U.S. Citizens, or otherwise contribute to our community and our economy.

Note: David Sperling is an immigration lawyer with offices in Central Islip, Huntington Station and Hempstead.

Litigating College Expenses (Continued from page 3)

Department held that "The Supreme Court properly directed the plaintiff to pay a proportionate share of the children's college expenses (see, Domestic Relations Law Section 240 [1-b][c][7]; *Matter of Cassano v. Cassano*, 85 N.Y.2d 649). However, it was error to do so without including a provision either reducing the plaintiff's level of child support, or crediting him for any amounts he contributes towards college expenses during those periods when the children may live away from home while attending college (see, *Sheridan v. Sperber*, 269 A.D.2d 439, *Imhof v. Imhof*, 259 A.D.2d 666, *Justino v. Justino*, 238 A.D.2d 549*, Reinisch v. Reinisch*, 226 A.D.2d 615)."

Another interesting college expense case was the matter of *Reiss v. Reiss*, 56 A.D.3d 1293, 870 N.Y.S.2d 177 (2008). *Reiss v. Reiss*, was an appeal from an order of the Monroe County Supreme Court where the father was directed to pay his pro rata share of the uncovered medical expenses of the children, contribute towards the college expenses of the parties daughter and towards his former wife's counsel fees. In *Reiss*, the Appellate Division, Fourth Department held that even though college expenses were not addressed in the parties stipulation, the referee properly ordered the father to pay 85 percent of the college expenses of the parties daughter based upon the tuition and expense schedule in place for the SUNY system and based upon the fact that both parents were college graduates and their daughter was performing well in college.

In *Reiss*, the Appellate Division, Fourth Department held "Contrary to the further contention of defendant, the Referee properly ordered him to contribute 85 percent of the college expenses of the parties' daughter, "based upon the tuition and expense schedule currently in place for the State University of New York College System." Although the college expenses of the parties' daughter were not addressed in the stipulation, "[i]n certain circumstances, a parent may be required to contribute to a child's higher education expenses even in the absence of an agreement to do so." *McDonald v. McDonald*, 262 A.D.2d 1028, 1029, 691 N.Y.S.2d 824 [1999]; see *Matter of Naylor v. Galster*, 48 A.D.3d 951, 952-953, 851 N.Y.S.2d 683 [2008*]; Matter of Holliday v. Holliday*, 35 A.D.3d 468, 469, 828 N.Y.S.2d 96 [2006]). Factors for a referee or court to consider include the parents' educational background, the child's scholastic ability, and the parents' ability to pay (see *Fruchter v. Fruchter*, 288 A.D.2d 942, 943, 732 N.Y.S.2d 810 [2001]).

The matter of *Frank v. Frank*, 2011 NY Slip Op 7335, 931 N.Y.S.2d 196 (2011) was an appeal from Broome County Family Court. In *Frank*, the parties were divorced in 2009 after having three children. The parties' separation agreement was incorporated but not merged into the parties' judgment of divorce. The parties' separation agreement stated that "if any of the children were to attend college full time, each parent would contribute on an equal basis to the child's reasonable educational expenses." The parties' second child enrolled in SUNY Fredonia and was offered $5,500 in student loans. The child declined the loans against the wishes of his father and the father deduced the $5,500 from the child's college costs. The father then paid his 50 percent share of the balance. The Support Magistrate held that the parties' separation agreement did not obligate the child to take out loans and the Support Magistrate directed that the father pay half of the total college expense. The father objected and the father's objections were denied by the Family Court. Upon appeal, the Appellate Division Third Department held "Here, the agreement contains no requirement that the children contribute to the cost of their education, nor can such a requirement reasonably be inferred (see *Desautels v. Desautels*, 80 A.D.3d at 928). The agreement does not allude to such a contribution; rather, it specifies that "the parties shall contribute toward payment of the reasonable educational expenses… on an equal basis."

Note: John E. Raimondi has been employed as a Family Court Magistrate since 1999. He was previously employed with the Suffolk County Legal Aid Society and was also a partner in Raimondi & Raimondi, P.C. He received his Bachelors Degree from John Carroll University, Juris Doctor from Creighton University School of Law and an LLM, Summa Cum Laude from Touro Law School. He is a former Officer of the Suffolk Academy of Law, a frequent lecturer at the Suffolk County Bar Association, an Advisory Committee Member, a Program Coordinator with the Suffolk Academy of Law and an Adjunct Professor at Briarcliffe College.

Real Estate Laws of 2011 (Continued from page10)

for energy efficiency measures, to be paid back on their utility bills. Moreover, the payments may be tax deductible and are transferable if the property is sold. A great aspect of this program is that homeowners can watch their savings offset the cost of their energy efficiency measures on the very same bill.

Home Improvement Contractors can't act on behalf of Mortgage Brokers

Unnecessary repairs are thwarted as home improvement contractors and their agents are prohibited from promoting or arranging for the services of a mortgage broker or its affiliate. Also, referral fees are strictly prohibited under this legislation as are contractors acting as co-signers or guarantors of a loan for home improvements.

Private Transfer Fees are Eliminated

In furthering the public policy of the marketability of real property, new legislation prohibits private transfer fee obligations from running with title to property or otherwise binding subsequent owners of property. Also, the legislation provides a procedure to remedy existing obligations. Private transfer fees have traditionally been utilized as a creative means for developers to realize an income stream long after the finalizing of their projects.

This list only provides a small blurb on each new law, regulation and opinion. There may be further discussion on these topics going forward as they get fleshed out in the courts. So stay tuned.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a family-owned law firm with offices in Center Moriches and Manhasset, New York. Mr. Lieb is also the founder and lead instructor of the firm's New York State licensed Real Estate School, which serves as the Pro Bono arm of Lieb at Law offering continuing education courses to Real Estate Agents and Brokers. He is the Co-Chair of the SCBA Real Property Committee

Consumer Bankruptcy (Continued from page 6)

dling by a bankruptcy trustee. Nevertheless, consumers should not be parading this fact to the frequent flyer program, nor do they have any obligation to do so.

Frequent flyer programs have no incentive to become embroiled in a fight over miles. Consumers should therefore be able to emerge from bankruptcy with their miles in airline frequent flyer programs intact.

Let's suppose, however, that the consumer has points in a credit card program such as American Express Membership Rewards. The consumer cannot use those points if the account is in default. That would certainly be the case once the bankruptcy petition is filed if there is any balance owed on the account.

If you had a client come to you a bankruptcy consultation, and they were current with their credit card account, should you advise the client to quickly cash out the rewards points before the account goes into default?

The argument the credit card company can conceivably make if the debtor cashes in the points just prior to filing bankruptcy is that the debtor engaged in some kind of bad faith conduct of sorts. However, the credit card company would have great difficulty proving this as the debtor would argue that the points were already earned, and that the debtor had the full right to use them regardless of any plan to file for bankruptcy. The bigger issue is not about the points, but whether the debtor incurred the credit card debt at a time when the debtor knew or should have known that they would not be able to pay their debts.

Accordingly, I would feel comfortable advising a debtor to immediately redeem the points or transfer them to an airline's frequent flyer program, assuming there was no larger issue that the debtor incurred the debt to the credit card company under fraudulent pretenses. From a practical perspective, I have never heard of any case in which a credit card company complained that a debtor used their rewards points prior to seeking bankruptcy relief.

Let me leave you with an anecdote. Jim Kennedy, a 46-year-old California man, lost his six-figure corporate development job. At the time, he had about a million frequent flyer miles and rewards points in various loyalty programs including 125,000 American Express Membership Rewards, 85,000 Starwood Preferred Guest points, 400,000 Hilton Honors points, 100,000 Delta Sky Miles, 120,000 American AAdvantage miles, and 200,000 United Mileage Plus miles.

After running out of funds, losing his home to foreclosure, and having no luck finding a job, he filed for Chapter 7 bankruptcy. He emerged from bankruptcy with his miles intact. Thereafter, he lived for months in Holiday Inns and Motel 6's by converting his frequent flyer miles into hotel points. This also helped his food budget because the motel provided free breakfast to its guests.

He regularly reported his plight on his blog and on Twitter. His story was publicized by a number of newspapers and TV stations on the West Coast. Last year, when he was down to just a month's worth of free motel nights, he found a job. The lesson is that frequent flyer miles can sometimes really help, even after bankruptcy.

Note: Craig D. Robins, a frequent contributor to The Suffolk Lawyer, 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*. Visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.*

Preserving A Step Up Basis (Continued from page13)

property held in a "family estate" trust is includible in transferor's gross estate under IRC § 2036(a)(1) because of transferor's retention of substantial present economic benefit in transferred real property by continuing to reside in real property.

If it can be established that the donor's retained possession or occupancy was limited to a particular period of time or a specific percentage of the space, then only a portion of the property is includible. *But see Disbrow Est. v. Comr.*, T.C. Memo 2006-34, where even though family members lived with decedent at certain times and decedent generally was confined to ground floor, decedent still had full possession and enjoyment of residence)

However, be wary of the same rules with respect to spouses. An inter-spousal lifetime transfer of real property that is thereafter jointly occupied by the transferor and the transferee spouse as a residence may avoid IRC § 2036(a)(1) on the basis that co-occupancy by the transferor does not significantly impair the possession or enjoyment of the transferee spouse. In *Gutchess Est. v. Comr.*, 46 T.C. 554 (1966) (reviewed), *acq.*, 1967-1 C.B. 2, there was no express retention of the right of occupancy by the transferor spouse and none was implied by the court from the actual co-occupancy until the death of the transferor spouse. The Tax Court stated that co-occupancy by the donor is not inconsistent with full possession or enjoyment by the donee. Accordingly, the property was not included in the transferor spouse's gross estate under IRC § 2036(a)(1). Although *Gutchess* was a taxpayer victory, the IRS acquiesced only with respect to husband-wife situations, and the IRS does not agree that co-occupancy in general bars application of IRC § 2036. See Rev. Rul. 78-409, 1978-2 C.B. 234. The Tax Court has itself distinguished *Gutchess* in a case where the husband transferred a citrus farm to his wife but continued to run the business and receive its profits, stating that *Gutchess* "should be carefully confined to its narrow factual situation." See, *Hendry Est. v. Comr.*, 62 T.C. 861, 876 (1974).

Note: David R. Okrent, Esq., CPA is the Managing Attorney at The Law Offices of David R. Okrent. He has been handling elder law, special needs and estate planning and administration matters for over 24 years. Mr. Okrent was designated one of Long Island Alzheimer's Foundation's "Angels of Spirit." He currently is serving as the NY State Bar Association Elder Law Section's tenth district (Long Island) delegate, and is its immediate past co-chief editor of its quarterly publication known as the "Elder Law and Special Needs Law Journal," as well as the past Vice Chairman of its Estate Tax & Planning Committee. He is also a past Co-Chair of the Suffolk County Bar Association Legislation Review Committee, Elder Law Committee, and Tax Committee and is an advisory member to its Academy of Law. The firm has offices centrally located in Huntington, Port Jefferson, Setauket, and Bayshore, New York. For more information visit http://www.davidrokrentlaw.com or call (631)427-4600.

Bench Briefs (Continued from page 6)

motion for an order pursuant to CPLR § 5015(a) vacating the default judgment against such defendants, and pursuant to CPLR § 3012(d), deeming the proposed answer served. In granting the motion, the court noted that the supporting affidavits established the defendants' reasonable belief that their interests in the action were being represented by their retained counsel. Moreover, a further sworn affidavit established that the assault of plaintiff occurred on the street outside the defendant's premises, together with the defendants' affidavits establishing their lack of personal involvement in the alleged incident, establishing potentially meritorious defenses to this action. In light of the above, and the public policy in favor of resolutions of actions on their merits, defendants' motion to vacate the default entered against them was granted.

Third-party complaint dismissed; barred by statute of limitations.

In *Ashraf Ahmed and Martyna Ahmed v. Michael Stewart and Kelli Stewart, Ashraf Ahmed and Martyna Ahmed v. Town of Brookhaven and Whitford Development Inc.,* Index No.: 9192/09, decided on September 14, 2011, the court dismissed the third-party plaintiffs' complaint for failure to comply with the applicable statute of limitations. On December 23, 2003, plaintiffs/third-party plaintiffs, as purchasers and third party defendant, as seller entered into a contract of sale with respect to Lot No. 1 of a four lot subdivision. Lots No. 2 and 3 were flag lots that shared a common driveway which was the sole source of access to and from the public highway for all lots in the subdivision. As a condition of subdivision approval, the Town of Brookhaven directed third-party defendant Whitford to provide a 16-feet-wide common driveway with cross-access and maintenance agreements for all lots within the subdivision. On July 29, 2004, the town issued a certificate of occupancy with respect to Lot No. 1, notwithstanding that the condition requiring cross-access and maintenance agreements with respect to the common driveway had not been complied with. Nearly five years later, on March 11, 2009, plaintiffs commenced the instant action against the owners of Lot No. 2 for assault, private nuisance, and intentional infliction of emotional distress arising, in part, out of the parties' use of the common driveway. Thereafter, plaintiffs commenced a third-party action against the Whitford and the town. The town alleged, among other things, that the third-party negligence claim was time barred. In deciding the motion, the court noted that it was a well established claim that a municipality was negligent in issuing a building permit or certificate of occupancy accrued on the date the permit or certificate was issued. The submissions thus established that the plaintiffs' commencement of this third-party action against the town, more than six years after the allegedly wrongful issuance of the certificate of occupancy, was untimely. Moreover, plaintiff was required to, and did not, file a notice of claim pursuant to General Municipal Law § 50-e and 50-I prior to interposing its claim against the town. Accordingly, the third-party action against the town was dismissed.

HONORABLE PATRICK A. SWEENEY

Motion for preliminary injunction denied; plaintiff had not demonstrated a likelihood of success on the merits.

In *Joseph Mario Riso v. Barbara McGinn and Paul Rocco,* Index No.: 23744/10 decided on October 20, 2010, the court denied plaintiff's motion for a preliminary injunction. The plaintiff sought to impose a constructive trust on a parcel of real property. He alleged that in 1997, he entered into an oral agreement with the defendants in which he contributed money toward the down payment for the purchase of the property but the title was placed in the name of the defendant McGinn. Defendants contend that the plaintiff was merely a tenant. The plaintiff moved for a preliminary injunction restraining the defendants from evicting him and from transferring or selling the property. In support of his motion, the plaintiff submitted an affidavit in which he alleged that from 1995 to 2000-2001 he and the defendant Rocco were co-workers at a Volvo dealership. The plaintiff was employed as a mechanic and Rocco was a service manager. In denying the motion, the court noted that while the elements of a constructive trust may be applied flexibly rather than rigidly, a mere friendship between the parties was generally insufficient to demonstrate a confidential relationship. In this case, the court found that the plaintiff merely alleged that he and defendant Rocco were co-workers for a period of two years before entering into the alleged arrangement. There was no allegation of a confidential or fiduciary relationship. Under these circumstances, the court found that the plaintiff had not demonstrated a likelihood of success on the merits.

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. To be considered for inclusion in the March 2012 issue, submission must be received on or before February 1, 2011. 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.

You Don't Need To Rob A Bank (Continued from page 8)

before institutionalization, or a sibling with an equity interest who resided with the applicant for only one year before institutionalization. Soc. Serv. Law § 366(5)(d)(3)(i); 18 N.Y.C.R.R. § 360-4.4(c)(2)(iii)(b). Practitioners are cautioned that when a transfer is made to a disabled child, that you have to determine if a transfer should be made outright or into a Special Needs Trust so as not to compromise governmental entitlements to which the child is entitled or receiving.

When planning for a person who is under the age of 65, there are also the options of protecting one's assets 100 percent by utilizing a Self-Settled Pay Back First Party Trust created for them by a parent, grandparent, Court or Guardian[1], or a Pooled Trust[2] which can be joined by the applicant himself. While Self-Settled First Party Trusts must have a payback provision to reimburse the local Medicaid Agency for the amount of medical assistance provided, no recovery can be made if the trustee has legitimately expended the corpus of the trust on the beneficiary during her lifetime.

Advance Directives v Guardianship

When consulting with clients, practitioners need to explain to the clients their individual rights to make health care and financial decisions. It also needs to be explained that in the event that the client becomes incapacitated, that they have the personal ability to memorialize who shall make their health care and financial decisions in Advance Directives, and that if they have not done so or to the extent that the documents are deficient for planning, that a Guardianship Proceeding may be necessary.

Advance Directives consist of the following:

Power of Attorney - Under General Obligations Law, Article 15, §§ 5-1501-5-1514, this document appoints agents to make financial decisions. The agent could be authorized to start automatically, or only on the occurrence of an event such as incapacity. For Elder Law and Estate Planning purposes to protect assets in case long term care is needed, modifications will be needed to allow for gifting.

Health Care Proxy - Under Public Health Law, Article 29-C, §§ 2980-2994, the client may appoint agents to make health care decisions when the client cannot do so herself.

Living Will - this document sets forth the client's desires as to medical and life sustaining treatment. In the 1988 case of In re: Westchester County Medical Center, 72 N.Y.2d 517, the court established the need for "clear and convincing" evidence of a patient's wishes and stated that the "ideal situation is one in which the patient's wishes were expressed in some form of writing, perhaps a 'living will.'"

HIPAA Release Authorization - this document names representatives who may obtain medical information about the client, and speak to the client's medical providers, if and when necessary, as allowed under 42 U.S.C. § 1320d.

Burial-Funeral Designation - Under Public Health Law § 4201, this documents sets an order of who can make burial and funeral arrangements for the client after her demise, and what those decisions should be.

To the extent that the client has not executed Advance Directives, or the Advance Directives are insufficient to implement the planning, then a Guardianship Proceeding may need to be commenced. Cases abound in which our justices have appointed indefinite Guardians and Special Guardians with the powers to implement Medicaid Planning. By using the standard of subjective intent, the petitioner can show the logic of why a person faced with the choice of dissipating her assets 100 percent on her care before seeking governmental entitlements, or protecting some portion of her assets for her family, might choose the latter option. Planning options include but are not limited to planning with Promissory Notes[3], electing the right of election[4], gifting to children[5], renouncing an inheritance[6], transferring a residence with a life estate[7],and of course spousal transfers[8]. Mental Hygiene Law Section 81.21 sets forth the standard on how and why a gift and/or transfer can be made, and is a roadmap for the practitioner in case Medicaid Planning is desired.

So with all the planning opportunities available to your clients, you have to ask them why they would ever want to rob a bank.

Note: Steven A. Kass, Esq., is a sole practitioner in Melville, concentrating in Elder Law, Estate Planning and Special Needs Planning. He is the Co-Chair of the Elder Law and Estate Planning Committee of the Suffolk County Bar Association. Mr. Kass is a Certified Elder Law Attorney by the National Elder Law Foundation (NELF). NELF is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in New York and does not necessarily indicate greater competency than other attorneys experienced in this field of law.

1 . 42 U.S.C. § 1396p(d)(4)(A); Soc. Serv. Law §366 subd. 2(b)(2)(iii).

2. 42 U.S.C. § 1396p(d)(4)(C); 18 NYCRR § 360-4.5(b)(5).

3. Matter of M.L., 25 Misc. 3d 1217A; 901 N.Y.S.2d 907 (Sup. Ct. Bronx Cty., 2009) (Hunter, J.).

4. Estate of Domenick J. Carota, NYLJ, 2/26/02 (Surr. Ct., Westchester Cty. 2002).

5. Matter of John "XX," 226 A.D.2d 79; 652 N.Y.S.2d 329 (3rd Dept., 1996), *lv. to app. denied*, 89 N.Y.2d 814; 659 N.Y.S.2d 854 (1997).

6. Matter of Baird, 167 Misc.2d 526; 634 N.Y.S.2d 971 (Sup. Ct., Suffolk Cty., 1995).

7. Matter of DiCeccho (Gerstein), 173 Misc.2d 692; 661 N.Y.S.2d 943 (Sup. Ct., Queens Cty., 1997).

8. Matter of Shah, 95 N.Y.2d 148, 711 N.Y.S.2d 824, 733 NE2d 1093, (2000); *affirming*, 257 A.D.2d 275; 694 N.Y.S.2d 82 (2nd Dept., 1999).

Lawrence v. Kennedy *(Continued from page 14)*

these concerns were "allegedly founded on 'significant and serious claims' which the Firm had against the plaintiff – in sums purportedly exceeding any salary amounts the Firm might owe the plaintiff under the 2008 employment agreement."

According to plaintiff's summary judgment papers, the Firm subsequently terminated him in January 2011 and failed to pay any remaining salary amounts. Plaintiff claims that at the time he was terminated, there were amounts outstanding which were owed to him from February 2010. Subsequent to his termination, plaintiff served a notice of default upon the Firm. When the amounts claimed to be due and owing were not cured, plaintiff filed the instant action against the Firm and Michael Kennedy individually.

Plaintiff's verified complaint contained three causes of action; two against both the Firm and Kennedy for gross negligence and willfully breaching their obligations under the contracts to pay plaintiff's fixed and performance based salary, and the third cause of action for an accounting alleging that a fiduciary relationship existed wherein plaintiff would be entitled to an accounting. At the same time as he served the verified complaint, plaintiff moved for summary judgment in lieu of complaint with respect to the fixed salary portion of the employment agreement under CPLR 3213. Thereafter, each defendant separately moved to dismiss the complaint.

In making the motion to dismiss, defendants argued that: "(1) the power of attorney relied on by Sherry Lawrence is defective, and the plaintiff otherwise lacks capacity to commence and maintain the action; (2) the employment agreement precludes enforcement of the contract against individual firm members, including managing member, Michael F. Kennedy; (3) there exists no fiduciary relationship between the defendants and the plaintiff and thus no accounting is warranted; and (4) the employment contract does not constitute an instrument for the 'payment of money only' within the meaning of CPLR 3213 and, in any event, the Firm possesses a fraudulent inducement defense which warrants dismissal of the complaint as a matter of law." *Lawrence*, 2011 WL 5107234 at *3.

The court granted defendant Kennedy's cross motion to dismiss the causes of action asserted against him, finding that it was undisputed that Kennedy did not execute the employment agreement in his individual capacity and thus he was not a party to the contract sued upon by the plaintiff. Furthermore, the court found the exculpatory clause in the employment agreement to be important, wherein the plaintiff irrevocably waived the right to enforce the agreement against any individual members of the Firm and that he can only look to the Firm for recovery under the agreement. The court noted that it will not "add or excise terms *** so as to make a new contract under the guise of interpreting the writing," especially where the plaintiff is a sophisticated businessman and the agreement is negotiated by sophisticated and well-counseled parties.

The court then turned to defendants' motion to dismiss the third cause of action for an accounting based on an alleged breach of a fiduciary duty. In dismissing the cause of action, the court found that even interpreting the facts alleged in the complaint in a light favorable to the plaintiff, the complaint did not show an "arms-length, employer-employee relationship at issue here [giving] rise to a fiduciary between the parties." Upon review of the contract, the court merely found that after the conveyance of the stock to the Firm, the Firm's obligation to pay plaintiff was merely "contractual and commercial" and not fiduciary in nature.

Next, the court analyzed plaintiff's motion for summary judgment in lieu of complaint. The court found that employment agreement concerning plaintiff's right to fixed income was not an agreement for the payment of money only in which CPLR 3213 would apply. Instead, the court found that the agreement was "an employment contract – one which contains a variety of interrelated provisions governing the parties' respective rights, duties and obligations." Furthermore, the court rejected plaintiff's argument that the Firm had no defenses at this point in time and that the promise to pay is now unconditional due to the Firm's default. The court noted that a reading of the instrument in the first instance should be that of an unconditional promise to pay, not through a later performance by the parties, and that here the agreement between the parties at execution of the agreements was that of an employment contract and not an agreement for money only.

Lastly, the court denied the Firm's motion to dismiss the first and second causes of action against the Firm. The court found allegations in the complaint sufficiently plead the causes of action for breach of contract for failure to pay both fixed and performance based salary amounts under the employment agreement.

The decision is particularly important to attorneys who engage in transactional drafting practice and those who litigate the same. First, it appears that the plaintiff, by entering into an employment agreement with his former partner, lost any fiduciary benefit which ran between the partners, when the court ruled that the employment agreement alone was insufficient to impute a fiduciary obligation upon the defendant sufficient to found an accounting claim. Second, despite the plaintiff's effort to expedite a monetary damages claim by characterizing the agreement as an instrument for the payment of money only (thereby triggering expedited relief via CPLR 3213), the court rejected the plaintiff's proposed use of CPLR 3213 to found his claim against the former partner. Third, the plaintiff lost the ability to pursue the Firm for claims premised upon the employment agreement. These three strikes undermined the plaintiff's claims against the defendants, rendering the claims more difficult to resolve.

Note: Leo K. Barnes Jr., a member of Barnes & Barnes, P.C. in Melville, can be reached at lkb@barnespc.com

Private Road Statute *(Continued from page19)*

is a conveyance of a tract of land formerly in unitary title with the land from which it was severed, and where the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. Thus, an immediate need arises for a 'way' to traverse the encircling parcels. It is a firm requirement that the necessity must exist as of the time of severance of unitary title." *Willow Tex, Inc., v. Dimacopoulos,* 120 Misc.2d 8, 13 (Sup. Court, Queens Cty., 1983) (internal citations omitted), rev'd on other grounds, *Willow Tex, Inc., v. Dimacopoulos,* 68 N.Y.2d 963 (1986). There must be "an *immediate necessity* which may lie dormant but must, at the very least, exist *contemporaneously* with the severance." *Id.*

In order to claim an easement by necessity, the landlocked owner must demonstrate absolute necessity. *Wells v. Garbutt,* 132 N.Y. 430 (1892); *Smith, et al., v. New York Central Railroad Company,* 235 A.D. 262 (4th Dept., 1932). The existence of an alternative means of access, or even the subsequent establishment of an alternative, will prevent or extinguish a way of necessity.[4] Additionally, the landlocked owner is at the mercy of the neighbor in establishing the location of the easement, unless the neighbor is "chargeable with palpable abuse." *Palmer v. Palmer,* 150 N.Y. 139, 147 (1896).

What Does The Future Hold?

As of this writing, it is unknown whether an appeal will be filed in *Preserve Associates.* Even if pursued, the appellants will have an uphill battle. The Private Road Statute directs that "the decision of the county court shall be final" (Highway Law §312). As a result, "an appeal does not lie on the facts ***or the law*** on the issues of necessity and damages but only on whether statutory procedures were substantially complied with and whether there was jurisdiction in County Court." *Towner v. Schoenthal et al.,* 120 A.D.2d 931 (4th Dept., 1986)(emphasis supplied).

Conclusion

As *Preserve Associates* demonstrates, the statutory scheme does not require a showing of absolute necessity, the parcels need not have come from a common owner, the existence of alternative access does not prevent a jury determination of "necessity" and the road can be located wherever the owner of the benefited property desires (as long as the jury agrees).

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and litigation support in land title disputes. He can be reached by email at lance@LandTitleLaw.com, or visit www.LandTitleLaw.com.

1. Due to the lack of pagination in the Slip Opinion, obvious references to this opinion will not be individually cited in the balance of this article.

2. Highway Law §301. The filing of an application containing the matters required by statute mandates that the superintendent empanel the jury. *Matter Of John T. Siwula v. Town of Hornellsville et al.,* 867 N.Y.S.2d 832 (4th Dept., 2008).

3. Bishop, *Highways, Ways and Plank Roads, 5th ed.* (Steele, Avery & Co., 1859).

4. See *Warren's Weed New York Real Property § 40.69[2*] (Matthew Bender & Company, Inc., 2011).

Medicaid, Promissary Notes *(Continued from page11)*

tection strategy is that there must be a monthly shortfall in the amount paid to the long-term care facility each month. This is because the resident must have medical expenses greater than the Medicaid rate in order to be considered "otherwise eligible" for Medicaid benefits while also having medical expenses s/he is unable to meet in full. 42 U.S.C. 1396p (c)(1)(D)(ii).

As promissory note cases made their way through the system, the Department of Social Services ("DSS") began to impose various hurdles. DSS began denying or ignoring promissory notes altogether, assessing a penalty period as if the entire transfer was a gift. DSS then created a multitude of other grounds for denial, from non-amortized interest calculations to modifications by written document to continued payments to the estate of a deceased lender/promissee. Many such cases resulted in Fair Hearing decisions issued by the Department of Health.

One such case, *In the Matter of G.F.* (FH #5013919Q), led to a series of promissory note challenges based on a particular fact in that case, that is, that the Medicaid applicant signed a promissory note after being admitted to a nursing home. DSS sought to use this as grounds to deny all notes signed after nursing home admission. However, promissory note planning only is engaged in when an applicant already is in a long-term care facility and is receiving services. Under the federal law, it is almost a condition precedent that a Medicaid applicant (the lender) be placed in a health care facility such that he or she can engage in promissory note planning because the applicant must be "otherwise eligible" for Medicaid, that is, both below the resource limit and *in the facility* receiving care, before a penalty period can commence. 42 U.S.C. 1396p (c)(1)(D)(ii).

Recently, in an unexpected turn, DSS has now swung the other way and has begun determining that all loans between parents and children are gifts and are made out of "love and affection" *unless* there is a written promissory note. It is often the case in today's society that children lend their parents money. Typical of the boomer generation, the children have reached a higher socioeconomic level than their parents. That is, after all, one tenet of the "American Dream." Further, as the parents retire with a "fixed income," extraordinary expenses become difficult to manage, such as home repairs, a family vacation, etc. It is often the case that the children loan the parents money – sometimes a one-time lump sum, sometimes a monthly stream. Either scenario is problematic for Medicaid purposes unless the arrangement was reduced to writing, which is typically *not* the case.

This complete about-face is just the latest manifestation of push back at the state and county level in opposition to the promissory note asset protection strategy. And it most assuredly won't be the last.

Note: Jennifer B. Cona, Esq. is the managing partner of Genser Dubow Genser & Cona, LLP, located in Melville. Ms. Cona practices exclusively in the field of Elder Law, including asset protection planning, Medicaid planning, representation in Fair Hearings and Article 78 proceedings, estate planning, trust and estate administration, guardianships and estate litigation. For further information, phone (631)390-5000 or visit www.genserlaw.com.

Medicaid Managed Care For Senior Citizens *(Continued from page 10)*

Certain services which are not provided by MMCO's will still be provided to Medicaid recipients:

(i) Day treatment services for people with developmental disabilities;
(ii) Medicaid case management for people with developmental disabilities;
(iii) Early intervention for disabled infants and toddlers;
(iv) Services for children with handicapping conditions;
(v) Day treatment mental health services for children with handicapping conditions;
(vi) Long term services provided to developmentally disabled individuals at licensed facilities;
(vii) TB directly observed therapy;
(viii) ADS adult day health care; and
(ix) HIV case management.

Requesting an exemption or exclusion

A Medicaid recipient may request an enrollment exemption or exclusion from the local social services district. The request may be made prior to or after enrollment. The local district must review supporting documentation and make a written determination. The recipient has a right of fair hearing upon receipt of an adverse determination. Expedited enrollment can be requested in certain instances. 18 NYCRR §360-10.5(d).

Good cause to change or disenroll from MMCO

If there is more than one available MMCO, a recipient can request permission to disenroll or change providers during the 6-month lock in period, if the recipient shows the MMCO has failed to furnish accessible and appropriate medical care. Unless an expedited decision is requested, the social services district must reach a determination by the first day of the second month after the request is made or else the request will be considered approved. Denial must be in writing, explain the reason for the denial, and advise the recipient of his or her fair hearing rights. 18 NYCRR §360-10.6

Good cause to change primary care providers

The MMCO must allow the recipient to change primary care practitioners (PCP), without cause, within 30 days of the recipient's first appointment. After that, the recipient must be able to change at least every six months, without cause. If, however, the PCP has failed to furnish accessible and appropriate medical care, the enrollee disagrees with the plan of care, there is a language barrier, there is a significant change in the PCP's practice, a change for good cause shown can be requested. This request must be submitted to the MMCO. 18 NYCRR §360-10.7

Fair Hearing rights

An enrollee has the right to a fair hearing if the social services district has (i) denied an exclusion or exemption from mandatory enrollment; (ii) denied a request to disenroll or change MMCO's; (iii) required an enrollee to disenroll; (iv) a referral or service request has been denied or (v) the MMCO's utilization review agent reached an unfavorable determination regarding the medical necessity for services**.** There is no right of fair hearing if the sole issue is a matter of federal or state law, an approved change in the MMCO contract, an MMCO act that is not considered an "action," or certain matters that have not been submitted to the MMCO for a determination. 18 NYCRR §360-10.8 Medicaid recipients enrolled in Medicaid Advantage programs have the right to appeal actions through the MMCO's internal process (with fair hearing rights) or through the Medicare Advantage appeal process (no fair hearing rights). Aid continuing, pending the fair hearing, may be available upon request of the enrollee.

The Medicaid Redesign Team changes are being implemented in order to cut costs and increase efficiency in the Medicaid program. No one denies the need for both. Medicaid has become an expensive patchwork quilt of programs, waivers, regulations and laws. The outstanding question is whether mandatory managed care will achieve any of the goals without sacrificing quality of care for our most vulnerable population. Mandatory managed care seems to have added another layer of bureaucracy on to the Medicaid home care process, while leaving the local social service districts with the job of policing the performance of private companies. The jury is still out on this matter.

Note: Janna P. Visconti is a member of Grabie & Grabie, LLP, and concentrates her practice in the areas of Trusts, Estates, Elder Law and Medicaid qualification. She is the current Co-Chair of the Suffolk County Bar Association Elder Law Committee, Vice President of RSVP (Retired Senior Volunteer Program), Chair of RSVP's Strategic Planning Committee, and a member of the Public Issues Committee of the Long Island Council of Churches. She is a frequent speaker on topics such as Elder Law, Medicaid, Estate Planning, and Asset Protection for Seniors.

They Would Always Have Paris *(Continued from page 22)*

enlarged, by their time there. As to each of them, what was at work here was Thomas Hardy's "Lyonesse": The traveler had been transformed.

Certainly transformed was Elizabeth Blackwell, the first American woman to have become a medical doctor. In Paris she received her clinical training at *La Maternite*, the world's leading maternity hospital. It was there that she gained her invaluable experience in obstetrics; of more lasting importance, it was there that she gained the confidence to later found the New York Infirmary and College for Women, a hospital run entirely by women.

William Wells Brown was himself transformed and, in turn, was to be an agent of transformation. Brown, a fugitive slave and ardent abolitionist, came to Paris, where he was a principal speaker at an international peace conference presided over by Victor Hugo. Brown's stirring speech—"we shall break…in pieces every yoke of bondage and let all the oppressed go free"—couldn't be uttered in the United States, he reminded his audience, without risk to his life. In that audience was Charles Sumner, a New England lawyer who was broadening his academic education by eclectically attending diverse lectures at the Sorbonne; so permanently affected was Sumner by Brown's oratory, that he would later, as a United States Senator from Massachusetts, place himself at the forefront of the abolitionist movement.

There was a reciprocity. Just as these Americans gained, so too did the French gain; they arrived at an understanding, an appreciation, of the sensitive, open American. Collateral to their main duty, the hard task of being diligent students, these Americans acted as virtual goodwill ambassadors, disabusing their hosts of any preconceived notion of the American as barbarian.

Probably no American impressed the French more than did an actual ambassador, Minister to France Elihu Washburne. President U.S. Grant made many missteps in his appointments, but they were largely offset by the man he selected to represent our interests in France. Washburne, a lawyer and erstwhile congressman from Illinois, was appointed to his ministerial post by Grant in 1868. Having recently recovered from a near-fatal "congestive chill," likely pneumonia, Washburne happily accepted the position, anticipating some "quiet and repose" in the French capital.

Some quiet! Some repose! Within a short time of Washburne's arrival in Paris, the Franco-Prussian war erupted. The city was besieged for 131 days, under constant bombardment from Prussian cannon; its population deprived of food and water; its gas lines cut—thus extinguishing, among other things, the source of light for the City of Light. Its American population sought its minister's aid for a safe, efficient departure from the country; its German population turned to that same man for safe-conduct passes to the German lines. The city was besieged; Washburne was besieged. Alone among the ambassadors of major powers in Paris, he remained at his post. "I would deem it," he wrote to Secretary of State Hamilton Fish,

> "a species of cowardice to avail myself of my diplomatic privilege to depart and leave my *nationaux* behind me to care for themselves."

As to the French, Washburne's efforts measured no less than those he exerted on behalf of his countrymen and the Parisian Germans; through those efforts, the American Ambulance, a field hospital, was set up to care for the wounded as they streamed in from the outskirts of the city. Washburne and his staff were a palliative presence, tending to the wounded, notifying their families of their whereabouts and condition. Succor given equally to his countrymen, his hosts, his hosts' enemies—this, then, was the action that defined Washburne during the war. This was a diplomat; this was an ambassador!

While it could be argued that Washburne, by dint of his position, was duty-bound to remain in the besieged city, medical student Mary Putnam was under so such constraint. Throughout the duration of the siege, she remained steadfastly with her landlords, a couple whom she had grown to love. On those nights when shells burst nearby, driving the three of them from their home, the free-thinking Putnam, along with her hosts and some 500 other Parisians took shelter among the spirits of the great freethinkers. In the vast crypt beneath the Pantheon, where the heroes of French liberty were buried, Putnam couldn't help but note the aptness of her setting. "It was singularly dramatic," she would later write, "the tombs of Voltaire and Rousseau sheltering the victims of the Prussian barbarians…."

These, then, are but some of *les personnages* profiled by McCullough in his splendid, comprehensive work. His ambition matches that of his subjects; with equal affection, he evokes both a broad range of successful people and the site central to their success. Notwithstanding that it has a legal gloss, a delimiting Latin clause must be acknowledged by and govern the reviewer of the high literature, the all-encompassing volume that is *The Greater Journey*: "*Expressio unius est exclusio alterius*—the express mention of one thing excludes all others. While all of McCullough's subjects are compelling—none more so than the City of Light itself—only some are selected for, thus many are excluded from, a review. Thus, inasmuch as a review can encapsulate but a sampling of them, can only offer some gold coins from the treasure found in the trove that is *The Greater Journey*, I return to Holmes and his colleagues.

They are representative of—not superior to—all of those who grew in time, all of those who grow before the eyes of the reader of McCullough's book; they would all come back enriched, and in their turn enrich our side of the Atlantic. Indeed, as the result of the enhancing influence of Holmes and his cohort, American medical education would become inferior to none; consequently, what had been a flood of medical students to Paris in Holmes's time would evaporate to a trickle at century's end.

As a young man, Holmes wrote of having "drawn closer the ties of social relations with the best formed minds I have been able to find from my own country." Some of those ties would be life-long ones, binding together Holmes and his fellow Bostonians Mason Warren and Henry Bowditch, all of whom would go on to successful careers. Bowditch would become a professor of clinical medicine at Harvard; would specialize in the study and treatment of tuberculosis; would publish "The Young Stethoscopist"—a work used by medical students for half a century; and would devote himself to public health, in which field his influence was to be nationwide. Mason Warren became a successful surgeon and was a pioneer in the employment of ether during surgery. Holmes was the beloved professor of anatomy at the Harvard Medical School for 36 years, and for part of that time, served as dean of the school.

All three made successful marriages and begat children, the most illustrious having been Holmes's son and namesake, who would attain the bench of the United States Supreme Court. They would remain colleagues and friends for the rest of their lives, in their later years reminiscing, lingering together over the moveable feast that had been and remained their principal nourishment, Paris. In his dotage, Holmes attended a lecture given by Warren, and in a follow-up note, he expressed regret that his hearing was now imperfect. "I suspect," he wrote,

> "that my ear-drums may not be quite as tightly corded up as in the days when we saw our young faces in the Burgundy of the *Trois Freres*."

Having grown old and infirm, Holmes and his two friends would nonetheless—like Ilsa and Rick—always have Paris.

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. He has made numerous trips to Quebec, to France, and to the French Department of Martinique. He remains an unreconstructed Francophile.

SUFFOLK ACADEMY OF LAW

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MID-TO-LATE 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 will be presented during February and March 2012.

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 SCBA website (www.scba.org – Internet CLE)**.**

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

Matinee

ELDER LAW UPDATE

Tuesday, February 14, 2012

Annual overview of all that is new and significant in the area by the SCBA's own elder law guru.
Presenters: **George L. Roach, Esq.** (Grabie & Grabie, LLP // Former SCBA President // Former Academy Dean)
Time: 2:00 – 5:00 p.m. (Sign-in from 1:30 p.m.) **Location:** SCBA Center **Refreshments:** Valentine's Day Snacks
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Non-Transitional and Transitional]

MATRIMONIAL LAW UPDATE

Monday, March 26, 2012

Annual overview of developments in case and statutory law affecting custody, visitation, child support, maintenance, pendente lite, equitable distribution, etc., etc.
Presenters: **Stephen Gassman, Esq.** (Gassman, Balamonte, Betts & Tannenbaum, P.C. – Garden City)
Time: 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Non-Transitional and Transitional]

SERIES

MATRIMONIAL MONDAYS

Three Evening Seminars – Mondays, March 5, 12, 19

This annual series provides new perspectives on key issues in matrimonial practice. You may enroll in individual programs or SAVE by registering for the trio.

MAINTENANCE, MAINTENANCE, WHERE ART THOU?

Monday, March 5, 2012

Developments in maintenance awards after No-Fault discussed by a knowledgeable faculty.
Faculty: **Hon. Carol MacKenzie; Jeffrey Horn, Esq.; Lee Rosenberg, Esq.; Florence Fass, Esq.**
Coordinator: **Debra Rubin, Esq.**

PREPARATION & TRIAL EXAMINATION OF A CUSTODY EXPERT

Monday, March 12, 2012

Well-known matrimonial attorney discusses and demonstrates key issues related to testimony of custody experts.
Faculty: **Tim Tippins, Esq.; Dr. Jeffrey Wittman**
Coordinator: **Linda A. Kurtzberg, Esq.**

TO VALUE OR NOT TO VALUE?

Monday, March 19, 2012

Valuations in the context of a divorce analyzed from key perspectives.
Faculty: **Hon. John Bivona; Hon. James Quinn; Howard Leff, Esq.; Vincent Stempel, Esq.; Representative of Brisbane Consulting** *Coordinator:* **Arthur E. Shulman, Esq.**
Each Session:
Time: 6:00–9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Lunch & Learn Series

REAL ESTATE PRACTICE

Three Seminars – Thursdays, March 15; March 29; April 5

This trio covers key issues in representing clients in real estate deals. Each program stands alone, but you will derive a tuition discount by enrolling in all three.

REPRESENTING BUYERS

Thursday, March 15, 2012

Faculty: **Lita Smith-Mines, Esq.; Frederick Eisenbud, Esq.; Peter Walsh, Esq.; Robert Steinert, Esq.; Vincent Danzi, Esq**
Topics
- Who is the client? (The perils of "relationships" with brokers and lenders)
- Advising clients pre-contract about inspection reports, surveys, COs, pros and cons of buying foreclosures or short sales; perils of buying before selling
- Environmental Issues to spot and address
- Contract clauses to insist upon
- Red flagging issues in the title report
- RESPA issues (the binding GFE, HUD settlement statements; closing cost estimate tolerances)
- More....

REPRESENTING SELLERS

Thursday, March 29, 2012

Faculty:: **Lita Smith-Mines, Esq.; Peter Walsh, Esq.; Peter Tamsen, Esq.; Audrey Bloom, Esq. ; Robert Steinert, Esq.; Vincent Danzi, Esq**
Topics
- Who is the client? (The perils of "relationships" with brokers and lenders)
- How to structure a buy and sell for the same client
- Contract clauses to insist upon
- Property Disclosure Law; Seller's Concession
- Mortgage commitments
- Advising a distressed homeowner (advantages/disadvantages/options re bankruptcy, foreclosure, mortgage modifications)
- Short sales (attorney's role; paperwork)
- Clearing title issues from seller's perspective
- RESPA issues (choosing/steering title company; RESPA disclosures for the seller)
- Post-closing escrow and possession agreements

A PRACTICAL GUIDE TO RESPA

Thursday, April 5, 2012

Faculty:: **Vincent Danzi, Esq.**
Topics
- Overview of the Real Estate Settlement Procedures Act (RESPA)
- Main areas of application: settlement (of mortgage loans); servicing (of mortgage loans); solicitation (of settlement services business)
- Transfer of enforcement from HUD to the Consumer Financial Protection Board
- RESPA's relationship with state law
- More....

Each Session:
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)

CONFERENCES & SEMINARS

Lunch 'n Learn

FUNDAMENTAL CONCEPTS IN DRAFTING CONTRACTS: What Most Attorneys Fail to Consider

Wednesday, February 1, 2012

The reduction to writing of an agreed-upon understanding among parties can sometimes be viewed as a cursory step in formalizing a business relationship. Yet the manner in which concepts are expressed on a page are often as important as the concepts themselves. This course, taught by a prestigious guest presenter, is designed to convey fundamental – but often unconsidered – principles to assist both newly admitted and seasoned attorneys with drafting, analyzing, and interpreting contracts. Topics include:
- the importance of language in contacts;
- categories of contract language (including language of performance, obligations, prohibitions, discretionary language, representations, acknowledgments, and language of policy);
- the distinction between "shall," "will," and "must";
- use of the active and passive voice; and
- legal archaisms

Presenter: **Vincent R. Martorana, Esq.** *(Reed Smith, LLP – NYC)*
Time: 12:30–2:10 p.m. (Sign-in from Noon) **Location:** SCBA Center **Refreshments:** Lunch
MCLE: 2 Hours (skills) [Non-Transitional and Transitional]

Lunch 'n Learn

SCPA 2211 EXAMINATIONS

Tuesday, February 7, 2012

This essential program for attorneys who handle wills and estates will explore the fine points of pre-objection examinations in an estate or trust accounting proceeding. You will gain not only pointers for representing both petitioners and objectants, but important insights on accounting procedures and fiduciary responsibilities. Specific examples will enhance this succinct presentation.
Presenters: **Robert M. Harper, Esq.,** and **Jaclene D'Agostino, Esq.** *(Farrell Fritz, LLP)*
Time: 12:30–2:10 p.m. (Sign-in from Noon) **Location:** SCBA Center **Refreshments:** Lunch
MCLE: 2 Hours (professional practice) [Non-Transitional and Transitional]

East End

CRIMINAL LAW & PROCEDURE UPDATE

Wednesday, February 8, 2012

This review of key developments in decisional and statutory law – with relevant practical pointers interspersed – will benefit any attorney who handles criminal matters. The presentation, highlighting the most important matters, is an abridged and updated version of last fall's Criminal Law Update.
Presenters: **Hon. Mark Cohen** *(NYS Supreme Court)* and **Kent Moston, Esq. (**Nassau Legal Aid Appeals Bureau)
Moderator: **William T. Ferris, Esq.** (Bracken Margolin Besunder, LLP // SCBA Vice President)
Time: 5:00–7:00 p.m. (Sign-in from 4:30) **Location:** Seasons of Southampton (15 Prospect St.-Southampton) **Refreshments:** Light supper
MCLE: 2 Hours (professional practice) [Non-Transitional and Transitional]

THE GRIEVANCE PROCESS IN THE 10TH JUDICIAL DISTRICT

Thursday, February 9, 2012

How the process works in the 10th JD; how to respond to a grievance; and grievance defenses are among the important topics covered at this three-hour ethics seminar. The prestigious faculty will relate true cautionary tales and engage the audience in an interactive discussion on what respondents did wrong and what they might have done to produce a better outcome. Spotting conflicts, handling escrow funds, post-closing procedures, and other areas that sometimes lead even the best intentioned into troubled waters will be addressed. Subtitled, "*When It Gets to the*

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Papers, It's Too Late," this program is a true must-attend for virtually *all* practitioners.
Presenters: **Robert Green, Esq.** (Chief Counsel, 10th J.D. Grievance Committee); **Mitchell T. Borkowsky, Esq.** (Deputy Chief Counsel); **Harvey B. Besunder, Esq.; Marian Rice, Esq.**
Coordinators: **Hon. John Kelly** (Academy Dean); **Patricia Meisenheimer, Esq.** (Co-Chair, SCBA Ethics Committee)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 Hours (ethics) [Non-Transitional and Transitional]

Developed by SCBA Labor & Employment Law Committee

22nd ANNUAL LAW IN THE WORK-PLACE CONFERENCE

Friday, February 10, 2012

With an emphasis on **employment discrimination,** this program is a must-attend for attorneys who want to be sure their own firm's practices are in keeping with new legal developments and for their business and municipal clients. You won't receive better insight and guidance than that dispensed by the "Who's Who in Employment Law" faculty assembled for this full-day conference.
Faculty: **Sima Ali, Esq.; John Bauer, Esq.; Sharon Berlin, Esq.; David M. Cohen, Esq.; Brian S. Conneely, Esq.; John M. Crotty, Esq.; Dawn Davidson Drantch, Esq.; Erica Garay, Esq.; Gina Grath, Esq.; Troy Kessler, Esq.; Philip L. Maier, Esq.** (PERB); **Scott M. Mishkin, Esq.; Brian Murphy, Esq.; Barry Peek, Esq.; Kathryn J. Russo, Esq.; Robert D. Rose, Esq.** (EEOC); **Hon. Kathryn Tomlinson** (EDNY)
Agenda:
- **Keynote Address** (Rose)
- **Panel Discussions:** Retaliation Claims in Private and Publc Sector; ADA/Religious Accommodations; Social Media
- **Public Sector Update** (Crotty)
- **Private Sector Update** (Conneely)
- **Luncheon Address** (J. Tomlinson)
- **Workshops – Private Sector** (Resolving Discrimination Disputes); **Public Sector** (Workplace Injuries; 2 % Cap; More)
- **Ethical Issues in Employment Investigations and Litigations**

Conference Chairs: **Sima Ali** and **Brian Conneely**
Time: 9:00 a.m.–4:00 p.m. (Sign-in from 8:30 a.m.) **Location:** SCBA Center **Refreshments:** Continental Breakfast & Lunch Buffet
MCLE: 7 Hours (6 prof. practice; 1 ethics) [Non-Transitional and Transitional]

HANDLING SLIP & FALL CASES

Thursday, February 16, 2012

Investigation of slip, trip, and fall claims usually address the *cause* of the slip, trip or fall and claimed injuries. Cases are decided upon the specific facts plus the claimant's behavior. A number of elements play into slip and fall litigation or settlements: engineering, biomechanics, human factors, and the environment (e.g., building codes, weather, illumination). This program – featuring an attorney and a mechanical engineer with an intensive background in biomechanics – will address biomechanical injury mechanisms resulting from slip, trip and fall and how slip, trip, and fall may – or may not – be the proximate cause of claimed injuries. It is a must-attend for both plaintiff's and defense lawyers.
Presenters: **Gail Ritzert, Esq.** (Havkins, Rosenfeld, Ritzert & Varriale)**; Timothy G. Joganich, M.S., C.H.F.P.** *(ARCCA)*
Time: 6:00–9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 Hours (1.5 professional practice; 1.5 skills) [Non-Transitional and Transitional]

WILL CONTESTS: A Primer

Tuesday, March 6, 2012

This basic-to-intermediate presentation covers all the key factors involved in a will contest. Topics include:
- Who Can Contest a Will & Grounds Upon Which to Contest a Will
- The "I Want to Contest a Will" Consultation & Will Contest Retainer Agreements
- 1404 Examinations & Pre-Objection Discovery
- Objections to Probate; Post-Objection Discovery; and Summary Judgment Motions
- Orders Framing Issues/Statement of Issues
- Pre-Trial Conference; Potential Settlement; and the Will Contest Trial

Presenters: **Karen Dunne, Esq.** (Manorville); **Lori A. Sullivan, Esq.** (Jaspan Schlesinger); **Bill P. Parkas, Esq.** (McCoyd, Parkas & Ronan, LLP); **Robert M. Harper, Esq.** (Farrell Fritz, PC)
Coordinator: **Sheryl L. Randazzo, Esq.** (Randazzo & Randazzo, LLP – Huntington)
Time: 6:00–9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 Hours (1.5 professional practice; 1skills; 0.5 ethics) [Non-Transitional and Transitional]

Transitional Training for New Lawyers

BRIDGE-THE-GAP "WEEKEND"

Friday, March 23, and Saturday, March 24, 2012

This two day training program provides a full year's worth of credits for newly admitted attorneys. All of the key bread-and butter practice areas are covered by a skilled, accessible faculty of judges and practitioners. Enrollment in the full program is recommended, but either day may be taken alone.
DAY ONE (FRIDAY) – EMPHASIS ON TRANSACTIONAL PRACTICE
- **Everyday Ethics - Barry Warren, Esq., Harvey Besunder, Esq., Barry Smolowitz, Esq.**
- **Residential Real Estate - Lita Smith-MInes, Esq.**
- **Foreclosure Basics - Barry Lites, Esq.**
- **Bankruptcy Basics - Richard Stern, Esq.**
- **Environmental Law - Frederick Eisenbud, Esq.**
- **Small Business Formation - John Calcagni, Esq.**
- **Wills, Trusts & Estates - Richard Weinblatt, Esq.**
- **Elder Law - George Roach, Esq.**

Plus: **Luncheon Address by Hon. H. Patrick Leis** (Suffolk Administrative Judge)
Time: 8:00 a.m. – 4:45 p.m. (Sign-in from 7:45 a.m.) **Location:** SCBA Center **Refreshments:** Continental Breakfast & Lunch Buffet
DAY TWO (SATURDAY) – EMPHASIS ON LITIGATION
- **Introduction to the Courts - Hon. Peter Mayor, Hon. Joan Genchi, Hon. James Flanagan**
- **Handling a Civil Case - Wende Doniger, Esq., A. Craig Purcell, Esq., James Fagan, Esq.**
- **Introduction to Federal Practice - D. Daniel Engstrand, Jr., Esq.**
- **Uncontested Matrimonial Actions - Arthur Shulman, Esq.**
- **New York Notary Law - Michael Isernia, Esq.**
- **Handling a Criminal Case - Stephen Kunken, Esq., and William Ferris, Esq.**

Time: 8:30 a.m. – 4:30 p.m. (Sign-in from 8:15 a.m.) **Location:** SCBA Center **Refreshments:** Continental Breakfast & Lunch Buffet
Planning Committee: Stephen Kunken and William Ferris (Chairs); Barry Smolowitz; Arthur Shulman; Wende Doniger; Diane Farrell
MCLE: 8 credits each day, for a total of 16 Transitional Credits (7-professional practice; 6-skills; 3-ethics)

FEBRUARY 2012 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788
Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588).
Register on-line (www.scba.org).

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COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
UPDATES										
Elder Law Update	$125	$75	$150	Yes	Yes	3 cpn	3 cpn	$125	$120	$25
Matrimonial Law Update	$125	$75	$140	Yes	Yes	3 cpn	3 cpn	$125	$120	$25
SERIES										
Matrimonial Mondays Series	$235	$110	$285	Yes	3 uses	8 cpn	8 cpn	$250	$245	$45
1. Maintenance	$95	$50	$110	Yes	1 use	3 cpn	3 cpn	$100	$95	$20
2. Custody Expert	$95	$50	$110	Yes	1 use	3 cpn	3 cpn	$100	$95	$20
3. Valuations	$95	$50	$110	Yes	1 use	3 cpn	3 cpn	$100	$95	$20
Real Estate Lunch Series	$125	$90	$200	Yes	3 uses	5 cpn	5 cpn	$200	$175	$40
1. Representing Buyers	$50	$35	$75	Yes	1 use	1 use	1 use	$75	$70	$20
2. Representing Sellers	$50	$35	$75	Yes	1 use	1 use	1 use	$75	$70	$20
3. RESPA	$50	$35	$75	Yes	1 use	1 use	1 use	$75	$70	$20
SEMINARS & CONFERENCES										
Concepts in Drafting Contracts	$75	$50	$95	Yes	1 use	2 cpn	2 cpn	$75	$70	$25
SCPA 2211 Examinations	$50	$30	$75	Yes	1 use	2 cpn	2 cpn	$75	$70	$25
East End: Criminal Update	$75	$55	$80	Yes	1 use	2 cpn	2 cpn	N./A	N/A	N/A
Grievance Process in 10th JD	$85	$45	$95	Yes	1 use	3 cpn	3 cpn	$85	$80	$15
Law in the Workplace Conference	$175	$65	$175	Yes	2 uses	6 cpns	6 cpns	$175	$150	$50
Slip & Fall	$75	$45	$95	Yes	1 use	3 cpns	3 cpns	$85	$80	$20
Will Contests	$95	$50	$110	Yes	1 use	3 cpns	3 cpns	$100	$95	$30
Bridge the Gap–adm. under 2 yrs.	$195	$195	$195	Yes	4 uses	14 cpn	12 cpn	N/A	N/A	N/A
Bridge the Gap–adm. over 2 yrs.	$300		$300							

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ACADEMY OF LAW NEWS

Find CLE Course Listings on pages 28-29

Words of Wisdom for the Workplace

22nd Annual Labor & Employment Law Conference takes place on February 10.

By Dorothy Paine Ceparano

The benefits of work, beyond providing sustenance, have been extolled by presidents and poets, playwrights and philosophers: "Far and away the best prize that life offers," stated Theodore Roosevelt, "is the chance to work hard at work worth doing." "The harder I work, the more I live," said George Bernard Shaw. "The sum of wisdom," Ralph Waldo Emerson wrote, "is that time is never lost that is devoted to work." And in an homage to work as the defining element of a man's life, George Sand declared, "It is his reward and his strength and his pleasure."

Work and its rewards, monetary and otherwise, are of utmost importance to most people in today's society. Hence, it is no wonder that the workplace functions as a microcosm of the greater world – with benefits, disadvantages, opportunities for cooperation, and conditions for conflict. As in the greater world, laws and rules are needed to ensure fairness, eliminate exploitation, and maintain a well-ordered existence. But like the world beyond, the workplace is ever changing, taking on new legal needs and invoking new legal nuances.

The **Annual Law in the Workplace Conference,** developed by the Academy and the SCBA's Labor and Employment Law Committee, explores legal developments in the world of work: new laws, new interpretations of old laws, new sources of disagreement, new ways to resolve disputes are discussed and dissected by an experienced and erudite faculty. For lawyers, human resource professionals, representatives of management and labor, business owners and municipal leaders, the conference is a place to meet and mingle, share thoughts and concerns, and, most important, gain information that will help them to make appropriate decisions.

The program is developed with both the private and the public sector workplace in mind. Each year the agenda, while covering an assortment of timely workplace issues, focuses on a topic that is deemed of particular importance.

This year's conference, scheduled for Friday, February 10, focuses on trends in **employment discrimination.** Much of the morning plenary session is devoted to the topic. Robert Rose, a supervisory trial attorney with the EEOC, will present the keynote address on trends in discrimination matters. And a panel discussion, featuring employment lawyers Sima Ali (*Ali Law Group, PC*), Sharon Berlin (*Lamb & Barnosky, PC*), Kathryn Russo (*Jackson Lewis, LLP*), and Dawn Davison Dranch (*Alcott HR Group*), will cover retaliation cases in the private and public sectors, First Amendment issues, ADA issues, religious accommodation, and discrimination claims using social media.

In the afternoon, the topic is taken up again with a luncheon address on "E-Discovery in Employment Discrimination Cases" by the Honorable Kathleen Tomlinson, United States District Judge with the Eastern District of New York.

Then, finally, a private sector break-out workshop following lunch deals with "Resolving Employment Discrimination Disputes." This session – featuring employment lawyers Troy Kessler (*Shulman Kessler, LLP*), John Bauer (*Littler Mendelson, PC.*), Erica Garay (*Meyer Suozzi, English & Klein, PC*), and Gina Grath (*Alan B. Pearl & Associates*) – will explore alternative dispute resolution procedures, including mediation and arbitration, and will address practical and legal aspects of settling employment discrimination claims and negotiating settlement agreements and terms.

The conference also includes a simultaneous breakout workshop directed toward the public sector. Three topics will be covered. David M. Cohen (*Cooper, Sapir & Cohen, PC*) will talk about "Workplace Injuries," in particular Civil Service Law Sections 71 and 72, the duty to accommodate (including light duty), and General Municipal Law Section 207-c. Philip Maier (*Regional Director, NYS Public Employment Relations Board*) will discuss the "Two Percent Cap," i.e., the Property Tax Cap, Chapter 97 of the Laws of 2011, which limits the increase of a tax levy imposed by a public employer, the effects on collective bargaining, and the impasse resolution process under the Taylor Law. Finally, Barry Peek (*Meyer Suozzi*) will address "Actions Taken in the Face of Fiscal Emergencies," including attempts to reject collective bargaining agreements in Chapter 9 bankruptcy cases and how such cases may impact pensions and post-retirement medical benefits.

An afternoon plenary session brings everyone – public and private sector attendees – back together for a discussion of "Ethical Issues Associated with Internal Employment Investigations and Disputes." In this session Brian Murphy (*Bond Schoenck and King, PLLC*) will talk about the ethical limits of common investigatory techniques, communicating with represented employees, protecting attorney-client privilege, and understanding the advocate-witness role. The lecture will be followed by a discussion of hypotheticals, joined by Scott M. Mishkin (*Islandia*) and Sima Ali, co-chair of the conference.

One of the most important elements of continuing legal education is the legal update, a presentation that covers what is new, what has changed, and how developments affect actions taken. Two updates anchor the Law in the Workplace conference: one on public sector labor law by John M. Crotty (*former deputy chair and counsel for the NYS Public Employment Board*) and one on private sector employment law by Brian S. Conneely, a partner with Rivkin Radler and the co-chair of the conference. Both presentations will review important case and statutory law and provide commentary on the practical significance of new developments.

The Law in the Workplace Conference will be held at the SCBA Center (560 Wheeler Road, Hauppauge) and includes, in addition to a packed agenda, complimentary continental breakfast and an upscale luncheon. A voluminous course book – distributed this year on an external hard-drive for the convenience of attendees and in an attempt to be conscientiously "green" – provides legal analyses and references that serve well into the future.

Tuition for the conference is $175 for the first registrant from an organization, and $150 for second and subsequent registrants. A 20 percent discount is offered to firms or municipalities that send four or more people to the program. Enrollment may be accomplished by calling the Academy at 631-234-5588, by utilizing the registration form in the CLE spread of this publication, or by sending back the tear-off from the brochure or reminder flier that have been disseminated to SCBA members, businesses, and municipalities.

The morning plenary session of the conference will also be available as a

(Continued on page 31)

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.

February

1	Wednesday	**Fundamental Concepts in Drafting Contracts.** 12:30–2:15 p.m. Sign-in and lunch from noon.
3	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
7	Tuesday	**SCPA 2211 Examinations.** 12:30–2:10 p.m. Sign-in and lunch from noon.
8	Wednesday	***East End:*** **Criminal Law Update** (Hon. Mark Cohen and Kent Moston). 5–7 p.m. at Seasons in Southampton. Sign-in and light supper from 4:30 p.m.
9	Thursday	**The Grievance Process in the 10th Judicial District.** 6–9 p.m. Sign-in and light supper from 5:30.
10	Friday	**Annual Law in the Workplace Conference.** 9:00 a.m.-4:00 p.m. Sign-in and continental breakfast from 8:30 a.m. Buffet luncheon.
14	Tuesday	**Elder Law Update** (George Roach). Matinee–2–5 p.m. Valentine's Day snacks from 1:30 p.m.
16	Thursday	**Handling Slip & Fall Cases.** 6–9 p.m. Sign-in and light supper from 5:30
28	Tuesday	**"Courting Justice."** Free film and (non-CLE) program, presented with the SCBA, on the role of female judges in South Africa's new democracy formed after the end of apartheid. 6:00 p.m. Refreshments.

March

2	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
5	Monday	**Matrimonial Mondays: Maintenance.** 6–9 p.m. Sign-in and light supper from 5:30
6	Tuesday	**Will Contests.** 6–9 p.m. Sign-in and light supper from 5:30
12	Monday	**Overcoming Procrastination.** 12:30–2:10 p.m. Sign-in and lunch from noon.
12	Monday	**Matrimonial Mondays: Preparation & Trial Examination of a Custody Expert.** 6–9 p.m. Sign-in and light supper from 5:30
15	Thursday	**Real Estate Series: Representing Buyers.** 12:30–2:10 p.m. Sign-in and lunch from noon.
19	Monday	**Matrimonial Mondays: To Value or Not to Value?** 6–9 p.m. Sign-in and light supper from 5:30
20	Tuesday	**The Florida Connection (Elder Law).** Time TBA
23	Friday	**Bridge-the-Gap Weekend for New Lawyers.** Day One: Transactional Practice. 8:00 a.m.–4:45 p.m.
24	Saturday	**Bridge-the-Gap Weekend for New Lawyers.** Day Two: Litigation. 8:00 a.m.–4:45 p.m.
26	Monday	**Matrimonial Update** (Steven Gassman). 6–9 p.m. Sign-in and light supper from 5:30
29	Thursday	**Real Estate Series: Representing Sellers.** 12:30–2:10 p.m. Sign-in and lunch from noon.

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

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"Courting Justice" – a Special, Complimentary Presentation for SCBA Members and Guests

In South Africa under apartheid, black women, subject to both racial and gender discrimination, had even fewer rights than black men. They had little access to education and couldn't own property. Because of the "pass-laws," they were forced to stay in rural areas and the only available jobs – if they could get them – were as domestic or agricultural workers at extremely low wages.

When apartheid was overthrown in 1994, things changed: along with free elections, a new constitution, and an infant democracy came new hopes and new opportunities. Possibilities for women, and for the greater South African society, underwent – and are still undergoing – a transformation.

On the evening of Tuesday, February 28, 2012 (6:00 p.m., with refreshments from 5:45), the Suffolk County Bar Association and the Suffolk Academy of Law will co-host the screening of a special film – ***Courting Justice –*** that tells the story of women who became judges in South Africa's fledgling democracy. The evening is organized by Suffolk District Court Judge William Ford and features, as guest speaker, Ruth B. Cowan, creator of the film. There is no charge to attend, but pre-registration is requested.

The post-apartheid judicial system in South Africa has four distinct levels. The Constitutional Court, the highest, makes judgments based on the South African Constitution, the supreme law of the land. The court is charged with guaranteeing the basic rights and freedoms of all persons. Judgments by the Constitutional Court are binding on other branches of government, including the parliament, presidency, police force, and all courts. The Supreme Court of Appeal is the highest court for matters not involving the constitution. Below that court are the Superior Courts of Law (general jurisdiction over defined areas) and Magistrates' Courts (courts of first instance).

In the film, we meet judges from all the court levels and learn how their personal histories – as well as the general history of pre- and post-apartheid South Africa – inform how they see their roles in the judicial system. Their pride and hopes are revealed, along with their ongoing need to prove themselves in what is still a male-dominated legal world.

One of the judges in South Africa's developing court system.

For lawyers and judges here in the United States, the stories of those for whom democracy and human rights are a new phenomenon is truly inspiring. We hope you will join in what should be a memorable evening. This is a non-MCLE event, but one that will surely re-new your dedication to and belief in the role of law as a transcending force in the growth of human compassion and dignity.

Please R.S.V.P. by calling the Academy at 631-234-5588. Family members and friends are welcome to accompany SCBA members. – Dorothy Paine Ceparano

Employment Law Conference *(Continued from page 30)*

real-time webcast, which may be accessed by going to the MCLE link on the SCBA website (www.scba.org).The full conference – including *both* breakout workshops and the luncheon address – will be available as an audio CD or DVD recording.

The conference chairs, Ms. Ali and Mr. Conneely, with the members of the SCBA Labor and Employment Law Committee, have put a year's worth of effort into planning the 2012 Law in the Workplace Conference. They have developed a timely and relevant agenda and have attracted a faculty drawn from the best and the brightest in the employment law field. It is safe to say that lawyers who manage firms or handle employment cases of any kind will find the program of utmost value. It is also hoped that Academy constituents will let their clients or acquaintances in businesses and municipalities know about this important event and urge them to attend.

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

Offshore Voluntary Disclosure *(Continued from page 30)*

OVDI program which may be longer than the length of the taxpayer's statutory exposure. This can impose the obligation to voluntarily and potentially self-assess a higher tax/penalty cost than the IRS could otherwise enforce and collect.

U.S. citizen taxpayers are subject to tax on their worldwide income. Even children born of U.S. citizens, residing abroad, who have never set foot on American soil, are also subject to the U.S. filing and Foreign Bank Reporting provisions. They too had been required to surrender a percentage of their assets to re-emerge from the shadows of non-compliance under the OVDI regime. In response to the public outcry, the IRS has attempted to carve out an exception for those taxpayers whom are (in their view) the least culpable of wrongful conduct. Namely, expatriate citizens ensnared in the Foreign Reporting tax trap. This past December, the IRS issued a Fact Sheet setting forth parameters of potential relief for US and dual citizens residing abroad. [2]

Upon first glance at the IRS FAQ web page for offshore voluntary disclosures, one would notice that on the top are the dates of additions to the questions but the list does not reflect all IRS shifts in interpretation. Due to the oftentimes lack of appeal rights afforded to amnesty applications, the potential for due process violations are raised - particularly when taxpayers set forth their submission based upon FAQ guidance that can be adjusted, not statutorily, or even through evolution of case law, but rather, with the click of a mouse in an IRS office. Absent withdrawal from the disclosure process, an entire body of tax law grounded in precedent, statute and/or regulations can be trumped by a nebulously drafted and transiently posted web-based FAQ. This can create the appearance that taxpayers have failed to comply with OVDI corrective measures simply because the original web page delineating them is no longer visible now.

In these difficult economic times, people are calling for action. They want government to run fast but they don't want it to run amok. Even for voluntary disclosures, the IRS should respect due process procedures to insure the preservation of taxpayer rights. After all, OVDI enforcement units must abide by the same IRS motto: "to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."

Note: Eric L. Morgenthal, Esq., CPA, M.S. (Taxation) maintains his Tax Law practice in Melville, NY specializing solely in International, Federal and New York State Tax Controversy Matters. He currently serves as Co-Chair of the Suffolk County Bar Association Taxation Law Committee, is a member of the Nassau County Bar Association Tax Law Committee, New York State Bar Association Tax Section, the American Institute of Certified Public Accountants and the American Institute of Attorney-CPA's IRS Liaison Committee. Comments can be directed to his firm at info@litaxlaw.com.

1. Pursuant to IRC Sections 7803 and 7805(a), Congress has bestowed the power to the Treasury or their delegate (the IRS) to administer the tax laws.
2. IRS Fact Sheet 2011-13