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INSIDE...
FEBRUARY 2016

Legal Articles

Commission Green Lights Pay Raises for Judges

By Laura Lane

At one time state Supreme Court justices' salaries were in line with the salary that federal district court justices received. That all changed in 1999 when state Supreme Court justices' salaries were frozen at $136,700, and although federal justices continued to receive pay raises, state Supreme Court justices did not for 13 years, including even cost of living raises. And because state Supreme Court justices' salaries are the benchmark for other state trial judges, they didn't receive a salary adjustment either.

Although the justices did receive a raise in 2011, as did other state trial judges, it was phased in over a four-year period. And Supreme Court justices continued to receive less than the federal justices.

The salary disparity will change on April 1, 2016, due to a decision by members of the New York State Commission on Legislative, Judicial & Executive Compensation (the Commission). They released a final report on Dec. 14, 2015 recommending a salary increase over the next four years for New York state judges.

Justice William J. Condon

The Commission's decisions for the amount, and the time frame for dispersal is law, unless the state Senate or Assembly amends it by passing a bill, which would require Gov. Cuomo's signature before March 31.

Several different judicial associations and bar groups, have supported a salary increase, including the SCBA.

"Our association is happy to see that the governor, Legislature and the OCA believe that it's important in order to attract a high quality judiciary that they pay judges a salary that is commensurate with the private sector," said SCBA

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SCBA Hosts Annual Judicial Swearing-In & Robing Ceremony

Photo by Ron Pacchiana

Presiding Justice C. Randall Hinrichs administered the oath of office to Supreme Court Justices, from left, Hon. Robert F. Quinlan, Hon. Howard H. Heckman, Jr., and Hon. William G. Ford. See story on page 6 and more photos on page 17.

PRESIDENT'S MESSAGE

Time Passes Quickly

By Donna England

Donna England

The time passes so quickly. Past presidents and colleagues often tell me that by now "your time is half over!" Well, what I say is, I have so much more to do before my time is over.

I am so proud that our Association is the sponsor and host of the Judicial Swearing-In & Robing Ceremony each January. It is such a proud day for us to see a new class of justices and judges sworn in. In addition, I am delighted to learn how these new judges got to this new chapter in their lives, as well as who is important in their lives.

Our Attorney for the Child Task Force is close to generating a report in which the task force has reviewed the current Rules of the Chief Judge for the Law Guardians and the New York State Bar Association Standards for Attorneys Representing Children, as amended January 2015. The committee has drafted a proposed amendment to 22 NYCRR 7.2 (d) (3), which would more effectively reflect the scientific and psychological reality of the children that the attorneys represent. The amendment would provide that an Attorney for the Child may substitute the child's judgment for knowing, voluntary and considered judgment not only when the child's wishes would result in a substantial risk of imminent, serious harm to the child, but also var-

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BAR EVENTS

Cohalan Cares for Kids
Benefiting EAC Network's Suffolk County Children's Center at Cohalan Court
Thursday, March 3, at 6 to 8 p.m.
SCBA Bar Center
This fundraiser benefits Suffolk County Children's Center at the Cohalan Court Company in Islip. Tickets $60 pp or $100 for two. For further information call the bar center.

Peter Sweisgood Dinner
Hosted by Lawyers Helping Lawyers Committee
Thursday, April 7, at 6 p.m.
Watermill Caterers, Smithtown
For further information, please contact the Bar.

Judicial Swearing In and Robing Ceremony

See story on page 6
Photos on page 17

Suffolk County Bar Association

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

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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

02 Tuesday	Joint Committee Meeting of the Commercial & Corporate Law & Appellate Practice Committees, 6:00 pm, EBT Room
03 Wednesday	Nominating Committee, 6:00 pm, Board Room
08 Monday	Executive Committee, 5:30 pm, Board Room
10 Wednesday	Education Law Committee, 12:30 pm, Board Room
10 Wednesday	TPVA Meeting, 5:30 pm, EBT Room
10 Wednesday	Landlord Tenant, 6:00 pm, Board Room
11 Thursday	Leadership Development Committee, 6:00 pm, Board Room
12 Friday	Holiday – Office Closed
15 Monday	Holiday – Office Closed
22 Monday	Board of Directors Meeting, 5:30 pm, Board Room
23 Tuesday	Surrogate's Court, 6:00 pm, Board Room
23 Tuesday	Young Lawyers, 6:00 pm, EBT Room

MARCH

01 Monday	Appellate Practice, 6:00 pm, EBT Room
03 Thursday	Cohalan Cares for Kids Event, Great Hall, 6 pm – 8 pm
07 Monday	Executive Committee Meeting, 5:30 pm, Board Room
16 Wednesday	Education Law, 12:30 pm, Board Room
17 Thursday	Elder Law & Estate Planning, 12:15 pm, Great Hall
28 Monday	Joint Board Meeting – Suffolk & Nassau Bar Associations, 6:00 pm, Great Hall

APRIL

04 Monday	Executive Committee Meeting, 5:30 pm, Board Room
05 Tuesday	Appellate Practice Committee, 6:00 pm, Board Room
07 Thursday	Peter Sweisgood Dinner, 6:00 pm, Watermill Restaurant, honoring Eileen Travis. For information call the Bar Center
12 Tuesday	Surrogate's Court, 6:00 pm, Board Room
14 Thursday	Elder Law & Estate Planning, 12:15 pm, Great Hall
18 Monday	Board of Directors Meeting, 5:30 pm, 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."

Write for The Suffolk Lawyer

Did you ever wonder how you could get involved in your bar association's monthly newspaper? Do you have a great idea for an article or believe your colleagues would benefit from information you've recently learned? Or do you just enjoy writing?

You too can write for *The Suffolk Lawyer*. Writing for the paper is open to all members and doing so is encouraged. *The Suffolk Lawyer* is a reflection of the fine members that belong to the Suffolk County Bar Association. Why not get involved? For additional information please contact Editor-in-Chief Laura Lane at scbanews@optonline.net or call (516)376-2108. Look forward to hearing from you!

Important Information from the Lawyers Helping Lawyers Committee

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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GAO Finds EPA Violated Propaganda and Lobbying Provisions

By Jack Harrington

Social media's ubiquitous presence in the lives of many Americans has transformed the way government communicates and interacts with the citizenry. Nearly every politician, from the President of the United States to mayors of America's smallest towns, has a Twitter account. Governments increasingly rely on social media to engage the public, providing information on emergency response and disaster relief to government services and events. A recent report from the U.S. Government Accountability Office ("GAO"), however, considers when the federal government's use of social media constitutes impermissible public advocacy in support of an agency's legislative agenda. The report raises interesting questions regarding what constitutes government "propaganda" or lobbying efforts in the Internet age.

On December 14, 2015, in response to a request from Senator James M. Inhofe, Chairman of the Senate Committee on Environment and Public Works, the GAO issued a report finding that the Environmental Protection Agency ("EPA") violated propaganda and anti-lobbying provisions of federal appropriations laws through its use of social media in association with the EPA's efforts to define "Waters of the United States" under the Clean Water Act ("CWA").

Jack Harrington

Federal appropriations bills passed by Congress and signed into law by the President fund the government, including the EPA, and contain any number of restrictions on how those funds may be spent. Section 718 of the Financial Services and General Government Appropriations Act, for instance, prohibits any appropriation from being used directly or indirectly for "publicity or propaganda purposes" not authorized by Congress. Section 715 of the Act prohibits indirect or "grassroots" lobbying in support of, or in opposition to pending legislation. Section 715 is violated where there is evidence of a clear appeal by an agency to the public to contact Congress.

The EPA released a proposed rule broadening the definition of waters protected under the CWA in March 2014. The rule, more popularly referred to as the "Waters of the U.S." or "WOTUS" rule, expanded the definition to include, among other things, tributaries, adjacent waters, territorial seas, and interstate waters. The EPA used social media platforms in connection with the WOTUS rulemaking to, by its own admission, clarify issues concerning the proposed rule, explain the benefits of the proposed rule, engage the public, and correct what it viewed as misinformation regarding the rule. Although the GAO found that certain social media initiatives were lawful, it concluded that the EPA violated federal propaganda and lobbying provisions in two instances.

First, in September 2014, the EPA used Thunderclap, a new "crowd speaking" tool that allows a single message to be shared across multiple social media platforms. The GAO focused on the fact that the EPA's Thunderclap message did not identify the agency as its author. As the GAO noted, the "critical element of covert propaganda is the agency's concealment from the target audience of its role in creating the material." While the EPA's authorship was apparent to anyone who chose to follow the EPA's Thunderclap campaign page, the technology's force multiplier effect disseminates the message to the followers' entire social media network. To that network of contacts, it appeared that their Facebook friend, for

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Meet Your SCBA Colleague

Jeffrey S. Horn, a Huntington matrimonial and family lawyer, has an autobiography that he wrote while in the fourth grade that he keeps in the left hand drawer of his desk. In it he said, "I might become a lawyer."

By Laura Lane

Do you think you became an attorney because your father was one? Dad never told me to be a lawyer. He responded to my interest.

But it helped having a father who was an attorney? I did raid his briefcase from time to time because the law always interested me. But I wasn't interested in real estate, which he did do. I was riffling around for when he had trials. I'd ask him questions about his cases and sat in court when I could and watched him. I watched the nuances between the lawyer and the judge and how it played out — that's what interested me.

And your mother was she encouraging you to follow in your father's footsteps? Mom didn't do anything to discourage me, but my parents' primary goal was for us to do well in school. They wanted us to get where we wanted to be career-wise.

Was there any person or event that influenced your decision to become a lawyer? My Dad clearly. When I was older and getting ready to go to law school I'd go to his office and there were other lawyers that had suites there too. He'd introduce me to them and this fueled my aspiration to move forward. And if I met Dad for lunch more likely than not another lawyer was there too.

What do you enjoy about being a lawyer? I like the strategy, the thought process that goes into handling a case. And I like working on hard cases because it's more of a mental exercise — strategizing what to do, finding the laws, that may not be used everyday. I like cases with nuances, the unusual cases. I do my own appeals and have handled 40 of them. What gives me the most satisfaction is a challenge.

What do you do to up your game? Every Wednesday and Thursday I check the NYS website cases that went through the Second Dept. Not infrequently I come across something that will help me with my cases. Part of being a good attorney is keeping abreast of what is going on.

You've been taking pro bono cases for a long time now. Yes, I've been doing so for many years. I really can't remember how I initially got involved in it, but when Nassau Suffolk Law Services calls me I take two cases at a time. I like the challenging ones. I call myself an old dog. Doing pro bono work is the right thing to do.

How did you get involved with the Academy? When I first joined the bar I attended the CLEs. I thought it was important when I first became an attorney. Law school teaches you how to think, not how to practice. With the CLEs you get tips even if they aren't in your own practice.

You've lectured quite a bit over the years at the Academy. Why? I like being involved at the Academy because it keeps me updated on the law and it's a nice change of pace, like doing appeals is a nice change of pace. When you lecture you need to do hours of prep work and you learn so much and are keeping fresh with the new laws and modifications. It's good to lecture even in the interest of getting your name out there. I've received a number of clients because of the lectures I've given. So it's beneficial monetarily too.

How did you end up becoming an officer? It's only recently that I became an officer. I was the program coordinator and never turned down a request to do lectures.

You've been a member of the Suffolk County Judiciary Screening Committee since 2005. Is that a long time to serve? Yes it is a long time. I have senior status and am appointed every three years.

Why do you continue to serve on it? I do value being on it and continue to serve on it because John Q public has no idea whose a good judge and who is bad. My contribution is to ensure that the people who are running are good judges. It helps me too because I'd rather appear before a good judge, not a bad judge. The committee is very important and we do important work.

What do you focus on while serving on the committee? I always remember that it is someone's livelihood and that what we are doing could upset this livelihood. There is this line between respectful questions and getting personal. I take being on the committee very seriously.

Jeffrey S. Horn

When did you join the SCBA? I joined right after I was admitted. I still don't understand why people don't join. The price borders on free for the professional benefits you get.

Why do you believe others should join? I like being around lawyers, like to bounce ideas off of them. The SCBA generates income for you and keeps you educated and at your best. The people that are active in the SCBA tend to be better lawyers.

Thompson Reuters chose you as a Super Lawyer for family law. Last I checked there are nine matrimonial lawyers to be in this group and I'm one of them. You don't apply for this but get there based on your lectures, your activities at the bar. This is one of the nicest accolades I've ever received.

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court
Honorable Paul J. Baisley, Jr.

Motion for summary judgment granted; summary judgment was not premature; police report not considered, as it was not certified within the meaning of CPLR §4518.

In *Sandra Calles v. Taylor Ellis, Taylor Ellis v. Susanne E. Petrella,* Index No.: 69282/2014, decided on April 2, 2015, the court granted the motion by the third-party defendant for an order pursuant to CPLR §3212 and dismissed the third-party complaint.

Here, the third-party defendant established her prima facie entitlement to summary judgment and it was incumbent upon the defendant/third-party plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact. The only opposition to the motion was an attorney affirmation, which contended that summary judgment was a drastic remedy and that the motion was premature because discovery had not been concluded. The court concluded that summary judgment was not premature and noted that they had not considered a police accident report as it was not certified within the meaning of CPLR §4518 and was therefore, inadmissible. Moreover, the court noted that there was no evidence that the police officer witnessed the accident so the conclusions therein were inadmissible.

Honorable Arthur G. Pitts

Motion for a protective order with regard to notice to admit granted; issues that go to the heart of the matter not the proper subject for a notice to admit.


Elaine Colavito

In *Joann Pilocane v. Incorporated Village of Patchogue Village Center for the Performing Arts, Inc., John Ashline, individually, Clara Iacopelli, individually, Mickey's Entertainment and Promotions, Inc., Somewhere In Time and Greater Patchogue Chamber of Commerce, Inc.*, Index No.: 33060/2013, decided on August 25, 2015, the court granted the motion for a protective order made by the Incorporated Village of Patchogue and the Greater Patchogue Chamber of Commerce as to defendant, Patchogue Village Center for the Performing Arts, Inc., John Ashline and Clara Iacopelli's notice to admit, dated March 30, 2015. In rendering its decision, the court noted that the purpose of a notice to admit was only to eliminate from the issues in litigation matters, which would not be in dispute at trial. It was not intended to cover ultimate issues, which could only be made after a full and complete trial. Herein, the court stated that examinations before trial had not yet been conducted. The court continued and said that issues that go to the heart of a matter, such as whether a lessee or lessor of the property was responsible for the maintenance of the exterior of the subject property and sidewalk, and who was responsible for the maintenance, ownership and repair of a metal receptacle located at the situs of the accident were not the proper subject for a notice to admit.

Defendants' motion to dismiss complaint decided; the alleged stipulation to warrant a finding of limited continuation of the plaintiff's deposition neither in writing nor made in open court; plaintiff to appear for deposition.

In *John W. Smith v. Timothy Arthur Bonnett and McCarney Enterprises, Inc.*, Index No.: 5153/2013, decided on October 19, 2015, the court ordered the plaintiff to appear for a deposition without limitation to testimony. In refusing to produce the plaintiff for testimony, plaintiff's attorney argued that the parties entered into an agreement that a further deposition would be of limited topics. In rendering its decision, the court noted that it is well settled that a stipulation is valid if written and signed by all relevant parties or if made orally in open court in a proceeding where the relevant parties are either present or represented by counsel who have actual or apparent authority to bind the client and consent to the stipulation. Herein, the alleged stipulation proffered by the plaintiff to warrant a finding that the continuation of the plaintiff's deposition should be limited was neither in writing nor made in open court. As such, the plaintiff was directed to appear for a deposition within 30 days of within the order with notice of entry without restrictions as to any topics, which may have been previously addressed.

Honorable William B. Rebolini

Motion to consolidate denied; issue of liability resolved in Action 2, no remaining common questions of law or fact to be resolved in a trial involving an assessment of damages.

In *Leary Glover v. Nicolette Faison, Jermel Faison and 159 South Franklin Avenue Corporation d/b/a Buckley's,* Index No.: 2946/2013, decided on May 28, 2015, the court denied defendants' motion to consolidate within the action with an action pending in Supreme Court, Queens County entitled, *Philip Robinson v. Nicolette Faison and Jermel Faison,* Index No.: 8497/2014.

In denying the application, the court noted that the plaintiffs in the two actions were occupants of a parked vehicle that was struck in the rear by the vehicle owned by the defendant Jermel Faison, and operated by Nicolette Faison. By order of the Supreme Court, Queens County, dated November 21, 2014, partial summary judgment on the issue of liability was awarded in favor of Philip Robinson, the plaintiff, in Action 2. Under the doctrine of collateral estoppel,

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REAL ESTATE

Top 10 Real Estate Laws of 2015

By Andrew Lieb

Now that 2016 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2015, but, instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2016. Being familiar with these laws, regulations and opinions may help you to better address your customer/client goals and to make you money while helping you to avoid malpractice.

1. TILA-RESPA Integrated Disclosure (TRID) implemented

The Loan Estimate and Closing Disclosure were implemented in October 2015 for most closed-end consumer credit transactions secured by real property. No more are the days of the HUD-1 settlement form, Good Faith Estimate and TILA disclosure forms. TRID is an implementation of Dodd-Frank Act requirements designed to make consumers better informed about the nature and costs of the residential settlement process. Under TRID, the Loan Estimate is to be given to consumers within three business days of application and the Closing Disclosure is to be received by consumers three days before the closing. TRID does not apply to commercial real estate, HELOCs, reverse mortgages or mortgages secured by a mobile home or by a dwelling that is not attached to real property. However, it is applicable to 1-4 unit rental apartments. To learn more, go to consumerfinance.gov.


Andrew Lieb

2. Disparate impact housing discrimination prohibited

In June 2015, the US Supreme Court broadened the nation's understanding of the Fair Housing Act's prohibition against housing discrimination in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* Therein, the court held that the Fair Housing Act prohibits not only disparate treatment claims, but also disparate impact discrimination. Disparate impact refers to conduct that appears neutral on its face, but which nonetheless has a discriminatory effect. So, "covert and illicit stereotyping" is now actionable. Nonetheless, the court was clear that even claims of such disparate impact discrimination have their limits. Specifically, the court stated that even where "a statistical disparity" indicates that a policy adversely impacts a protected class, such claim can be defended by a demonstration that such policy was implemented to further a significant non-discriminatory business objective where such justification is not "artificial, arbitrary, and unnecessary."

3. Foreclosure standing requirement clarified

In *Aurora Loan Services v. Taylor*, the Court of Appeals clarified that "the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law." As a consequence, the foreclosure defense jurisprudence from the dicta in *Bank of New York v. Silverberg*, that Mortgage Electronic Recording Systems, Inc.'s (MERS) involvement may have resulted in an improperly assigned mortgage (i.e., where MERS was only listed as nominee for recording purposes), is over. Now, practitioners must focus solely on the note's chain of title.

4. Deficiency judgments got easier to obtain

In *Flushing Savings Bank v. Bitar*, the Court of Appeals mandated that the trial courts give out second chances to lenders who fail to satisfy the rigid steps of RPAPL §1371, which are required to secure a deficiency judgment against a borrower in a foreclosure action. Specifically, the court directed that the appropriate remedy, where a lender fails to submit sufficient proof to establish its entitlement to a deficiency judgment, by way of only submitting a "conclusory" expert appraiser's report without "any specific information regarding how he reached his fair market value determination," was to direct the lender to "submit additional proof," but not to

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Remembrance of Justice Lawrence J. Bracken

A man of great courage, integrity and independence

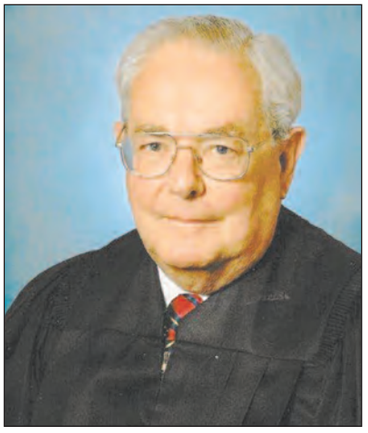
By Scott M. Karson

Justice Lawrence J. Bracken died on January 6, 2016. He was 84. During his remarkable career as a jurist, he served with distinction as a New York State Supreme Court Justice in Suffolk County from 1973 through 1981, and as an Associate Justice of the Appellate Division, Second Department from 1981 through 2001. Justice Bracken was elevated to serve as the Presiding Justice of the Second Department on March 15, 2001, a position that he held until his retirement on December 31, 2001.

Justice Bracken was a graduate of Harvard Law School and earned a Master of Laws degree in Judicial Process from the University of Virginia School of Law. He was an adjunct professor of law at the Jacob D. Fuchsberg Law Center of Touro College. Justice Bracken was also an active member of the Suffolk County Bar Association, where he served as a director, founded the Bench Bar Committee and was the recipient of the President's Award, the Association's highest award. He was also an active member of the New York State Bar Association, a former President of the New York State Supreme Court Justices Association and a member of the New York State's Committee on Pattern Jury Instructions. In addition, Justice Bracken served on the Board of Directors of St. Charles Hospital in Port Jefferson.

Sadly, because it has been 15 years since he retired from the bench, it is likely that a large segment of Suffolk County's legal community did not know him and never had the opportunity – indeed, the privilege – to try a case in his courtroom, or to argue a motion or an appeal before him. Those who did not have the opportunity to do so may not know or appreciate that during his 28 years of judicial service, he was recognized as a consummate judge and universally respected as one of the "giants" of the judiciary in our county, and of our state as well.

For me, the opportunity to meet Justice Bracken occurred in the early 1980's when, as a young assistant district attorney assigned to the Suffolk County District Attorney's Appeals Bureau, I appeared before him regularly in the Appellate Division to argue criminal appeals. In what I can only describe as a stroke of good fortune (for me), Justice Bracken asked me to become his law secretary, an offer that



Justice Lawrence Bracken

I gratefully accepted.

During the ensuing five years of my service as his law secretary, I came to know Justice Bracken as a great judge, a mentor and friend. I came to appreciate his keen intellect – which was tempered by common sense – and his remarkable ability to analyze and resolve the thorniest and complex legal issues without losing sight of the fact that the ultimate goal in deciding a case was to arrive at a just and fair result. I also came to appreciate his ability to write clearly and persuasively. To say that I learned a great deal from Justice Bracken is a classic understatement – he taught me how to be a lawyer, and I shall always be indebted to him for that.

One of the proudest moments of my career occurred when Justice Bracken honored me by administering the oath of office when I was installed as President of the Suffolk County Bar Association in 2004.

The current Presiding Justice of the Second Department, Randall T. Eng, told those in attendance at Justice Bracken's funeral that during his long tenure on the Appellate Division bench, Justice Bracken authored some 90 signed opinions. Of course, that number does not take into account the thousands of memorandum decisions, motion decisions and decisions on administrative matters in which Justice Bracken took part. A brief summary of just some of those signed opinions reveals how Justice Bracken left an indelible mark on so many substantive areas of this state's jurisprudence. For example, in *Ott v. Barash*, 109 AD2d 254 (2d Dept. 1985), Justice Bracken

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SCBA Hosts Welcoming Ceremony Honoring Suffolk's Judiciary

By Sarah Jane LaCova

The Judicial Swearing-In & Robing Ceremony began with a colorful display of pomp and circumstance, when the Suffolk County Court Ceremonial Unit marched into the room, followed by District Administrative Judge Hon. C. Randall Hinrichs, the justices and judges, SCBA President Donna England, members of the Executive Committee and Board of Directors, Touro Dean Patricia Salkin and sponsors.

President England introduced Executive Director Jane LaCova to recite the Pledge of Allegiance, and SCBA member and resident soloist John Zollo sang *The Star Spangled Banner*. The Honorable Derrick J. Robinson then gave a memorable invocation.

The stage was set and the auditorium was packed with SCBA members, friends and family with President England welcoming everyone. She then thanked Dean Patricia Salkin for the use of Touro's auditorium and asked her to join the celebration by saying a few words of welcome to the justices and judges being inducted. Following the Dean's greeting, President England noted in her remarks that we were all saddened to learn of the passing of two special jurists — the former Presiding Justice of the Appellate Division, Second Judicial Department, the Honorable Lawrence J. Bracken and former New York State Chief Judge Judith S. Kaye. They were remembered for their extraordinary intellect, scholarship and temperament and for their selfless devotion to what was in the best interest of the legal profession for over a quarter of a century. Following a moment of silence, she introduced Justice Hinrichs who presided over the ceremony.

Photo by Ron Paccchiana

SCBA President Donna England congratulated District Court Judge Marian Rose Tinari at the annual Judicial Swearing-in and Robing Ceremony hosted by the SCBA.

This annual Judicial Swearing-In & Robing Ceremony continues a time-honored tradition, in which the SCBA presents newly elected judges with their first set of judicial robes as a symbol of the mantle of the office to which they were elected, which is also a gift from the members of the Association. Veteran judges elected received a rosewood gavel as a memento of the occasion.

The event conjured up both tears and laughter, when sponsors and candidates shared personal memories and amusing stories. However, the common denominator each of the newly inducted justices and judges shared was something very serious — a strong love for the law and for justice.

The Supreme Court justices inducted included the Hon. William G. Ford who was sponsored by his wife of 25 years, Pamela. The Hon. Howard H. Heckman, Jr. was sponsored by his daughter, S. Betsy Heckman, and the Hon. Robert F. Quinlan, was sponsored by his brother Richard.

Justice Quinlan, an SCBA past president, had shared a poignant and memorable message in his President's Message in January 2006, which bear repeating. "… these men and women and their colleagues are the true guardians at our gates. They protect us from anarchy on the one hand and despotism on the other. What is said here today will be little remembered, but the actions they take as judges will long shape justice in our republic. I ask each of them to recall that as they perform their duties in the highest position that our profession recognizes, that of judge …"

The Family Court judges sworn in were Hon. George Francis Harkin, whose sponsor was former NYS Senator Hon. James J. Lack, and the Hon. Matthew G. Hughes, sponsored by his father George.

The Supreme Court justices and Family Court judges received the Oath of Office from Presiding Justice Randall Hinrichs.

The District Court judges being sworn in were: Hon. Robert L. Cicale, sponsored by his father, Alfred. The Hon. Philip Goglas sponsored incoming Judge John P. Schettino, the county attorney Porter L. Kirkwood of Delaware County, sponsored his long-time friend Hon. Anthony S. Senft, Jr., Frank A. Tinari was most happy to sponsor his wife the Hon. Marian R. Tinari, and Judge Richard I Horowitz was pleased to sponsor Judge Stephen Ukeiley. The District Court judges were sworn in by the newly appointed Supervising Judge of the District Court Hon. Karen Kerr.

President England, upon presenting the judicial robes and gavels to the justices and judges, said that our bar association takes pride in our bench and even greater pride in the support the bench lends to our bar association.

Then Presiding Justice Hinrichs thanked the Honor Guard, the justices and judges who took the time out of their busy schedules to support the new justices and the judges that were sworn in for this new year, and he added how much he appreciated their presence on the stage. He wished everyone a Happy New Year and concluded the ceremony.

ADR

Does Your Settlement Agreement Need an ADR Clause?

By Lisa Renee Pomerantz

Settlements are sometimes deemed "final," but are not actually so. This is especially true when a settlement of a commercial or employment dispute involves not only payments of money in exchange for a release, but also promises as to future conduct. Such promises might include maintaining the confidentiality of the settlement, non-disparagement of the other party, non-compete or non-solicitation provisions, and indemnification for claims arising from pre-settlement conduct. Moreover, sometimes issues arise that the parties have not anticipated and are not covered by the settlement agreement.

Promises as to future conduct or unanticipated or unaddressed issues can lead to future disputes, especially if there are still hard feelings between the parties. Counsel for the parties can help manage those disputes by anticipating the issues that are likely to arise and considering what procedures, remedies and methods of dispute resolution might be appropriate. For example, it is common for settlement agreements to specify the method and timetable for asserting and responding to claims for defense and/or indemnification and allocation of costs and decision-making authority in resolving the underlying claims. However, disputes can arise over whether a specific claim is covered by the indemnity clause.

Lisa Pomerantz

Mediation can be an excellent way for parties to raise and resolve such issues that can arise when application of the agreement to the facts may not be clear-cut or that have not been foreseen by the parties. Such issues might also include whether particular conduct would violate a non-compete clause or whether a proposed trademark use is permitted under a trademark coexistence agreement. Arbitration can be a useful second step to resolve any lingering issues that cannot be resolved through mediation.

The remedies provided for breach of a settlement agreement can also promote compliance and facilitate resolution. For example, the parties can include liquidated damages for violations of confidentiality or non-solicitation clauses. Provisions awarding attorneys' fees and costs to prevailing parties can also promote compliance. The parties might also consider payments over time or escrowing part of a settlement to incentivize adherence to a settlement's terms.

In sum, settlement agreements are not always truly "final." The parties should consider what types of disputes can arise under them and consider the use of mediation and arbitration to resolve them.

Note: Lisa Renee Pomerantz is an attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel and serves on the Advisory Council of the Commercial Section of the Association for Conflict Resolution.

SIDNEY SIBEN'S AMONG US

On the Move…


Jacqueline Siben

Helen Feingersh has joined the team at Tenenbaum Law, P.C. as a tax attorney. **Vincent Valente**, who is admitted in Massachusetts and awaiting admission in New York, has also joined Tenenbaum Law, P.C.

Announcements, Achievements, & Accolades…

Farrell Fritz attorneys **Hillary A. Frommer,** who is also a frequent contributor to this publication**, Jordan S. Linn** and **Spencer L. Reames** were recently elected fellows of The New York Bar Foundation.

Jennifer Cona, managing partner, Genser Dubow Genser & Cona (GDGC), has been elected vice chair of the Board of Trustees of the Long Island Alzheimer's Foundation (LIAF). She has served on the board for the past five years and on the Legal Advisory Board for 16 years.

Douglas W. Atkins, an attorney at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP has been made a partner. Mr. Atkins concentrates his practice in the areas of tax certiorari, real estate and condemnation.

Regina Brandow will be presenting a Self Directed Guardianship Workshop for Sachem SEPTA - at Sachem H.S. North on Feb. 22.

Karen Tenenbaum, of Tenenbaum Law, P.C., volunteered at the first annual Financial Fitness Day for children, hosted by the Financial Planners Association and the NYSSCPA, Nassau Chapter's Financial Literacy Committee.

Karen Tenenbaum, **Yvonne Cort**, and **Jaime Linder** spoke for the Nassau Academy of Law during Dean's Hour about "The Latest from Albany: NYS Tax Collections & Audit Issues."

Karen Tenenbaum and **Yvonne Cort** spoke at the LI Bud Rosner UJA Estate, Tax and Financial Planning Conference and the AAA-CPA Study Group on the topics of Residency and IRS and NYS Tax Collections, respectively. **Karen Tenenbaum**, **Yvonne Cort**, and **Jaime Linder** recently presented on the topic, IRS & NYS Tax Collections for the NYSSCPA, Nassau All Day Tax Conference. Yvonne also spoke for the NYSSCPA, Suffolk All Day Tax Conference on the topic, "Innocent Spouse."

James F. Gesualdi's "Coming Together To Make A Difference For Animals And People" was published in the Fall 2015 American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee, *Committee News*, discussing the USDA APHIS Marine Mammal Negotiated Rulemaking under the Animal Welfare Act.

Congratulations…

Lisa Renee Pomerantz was honored as the Moxxie Network Member of the Year.

Congratulations to **Frank M. Maffei, Jr.** as the recipient of the Bench and Bar Award from the New York State Fraternal Order of Court Offices.

Congratulations to Honorable **John J. Toomey, Jr.** who will receive the Man of the Year Award from the Suffolk County Court Officers Association.

Condolences…

To the family of the Honorable **Lawrence J. Bracken**. A former Presiding Justice of the Appellate Division, Second Dept., Justice Bracken was a devoted member of the SCBA, serving on its Board of Directors and the Professional Ethics Committee, and authoring articles for *The Suffolk Lawyer.* He was a man of courage, sincerity and understanding and commanded the affections and respect of all who knew him. The charm of his character, his kindness and human sympathy were an inspiration to his many colleagues, friends and associates. Please see Scott M. Karson's remembrance of Justice Bracken on page 5.

To the family of long time member **George R. Zuckerman**. George's passion and dedication to the Academy, his profession and family were exemplary.

To the family, colleagues, friends and associates of Chief Judge **Judith S. Kaye**. Judge Kaye was the first woman to serve on the Court of Appeals and was honored numerous times for her contributions and dedication to the law, the legal community and the organized bar. She gave unstintingly of herself as a leader of women and devoted her life to the law.

To the family of former County Court Judge **Charles F. Cacciabaudo,** who died in December.

FAMILY

A Problem Solving Court for Child Support Non-Payment Issues?

By Dennis J. McGrath

Problem-Solving Courts saw their advent in Miami in 1989, when a judicial system overloaded with drug crimes decided to take an alternative approach to how defendants were handled. The court began ordering drug addicts into treatment rather than incarceration. The hope was that repairing the problem, instead of merely punishing the crime, would lead to improved outcomes for the defendant and the community at large, while reducing recidivism.

The Miami experiment proved to be an overwhelming success, one that has since been replicated throughout the country. While initially viewed upon with skepticism, the resulting successes were undeniable. Jurisdictions throughout the country were quick to attempt to replicate the success seen in Miami, though many remained skeptical. Today, over 4,000 Problem-Solving Courts exist, handling issues of drug abuse, domestic violence, mental health, human trafficking, and adolescent crimes, amongst others. Many of these innovative courts were developed here in Suffolk County.

The Problem-Solving Courts are distinguishable from our typical courts. They include a dedicated judge who has been trained in the issues unique to that court type, the judge has repeated engagement with litigants, and there exists coordination between court and outside groups such as service providers, victim services organizations and dedicated treatment programs.

Dennis J. McGrath

As you may know, some of these courts are mandatory, such as the Integrated Domestic Violence Court, to which the defendant is automatically assigned. Others are voluntary, such as the Drug Treatment Court. This court provides an alternative to incarceration for an individual who want to help themselves kick the drug or alcohol habit and addiction In order to be eligible, the defendant must have been arrested in Suffolk County on drug or alcohol charges.

Participation in the drug court is voluntary and requires the defendant to plead guilty to the charge. In exchange for the guilty plea, they are offered a reduced charge or dismissal contingent on the successful completion of a treatment program. Drug Treatment Court combines the resources of the court, law enforcement, substance abuse and mental health service providers to bring effective intervention to individuals caught in the cycle of substance abuse.

These defendants are required to make regular court appearances before the judge in order to update him on their progress. While it is expected that many of the individuals appearing in this court will have setbacks, the court continues to encourage the defendants to complete treatment, but in the end, if they do not follow through, a prison sentence is likely.

A recent success was the formation of the Suffolk County Veteran's Court. This was created as a means to assist veterans of the armed forces by diverting them from the traditional criminal justice system. The courts try to help these individuals who have run afoul of the law by providing them with the tools needed to live a law abiding life. Again, these include treatment, rehabilitative programming, reinforcement and judicial monitoring. If successful in their treatment program, the veteran is eligible for a reduction of the legal charge.

One of the strengths of this system of adjudication is the ability of the judge to repeatedly see similar types of cases, thus forming an expertise in a particular area. This better enables a judge to decide the best manner to correct a particular issue, one that would benefit all parties involved with the goal of correcting the poor conduct of the defendant, not just punishing it.

Because these courts have been such an overwhelming success, the scope of cases funneled into them has expanded. This begs to question whether we should be looking to expand the concept of these courts even further. It may be time to consider a problem solving court to better address the growing issue of non-payment of child support.

According to the New York State Division of Child Support Enforcement, a delinquent non-custodial parent is first sent a letter detailing the process and manners in which they may comply. Depending on the delinquent amount and time past due, the state may do wage garnishments, interception of unemployment benefits, or suspension of drivers licenses. In extreme cases, probation or jail time may result. Unfortunately, the manner of forcing compliance in these matters is not

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CONTRACTS

Blurred Lines: Additional Insured Requirements in Architectural Services Contracts

By Michael Stanton

It is increasingly common for owners and developers to impose onerous contractual provisions upon architects as a means of securing their services for projects. The failure of owners to distinguish the roles of contractor and architect has resulted in a trend whereby architects are asked to assume significant financial risks that are disproportionate to the services they provide.

For example, owners and developers are typically now requiring architects to name the owner or developer as an additional insured on the Architect's insurance policy. Coverage would be triggered under standard policy language in the event the claim "arises out of the activities or operations of the architect," but defining whether a claim arises out of the architect's activities or operations is seldom a simple task. Invariably, it is the contractor who controls the worksite, and the contractor who is capable of providing a safe place to work. As such, in the case of workplace injuries, it is rare when architects bear any responsibility for the injury.

Frustrating for architects, their comparatively limited role on a project may nevertheless result in a claim for coverage under their policy. Case law from the Court of Appeals shows this difficulty, as courts are guided to construe a claim to have "arisen out of" an architectural services contract so long as it "originated from, is incident to, or has a connection with" the services provided under the contract. *See Worth Const. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411 (2008).

Michael Stanton

The standard of interpreting insurance policy provisions to require coverage where the services "originate from, are incident to, or have a connection with" the claim is vague at best. Years of litigation can arise simply in determining whether a claim "has a connection with" an architect's services. In *Worth*, for example, the Court of Appeals reversed a determination by the First Department in favor of coverage to the general contractor as an additional insured on the insurance policy of a stairway installer. The claim arose when the claimant slipped on fireproofing installed on the stairway, but the stairway installer was neither present at the job site at the time of the accident, nor did it have any responsibility for the fireproofing. Nevertheless, the First Department held, for coverage purposes, the fact that the injury occurred on the stairway was sufficient to trigger coverage under the stairway installer's policy. The Court of Appeals reversed, holding that the stairway was merely the location of the accident, and thus did not "have a connection with" the actual injury giving rise to the claim.

Although coverage was not triggered in *Worth*, it is nearly impossible to use that case as guidance in attempting to forecast when an architect's services will potentially "have a connection with" a claim. Case law interpreting the applicability of this loose standard to architectural services contracts is scant, but it is conceivable that an architect's services will "have a connection with" a claim under a variety of scenarios involving otherwise innocuous contract language. For example, in the hypothetical case of a construction defect giving rise to a claim, it is entirely possible that the claim will be submitted to the architect's carrier under the theory that construction defects "have a connection with" or "are incident to" the architect's services. Under such a scenario, the architect (and his/her insurance carrier) will not only be responsible for his or her own errors and omissions, but also for those of the contractor.

When faced with insurance and indemnification provisions, the architect would be wise to assess his or her risk in determining whether to proceed with the contract including an additional insured obligation. Given the uncertainty surrounding whether coverage will be triggered, and the potential for protracted litigation, it would be far from unreasonable for an architect to balk at contractual language obligating the architect to name owners or developers as additional insureds under the architect's insurance policy.

Note: Michael Stanton is an associate with Sinnreich Kosakoff & Messina, LLP, and has a broad range of litigation experience. Mr. Stanton joined the firm in 2014, and handles all aspects of litigation in federal and state courts. He has represented businesses, insurance companies, universities, and individuals in litigation and other proceedings involving tort, breach of contract, labor law, fraud, consumer protection, real estate property and RICO claims. His practice involves commercial litigation, municipal law, and the representation of design professionals.

LANDLORD TENANT

Can an E-mail Exchange Create a Binding Contract?

By Patrick McCormick

Can an e-mail exchange create a binding contract? The short answer is yes!

With the proliferation of electronic communications, it is not surprising that courts are increasingly called upon to address claims alleging the creation of a binding contract based upon an exchange of e-mails.

The Appellate Division, Second Department recently held that e-mail communications between parties were sufficient to create a binding contract. *Law Offs. of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 15 N.Y.S.3d 814 (2d Dep't 2015) involved breach of contract claims related to services provided by the plaintiff. In examining e-mail communications between the parties, the court found "[b]y the plain language employed" by the parties in e-mail communications, it was clear that the plaintiff made an offer to provide services for a certain fee and that the defendant accepted the offer, creating a binding contract.

Patrick McCormick

The Appellate Division, Third Department addressed a similar situation in the recent case *In re Estate of Wyman*, 128 A.D.2d 1157, 8 N.Y.S.3d 493 (3d Dep't 2015). The decedent and the respondent purchased an improved parcel of real property. After the decedent's death, her executor commenced a proceeding against the respondent to turn over ownership of the entire parcel to the estate, claiming that a series of e-mails between the decedent and respondent had created an enforceable contract to transfer sole ownership of the property to decedent. Upon examining the e-mails, the Appellate Division found that there was no contract because the e-mails did not establish a necessary term of the claimed contract: the price to be paid for the transfer of the property. It appears from this decision that if the e-mails in question contained evidence of an agreement on price, the court would have found a binding and enforceable contract in the e-mail exchange.

While communicating by e-mail may seem informal, these cases make clear that parties to an e-mail exchange must exercise care to avoid unintentionally creating a binding contract. An otherwise valid contract cannot be undone simply by concluding with "Sent from my iPhone."

Note: Patrick McCormick litigates all types of complex commercial and real estate matters. These 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.

MATRIMONIAL

Charge it to the Game - Retaining and Charging Liens in Matrimonials

By Vesselin Mitev

An all-too familiar scenario: the rosy glow of a new relationship has worn off, replaced with the miasmic haze of resentment and contempt, un-returned phone calls and e-mails, an overall chaotic mess. No, this isn't a bad break up (but it well as may be); instead, your client has stopped paying her bill, stopped taking your calls/e-mails and the attorney-client relationship appears irretrievably broken, leading you to seek leave to be relieved. (The corollary is the surprise phone call from a fellow attorney saying that they are now on the case, and will be sending the consent-to-change shortly, on a case you thought was going perfectly fine).

In either case, chances are you are left with the client's file (probably quite hefty) and an equally hefty unpaid bill. Sometime shortly, someone will be asking for the file, whether it's your successor attorney, or if you are seeking to be relieved, your (former) client. But handing over the only leverage you have to ever getting paid without getting paid seems like a raw deal. After all, even mechanics get to keep your car on blocks until you've paid what you owe.

Vesselin Mitev

Two powerful arrows in the quiver, which should be immediately deployed, are the assertions of the retaining and charging liens (and a plenary action to recover for the services provided, and a cause of action for foreclosure of the lien(s) should be contemplated).

Assertion of a retaining lien allows the lawyer to simply hold the client's file, papers and things (including money obtained by you during the litigation that is sitting in escrow) until payment (or security of payment) is posted by the client.

The lien has been called "possessory" and "passive" in that it accrues out of and endures so long as the attorney physically holds the client's possessions to induce payment of the bill. It evaporates if the attorney voluntarily turns over the client's things. Almost self-evidently, the retaining lien does not attach to maintenance or child support payments but does attach (if already in your possession) to a distributive award, or equitable distribution proceeds[1] except for things already owned (and retained) by the client.

The next step, of course, is defending having to turn over the file to either your old client or new counsel until you are paid. It is well settled that prior to the court directing the turnover of the file, the lawyer is entitled to a "summary determination" of the value of his/her services, and the amount must either be paid or otherwise secured before the turnover may be enforced[2].

While a former client asserting "indigence" in order to obtain his file appears to still hold vast sway with judges, the law is well settled that the amount of the lien must still be fixed prior to turnover (id) and that an attorney is only relegated to a charging lien if the allegations of indigency are unrefuted. In other words, if faced with an application by a former client claiming indigency (but knowing, for example, that the client has unreported income, or that the claim is a mere red herring to avoid having to pay), a hearing should be demanded and held, not least if only to determine the value of the lien.

The charging lien (also arising out of common law) but codified by Judiciary Law 475, attaches, remora-like, to any "proceeds" of a judgment or settlement

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FUTURE LAWYER'S FORUM

The 'P' Word — Professionalism

By George Pammer

We all know about the challenges that currently face law students today. Mounting student debt, lower starting salaries and the difficulty in finding work in the legal field have made the legal profession rather challenging for today's law student. An aspect that has not changed over the years is professionalism. It has always been an important component in the legal field, but now seems more important than ever given the challenges law students are facing.

Networking has always been a key component to the development of a successful legal career for a law student. In today's legal world, professionalism is the key element that may help you stand out amongst your peers. This is not just limited to the occasional visit by a judge or a dignitary at school where you are on your best behavior. There is an ever increasing interaction between students and the courts, practicing attorneys, judges, and firms throughout Long Island. This requires the student to be more cognizant not just of where they are, but who else may be there.

There have been countless sitcoms making light of a situation where someone gets into an argument, possibly over a parking spot, and 10 minutes later they are sitting down in that persons office for an interview. Moral of the story: You never know if that person you met today will be your opportunity tomorrow.

George Pammer

The first impression. Sounds simple enough; nice suit, firm handshake, make eye contact. Although these are important tools in making a positive impression, unfortunately, it is no longer limited to such niceties. Law students today do a rather large amount of self-marketing. This means you must always be on your "A" game. Events that are school-related require a specific amount of decorum. You may never know when an alum of the school is present at an event, an invited guest who happens to be a judge or a partner at a firm or even a board of director from the school itself. The last thing you want to stand out for is being unprofessional.

When in doubt, always wear a suit. Even if you think the event is casual in nature, do not hesitate to dress appropriately. It is always easier to remove your tie and jacket than to be underdressed and stand out for the wrong reason. Dressing professionally is a sign of respect for those you are meeting. Do not dress for the job you have, dress for the job you want.

Just as important as the clothes you wear in making an impression, is your body language. Two examples are a handshake and eye contact. When shaking hands there is nothing worse than shaking hands with a dead fish. The perception is the person has a lack of confidence and really does not want to be there. A strong positive handshake goes a long way in making that first impression as one of confidence. Just as important is to make eye contact with the person that you are engaged in conversation with. Under no circumstances do you look at your cell phone. Engage the listener in conversation, making sure to connect with them. There is a personal nature in making eye contact.

Always, without exception, follow up with the person you have met. An email is a good way to touch base with the person you met. A better way to make a lasting impression is to actually send a letter through the mail. It demonstrates more of a commitment to the person and will certainly leave a lasting impression. The purpose of the follow-up is not just to thank them for the time that they spent with you, but also to make yourself stand out. In this case, the old fashioned way may actually prove itself the best way to make a lasting impression.

Many events that you will attend will involve alcohol and may in fact be a celebratory atmosphere. The Suffolk County Bar Association does hold some first class dinner events. Touro Law School and the Student Bar Association also host events where alcohol is served. Do not treat these types of events as a time to kick back and over indulge in alcohol. You not only risk the chance of embarrassing yourself in front of your colleagues, but also take the risk of doing serious harm to your reputation. A negative impression will make a lasting impression that you certainly do not want. Just thinking that you are with your law school colleagues does not mean there will not be someone there that either knows you or knows of you. Law school is not undergrad and requires a higher level of professionalism. Years of working towards building a positive reputation can be ruined by one indiscretion at the wrong place at the wrong time. The years spent in law school are certainly not the time to risk your reputation making the wrong impression.

As a law student, you are entering one of the oldest and most noble professions. The first day of orientation at law school is the first day of your legal career. There may be no second chance at this and many people never get the opportunity at all. You never get a second chance to make a first impression.

Note: George Pammer is a 3rd year law student at Touro Law School. George is a part-time evening student and the President of the Student Bar Association. He has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association – Student Committee, where he was one of the founding members.

WHO'S YOUR EXPERT?

2015 Roundup

By Hillary Frommer

As 2015 closes, we take a look at cases decided this past year, which address common issues involving expert witnesses. These decisions tell us that time and time again, the courts are called upon to decide the admissibility of expert testimony or the disqualification of an expert witness. They also remind us that these are all fact specific inquiries, and there really is no rule of thumb. We start with a decision from Suffolk County.

Disqualification

In its recent decision in *Rausnitz v Rausnitz*,[1] the Supreme Court, Suffolk County denied the defendant's motion to disqualify the plaintiff's forensic accounting expert on the grounds that there was a conflict of interest. The parties (husband and wife in a divorce proceeding), each retained experts to provide valuations of various business interests. Shortly after the plaintiff retained her valuation firm, that firm hired as one of is senior associates, Mayda Kramer, who had been an employee of the defendant's expert firm and had specifically worked on the defendant's case. In assessing whether disqualification was appropriate, the court applied the standard two-prong test: whether it was objectively reasonable for the defendant to believe that a conflict of interest existed, and whether the defendant disclosed any privileged or confidential information to the expert.

Hillary A. Frommer

At the outset, the court stated that a party to a matrimonial proceeding has no expectation of confidentiality with its forensic accountant because the Domestic Relations Law requires the parties provide each other with financial disclosures and to file sworn net worth statements with the court.

Faced with Ms. Kramer's affidavit stating that her role was limited to assisting with the defendant's net worth statement, the court found that there was "no reasonable expectation of confidentiality for the work performed by Ms. Kramer on behalf of the defendant while employed by [his expert firm]." The court then determined that even if the defendant had a reasonable expectation of confidentiality, because the motion was based solely on what the court perceived to be a general and conclusory affirmation by counsel, there was no evidence that any privileged information was disclosed to Ms. Kramer. The court credited several affidavits from the defendant's experts, including an affidavit from Ms. Kramer, all attesting to the fact that Ms. Kramer did not work on the matter nor spoke to anyone about the matter. This satisfied the court that the screening procedures in place were sufficient to avoid any conflict of interest. Finally, the fact that the defendant knew about the purported conflict of interest, but waited 26 months to bring the motion weighed heavily against disqualification, because "where a party moving for disqualification was aware of the alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other parties' expert."

The right to a Frye hearing

State v Daryl W.[2] reminds us that there is no automatic right to a *Frye* hearing. In that case, the respondent sought a *Frye* hearing to preclude the state's expert psychologist from testifying that she considered but did not assign certain medical diagnoses to the respondent. The import of the decision is the court's recognition that *Frye*

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Reauthorization of the James Zadroga 9/11 Health and Compensation Act

By Troy G. Rosasco

President Obama signed the James Zadroga 9/11 Health and Compensation Reauthorization Act on Dec. 18, 2015, as part of Congress' year-end Omnibus spending bill (H.R. 2029). The signing ended a long and difficult struggle in Congress to guarantee that the heroes of Sept. 11 would maintain the healthcare and compensation benefits they need in the future. While often thought as a New York focused bill, there are now sick Sept. 11 responders or volunteers living in all 50 states.

Although eventually made part of the Omnibus spending bill along with many other year end add-ons, the original bill had majority bipartisan support in Congress standing on its own. The Zadroga Act's original sponsors in the House were New York Representatives Carolyn Maloney, Jerrold Nadler, and Peter King. The original sponsors in the Senate were New York's Senators Kirsten Gillibrand and Charles Schumer. Prior to being added to the Omnibus spending bill, the Act had 272 co-sponsors in the House of Representatives and 69 co-sponsors in the Senate.

One unique and stalwart advocate for the Zadroga Act (the Act) was Jon Stewart, formerly of the Daily Show. He literally walked the halls of Congress "shaming" elected officials (and staff) into supporting the Act. The passage of the Reauthorization Act was heralded on the front pages of newspapers across the country just before Christmas.

Troy G. Rosasco

The New Act

As the name implies, the new Zadroga Act "reauthorizes" the original James Zadroga 9/11 Health and Compensation Act of 2010. The original Zadroga Act expired on Sept. 30, 2015, leaving thousands of first responder heroes without future medical care and compensation.

The new "Reauthorization Act" does the following to the World Trade Center Health Fund:

- Adds an additional $3.5 billion to the original $1.5 billion to the World Trade Center Health Program (WTCHP) and extends the program for 75 years until 2090. Effectively, this will cover medical benefits for any first responders or residents of the "exposure area" (generally lower Manhattan below Canal Street) for the rest of their lives. The long program duration was necessitated by the long latency period of certain types of Sept. 11 related cancers, such as mesothelioma.
- Sets funding caps for the first 10 years and then ties future funding increases to the consumer price index for urban consumers.
- Allows any unexpended funds in each year to be available for use in future years.
- Requires that the WTC Administrator provide for an independent peer review of the scientific and technical evidence prior to adding a new "covered condition" to the list of WTC-related health conditions.
- Requires the WTC Program Administrator to promulgate new regulations to administer the new law.
- Requires the Government Accountability Office (GAO) to report about the World Trade Center Health Program every five years to ensure program integrity.
- Terminates the World Trade Center Health Fund officially on October 1, 2090.

The new "Reauthorization Act" does the following to James Zadroga 9/11 Victim Compensation Fund:

- Adds an additional $4.6 billion to the original $2.775 billion to pay non-economic and economic damages for Sept. 11 first responders and "exposure area" residents.
- Extends the Victim Compensation Fund (VCF) for five years, as opposed to the 75-year extension for the World Trade Center Health Program.
- Requires the Victim Compensation Fund Special Master to prioritize claims for claimants who are determined by the Special Master as "suffering from the most debilitating physical conditions to ensure, for purposes of equity, that such claimants are not unduly burdened."
- Provides that all applicants who have received a "Final Award Determination" prior to enactment (12/18/2015) shall receive 100 percent of their award "as soon as practicable." Prior to the reauthorization,

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COMMECIAL LITIGATION

Don't Overestimate the Power of a Restraining Notice

By Jarrett M. Behar

A restraining notice issued pursuant to CPLR § 5222 can be a useful tool for an attorney representing a judgment creditor looking to collect. It operates as an injunction on the judgment debtor or garnishee, preventing the party from conveying the judgment debtor's property other than to the sheriff or pursuant to a court order. Better yet, it is an injunction that does not require any further judicial intervention. In the event that the judgment debtor or garnishee ignores the restraining notice, they can subsequently be held in contempt of court or liable for damages.

That being said, a restraining notice – or a judgment for that matter – should not be mistaken for a lien that establishes the judgment creditor's priority, should assets of the debtor be identified.[1] In the event that there are competing judgment creditors attempting to recover the judgment debtor's assets, a restraining notice will not preserve the judgment creditor's place in line. Nor will it fix a date for priority against a creditor that obtains a non-judgment related secured interest in the judgment debtor's property such as a UCC filing or a mortgage. As a result, while a restraining notice is a good first step in the path to collecting on a judgment, that step should be expeditiously followed by one of the lien-creating mechanisms contained in the CPLR – levy and execution pursuant to CPLR §§ 5230 and 5232, obtaining a delivery order pursuant to CPLR §§ 5225 or 5227, or obtaining a receivership order pursuant to CPLR § 5228.

Jarrett M. Behar

An example of the dangers of relying on a restraining notice is contained in *U.S. ex rel. Solera Construction, Inc. v. J.A. Jones Construction Group, LLC*, a federal case concerning the construction of our own Eastern District of New York courthouse that applied New York law on enforcement of judgments.[2] In that case, the plaintiff obtained a default judgment against one of the defendants, LBL Skysystems (USA), Inc. ("LBL") and learned of a debt owed to LBL by non-party Turner Construction Corporation ("Turner"). The plaintiff served a restraining notice and information subpoena on Turner. A secured creditor of LBL (the "Bank") pursuant to a prior security agreement moved to vacate the restraining notice so it could obtain the funds from Turner. Although the security agreement was secured by UCC-1 filing statements originally filed six years before the plaintiff obtained its default judgment, those statements had lapsed after five years. Thus, there was a 14-month window before the Bank renewed those filing statements that created an opportunity for another creditor of LBL, such as the plaintiff, to gain priority over the Bank.[3]

The plaintiff, however, only took the step of serving a restraining notice and information subpoena on Turner. Unfortunately for the plaintiff, this did not have the effect of creating a lien on the debt owed to LBL by Turner and the Bank's subsequent renewal of the UCC-1 filing statements re-established its priority to the debt. The court noted that instead of serving Turner with restraining notices, the plaintiff "should have instead delivered a writ of execution to the U.S. Marshal [or the sheriff in the event of a state court judgment] for service upon Turner to levy on the property at issue" to gain priority.[4]

The court further noted that, pursuant to CPLR § 5232, the levy only acts to create and preserve priority for 90 days, and that before expiration of that period the plaintiff "could have then moved for an extension of the period or commenced a special proceeding under section 5225 or 5227 of the CPLR."[5]

The facts of *Solera Construction* demonstrate the dangers of relying on a restraining notice to collect on a debt owed to a judgment debtor as against other secured creditors. The same danger is present in establishing priority among competing judgment creditors. Care should be taken to not only promptly establish priority when knowledge of such a debt is obtained, but also to preserve that priority in the event that the garnishee is not cooperative through a motion for an extension of the levy period or the commencement of a special proceeding.

Note: Jarrett M. Behar, a member of the firm Sinnreich Kosakoff & Messina LLP, practices in the areas of commercial litigation, construction law and professional liability defense, and has represented both judgment creditors and debtors in enforcement actions. For additional information concerning this article, please feel free to contact Mr. Behar at jbehar@skmlaw.net.

[1] *See Aspen Indus., Inc. v. Marine Midland* Bank, 52 N.Y.2d 575, 579-80, 439 N.Y.S.2d 316, 421 N.E.2d 808 (1981).
[2] *Id.*, 2010 WL 1269938 at *2 (E.D.N.Y. Apr. 2, 2010) (citing Fed. R. Civ. P. 69(a)(1); 28 U.S.C. § 1962)
[3] *Id.* at *3 (citing N.Y. U.C.C. §§ 9-317(a)(2)(A); 9-515(a), (c)).
[4] *Id.* at *5
[5] *Id.*

REAL ESTATE

Court of Appeals Clarifies Trivial Defect Doctrine

By Dennis C. Valet

The Court of Appeals in *Beltz v. City of Yonkers*[1] effectively established the Trivial Defect Doctrine in 1895, a staple in the modern defense attorney's playbook. Therein, the court recognized that no walkway could be kept so perfectly safe so as to preclude the possibility of an accident and accordingly held that "when … the defect is so slight that no careful or prudent man would reasonably anticipate any danger from its existence … the question of defendant's responsibility is one of law." Perhaps shocking to a modern practitioner, the *Beltz* court found that a two and a half inch deep, 26 inch long and seven inch wide depression in a sidewalk was not an actionable defect. Ever since, New York courts have struggled to define when a defect in a walkway is actionable.

By 1948, the Court of Appeals in *Loughran v. City of New York*[2] had firmly rejected the proposition that a defect must have a minimum measurement to be actionable and instead elected to follow an examination of the totality of the circumstances for each particular accident. The last 30 years have been dominated by the Court of Appeals case of *Trincere v. County of Suffolk*[3], which identified some factors relevant to determining whether a defect is trivial, including but not limited to width, depth, elevation, irregularity and circumstance.

Dennis C. Valet

The Court of Appeals in *Hutchinson v. Sheridan Hill House Corp.*[4] in 2015 revisited the Trivial Defect Doctrine and shed some much needed light onto the standards of proof required by both plaintiffs and defendants in motions for summary judgment. The Court of Appeals examined three different claims brought by three different plaintiffs and analyzed whether the Appellate Divisions had properly granted or denied summary judgment. This article focuses on the lessons from *Hutchinson* for any party seeking to win, or defeat, a motion for summary judgment based upon the Trivial Defect Doctrine.

Relevant factors

The *Hutchinson* court cautions against examining only the defect itself in determining whether it constitutes a "trap." Instead, the totality of the circumstances surrounding the accident should be considered. That is, both the defect itself as well its context is relevant. In addition to the factors outlined in *Trincere*, courts should also consider the following: the presence of other defects in the vicinity of the subject defect, the lighting surrounding the defect, the characteristics of the surrounding walkway surface, and the location or characteristics of the area in which the defect is located. In sum, any contextual fact, which contributes or detracts from the danger the defect poses, is relevant.

The danger posed by a defect is not limited to the physical characteristics of the defect itself, but rather, is largely affected by the greater context surrounding the defect. A defect may be actionable in one location while an identical defect in a different area may not be actionable. For example, the first identical defect may be located on a crowded walkway in a dark subway station which commands pedestrians' attention away from their feet while the second identical defect may be on an open, well lit, unobstructed and uncongested walkway where pedestrians can easily observe where they are stepping.

In summary, "lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot."[5]

Questions of fact

A defendant seeking summary judgment on the basis of the Trivial Defect Doctrine must present evidence establishing that "the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses." Plaintiffs defending the same motion must create a question of fact, demonstrating that a reasonable person could find that the defect unreasonably imperils the average pedestrian. Common sense dictates that both parties should, when applicable, submit evidence relevant to each of the factors listed in the *Trincere* and *Hutchinson* decisions. The court's analysis of the three cases in the *Hutchinson* decision reinforces the benefits of submitting as much evidence as possible to understand the characteristics and circumstances of the defect.

In the first set of facts before the Court of Appeals, the defendant provided photographs of the defect, which included measurements of the dimensions of the defect. The defendant also provided evidence of the lighting at the time of the accident and evi-

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TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Revocation of Will

Before the court in *In re Powers*, was a claim that the propounded instrument should be denied probate on the ground that it had been revoked. Objections to probate had been filed by the decedent's spouse, who simultaneously moved for summary judgment denying the will probate. The proponent opposed and cross-moved for summary judgment striking the objections.

The propounded Will was a typewritten instrument, but at the top of the first page, there was handwritten and dated, in red, by the testator, the words: "This Will is no longer valid." In addition, the testator indicated that after two years of consideration, she handwrote a new Will, which she requested be "honored", until she was able to get the instrument "officially changed" and typed. Attached to the instrument, were twelve sheets of paper containing the testator's handwriting and signed by her. Notably, these handwritten sheets were never re-done in typed form prior to the testator's death. Moreover, none of the words of the testator on the top of the propounded instrument touched or obliterated any part of her Will. Nevertheless, the objectant maintained that the testator revoked her Will pursuant to the provisions of EPTL 3-4.1, which allows a Will to be revoked by an act of burning, tearing, cancelling, or obliteration by the testator.

The court opined that when words of revocation and the signature of the testator are written directly across the face of a Will, it obliterates the words on the instrument, thereby reflecting the intent of the testator to revoke it. However, in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject Will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute. Further, in response to the objectant's claim that the instrument had been cancelled by a writing, the court held that in order to be effective, such writing had to be executed in accordance with the statutory formalities of a duly executed Will. Inasmuch as those formalities had not been complied with, objectant's argument failed. Accordingly, based upon the foregoing, the proponent's motion for summary judgment was granted, and the objections to probate were dismissed.

In re Powers, NYLJ, July 14, 2015, at p. 29 (Sur. Ct. Oneida County).

Ilene S. Cooper

Constructive Trust

In *Matter of Thomas*,[77.1] the Appellate Division, Fourth Department, modified in part, and affirmed in part, an Order of the Surrogate's Court, Monroe County, dismissing a petition seeking the imposition of a constructive trust on certain real properties and stock, which petitioners claimed were assets of the decedent's estate. The record revealed that the decedents, husband and wife, died, testate, survived by four children, each of whom were named beneficiaries of their residuary estates. Shortly after the decedents' deaths, the petitioners, two of the decedents' children, instituted a proceeding against their sibling, who was the executor and trustee under both decedents' wills, challenging numerous real estate transactions between respondent and the decedents, as well as respondent's failure to identify, as assets of the decedents' estates, the shares of stock in a company, that had been founded by their father and which respondent claimed had been transferred to him.

More specifically, according to the petitioners, the respondent exploited his close relationship with the decedents by inducing them to transfer the realty to him, with the promise that he would either pay for or reconvey the parcels to the decedents or his siblings. The petitioners alleged that respondent failed to do either. Moreover, petitioners alleged that respondent failed to produce any records reflecting the transfer of the stock from their father or any records reflecting respondent's payment for the stock.

Petitioners sought, *inter alia*, the imposition of a constructive trust related to the real properties and stock in issue, and the respondent moved to dismiss the proceeding on the grounds that the petition failed to state a cause of action and was time-barred.

In concluding that the petition stated a cause of action, the Appellate Division opined that in order to assert a claim for constructive trust, a petitioner must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise and unjust enrichment. Further, the court noted that inasmuch as a constructive trust is an equitable remedy, the elements thereof are not rigidly applied, and have been invoked under circumstances where the promise is not express, but may be implied based on the relationship of the parties and the nature of the transaction between them. Accordingly, the court held that the Surrogate erred in dismissing the petition on this ground. Significantly, to this extent, the court found that the petition and corresponding affidavits had alleged that the respondent's father had believed he owned the company until the day he died, and that respondent had made promises to allow all of his siblings, i.e. the decedent's children, to share in the company. Indeed, the court noted that while the petition lacked allegations of an express promise between the parties, even if a petition fails to allege facts sufficient to support one of the elements of a constructive trust, a constructive trust may nevertheless be imposed.

On the other hand, the court modified the order of the Surrogate's Court on the issue of the statute of limitations, holding that the Surrogate's Court had correctly dismissed the claims with respect to the real estate, but had erred when it determined that the claim with respect to the shares of stock was untimely. The court opined that a claim for the imposition of a constructive trust is governed by the six-year statute of limitations of CPLR 213(1), which begins to run at the time of the wrongful conduct or event giving rise to restitution. Referring to the allegations in the petition, the court noted that petitioners claimed that the respondent had promised to share the stock in issue with his siblings upon the death of the decedents, which had occurred in 2012. In

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ELDER

Costly Mistakes — Why Clients Need an Elder Law Attorney

By Melissa Negrin-Wiener

Elder Law is rooted in an intricate and detailed set of statutes and regulations. Unlike most areas of practice, the field of Elder Law is constantly changing. In the Medicaid arena, the Department of Health regularly directs the local Departments of Social Services to re-interpret the Medicaid regulations. These directives are often followed by appeals, the outcome of which can change the planning and processing of all Medicaid cases.

A recent trend has shown clients seeking lower-cost advice and services by utilizing non-lawyer, "Medicaid specialists" to process Medicaid applications. However, like the old adage, you get what you pay for. Mistakes in the Medicaid context can easily cost tens or even hundreds of thousands of dollars. An attorney immersed in this type of work must undertake proper legal planning and accurate and thorough processing of a Medicaid application.

One example of costly mistakes can be found in the handling of real property. Marcia[i] lived with her mother in the home she grew up in for the last 30 years. Marcia's mother sought assistance in applying for Medicaid benefits and was referred to a non-attorney "Medicaid specialist." Title to the house that Marcia lived in was solely in her mother's name. A Medicaid application was submitted and approved. When Marcia's mother passed away, however, Marcia received a Notice of Claim wherein Medicaid asserted a lien against the real property for the $225,000 paid for her mother's care. The only asset of the estate was the house — the house that Marcia planned to live in for the rest of her life.

The Social Services statute and implementing regulations[ii] states that a person will be eligible for Medicaid if the applicant's house is transferred to that person's:

1. Spouse.
2. Child who is blind, disabled or under age 21.
3. Sibling who has an equity interest in the home and who resided in the home for at least one year before the person was institutionalized; or
4. Child who resided in the home for at least two years before the person was institutionalized and provided care to maintain the person at home ("caretaker child").

Clearly, Marcia was entitled to the "caretaker child" exemption. Accordingly, the home could have been transferred to Marcia during the Medicaid planning process and it would have been completely protected; Medicaid could not assess a lien on the house and Medicaid could not impose a penalty upon the transfer. The "Medicaid specialist" did not know the law and Marcia was incorrectly advised that as long as she lived in the home, it would be protected. Marcia now needs to sell the house or otherwise come up with $225,000 to pay back the state. As is often the case, these costly mistakes are not discovered until it is too late.

Melissa Negrin-Wiener

In another case, John and Diane[3] lived with John's mother in her home for the past seven years. The Medicaid application filed by a "Medicaid specialist" was approved with a penalty period of 40 months based on the transfer of title to the home to John and Diane. Although John fell into the category of "caretaker child," the deed was transferred to both John and Diane. The case law interpreting this regulation makes clear that the "caretaker child" exemption extends only to natural children. Further,

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PRO BONO

Pro Bono Attorney of the Month – Francine H. Moss

By Ellen Krakow

The Suffolk Pro Bono Project (the Project) is pleased to honor Francine H. Moss once again**,** as its Pro Bono Attorney of the Month for the substantial work she has done recently on behalf of our matrimonial clients. Ms. Moss is receiving this honor for the third time. She first honored in 2000 and again in 2005. Ms. Moss began representing the Project's matrimonial clients in 1995 and has regularly accepted referrals since that time.

Ms. Moss sees pro bono work as an imperative. "When there are people who have a real need and yet no way to protect their rights, we as attorneys should be there for them," she said. Maria Dosso, Nassau Suffolk Law Services' Director of Communications and Volunteer Services is grateful for the many hours of work Ms. Moss has devoted to her Pro Bono Project clients, noting, "experienced and generous attorneys like Francine are the backbone of the Project."

Francine H. Moss

In her many years with the Project, Ms. Moss has never shied away from challenging cases. This is exemplified in her most recently completed case for the Project, in which she represented a domestic violence victim who was a non-English speaking Asian immigrant. The client had been exploited by her affluent husband and forced into servitude. When the case began, the client had recently fled from her abusive spouse, was homeless and temporarily living in a shelter run by a local organization that assists victims of domestic violence. The client had no supports in this country other than the assistance she was receiving from the domestic violence organization. Ms. Moss was able to communicate with the client throughout the case by utilizing the language interpreter and translation services provided by the Project. The client was determined to start a new life for herself here on Long Island, free of her husband's abuse and exploitation.

To achieve the best possible result for her client, Ms. Moss remained in close contact with the domestic violence organization's staff assisting her. She sought out consultation from immigration law specialists to avoid inadvertently jeopardizing the client's immigration status through actions taken in the divorce. From these consultations, Ms. Moss crafted an effective legal strategy predicating the husband's maintenance obligations on his existing financial obligations to her as her immigration sponsor. The approach worked. In fairly short order Ms. Moss obtained a substantial lump-sum maintenance concession from the spouse. With her financial recovery, the client was able to move out of the shelter, find employment and begin her life beyond her ex-husband's reach.

While appreciating that matrimonial law "isn't for everyone," Ms. Moss truly enjoys it, largely because of its multi-dimensional aspects. "You wear a lot of hats in this type of work," she explains. "There's always an emotional piece to these cases, and you assume many roles for the client. You're their lawyer and their psychologist."

Ms. Moss also enjoys the fact that the cases are challenging, in that they require knowledge of several different substantive areas of the law, including real estate, bankruptcy and, as in the case of her recent pro bono matter, immigration law. "This work really keeps you on your toes," says Ms. Moss.

Prior to going to law school, Ms. Moss studied sociology at Brooklyn College, where she developed an interest in criminal and juvenile justice. After earning her bachelor's degree in 1973, she attended New York University Law School, earning her J.D. in 1978. Immediately after graduation, the Bay Shore law firm, Flower and Plotka, hired her. Working alongside named partner Richard Plotka, Ms. Moss received her training in matrimonial and family law.

She left Flower and Plotka in 1980, to become the managing attorney at the Bohemia office of Jacoby and Meyers, which at that time had a general legal practice involving matrimonial, criminal and bankruptcy matters. "This was a high-volume office with approximately 100 new consults each month," says Ms. Moss. While at Jacoby and Meyers, she met her current law partner, fellow matrimonial/family law attorney and Pro Bono Project mentor, Stephanie Judd.

Ms. Moss and Ms. Judd left Jacoby and Meyers in 1995 and together formed their current firm, Judd & Moss in Ronkonkoma. Since its inception, the majority of the firm's practice has been matrimonial and family law, but on occasion includes real estate and wills/trusts matters. Of their matrimonial and family law cases, approximately 70 percent involve private clients. The remainder is 18b and law guardian cases assigned by the court.

Ms. Moss' life outside the practice of law is centered on her many interests, which include theatre (especially musicals), sports (she's an avid Yankees and Jets' fan.), reading (history and novels), food and wine. She has been married for 38 years to Steven Moss, a nuclear engineer at Brookhaven National Laboratory who currently manages the license for BNL's newest and the world's brightest National Synchrotron Light Source. Their two children, Hillary and Ian Moss, have followed in their parents' footsteps. Ian studied law at Hofstra University and is now a matrimonial and family law attorney at Ray Mitev & Associates. Hillary, like her father, has chosen a career in the sciences. She will soon graduate from Stony Brook University Medical School and begin practicing emergency medicine.

The Pro Bono Project is pleased to recognize Francine Moss once again for her pro bono contributions. We are proud of our long association with her and look forward to our future work together. It is with great pleasure that we honor Ms. Moss this third time as Pro Bono Attorney of the Month.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. (631) 232-2400 x 3323.

Note: Ellen Krakow Suffolk Pro Bono Project Coordinator Nassau Suffolk Law Services..

Wanted: SCBA FunRun Team Members

The Suffolk County Bar Association is looking for walkers and runners to join our team for the Corporate FunRun 5k on May 18, 2016 at the Bethpage Ballpark in Central Islip (right next door to the Courthouse). Bar Association members, their families, office staff and friends are all invited to join our team. Glenn Warmuth is the team captain. Come for the fun-run, stay for the party! Entry is $40/person. To sign up for our team go to: http://corporate-funrun.com/registration/?id=27&teamid=1919

ENTERTAINMENT

Better Lucky Than Good, Odell

By Michael Pernesiglio

The New York Giants hosted the then undefeated Carolina Panthers on Dec. 20, 2015. Although this was just another regular season game, there were many intriguing storylines, which raised the intensity level greatly. For starters, the Panthers were undefeated with a 13-0 record and seeking to become the only team to finish the regular season undefeated since the 2007 New England Patriots (who eventually lost to the Giants in the Super Bowl). Also, the Giants desperately needed a victory to keep their playoff chances alive. Lastly, this game contained the most highly anticipated individual matchup of the season — the Giants' stud wide receiver Odell Beckham Jr. ("Beckham") against the Panthers' lockdown defensive back, Josh Norman ("Norman").

There was a great deal of media coverage leading up to the game and bulletin board material surrounding this individual matchup between Beckham and Norman. One such instance was during the Giants game against the Dolphins, played before the Panther game, when Beckham subliminally taunted Norman by wearing specially designed cleats that carried the image of "The Joker" as a counter to Norman's "Batman" nickname. As such, emotions were running very high come game time.

From the onset of the game, both players were trash-talking and having individual skirmishes after just about every play. However, what caught the nations attention was when after a play in the third quarter, Beckham ran 15-yards at full speed and speared Norman with a helmet-to-helmet collision. This attack occurred after the play was over and drew a 15-yard "unnecessary roughness" penalty. Luckily, Norman walked away without injury, however the video leaves viewers wondering how that was possible.

Michael Pernesiglio

One could understand Beckham's frustration prior to that point in the game. Beckham amassed a whopping two catches for 8 yards and had approximately four penalties, three of which were for "unnecessary roughness," in altercations with Norman. Clearly Norman was "under the skin" of Beckham and completely threw him off of his game. At one point the game became difficult to watch and it was surprising that both players were not ejected. But, what if Norman wasn't so lucky and did suffer a serious injury? Or, what if Norman's injury was a career threatening injury? Is there any other recourse available to him?

In *Hackbart v. Cincinatti Bengals, Inc.*, 601 F.2d 516, Dale Hackbart, a player for the Denver Broncos team, brought suit against the Cincinnati Bengals team and Charles Clark, a player for the Bengals, when Clark allegedly struck a blow to the back of Hackbart's head during a game, causing a serious neck fracture. The reviewing court reversed the trial court's ruling for the defendant, and ordered a new trial where no law prevented the application of tort concepts to football games. This concept has been applied to other sports such as basketball, where an intentional punch to the face, shattering the face and jaw of a professional basketball player by a member of an opposing team was held liable. *Tomjanovich v. California Sports, Inc.*, 1979 U.S. Dist. Lexis 9282. See also *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714 (D. Md. 2014), where professional football player plaintiff's claims for battery and civil conspiracy were not preempted under 29 U.S.C.S. §185(a) by the collective bargaining agreement (CBA) between the league, its owners, and players and because the elements of the torts were not inextricably intertwined with the CBA.

As such, it is not out of the realm of possibility that legal action can be brought against Beckham and/or the Giants under the doctrine of respondeat superior.

However, the main difference between Beckham's case and the other aforementioned instances is that in the ladder, each of the players suffered a serious injury, thereby jeopardizing their chances of continuing a career in their respective professional sports (Green tore his anterior cruciate ligament on the play, which effectively ended his career). Luckily for Beckham and the Giants, Norman appeared to walk away unscathed from the incident. In fact, after being hit, Norman received a penalty for "unnecessary roughness" for defending him-

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TOURO

AHEMs, Coffee Stains, and Missing Buttons — Some Common Writing Pitfalls

By Stephanie Juliano

Imagine this: You are a juror. After the plaintiff's attorney delivers her opening statement, the defendant's attorney approaches the podium. He begins to speak:

"Ladies and gentleman of the jury, *AHEM*, my name is Paul Hanes, *AHEM*, and I represent the defendant, Mr. Thomas Jackson, *AHEM*."

Why does he keep clearing his throat? you wonder.

The defense attorney continues delivering his opening statement and gestures towards his client. As his torso twists, his motion exposes a coffee stain on his shirt hidden under his suit jacket. You then notice that the suit jacket is missing a sleeve button. Thinking about your own clothing, you note to yourself that you need to stop at the drug store on the way home to pick up some iron-on hem tape so you can hem your pants for tomorrow. You would have worn the pants today, but with the rain outside, you did not want to sit all day with wet ankles. With that final thought, the defense attorney returns to his seat.

Many attorneys are not foolish enough to enter a courtroom looking less than impressive, because the importance of presentation has been engrained in us. But this same reverence for presentation is often not reflected in attorneys' written works, particularly in the work of attorneys of my generation and the next to come. Why this disparity exists is a weighty question, one not addressed in this piece. What is presented are some common errors — the written "AHEMs," coffee stains, and missing buttons that distract a reader's attention and attack the writer's credibility.

Stephanie Juliano

AHEM: the comma

"A writer should use a comma any time the writer takes a breath" is a poor comma rule, but a common one. What if the writer is an asthmatic? Is this writer going to breathe the same way a triathlete would? The answer is, "no." This rule is not one a writer should follow because it leads to habitual throat clearing. Instead, here is one rule (among many) to try:

The FANBOYS Comma: when one of the seven coordinating conjunctions combines two independent clauses, place a comma before the conjunction.[1]

Correct: The police officer arrested the defendant Thursday night, *and* the judge arraigned the defendant on Friday morning.

The acronym "FANBOYS" stands for the seven coordinating conjunctions, which are *for*, *and*, *nor*, *but*, *or*, *yet*, and *so*. In the example, the coordinating conjunction is "and." Here, "and" combines two independent clauses, i.e. two clauses that could stand as sentences on their own. Therefore, the writer uses a comma before "and" to combine the two clauses together.

A common comma pitfall is the "comma splice." A comma splice is two sentences fused together with a comma without a coordinating conjunction to combine them.

Incorrect: The defendant's girlfriend cried all night, her father would not lend her money to bail out her man.

Here, a comma combines, or splices, together two independent clauses without the help of the conjunction "for." An easy way to fix comma splices is to use a period, or if the writer is daring, a semicolon in place of the comma. The writer could also supply a conjunction.

Coffee stains: noun and pronoun agreement

A pronoun and the word the pronoun replaces must agree in number and gender.[2] Errors in noun and pronoun agreement are sometimes difficult for writers to spot because the ear overrides the eye; that is, that which sounds correct is believed to be correct because of informal speech. This error occurs predominately when writing about a nonspecific person or thing.

Incorrect: A writer may not spot this error because their ear tricks them.

Corrected: A writer may not spot this error because his or her ear tricks him or her.

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LAND TITLE LAW

Ancient Document Exception – Don't Throw the Baby Out with the Bath Water

By Lance R. Pomerantz

Existing Federal Rule of Evidence Rule 803(16) ("Rule 803(16)") provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Judicial Conference Advisory Committee on Rules ("the Advisory Committee") has formally proposed the complete abrogation of the rule. The "Ancient Document Exception" can play a critical role in land title litigation. Indeed, proving title is the principal reason the exception was originally recognized.

The Advisory Committee's concern springs from the exponential growth of electronically stored information ("ESI") during the last several decades. The Advisory Committee fears the exception could be abused to admit a flood of unreliable hearsay in various non-title cases simply because the evidence has been preserved electronically for 20 years or more.

While the Advisory Committee's concern may be valid in certain types of cases (a point on which I express no opinion), the proposed response overlooks the continuing vitality of the Ancient Document Exception in land title litigation and the mischief that might arise from its abrogation.

Lance R. Pomerantz

The origin of the exception

The Advisory Committee's own analysis reached four meaningful conclusions about the exception: it "was originally intended to cover property-related cases to ease proof of title;" it is usually invoked because there is no other evidence on point; "the common law has traditionally provided for authenticity of documents based on age" and it has hitherto been infrequently used.

The tenor of the Advisory Committee's report casts these conclusions as support for the proposed abrogation — as if resort to ancient documents in land title litigation is a relic of a bygone era. To the contrary, day-to-day land title and title insurance litigation regularly addresses boundary disputes, easement claims and riparian rights, among many other issues. These cases frequently require reference to documents in excess of 100 years or more, let alone 20.

On a broader scale, three frequently litigated types of high-profile cases often rely on so-called "ancient documents:" Native American land claims, "rail-banking" or railroad right-of-way cases, and mineral rights claims. Many of these cases must resort to documents extrinsic to the public land records to illuminate otherwise opaque issues like corporate authority, death and survivorship, intent, lines of descent or the location of no-longer-extant boundary monuments. The proposed abrogation might well stymie a court's ability to reasonably resolve otherwise intractable problems.

The "problem" was created by the courts

The Advisory Committee's Analysis succinctly states the origin of both the exception and the problem: "it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant." *See* Request for Comment, pp. 18-19 (emphasis added).

Thus, the underlying cause of concern has actually been unwarranted expansion of the types of cases in which the exception is used. The feared influx of ESI may magnify the problem, but does not fundamentally define it.

Assuming *arguendo* that use of the exception in environmental contamination, toxic tort, products liability, financial fraud or various species of criminal cases (just to name a few) is outside its original scope, that doesn't mean its original intended use is no longer viable or valuable.

An everyday tool

The Advisory Committee offers no data to support its conclusion that the ancient document exception "has hitherto been infrequently used." The relative dearth of reported case law concerning Rule 803(16) in land title cases should not be used to gauge the extent of its actual use in such cases. Its use as an "everyday" tool far outstrips the occasions on which it is mentioned in trial court decisions or becomes an appealable issue.

The Advisory Committee has not suggested any action be taken with respect to the rule providing for the

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Judicial Swearing-In & Robing Ceremony

Photos by Ron Pacchiana

CORPORATE

Private Label Agreements

By Joseph V. Cuomo and Allison W. Rosenzweig

In challenging financial times, it is important for manufacturers to consider profitable business alternatives. One such alternative is entering into a private label agreement. Under a private label agreement, products are manufactured by one company but sold under the name or brand of another company, often a retailer or a wholesaler. The resulting private label products are often referred to as "store brands," as opposed to "name brands," which are the products sold under the name of the manufacturer. This arrangement happens in a wide variety of products, but is most common in grocery stores and drug stores.

This article will cover some factors to determine if a private label arrangement is the right business move; reasons for a manufacturer to consider entering into a private label agreement; and considerations that a manufacturer should think through and discuss with its lawyer when negotiating the contract.

Is a private label arrangement the right move?

There are several factors that help determine whether a private label deal is the right move for a manufacturer, some of which include: sales potential of the product, the manufacturing process, and quality.

Joseph V. Cuomo

Allison W. Rosenzweig

A manufacturer that produces products with significant sales potential that satisfy a mass market is usually the most successful in a private labeling arrangement. Retailers are not interested in branding low-demand items. When a manufacturer's name brand product has been pre-tested and retailers and consumers are already familiar with it, the product should be desirable in a private label arrangement, as it can now be sold in a new package because it will self-sell.

Another key factor in determining if private labeling is the right business move is the manufacturing process. It is important to consider whether the manufacturer has the ability to produce a substantial amount of the product, be reliable and ensure on-time delivery. An additional aspect of the manufacturing process is the manufacturer's flexibility and ability to increase production in order to meet demand. The ability to meet a retailer's needs plays favorably in this type of arrangement.

Finally, it is often important to ensure that the private label product is of high quality. Consumer perceptions about private label products have increased significantly in the last few years. Consumers reaching for store brands are no longer just looking for value. They also expect a store name product to have equal or greater quality to brand name products. The quality includes both the product itself, as well as the appearance of the product. It is important to capitalize on this now favorable consumer perspective and factor it into the product and label development process.

Reasons for manufacturers to enter into a private label agreement

During the recent economic recession, private label arrangements became more common for manufacturers. Now the trend seems to be here to stay, and has resulted in an explosion of sales of private label brands. It has become a valued strategy by manufacturers of any size, especially those that have established recognized name brands of their own. Even small and medium-sized manufacturers have new opportunities using private labeling because these companies may gain additional market share and no longer have to compete directly with large manufacturers. Now manufacturers of any size can grow their business by marketing their products to retailers.

Entering into this type of business arrangement allows the manufacturer's product to reach a larger audience. It also allows the product to have more credibility because it bears the label of a store that already has a brand identity of its own. Retailers may be interested in this business strategy as a way to introduce new product lines or source products from specialized manufacturers because it is a more economical alternative to establishing their own production and manufacturing facility.

One major benefit for a manufacturer in a private label arrangement is that it does not have to incur advertising expenses to promote the products.

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CONSUMER BANKRUPTCY

Can Debtors Enter Chap 7 Through the Back Door?

Means test may not be required for conversions

By Craig D. Robins

Some debtors seeking Chapter 7 relief whose incomes are above the state median are unable to do so because they do not pass the means test. So imagine the excitement experienced by the consumer bankruptcy counsel who thinks they discovered a backdoor into Chapter 7 where they do not have to have their clients qualify under the means test.

Ever since Congress imposed a means test requirement on debtors seeking Chapter 7 relief, consumer bankruptcy practitioners have been analyzing the statute, trying to find a way around it.

For years, counsel across the country believed they discovered a loophole. Due to a possible ambiguity in the way Bankruptcy Code section 707(b) was drafted, it appears that if a debtor in a Chapter 13 case voluntarily converts it to one under Chapter 7, the means test is no longer necessary. In other words, debtors can obtain Chapter 7 relief even if they do not pass the means test.

Bankruptcy Code section 707(b) requires debtors seeking Chapter 7 relief to file the means test and pass it. The ambiguity is that this statutory provision states that the means test must be "filed by an individual debtor *under this chapter*." Thus, some counsel have argued that if the debtor did not initiate the case in Chapter 7, the debtor is not legally required to file the means test.

Craig Robins

This was a hot topic discussed at a great many seminars and workshops, including some here on Long Island. However, local counsel could only shrug their shoulders as there has been a dearth of case law in the district and judges have been tightlipped discussing their opinions on the issue.

It seems that over a decade after BAPCPA has gone into effect, there is no definitive guidance for practitioners in New York. Apparently, courts addressing this issue have adopted one of three approaches, either permitting it, rejecting it, or providing for a hybrid approach. Yet, there seems to be no case law in the entire Second Circuit.

The judge in a recent Colorado case found this to be an issue of first impression in that district and discussed the three approaches. *In re: Burgher* (N.D. Colorado; Case No. 12-14410-sbb, September 30, 2015). In this case, the debtors sought conversion from Chapter 13 to Chapter 7 after two years, during which time the Chapter 13 trustee used their plan payments to totally satisfy all mortgage, car loan and income tax arrears. After converting, the U.S. trustee argued that the debtors had sufficient funds to pay their unsecured debts.

The judge agreed and dismissed the case because the debtors conceded that they could not pass the means test if they had to file it. The judge determined that section 707(b) applies to converted cases and that Chapter 13 debtors converting their cases to Chapter 7 had to file and pass the means test.

Judge Sidney B. Brooks began his analysis by reminding us that BAPCPA was enacted to restrict eligibility for relief under Chapter 7 by making it harder for individuals who can repay their debts to file for bankruptcy under Chapter 7. He then discussed the three approaches regarding the application of section 707(b) to converted cases. Nationwide, three distinct approaches have developed. Judge Brooks says that an overwhelming majority of courts have decided that applying section 707(b) to cases converted to Chapter 7 is in accord with the overarching goals of BAPCPA.

Under the majority approach, courts have taken the view that when a case is converted to Chapter 7, the case is deemed filed under Chapter 7 as of the initial petition date, and therefore, subject to a full section 707(b) analysis for purposes of eligibility. In addition, different courts also rely on different supplementary rationales to support their conclusions.

Bankruptcy courts adopting the majority approach include the Eighth Circuit, Rhode Island, the Eastern District of Virginia, the Western District of Missouri, Oregon, the Western District of Virginia, and the Southern District of Georgia.

Meanwhile, a minority of courts utilizes a "literalist view," and has found

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FREEZE FRAME

Welcome to the world

SCBA Past President A. Craig Purcell (1995-96) couldn't be happier with the birth of his first grandchild, Preston Ray Purcell, left, born on Nov. 29 to Craig's son, Scott, and his wife Randa, in San Jose, Calif.

New grandchild a blessing

SCBA staffer, Nicolette Ghiglieri is enjoying life with her first grandchild, Alexa Nicole, right, born on Jan. 18, 2016, 7 pounds 9 ounces and 20 inches long. Nicolette and her husband Dominick are as happy as can be and Alexa's parents, Christine and Chris Prieto, couldn't be prouder.

VEHICLE AND TRAFFIC

Practice Tips for 2016

By David A. Mansfield

Defending clients at the Suffolk County District Court Traffic and Parking Violations Agency (the Agency) can present challenges for defense counsel. The general rule is that defense counsel should not request a supporting deposition pursuant to statute at the outset of the case, unless they are committed to conducting a trial.

The Agency policy is that once defense counsel has requested a supporting deposition pursuant to CPL §100.25, the Rubicon has crossed plea bargaining off the table and the case will proceed to trial. This is important because in many cases the defense attorney can successfully negotiate a substantial reduction of the charges.

You may wish to request a supporting deposition if plea bargaining negotiations are of no avail and you are within the statutory time period. But your client may wish to proceed to trial or the case may fall within policy guidelines that will not permit a reduced plea bargain to be offered.

Defense counsel should always try to obtain copies of the summonses. If your client was issued an electronic summons, a copy of the accompanying supporting deposition can be very helpful in the preparation of the defense. The prosecutors will have the ability to pull up these documents during the conference.

The supporting deposition may include an alleged statement made by your client, which would be introduced at any trial. The electronic summons and supporting deposition read together should tell you the manner and method of how the speed of the defendant's moving vehicle was determined or what constituted the alleged violation of the Vehicle & Traffic Law.

When first consulted by your client, it is very important to know whether the case is on for conference or for trial. Should your client's case be on for trial it is incumbent to learn that fact at the initial interview.

David Mansfield

When the case is on for trial, the defense attorney must understand the urgency of the matter. Once defense counsel has been retained, it is incumbent to appear at the Agency as soon as possible to conference the case to determine if an offer of a satisfactory plea bargain will be made to dispose of the case prior to trial.

Should your file contain only the trial notice, it is essential you obtain copies of the summonses indicating whether your client was the owner of the vehicle in an insurance case, or just to learn the specifics of the alleged violations to properly prepare for trial.

When scheduled for a trial, the better practice for defense counsel is to be present at the appointed hour with your client to declare your readiness. Defense counsel must be prepared to budget the entire morning, afternoon or Thursday evening. Experience has shown that on average it takes from the time you check in to the time the case is concluded, on average about 2 ½ to 3 hours and sometimes longer. The Agency is making an effort to reduce the actual amount of time to conclude a trial.

The Agency, as a rule, will not plea bargain the case on the date of trial other than perhaps a plea as charged with reduced fines to each violation. Defense requests for an adjournment will only be granted if made in person at the Agency and as far in advance of the trial date as practical. The judicial hearing officer decides the granting of the People's application for an adjournment on the date of trial. The administrative regulations regarding the non-appearance of a police officer at the former Suffolk County Traffic Violations Bureau do not apply. The adjournment at the People's request will usually be granted in the first and second instances.

Reduced fines can be an incentive, especially when defending charges of operating without insurance §319(1), without a valid defense such as non-ownership with lack of knowledge for which the minimum fine is $150 and the maximum fine is $1,500.

The Agency prosecutors will routinely request the maximum fines at trial.

The actual trial depending upon the nature of the case can take anywhere from a ½ hour to an hour. Your client is required to appear unless arrangements are made in advance to waive their appearance pursuant to CPL §340.50.

It may be better for your client to participate in the trial unless there is some compelling reason, such as they are an over the road truck driver, and it would be difficult for them to appear. There is no substitute for your client being able to view your efforts on their behalf and the process. And your client may wish to testify, which is their decision. Defense counsel should advise the client what to expect, as a professional traffic prosecutor and the JHO will cross examine them.

You should use written retainers where possible specifically stating what services are included for either disposition without a trial or a trial. You may wish to include a per diem fee as the case may be adjourned at the People's request in one or two instances.

The retainer agreement should state it does not include any appeal or judicial review of any administrative decisions or such as a suspension pending prosecution or appearances at Department of Motor Vehicles Hearings.

Handling cases with high speeds presents certain challenges. Your client may have already appeared pro se and was suspended pending prosecution §510(3)(a). Once retained you should appear at your earliest convenience, preferably with your client, and seek to work out a plea bargain with the termination of the §510(3)(a) suspension.

Should your client retain you prior to appearing in court, the possibility of a §510(3)(a) suspension should be presented to them as well as the likelihood of community service to be performed in order to get the case reduced one level. And you should always send your client a detailed letter explaining how to pay the fine and encourage your client to pay the fines online.

While there is a 4 1/2 percent fee to do so, the charge is insignificant compared to the schedule of late fees and increasing charges in the event of late payment.

The Supreme Court Appellate Division Third Department in a split decision rendered 11/25/15, upheld the Department of Motor Vehicles permanent denial of a driver license application pursuant to 15 NYCRR Part §136.5 (b) (1). *Matter of Carney v. New York State Department of Motor Vehicles*, 133 AD3 1150, 2015 NY Slip Op 0861.

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

AMERICAN PERSPECTIVES

The Paying Fan's Right to Full Disclosure

By Justin Giordano

At the CNBC's October Republican Presidential debate a question pertaining to "Fantasy Football" was brought up. Whether that was a relevant question in the context of the debate has been vociferously contested by many pundits and the overwhelming majority of the candidates participating in the debate. The issue is mentioned here to highlight the prominence that sports has achieved at every level of American life and the ensuing legal challenges that accompany it. Regarding fantasy football, there's been a great deal of discussion regarding truthful and undistorted information. More specifically, it is required that all information dealing with football players' statistics, health concerns, etc. be open and aboveboard since it directly impacts the outcome of any given fantasy football result. And given that those playing the various fantasy football leagues stand to make or lose small to often large amounts of money, the veracity of the information is critical. Consequently any intentional disinformation or obfuscation or attempt thereof is potentially subject to severe consequences and legal penalties.

The much anticipated Floyd Mayweather versus Manny Pacquiao boxing match took place on Saturday, May 2, 2015 in Las Vegas, Nevada. This was a highly hyped-up event and it is estimated that it grossed more than $400 million from the pay-per-view audience that numbered at around 4.4 million people. These viewers individually paid up to $100 each to watch the match. In fact HBO and Showtime, the two cable broadcasting entities, set new records for a pay-per-view event of this genre. In addition there were also substantial revenues generated by the paying audience in attendance at the Las Vegas venue where the event was held, and said proceeds greatly benefited the fight and fighters' promoters. The match went the full scheduled 12 rounds but the overwhelming consensus by experts and viewers alike, was that this match was anything but impressive. The overall reviews were decisively negative as the match was described as non-action packed, and even boring. Certainly as far as major title matches go, the charge is that it fell far short of the expectations that were assiduously build up by the promoters, cable networks and all those surrounding the match and the two fighters.

Nonetheless, boxing matches, just like any other sporting or even entertainment events in general, have fallen short of their build ups on many previous occasions and doubtlessly will do so again. What is different in this case and directly relates to the broader principle that comes into play here and makes the reference at the outset of this article to fantasy football (and other fantasy sports leagues) pertinent is the matter of full disclosure.

Justin Giordano

Failure to disclose: the pre-existing injury

At the conclusion of the Mayweather-Pacquiao bout it was revealed that Manny Pacquiao had suffered a shoulder injury at some point prior to the May 2 fight. However Mr. Pacquiao did not reveal this condition in the questionnaire that the Nevada Athletic Commission (NAC) required boxers to fill out in order to issue them a license to fight. Actually the Pacquiao injury was only disclosed to the NAC and the U.S. Anti-Doping Agency (USADA) on the evening of the bout when the boxer requested a Toradol and lidocaine injection just prior to the start of the match. The NAC denied Pacquiao's request although these substances are not banned by the USADA. Their reason was that the request came too close to the start of the match. The commission pointed out that the injury was not disclosed on the questionnaire, which is completed under oath and under the penalty of perjury for untruthful answers. The latter matter, namely whether perjury has occurred, is to be investigated and determined by the Nevada authorities. What is clear however is that there was no full disclosure to the public prior to the match. Consequently viewers purchased the Mayweather-Pacquiao pay-per-view event under false assumptions or, at the very least, incomplete information.

As a result of this non-disclosure or misrepresentation, fraud has been alleged by many of the pay-per-view purchasers and they have sought redress by filing some 32 U.S. lawsuits. These suits are seeking class-action status alleging that Pacquiao should have disclosed his shoulder injury to the NAC and by extension to fans and the general public prior to the fight. To further underscore the fact that this was potentially a substantive or even major factor that led to the unanimous decision in favor of Mayweather is that following the bout Mr. Pacquiao did have surgery on his shoulder.

Lawsuits claims and will plaintiffs' prevail?

As previously mentioned, the plaintiffs are seeking to consolidate their lawsuits into a class action suit. The threshold for class action federal lawsuits is a jury trial and at least $5 million in damages.

Some of the plaintiffs' lawsuits make the following contention: "Fight of the century? More like fraud of the century." Another lawsuit filed in Texas states, "The fight was not great, not entertaining, not electrifying. It was boring, slow and lackluster." The Texas suit alleges racketeering, which is a very serious claim and one that has been typically utilized in cases involving organized crime. Yet another lawsuit, which was filed on behalf of Flights Beer Bar near Los Angeles International Airport in California, which paid $2600 to broadcast the fight to its customers, contends that Manny Pacquiao and his promoter's actions amounted to "nothing but a cash-grab." Gamblers — legal gambling of the Las Vegas kind that is — that placed bets on the outcome of the bout also joined in the lawsuit bandwagon.

It would thus seem that the claim of non-disclosure and misrepresentation rest on meritorious ground. But the determinative question is whether this non-disclosure amounts to fraud against the paying public and more precisely the pay-per-view purchasers of the bout. In terms of law and particularly contractual obligation, did the promoters, the cable networks and other entities involved in organizing the event live up to their end of the bargain? To answer this key question that must be addressed is "what was promised to the viewing audience?"

The answer, it can be argued, was a boxing match, and all said parties involved delivered just that, for the scheduled 12 rounds in fact. The breach of contract would thus have occurred if due to the Pacquiao injury the match would not have taken place at all, only the other fights listed on the undercard, and the paying viewers would still have been charged for the event. Another example would be if at the very last minute, after the pay-per-view customers had already paid, a substitute fighter had been inserted to replace the injured Mr. Pacquiao. This was clearly not the case here.

Essentially as far as contract law goes, the pay-per-view customers entered into a contract with their cable networks to view a boxing match and the cable networks delivered. That is the simplest and most direct answer and it would seem a plausible one as far as contract law is concerned. It may ultimately win the day for the defendants. With regard to Mr. Pacquiao, did he have a legal duty to explain his injury to the paying public or only to the NAC? If the answer is to latter only, since he did not have an individual contract with each and every pay-per-view customer, then the plaintiff's lawsuits will fail with regard to their suits against the boxer. This is separate, as a matter of law, from the issue of whether Mr. Pacquiao potentially committed perjury in completing the NAC form.

On the other hand and in conclusion, the American legal system embraces the pursuit of justice as one of its principal objectives. By extension this implies that the notion of "fair play" is paramount. It would seem that in this case "fair play" may have been compromised, If that is ultimately determined to have been the case, then the legal consequences should follow suite.

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

Thanks for Making the Season Brighter

SCBA President Donna England, members of the Board of Directors and staff thank Ron Hoffman for the gorgeous wreath you presented to us for the outside of the bar building during the holiday season. For the last 25 years, you and Glenn have been sending us a wreath for the outside of the Bar Center and we appreciate your generosity.

Trivial Defect Doctrine (Continued from page 12)

dence that the area was not crowded or congested. Finally, the defendant provided evidence that the defect was alone and not hidden or obscured in any way to prevent the plaintiff from identifying it as a hazard. The court held that the defendant had established as a matter of law that the defect was trivial and not actionable.

In the second set of facts the plaintiff, through an expert affidavit, overcame the defendant's *prima facie* showing of entitlement to summary judgment. The expert demonstrated how an otherwise seemingly insignificant defect was particularly dangerous due to its location on the nosing of a stairway. The expert placed the trivial defect into a greater context, sufficient to raise a question of fact as to whether a reasonable person would anticipate an accident occurring as a result of its existence. This set of facts demonstrates when a fact pattern can benefit from securing an expert who can analyze an individual's gait and apply the normal walking motion to the specific location of the defect within the walkway or stairway.

In the third set of facts, the defendant provided photographs of the defect, but did not submit any evidence of the dimensions of the defect. While holding that some defects may be determined to be trivial based upon photographic evidence alone, the characteristics surrounding the defect in question, which were a "clump" of raised material on a stairway, required an examination of the dimensions of the defect to make such a determination.

The role of the everyman

A defect is not actionable simply because it is capable of causing injury. The fact that the plaintiff happened to be injured does not automatically make a defect actionable. The test is whether the defect unreasonably imperils the safety of an ordinary person traveling in a manner typical of an ordinary person. As stated by the *Beltz* court, it is impossible to prevent every accident. Instead of debating what danger the defect posed to the injured plaintiff, the analysis should consider what danger the defect posed to the average pedestrian traveling the subject walkway in an average, reasonably expected manner. As analyzed in the second set of facts considered by the *Hutchinson* court, a defect under a handrail on a stairway might not be actionable despite the fact that an identical defect on the nosing of a stairway tread may be actionable.

In the same way that that a defect will not automatically be actionable because one person happened to be injured, a defect is not automatically trivial because others have managed to navigate the same walkway unharmed. The *Hutchinson* court urges lower courts to "avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere."[6]

The role of the reasonable man

The *Beltz* court in 1895 held that "when the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury."[7] This standard is still followed today with the *Hutchinson* court holding that "whether a dangerous or defective condition exists on the property of another so as to create liability is generally a question of fact for the jury."[8]

After 120 years practitioners still don't have a bright line rule for determining when a defect is actionable and the very nature of a negligence claim likely precludes the introduction of one. The standards of the reasonable man change with time, and with them, the defects that a jury can find actionable evolve.

Hutchinson may not have rewrote the field of premises liability, but at the very least it consolidated and clarified the factors to be considered when determining whether a defendant has violated the standard of care owed to pedestrians on walkways. Context is the key to victory under *Hutchinson*; the parties should be careful not to focus so intently on the defect itself in that they lose sight of the circumstances surrounding the defect and the moment that the plaintiff was injured.

Note: Dennis C. Valet is an associate attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Valet focuses his practice on real estate litigation with an emphasis on real estate brokerage and premises liability.

[1] 148 N.Y. 67 (1895)
[2] 298 N.Y. 320 (1948)
[3] 90 N.Y.2d 976 (1997)
[4] 26 N.Y.3d 66 (2015)
[5] *Id*. at 79.
[6] *Id*. at 84.
[7] Beltz, 148 N.Y. at 70.
[8] Hutchinson, 26 N.Y.3d at 77.

Trusts and Estates Update (Continued from page 14)

view of the fact that the proceeding seeking its recovery was instituted in 2013, the court held that the claim for a constructive trust with respect to the shares of stock was not time-barred.

However, the court held that the statute of limitations with respect to the real properties in issue began to run when the promised payments for same were due and owing. In the case of one of those properties, the promised payments were due between 1989 and 1992, and in the case of the second, payments were due in 1994 and again in 1998. Accordingly, the court found that under any such circumstance, the proceeding for a constructive trust was untimely.

Finally, the court rejected petitioner's contention that their claim for a constructive trust could nevertheless be maintained as an equitable remedy for other causes of action, holding that an equitable remedy is not available to enforce a legal right that is, itself, barred by the statute of limitations. Additionally, the court held that petitioners claims based upon equitable estoppel lacked merit, concluding that there was no evidence that the decedents were lulled into inactivity with respect to the real property in question until after the statute of limitations had expired.

Matter of Thomas, 2015 NY Slip Op 00017 (4th Dep't).

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

Who's Your Expert (Continued from page 10)

requires that "a principle or procedure has gained general acceptance in its specified field"[3] in order for expert scientific testimony to be admissible, but that a court need only "conduct an inquiry, concerning general acceptance, pursuant to *Frye*, in situations in which a party seeks to rely upon novel, scientific, technical or other concepts involving expertise."[4] The court rejected the respondent's argument that under prior case law, he was automatically entitled to a *Frye* hearing, and then denied his application entirely, finding that he failed to make a *prima facie* showing that the state's expert was relying on a novel theory that is generally not accepted in the scientific community.

Similarly, the Appellate Division upheld the lower court's denial of a *Frye* hearing in *Johnson v Guthrie Med. Group, P.C.*,[5] where the defendant failed to establish that opinion offered by the plaintiff's expert was "premised on novel science." The court found that to the contrary, the opinion offered was based on generally accepted scientific principles. The court further determined that the question was not whether the expert opinion was admissible, but rather whether the proper evidentiary foundation had been laid for it, and then answered that in the affirmative.

Precluding expert testimony

In *LeBarre v Werner Enterprises, Inc.*,[6] the federal District Court for the Northern District of New York precluded certain expert testimony on the grounds that the opinion was not previously disclosed in the party's disclosure pursuant to FRCP 26(a)(2)(B). However, the court determined that some of the testimony offered was not a new opinion, but rather, was based on facts that had been previously disclosed and, therefore, was permissible at trial. This decision importantly reminds practitioners to ensure that their pretrial expert disclosures contain every opinion sought to be offered, as the failure to include an opinion could prove fatal at trial.

In *People v Brooks*,[7] the Appellate Division upheld the lower court's decision to preclude the defendant's expert pathologist from testifying affirmatively that the victim was not forcibly drowned. The court found that because the pathologist had very limited experience with forcible drownings, he had no basis to offer that particular opinion. The lower court also properly precluded the pathologist from testifying that bruises found on the victim's body might have come from rough sex or erotic choking because there was no evidence offered that the defendant and victim ever engaged in either behavior.

In *Gonzalez v Palin*,[8] the Appellate Division reversed the lower court's decision precluding the defendant's biomechanical engineer expert from testifying on the grounds that he was not qualified to offer an opinion as to the plaintiff's injuries. The Appellate Court found that the expert had the educational background and experience to render him qualified to offer his particular expert opinion. The fact that he did not have a license to practice medicine in the United States did not change that fact. Because the expert's testimony was central to the case, the court determined that the preclusion was not harmless, and remanded the case for a new trial on damages.

Happy 2016 to all.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

[1] 30249/12 NYLJ 1202744516311, at *1 (Sup Ct, Suffolk County Nov. 24, 2015)
[2] 2015 NY Slip Op 25359 (Sup Ct Dutchess County Oct. 13, 2015)
[3] *People v Wesley*, 83 NY2d 417, 422 (1994)
[4] *DeMayer v Advantage Auto.*, 9 Mic 3d 306, 311 (Sup Ct, Wayne County 2005)
[5] 125 AD3d 114 (4th Dept 2015)
[6] 1:12-CV1316 (MAD) (NDNY Dec. 4, 2015)
[7] 2015 NY Slip Op 09379 (1st Dept Dec. 22, 2015)
[8] 48 Misc 3d 135(A) (1st Dept July 21, 2015)

Remembrance of Justice Lawrence J. Bracken (Continued from page 5)

wrote that the settlement of a personal injury claim against the state in the Court of Claims did not preclude the injured plaintiff from pursuing recovery for the same injuries against the negligent state employee in the Supreme Court.

In *Braun v. Ahmed*, 127 AD2d 418 (2d Dept. 1987), Justice Bracken issued an opinion affirming the right of counsel in a medical malpractice action to argue to the jury an actual dollar amount that the jury should award as damages.

In *People v. Gallagher*, 116 AD2d 299 (2d Dept. 1986), Justice Bracken filed a dissenting opinion in which he argued that a verdict finding the defendant guilty of second degree murder (intentional murder) and second degree manslaughter (reckless manslaughter) arising out of the death of a single person was repugnant and could not stand. Justice Bracken's analysis was followed by the Court of Appeals, which reversed the Appellate Division. *People v. Gallagher*, 69 NY2d 525 (1987).

In *Matter of Dep't of Social Services v. Thomas J.S., 100 AD2d 119* (2d Dept. 1984), Justice Bracken authored an opinion holding that section 532 of the Family Court Act, which authorized the results of a human leucocyte antigen (HLA) blood tissue test to be received as evidence of paternity, is constitutional.

In *People v. Haupt*, 128 AD2d 172 (2d Dept. 1987), Justice Bracken wrote for the court that the good-faith loss or destruction of evidence over a period of 16 years, while the defendant was not competent to stand trial, did not deprive him of a fair trial.

In *Conner v. Conner*, 97 AD2d 88 (2d Dept. 1983), Justice Bracken, along with Justice Richard Brown, filed a concurring opinion, which parted company with the majority and took the position that a professional degree is marital property which is subject to equitable distribution. This view would be adopted by the Court of Appeals just two years later in *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).

In *People v. Kinitsky*, 119 AD2d 159 (2d Dept. 1986), Justice Bracken wrote that the trial court's failure to deliver the jury charge concerning the consequences of a verdict of not responsible by reason of mental disease or defect, as required by CPL 300.10, constituted reversible error.

In *Iannelli v. Powers*, 114 AD2d 157 (2d Dept. 1986), a premises liability case, Justice Bracken wrote an opinion holding that the owner of a commercial office building, along with a tenant and subtenant, were not liable for an on-premises shooting death perpetrated by third parties.

One opinion, which is particularly memorable, is *Matter of J.A.J. Liquor Store, Inc. v. New York State Liquor Auth.*, 102 AD2d 240 (2d Dept. 1984). In that case, a retail liquor store licensee brought an Article 78 proceeding to review a determination of the State Liquor Authority finding that the licensee had sold liquor at less than the minimum resale price prescribed by section 101-bb of the Alcoholic Beverage Control Law. Writing for the court, Justice Bracken issued an opinion holding that New York's statutory resale price maintenance system violated the Sherman Antitrust Act. Accordingly, the Appellate Division granted the petition and annulled the SLA's determination. The New York Court of Appeals rejected Justice Bracken's view that the retail price maintenance system violated the Sherman Act. *Matter of J.A.J. Liquor Store, Inc. v. New York State Liquor Auth.*, 64 NY2d 504 (1985). However, the United States Supreme Court agreed with Justice Bracken and reversed the Court of Appeals. *324 Liquor Corp. v. Duffy*, 479 US 335 (1987).

In addition to his signed opinions, Justice Bracken is frequently remembered for the *Baby Jane Doe* case, a highly publicized and emotionally-charged case in which he stayed enforcement of an order directing that a profoundly ill infant undergo surgery against the wishes of the child's parents. Ultimately, the New York Court of Appeals sustained Justice Bracken's position. *Matter of Weber v. Stony Brook Hosp.*, 60 NY2d 208 (1983). The *Baby Jane Doe* case stands as a reminder of Justice Bracken's courage, integrity and independence.

In my 40 years of practicing law, I have been privileged to meet and befriend many judges, and we are entirely comfortable being on a first-name basis. However, Justice Bracken was different. Although his colleagues on the bench, the members of his family and his personal friends called him Larry, I could never do so despite our long and enduring friendship. To me, he was — and will always be — Justice Bracken or, very simply, Judge, and he will be missed.

Note: Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He is also Chair of the NYSBA Audit Committee and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is a former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and Vice Chair of the Board of Directors of Nassau-Suffolk Law Services Committee, Inc. He is a partner at Lamb & Barnosky, LLP in Melville, where he serves as Chair of the firm's Ethics Committee and Litigation Committee.

Lawyer Assistance Foundation

The Lawyer Assistance Foundation acknowledges with gratitude a donation from Joshua M. Pruzansky in memory of the Honorable Lawrence J. Bracken.

President's Message (Continued from page 1)

ious factors such as maturity level, age, emotional or intellectual handicap, manipulation, undue influence or parental alienation.

Once the report is complete it is the intention of the task force to distribute their report to the New York State Bar Committee on Children and the Law, and various other associations with the hope of having the Chief Judge to amend the court rule.

Our 18b Task Force is in the process of preparing a new plan for the 18b Administrator in Suffolk County. The new plan is for a full-time administrator with a staff of approximately 4 or 5 with offices in the Cohalan Complex. The full-time administrator will be handling the current 18b attorney's in the Supreme Court, County Court, District Court and Family Court, as well as the additional grants that have been issued to the administrator. Once the plan is approved, the task force will be taking applications for the position as administrator.

The Association's Lawyer Referral & Information Service (LRIS) has received permission to place signs in the courthouse informing litigants of this service. It is our hope that once the signs have been strategically placed throughout the courthouses in Suffolk County, we will be receiving many more calls from litigants seeking to hire an attorney. If you are not a member of LRIS, consider joining and increasing your clientele. Call bar headquarters and speak to our LRIS administrator, Edith Dixon. This is our number one membership benefit. The Lawyer Referral Service receives calls from thousands of potential clients annually and refers them to attorneys based on areas of law and geographic location. You can enhance your practice by joining today!

Later this year there will be vacancies on the Grievance Committee for the Tenth Judicial District. I served on this Committee from 1998 through 2015. While this committee requires a real commitment, it was one of the most fulfilling and important experiences of my career. The committee meets once a month, in the evening but the reports take an afternoon to read.

In the event that you are interested, please contact any member of the Executive Committee or send a resume to our executive director, Jane LaCova.

On behalf of our Board of Directors and the members of the SCBA, I would like to express our special appreciation to co-chairs Marian Rice and Harvey B. Besunder of the Joint NCBA and SCBA Task Force on Proposed Uniform Attorney Disciplinary Rules as well as members Steven Leventhal, Carolyn Reinach Wolf, Hon. David T. Reilly and Ilene Sherwyn Cooper for preparing the "Report of the Joint NCBA and SCBA Task Force on Proposed Uniform Attorney Disciplinary Rules" (report) five days before the Office of Court Administration comment period ended.

Although the Task Force supports many of the initiatives contained in the proposed rules, which seek to unify and expedite the disciplinary process, the Joint Task Force remains disappointed that the review of this long overdue examination of the system has been mandated in a time frame that did not allow for measured examination of the issues and an extended period of comment.

Please contact the Executive Director Jane LaCova at jane@scba.org for a copy of the report.

Bench Briefs (Continued from page 4)

a party is precluded from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals are the same. Since the issue of liability was resolved in Action 2, there were no remaining common questions of law or fact to be resolved in a trial involving an assessment of damages.

Motion to dismiss granted; relating to slander and libel concern communications that were materially related to the defendants' efforts to report on, comment on, or oppose the plaintiffs' application; no allegations tending to support any claim that defendants had substantially interfered with plaintiffs' right to use and enjoy his land; allegations alleged to have been committed did not rise to the level of extreme and outrageous conduct; mere furnishing of information to the police, did not constitute an actionable tort.

In *James Greco and Nicole Greco v. Kim Rivera and Artemio Rivera, Jr.*, Index No.: 16264/2012, decided on May 28, 2015, the court granted the defendants' motion to dismiss. It granted the motion to dismiss as to the claims for slander and libel.

The court noted that plaintiffs were public applicants for a variance, and that the allegations relating to slander and libel concern communications that were materially related to the defendants' efforts to report on, comment on, or oppose the plaintiffs' application. In addition, the court pointed out, that one of the statements made by defendant, Kim Rivera to a third party, could not be taken literally and was merely vituperation. Accordingly, the motion to dismiss the causes of action for slander and libel was granted.

The third and fourth cause of action was also dismissed. As to the private nuisance claim, the court reasoned that there were no allegations tending to support any claim that defendants had substantially interfered with plaintiff's right to use and enjoy his land. In addition, the allegations alleged to have been committed did not rise to the level of extreme and outrageous conduct required to sustain the fourth cause of action for intentional infliction of emotional distress. With regard to the final cause of action for abuse of process, the court noted that the mere furnishing of information to the police, who are then free to exercise their own judgment as to how to act, did not constitute an actionable tort, and any defamatory statements that may have been made to the police are privileged. Accordingly, the fifth cause of action was dismissed.

Motion for summary judgment granted; vehicle involved in the accident was leased and moving defendant did not operate, direct or control the vehicle at the time of the accident.

In *Adilson Moreira v. Andrew H. Gelderman, Andrew M. Gelderman, Hub Truck Rental Corp. and Luis A. Mera*, Index No. 20167/2014, decided on November 5, 2015, the court granted the motion of defendants, Hub Truck Rental Corp. and Luis A. Mera, for summary judgment dismissing the complaint.

The summons and complaint to recover damages for personal injuries sustained at the time of an accident when plaintiff was a passenger in a vehicle leased from Hub and operated by Mera, which came into contact with a vehicle operated by defendant Andrew M. Gelderman and owned by the defendant Andrew M. Gelderman. The first cause of action alleges that the accident was caused by the negligence of the defendants Gelderman, and it is alleged in the second cause of cation that the accident was caused by the negligence of the defendants Hub and Mera. In granting the application, the court noted that pursuant to the Graves Amendment (49 USC §30106), generally the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner is engaged in the trade or business of renting or leasing motor vehicles, and there is no negligence or criminal wrongdoing on the part of the owner.

Here, the court found that Hub's entitlement to judgment as a matter of law was established by the affidavit of its insurance manager, who averred that the vehicle involved in the accident was leased by Hub to Mr. Grade "A," Inc., and that Hub did not operate, direct or control the vehicle at the time of the accident.

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

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Charge it to the Game (Continued from page 9)

"in whatever hands they may come" and accrues from the "commencement of an action" if one represents the plaintiff or "the service of answer containing a counterclaim" if one represents the defendant.

The key word is "proceeds," to which the lien must affix. If there are no proceeds, in a zero sum matrimonial, where both sides essentially "split the pie," the charging lien is nearly worthless. If one represents the monied spouse, for example, who "retains" the home in the Hamptons, good luck trying to lien it. The lien will be denied, since there were no proceeds created, as your client already owned the property.

Likewise, if you are representing the non-monied defendant spouse in a matrimonial, it appears that wedging a "counterclaim" in the answer, even though most answers contain the standard "neither admits nor denies the allegation of irretrievable breakdown but consents to the issuance of a judgment of divorce upon said ground as set forth in DRL 170.7," is a prerequisite to seeking a charging lien later on in the litigation.

Like the retaining lien, a charging lien does not lien against maintenance, or child support, again on public policy grounds,[3] but there is no prohibition against attaching it to counsel fee awards[4] either to your client or to incoming counsel.

Notably, Special Term has no power to order the turnover of the file without first determining the compensation due and owing to the outgoing attorney; meaning, that any order to show cause with a decretal paragraph directing that pending the return date of the motion, that the file be turned over, should be immediately brought to Brooklyn for a stay (and reversed as improper).

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] *Golden v. Whittemore*, 125 AD2d 942 (4th Dept. 1986)
[2] *Ventola v. Ventola*, 112 AD2d 291 (2d Dept. 1985); *Rosen v. Rosen*, 97 AD2d 837 (2d Dept. 1983)
[3] *Theroux v. Theorux*, 145 AD2d 625 (2nd Dept. 1988).
[4] *Levitas v. Levitas*, 96Misc.2d 929 (Sup Ct. NY Ct. 1978)

Better Lucky Than Good, Odell (Continued from page 15)

self against Beckham's insanity.

Ultimately, Beckham was suspended one game by the National Football League ("NFL") for the incident. Probably no additional action will be taken against Beckham by the NFL or Norman because of the mere fact that Norman did not suffer a serious and/or potentially career threatening injury. Had that been the case, the action taken against Beckham by the NFL would probably have been much more severe, and Norman's attorneys would have already contacted Beckham's camp. For anyone who has not seen the incident, check it out because it will absolutely shock you that Norman walked away without injury.

Note: Michael Pernesiglio is a solo practitioner of a general practice with a primary focus in foreclosure defense, criminal law, vehicle and traffic hearings, transactional law, and sports and entertainment representation. Michael is an active member of the Suffolk County Bar Association and is currently enrolled in the Suffolk County Pro Bono Foreclosure Settlement Conference Project, the Assigned Counsel Defender Plan of Suffolk County and occasionally makes pro bono appearances at Nassau County Supreme Courts and the Nassau County Bar Association.

Problem Solving Court (Continued from page 8)

always consistent and it is sometime ineffective.

Since the problem solving courts have been so successful in dealing with other issues plaguing our society, perhaps it is time to take a new approach to dealing with a problem that so negatively effects the most vulnerable in our communities, our children. Having a judge who is dedicated to this situation may provide a forum where cases can be expedited to resolve this problem. Further, having a judge who deals with this problem exclusively may uncover patterns or manners to better deal with a situation that affects such a large number of individuals.

The problem solving courts are not a magic potion for resolving all of our society's ills, but considering their proven success, it is our responsibility to consider this as an option for resolving an issue that is not only growing, but one that affects those who can afford it least.

Note: Dennis J. McGrath is in his 3L year at Touro Law School. Dennis is a part-time evening student and a member of the Touro Law Review and the Touro Honors Program. In addition to his studies, he currently works full time running a company for the Cerebral Palsy Association of Nassau County.

Top 10 Real Estate Laws of 2015 (Continued from page 4)

dismiss the motion for a deficiency judgment. It's anticipated that the court's aspirational conclusion to its decision, that "[l]enders seeking deficiency judgments, however, must always strive to provide the court with all the necessary information in their first application," will only work as lip service because the court has stripped the trial courts of their authority to enforce the aspiration with any teeth (i.e., can no longer deny the application for insufficient proof in the first instance).

5. Chapter 7 cram downs eliminated

In *Bank of America v. Caulkett*, the US Supreme Court eliminated the ability of debtors to void a wholly underwater junior mortgage lien by way of 11 USC §506(d). This decision furthers the court's prior decision in *Dewsnup v. Timm* where a strip down was previously disallowed. Whereas a strip down seeks to reduce the value of a lien, which is partially secured, to only the value of such collateral, a cram down seeks to totally remove the lien as there exists no collateral whatsoever. As a result of Caulkett, post-bankruptcy debtors, who retain ownership of their homes, will no longer be able to realize any appreciation in their real estate until their liens are first satisfied.

6. Mortgage Debt Forgiveness Relief Act extended through 2016

The income tax exemption available to underwater homeowners who earn phantom income (i.e., cancellation of debt income), which arises when a debt is forgiven incident to a principal reduction, short sale or a deed-in-lieu of foreclosure, was extended through the end of 2016 by the Protecting Americans from Tax Hikes Act of 2015 (PATH Act). This is the first proactive extension of the Mortgage Debt Forgiveness Relief Act of 2007 since the law was first enacted (PATH retroactively applies it to 2015). In 2013 and 2014 the law was retroactively extended at the end of the calendar year. Finally, 2016 will be a year of certainty where homeowners in foreclosure will be able to make strategic decisions in agreeing to a principal reduction, short sale or a deed-in-lieu of foreclosure while knowing that they can avoid a significant tax bill. Furthermore, the PATH Act protects homeowners who are in contract before January 1, 2017 from phantom income tax regardless if their transaction (e.g., short sale) closes after the end of 2016. The best resource to understand cancellation of debit income is the IRS' Publication 4681 or the IRS website.

7. Foreign Investment in Real Property Tax Act (FIRPTA) rate increase

The Protecting Americans from Tax Hikes Act of 2015 (PATH Act) increases the withholding amount under the Foreign Investment in Real Property Tax Act (FIRPTA) from 10 percent to 15 percent. However, the PATH Act continues the 10 percent withholding rate where both the "amount realized does not exceed $1,000,000" and the property will be used "by the transferee as a residence." The new rate and exclusion is applicable starting on February 16, 2016.

8. Premises Liability: Clarification of the Trivial Defect Doctrine

In *Hutchinson v. Sheridan Hill House Corp.*, the Court of Appeals clarified its Trivial Defect Doctrine by analyzing three separate cases involving a protrusion from a sidewalk, a chip on the edge of a stair, and a painted clump on a stair thread. The court held that "small defects" may be actionable dependent on "their surrounding circumstances or intrinsic characteristics [which] make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot." In such, the court expressly held that "specific circumstances" and not "whether a defect is a 'trap'" is the operative inquiry. Moving forward, Hutchinson furthers the court's prior rejection of the "minimal dimension test", in *Trincere v. County of Suffolk*, and should result in more slip and fall cases ending at trial, not summary judgment.

9. Reciprocal right to attorneys' fees in eviction

In *Graham Court Owner's Corp. v. Taylor*, the Court of Appeals eliminated any possibility for landlords to have their cake and eat it too when it comes to the availability of collecting attorneys' fees incident to an eviction while avoiding a tenant's reciprocal right to such fees, pursuant to Real Property Law §234. The court broadly interpreted the statute in extending its application to a uniquely drafted lease. The lease, at issue, only provided the landlord with a right to attorneys' fees as a deductible cost of reletting the premises before crediting the relet rents to mitigate the tenant's damages, but did not provide a right to attorneys' fees concerning the eviction proceeding itself. In such, the court clarified the issue before it as "whether the lease provides that 'in any action or summary proceeding' the landlord may recover attorneys' fees incurred as the result of the tenant's breach," without restriction to the "underlying proceeding against the tenant for the breach." Moving forward, landlords seeking to avoid §234 better avoid any mention of a right to attorneys' fees whatsoever in their leases.

10. Tax grievance limited if property not owner-occupied

In the *Matter of Mehran Manouel v. Board of Assessors*, the Court of Appeals denied jurisdiction for a Small Claims Assessment Review (SCAR Proceeding) in obtaining judicial review of a tax grievance where the property was "occupied during the relevant tax period by an owner's relative but not by the owner." A SCAR Proceeding is a "low-cost, expeditious tax assessment review" alternative to a traditional tax certiorari appeal, and is designed for non-income producing property. Nonetheless, the court strictly construed the term "owner-occupied" within RPTL §730(1)(b)(i) and dispensed with the petitioners' statutory purpose arguments (i.e., it concerned non-income producing property). Now there is an increased cost in being a nice relative — higher taxes.

Bonus concept: The Court of Appeals clarified in *Faison v. Lewis and Bank of America* that since a "a forged deed is void ab initio," "any encumbrance upon real property based on a forged deed is null and void," and as such, the statute of limitations concerning "an action based upon fraud" is inapplicable as the action would not be based upon fraud, but instead based upon a void deed, which is distinct from fraud.

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

GAO Finds EPA Violated Propaganda and Lobbying Provisions (Continued from page 3)

instance, independently shared their support for the EPA's initiative. The EPA's message is estimated to have reached upwards of 1.8 million people.

Second, the EPA's blog associated with WOTUS linked to various third-party advocacy organizations. The pages to which the EPA linked contained calls for action, encouraging and enabling visitors to contact members of Congress regarding WOTUS-related legislation. According to the GAO, this violated Section 715's prohibition against grassroots lobbying.

The EPA ultimately finalized and published the regulation on June 29, 2015, but cannot currently enforce the rule after the U.S. Court of Appeals for the Sixth Circuit issued a temporary stay. Dozens of states and business lobbies have brought suit, arguing that the rule represents federal overreach. The EPA, the Army Corps of Engineers, and the White House maintain that the rule is necessary to protect vulnerable waterways and drinking water. President Obama has promised to veto any legislation overturning the definition.

The GAO report will likely not impact the pending litigation, nor will it prevent the WOTUS rule from taking effect. The GAO report, however, does highlight how technology impacts the way in which the Executive and Legislative branches of our government interact with one another and the public, and where one draws the line between advocacy and propaganda in the Internet age.

Fifty years ago, federal agencies could not communicate their position on legislation to the American people with a few clicks of a computer mouse. Why did the EPA's actions here cross the line? It is common practice for a president to spend weeks "stumping" across the country for the policies objectives and legislative proposals contained in his State of the Union address. Even treating the presidential bully-pulpit as sui generis and exempted from the grassroots lobbying restrictions, organizations cannot necessarily control social media campaigns, which, once released, cannot be controlled in the same way as traditional messaging or advocacy. The answer may turn on the agency's intent: for instance, whether the agency purposefully used Thunderclap to disguise the source of the message. We should not be surprised if future appropriations bills may more specifically define how agencies can and cannot use social media.

As was previously reported in the New York Times, the GAO's finding is rare, but not completely without precedent. During the George W. Bush administration, for instance, the GAO concluded that the Department of Education had violated the law in 2005 when it hired a public relations firm to covertly promote the No Child Left Behind Act. Federal agencies will need to pay closer attention to how they use social media in connection with pending legislation. To the extent that state and local governments have similar restrictions, those agencies and instrumentalities must also take warning.

Note: Jonathan ("Jack") Harrington is Counsel to Campolo, Middleton & McCormick, LLP. He counsels multinational corporations and individuals in securities, white-collar, anti-money laundering, and Foreign Corrupt Practices Act (FCPA) matters.

Commission Green Lights Judicial Pay Raises (Continued from page 1)

President Donna England. "Throughout this time our bar association has always supported high quality judgeship and that their pay equal that. Prior to their raise in 2011, over the 13 years prior that judge's were not given raises, we always supported the judiciary."

In addition, there was much discussion by the Commission regarding what the raises would be and when they would occur.

Judiciary members were dissatisfied with the 2011 Commission's decision, which allowed for incremental Supreme Court justice salary adjustments to cap at $174,000 in 2014, a figure less than what federal justices were making.

Chief Administrative Judge Lawrence Marks wanted to meet with the 2015 Commission, but before doing so arranged for a meeting with the leaders of the judicial associations last November. His objective was to ascertain what they thought would be an appropriate salary recommendation before he contacted the new Commission. Presidents for the Court of Claims and the Supreme Court associations as well as the OCA agreed that there should be pay parity between the state Supreme Court justices and their federal counterparts. Ultimately, all of the other associations and bar groups agreed too.

SCBA member Suffolk's State Supreme Court Justice William J. Condon, who is also the president of the Association of Justices of the Supreme Court of the State of New York and Supreme Court Justice Paul Feinman, who sits in the Appellate Division, 1st Dept., and is the immediate past president of the same group, testified at the judicial pay commission's meeting on Nov. 30, 2015 to support the salary adjustment. The Commission voted to approve pay parity on Dec. 14.

"We didn't get exactly what we wanted, which was immediate parity with the federal justices' salary, but we are getting it by year three," Justice Condon said. "I believe the reason why we got it was because the various courts were all in agreement and the economy is much stronger now."

A weak economy was the reason given by some members of the 2011 Commission as to why they voted not to allow for parity. Some members of the recent Commission tried to broker the same tactic, saying that a raise would collide with the governor's call for fiscal restraint.

Justice Condon said that reasoning wasn't valid, adding that the state is much stronger, economically speaking, than it was in 2011. "The state of New York is going to enjoy a projected surplus of 250 million for 2016 and a 1.7 billion surplus in 2017," he explained.

The Commission is made up of three appointments from the governor, one from the Senate and one from the Assembly and the Chief Judge picks two appointees.

Two members on the Commission, James Lack, the Senate's appointee (a former state senator and Court of Claims judge) and Roman Hedges, the New York Assembly's appointee, (a former deputy secretary of the Assembly's Ways & Means Committee) both voted with the majority for the pay raises.

The 2011 Commission also included a member from the state Senate and Assembly, but the 2015 Commission has an additional responsibility, which Justice Condon believes might have helped formulate a positive outcome for the judiciary.

"This same Commission will decide the executive and legislative salary raise at the end of 2016," said Justice Condon. "In my opinion they were probably thinking, 'let's not hurt the judges' because of this."

And he added, unlike the judicial salary adjustment vote, the legislative and executive salary vote would not include the participation of chairwoman, Sheila Birnbaum, who voted with the majority.

Members of the judiciary are restricted from making outside income, unlike members of the legislative and executive branches of the state government. And there's good reason for that, said Hon. Leonard Austin, Associate Justice of the Appellate Division, 2nd Department, who is an Association of Justices of the Supreme Court of the State of New York board member. "There could be a possibility of a conflict of interest," he said. "We can write a book or teach but anything beyond that we need permission."

Both justices believe that pay parity between Supreme Court justices and their federal counterparts will do a great deal for the profession. "We will get more qualified, experienced lawyers who will want to become judges," Justice Condon said.

Justice Austin agreed. "For judges it's a matter of respect," he said. "Before the initial adjustment in 2011, a first year lawyer who barely knew how to carry a briefcase was making more than we were."

Being a judge carries a great responsibility. "What we do is very important," Justice Condon said. "We are administering justice and in that respect the pressure is greater than it is on a lawyer. We are trying to make sure every decision is fair, equitable and just."

And, Justice Austin said, judges aren't in the profession for the money. "It's a calling. You are a judge because you love the law, have a desire to help people and make a difference."

Being recognized for their efforts and reasonably compensated for choosing public service is what judges' desire. "As one colleague said, 'I don't want to be punished for choosing public service,'" Justice Austin said.

The OCA is asking for a 2.4 percent increase from the governor. But Gov. Cuomo said he'll oppose that and will ask for a 2 percent cap. He'd like to see the OCA fund the raises from its own budget, but the OCA objects, because that would leave fewer funds for them to run the court statewide.

Chief Judge Marks has asked the Legislature for supplemental funding to add to the OCA budget to pay for the judicial raises. But even if the Legislature votes in favor of this funding suggestion, the governor could veto it.

The Commission stated that other types of state trial judges, including county, family and surrogate court judges, will also receive an increase in salary, phased in over four years, that is based on 95 percent of what the Supreme Court justices will be making.

Note: Laura Lane, an award-winning journalist, is the Editor-in-Chief of The Suffolk Lawyer. She has written for the New York Law Journal, Newsday, and is currently the editor of the Oyster Bay Guardian.

Supreme Court Justice Salary Adjustment Details

Current Supreme Court justice salary — $174,000

Current Federal district court justice salary — $203,100

APRIL 1, 2016 — Supreme Court justice salary — approx. $194,000, which is 95 percent of federal justices' salary.

APRIL 1, 2017 — Supreme Court justice salary — 95 percent of what federal justices receive and a cost of living increase identical to what federal justices' receive.

APRIL 1, 2018 — Supreme Court justice salary will match federal justice salary 100 percent and cost of living increases identical to federal justices' receive.

APRIL 1, 2019 — Will get cost of living that feds get.

JUNE, 2019 — New Commission will be formed to consider salaries for next four years.

Zadroga Act (Continued from page 11)

such applicants received only 10 percent of their award pending potential pro-ration based upon a presumed lack of funds. The Victim Compensation Fund is now fully funded to pay all prior awards made before enactment.

- Codifies the legal definition of the "exposure area" as ''the area in Manhattan that is south of the line that runs along Canal Street from the Hudson River to the intersection of Canal Street and East Broadway, north on East Broadway to Clinton Street, and east on Clinton Street to the East River.''
- Codifies that "mental conditions" are not eligible for compensation under the Victim Compensation Fund (but they are eligible for medical benefits under the World Trade Center Health Program).
- Caps non-economic awards for future non-cancer claims to $90,000.
- Caps non-economic awards for future cancer claims at $250,000.
- Limits the yearly salary maximum for the calculation of economic awards to $200,000.
- Eliminates requirements for minimum payments.
- Eliminates "future medical expense" loss from the calculation of economic losses.
- Requires the Special Master to issue updated regulation within 180 days of enactment to the extent necessary to comply with the "Reauthorization Act."
- Separates claims into "Group A" claims (before enactment) and "Group B" claims (after enactment and subject to new caps on awards).

The James Zadroga Reauthorization Act would not have been possible without a group of indefatigable Long Island Sept.11 responders who could no longer tolerate seeing colleagues die of Sept. 11 related cancers. They made 22 trips to walk the halls of Congress and demanded that this bill be passed. They would not take "no" for an answer. Neither would our New York elected officials. While Congress oftentimes is criticized these days for a variety of ills, with the James Zadroga 9/11 Health and Compensation Reauthorization Act they got it right. Sept. 11 first responders and their families will benefit for years to come.

Note: Troy G. Rosasco is a senior partner with Turley, Redmond, Rosasco & Rosasco, LLP in Ronkonkoma. For the last 15 years, he has represented victims of 9/11 and their families in compensation claims ranging from cancer to lung conditions to PTSD. His practice spans all areas of disability benefits law, including 9/11 Zadroga Victim Compensation Fund claims, New York Workers' Compensation claims and Social Security Disability claims. He also teaches a course of Workers' Compensation and Social Security Disability law as an adjunct professor at St. John's University School of Law.

Ancient Document Exception (Continued from page 18)

authentication of ancient documents pursuant to Federal Rule of Evidence 901(b)(8). Were the proposed abrogation implemented, title litigators could be placed in the anomalous position of possessing authentic evidence proving an important fact, yet being unable to have it admitted due to the absence of the hearsay exception.

What about other exceptions?

The Advisory Committee concluded that the appropriate remedy to the problems presented by the Ancient Document Exception is to abrogate the exception and leave the field to other hearsay exceptions such as the "residual" hearsay exception (Rule 807) and the "business records exception" (Rule 803(6)), Request for Comment, p. 18-19.

While the existing regime of exceptions *might* prove up to the task of addressing ancient document hearsay in land title litigation, experience has taught that it is impossible to imagine every possible type of evidence. One brief example drawn from a real-world case illustrates difficulties other exceptions might not cover.

Information contained in a personal diary and ship's log kept by the captain of a 19th-century vessel proved to be the critical link in a chain of title that would have otherwise been irretrievably broken. Such evidence would not be explicitly excepted from the hearsay rule by any other current exception. This evidence might be admissible under the "residual" exception, but only if the presiding judge was convinced it satisfied the four provisions of Rule 807(a). These provisions require a more searching inquiry nature of the evidence than does the ancient document exception and residual admissibility ultimately lies within the discretion of the trial judge. Indeed, abrogation might be interpreted by trial judges to mean the hearsay exception now routinely accorded "ancient documents" must meet a higher standard of reliability to be admissible.

In strategic planning parlance, the Ancient Document Rule allows for admissibility of the "known unknown," the important piece of evidence whose existence can be anticipated, but whose form or circumstance can't be precisely predicted, and would be inadmissible save for 803(16). The preference should be to maintain a scheme that gives the broadest possible latitude to admissibility of title evidence that is *prima facie* hearsay.

Unintended consequences

It is also important to consider the potential domino effect a complete abrogation might have on similar state evidence rules. For example, in 1974 the National Conference of Commissioners on Uniform State Laws dramatically revised the then existing Uniform Rules of Evidence to conform to the ancient document hearsay exception contained in the Federal Rules of Evidence.

Should the proposed abrogation occur, it could provide precedent for abrogation of similar state laws in response to similar concerns. The other side of the coin is that if any action ultimately taken on the Federal Rule is adapted to the concerns of title litigators, similar state efforts might be guided by that result.

Federal Rule of Evidence Rule 803(16) should not be abrogated. Any modification of the Ancient Document Exception should preserve the rule for use as originally intended: in property-related cases to ease proof of title.

Litigators in practice areas benefitted by the judicially expanded scope of the rule have their constituencies who will voice their opposition to abrogation on policy grounds different from those of title litigators. Title and title insurance litigators are a constituency that does not appear to be on the Advisory Committee's radar.

If you would like to stand in defense of the exception's fundamental (and uncontroversial) purpose, consider submitting a comment through the Advisory Committee web site: *http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment*. The comment period closes February 16, 2016.

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

[1] *See* "PRELIMINARY DRAFT OF Proposed Amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence, Request for Comment" prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, pp. 17-19, 25-26 (hereinafter referred to as "Request for Comment").

[2] *See* National Conference Of Commissioners On Uniform State Laws, Proceedings in Committee of the Whole, Revised Uniform Rules of Evidence, August 1, 1974, pp. 1-4, 147, 150. Thirty-eight states presently have a version of the URE in effect.

Some Common Writing Pitfalls (Continued from page 16)

Better: Writers may not spot this error because their ear tricks them.

For many writers, the first correction is cumbersome. It is easier to change "a writer" to its plural form, "writers" and keep the pronouns plural as in the second correction. The second correction also avoids issues of sexism.

Collective nouns can also confuse readers. For example, words like "jury," "corporation," "court," and "committee" are singular words that refer to a group of people that act as a singular unit; these words are also genderless. When choosing a pronoun for a collective noun, use "it," or if the writer needs the possessive form, "its." (Please note that "it's" is NOT a possessive pronoun, but a contraction of "it is" or "it has.")

Missing buttons: the passive voice

The difference between the passive and the active voice is confusing for many writers, but the concept is simple. In a passive sentence, the actor in the sentence is delayed or omitted. The writer will also need to supply a form of the verb "be" and an action verb disguised as a "past participle."[3]

Passive Example: The gun was slapped out of the robber's hand.

Here, the subject is "the gun," but who exactly slapped the gun out of the robber's hand? The actor, the person doing the slapping, is omitted. The writer also uses a form of "be" ("was") and a past participle ("slapped"). All of this indicates that the sentence is written in the passive voice. To write this sentence in the active voice, simply place the actor in the subject position:

Active example: The clerk slapped the gun out of the robber's hand.

Writing in the active voice creates punchy sentences and puts the important information up front. There are certain benefits to writing in the passive voice, such as when the writer wants to detract attention from the actor, but these instances are rare. Whenever possible, write in the active voice.

Writing with clarity and precision is an attorney's primary objective. A misplaced comma, agreement error, or passive sentence damages a writer's credibility. Purchase a style and grammar guide and avoid these common errors.

Note: Stephanie Juliano is a 2010 graduate of Touro Law Center, practicing attorney, and the Assistant Director of the Writing Center at Touro Law Center since 2011. For more writing tips and tricks, you may contact her at sjuliano@tourolaw.edu.

[1] Bryan A. Garner, THE REDBOOK: A MANUAL ON LEGAL STYLE 4-5 (3d ed. 2013).

[2] *Id.* at 179.

[3] *Id.* at 198.

Private label Agreements (Continued from page 18)

Name brand products tend to cost more than their generic store-brand counterparts. That is mostly because branded products carry all of the costs of promotion, but private label products carry no such costs. Instead, the retailer becomes responsible for advertising and marketing.

Further, manufacturers and retailers are providing a combination of price and value to the consumer. When a store brand product and a brand name product come out of the same manufacturing plant, they are often the same item with different labels. The result is that consumers that switch to store brands save money, because the price does not include the manufacturer's advertising and marketing costs, and also do not have to sacrifice quality.

Factors to consider when negotiating a private label agreement

There are several factors to consider when negotiating a private label agreement. In addition to the considerations provided below, each industry may have specific issues that need to be included in the agreement. It is essential for a manufacturer to have discussions with its lawyer as to its specific needs in order to ensure that the agreement accurately covers all of the necessary elements of the deal.

Exclusivity is an extremely important issue to consider during the negotiation process. If the agreement states that the retailer has the exclusive retail rights and/or private label rights to a manufacturer's product, the manufacturer may be preventing itself from selling the products under its brand name and/or selling store brand products to other retailers. Exclusivity to a specific territory may prevent the manufacturer from selling products directly in that location. The manufacturer should look to be free to continue to sell product under its own brand and to other private label retailers, if possible. It is recommended that a manufacturer should not allow any one retailer to account for more than 15 percent of its sales. It may even be included in the contract that the name brand product and the store brand product have different images and consumer perceptions in order to reduce direct competition between the brands. The manufacturer will also want to avoid or limit giving its private label retailer "first refusal" rights on future manufacturer products.

During the negotiation of the agreement, the lawyer should discuss minimum order requirements for the private label product. The volume commitment establishes the minimum amount of the product the retailer must order within a specified time period. Additionally, the lawyer should discuss the amount of packaging that the manufacturer must keep in stock. Manufacturers will want to keep the minimum order amount high, and the stock requirement amount low. If possible, the manufacturer should negotiate to include a clause in the agreement that states the retailer will reimburse it for any unused packaging.

Intellectual property should be protected in a private label agreement. The manufacturer must retain all of its intellectual property rights, including trademarks, trade dress, service marks, patents, and copyrights, in its company, products and all related materials. The retailer will want to retain its store brand intellectual property.

Parties to a private label agreement may exchange confidential information and, therefore, should protect that information by including a confidentiality clause in the agreement. This clause may cover product costs, company overhead costs, recipes or product development plans, distribution plans, and other proprietary information. The manufacturer should restrict the sharing of its confidential information to the greatest extent possible. Additionally, the manufacturer may want the retailer to be prohibited from disclosing the terms of the agreement and even the private label relationship with the manufacturer.

Additional provisions that may be discussed during the negotiation and drafting stages of the private label agreement include quality control, term of the agreement, order procedure, pricing, billing and payment methods, delivery, labeling obligations, warranties, limitations on damages, insurance and indemnification obligations.

The manufacturer should avoid giving the retailer any "most favored nation" rights as to pricing or other business terms. Such rights are often hard for the manufacturer to manage and comply with, and could prove devastating down the road.

As the retailer is often a competitor or potential competitor of the manufacturer, anti-trust laws should always be considered, especially in the area of pricing.

Manufacturers are increasingly more attracted to private labeling. Many manufacturers have even created a specific private-label division within the company to take advantage of the company's excess manufacturing abilities. The manufacturer may have a well-known brand of its own, but may choose to sell a portion of its production under a private label. As the trend continues to gain popularity, companies should consider expanding their business to include a private label strategy.

Note: Joseph V. Cuomo co-Chairs Forchelli, Curto, Deegan's Corporate Department and concentrates his practice on the representation of private and public companies and emerging businesses with respect to business law and transactional matters.

Note: Allison Rosenzweig is an associate in Forchelli, Curto, Deegan's Corporate and Commercial and Tax, Trusts and Estates Departments. She concentrates her practice in commercial transactions, shareholder, partnership and LLC operating agreements, general corporate and commercial representation, business succession planning and estate planning.

Consumer Bankruptcy (Continued from page 19)

that the plain language of the statute provides that only cases initially *filed* as Chapter 7 petitions are subject to the scrutiny of section 707(b). These courts have held that the inquiry at issue begins and ends with the language of the statute and what it does and does not say.

Courts adopting the minority view include the Middle District of Florida, New Jersey, the Western District of Virginia, the Southern District of Texas, and the Western District of Arkansas.

A small number of courts have resorted to a third, hybrid approach, which like the minority "literalist view" also relies on a plain reading of the statute, but concludes that the statute applies to cases converted to Chapter 7.

If you find yourself with a client in a failing Chapter 13 case, but are worried that the debtor will not pass the means test, consider filing anyway, but be prepared to defend your position if the U.S. Trustee raises the issue, and also be prepared that the conversion might not be ultimately successful.

In addition, Counsel should support the conversion with an affidavit from the debtor, explaining the change in circumstances that justifies conversion to Chapter 7. Of course, if the debtor passes the means test at the time of conversion, then counsel should simply file an amended means test and there should be no issue.

Also be mindful that if you seek a backdoor entry into Chapter 7 in a preplanned manner, it will be evident that your position is disingenuous and lacks good faith, which will likely end up backfiring.

If your author was a betting man, he would wager that the judges in our district, who have shown a preference for statutory interpretations supported by a logical rather than literal analysis, would adopt the majority approach.

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

Elder Law Attorney (Continued from page 13)

John and Diane had taken a mortgage for half of the value of the property. As such, one-half of the value of the property was transferred for consideration. As it stood, however, John and Diane would need to pay the nursing home approximately $480,000 ($12,000/month) due to the 40 month penalty period. Had John and Diane retained an Elder Law attorney, this costly mistake would not have happened.

While some of these mistakes can be successfully appealed, it comes at great cost to the client — both financially and emotionally. Had these clients retained an Elder Law attorney *ab initio*, these costly outcomes could have been avoided.

These are but two examples relating to real property. Elder Law practitioners come up against many issues that are specific to our area of practice, such as Promissory Note planning to protect assets upon or even after nursing home admission, Undue Hardship applications to reverse a penalty period that resulted from action taken by someone other than the applicant, applications and hearings to prove that an asset transfer was a gift made for a purpose other than to qualify for Medicaid benefits, and more. Elder Law attorneys can provide the legal advice necessary to handle all such cases properly from the beginning, saving the client time, money and much unnecessary angst.

Note: Melissa Negrin-Wiener is a partner at the Elder Law firm Genser Dubow Genser & Cona in Melville. She is the President of the Suffolk County Women's Bar Association and is an Advanced Elder Law Mediator. For more information, go to www.genserlaw.com.

[1] Names have been changed for confidentiality.
[2] N.Y. Soc. Serv. Law § 366(5)(d)(3)(i); 18 N.Y.C.R.R. § 360-4.4(c)(2)(iii)(b).
[3] Names have been changed for confidentiality.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

WINTER 2016 CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the winter of 2016.

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

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

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

N.B. - As per NYS CLE Board regulation, you must attend a CLE program or a specific section of a longer program in its entirety to receive credit.

NOTES:

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

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

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

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

Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA, please let us know.

Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501(c)(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, call the Academy at 631-233-5588.

INQUIRIES: 631-234-5588.

SEMINARS & CONFERENCES

Evening Program

THE INTERSECTION OF BANKRUPTCY AND MATRIMONIAL LAW

February 4, 2016, 5:30 -8:30 p.m.

This important program covers aspects of bankruptcy law that are important to matrimonial and family law practitioners. For example, what is the effect of a bankruptcy on a matrimonial action, divorce decree or separation agreement? Attendees will gain an understanding of what can and cannot be discharged in a bankruptcy, how language in a separation agreement or divorce decree affects a bankruptcy, whether the bankruptcy court can force a sale of assets after a divorce decree has been entered, and more.

Faculty: Hon. John Leo, Supreme Court, Suffolk County; Hon. Alan S. Trust, United States Bankruptcy Judge;; Program Coordinator: Richard L. Stern, Esq., Macco & Stern, LLP
Time: 5:30 p.m. – 8:30 p.m. (Registration from 5:00 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **3 Hours Professional Practice** [Transitional or Non-Transitional]; $90

Evening Program

CYBER-INSURANCE AND CYBER-SECURITY:

WHEN HACKERS STRIKE YOUR PRACTICE, WILL YOU BE PREPARED?

February 9, 2016, 6:00 -8:00 p.m.

Faculty: Regina Vetere, CBS Coverage; Ken Hale, Glasser Tech; Elizabeth Simoni, Travelers Insurance; Tom Rizzuto, Esq., Travelers Insurance; Shari Claire Lewis, Esq., Rivkin Radler LLP
Time: 6:00 p.m. – 8:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 2 Hours Professional Practice [Transitional or Non-Transitional]; $60

Lunchtime Program

RESEARCHING EXPERT WITNESSES

February 11, 2016, 1:00 -2:00 p.m.

Attorneys have an obligation to make the best use of technology to discover forgotten or hidden facts. And when it comes to expert witnesses, those forgotten facts can make all the difference. In an age when falsifying credentials is all too common, attorneys must not only vet the opposing experts but their own as well.

Learn to uncover unflattering facts or successful Daubert challenge strategies using the latest in technological advancements, find out how to track down information beyond the normal sources; how to use content you find; and discover tools such as the "way-back machine." You'll also learn how to use the information you have to discover the identity of an adversary's expert where the name has not been disclosed.

Faculty: Caren Silverman, Esq.,LEXIS NEXIS Client Relationship Specialist; Program Coordinators: Michael Glass, Esq., Robin Abramowitz, Esq.
Time: 1:00 p.m. –2:00 p.m. (Registration from 12:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **1 Hour Professional Practice** [Transitional or Non-Transitional]; $30

Courthouse Lunchtime Program

THE ABC'S OF THE GRIEVANCE PROCESS IN SUFFOLK COUNTY

February 24, 2016, 12:30 -2:00 p.m.

This program will cover the attorney discipline process from A-Z in Suffolk County

Faculty: Harvey B. Besunder, Esq., Program Coordinator: Marianne Rantala, Esq.
Time: 12:30 p.m. –2:00 p.m. (Registration from 12:00 p.m.)
Location: Hon. William Condon's Courtroom, Riverhead
MCLE: **1 Hour Ethics** [Transitional or Non-Transitional]; $30

Evening Program

TRUST DECANTING

February 25, 2016, 6:00 -7:00 p.m.

After doing this program for the Surrogate's Court Committee to rave reviews, presenter Joseph LaFerlita agreed to reprise this program for the Academy.

Faculty: Joseph LaFerlita, Esq., Farrell Fritz Program Coordinators: Brette Haefeli Esq.; Robert Harper, Esq., Farrell Fritz
Time: 6:00 p.m. –7:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **1 Hour Professional Practice** [Transitional or Non-Transitional]; $30

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

Matinee Program

ADVANCED 1031 EXCHANGE CONCEPTS AND RELATED TAX ISSUES

March 15, 2016, 4:00 -6:00 p.m.

Attendees at this program will learn how to structure 1031 exchanges to maximize the tax benefits to their clients. Faculty will cover the different formats available and the benefits of and requirements for each, as well as reviewing noteworthy caselaw, and recent developments. Practical solutions to real life obstacles in performing an exchange will be provided. Additional highlights will include a review of current tax rates applicable to investment sales, like-kind property, vacation home exchanges and more.

Faculty: Pamela Michaels, Esq.; Program Coordinator: Vincent Danzi, Esq.
Time: 4:00 p.m. – 6:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **2 Hours Professional Practice** [Transitional or Non-Transitional]; $60

Save the Date!

BRIDGE THE GAP WEEKEND

March 18 and 19, 2016

This year's Bridge the Gap weekend program is currently being developed in accordance with the new rules for newly admitted attorneys which will go into effect on January 1. The Friday program will be given live *and will also be webcast live, in accordance with the new rules.* This year's weekend program includes segments on the following topics: Practical Ethics, Handling a Civil Case, Handling a Criminal Case, Practicing in Family Court, Foreclosures, Grievances, Forming a Small Business, Wills, Trusts and Estates, Residential Real Estate, Elder Law, and New York Notary Law. The program will offer newly admitted attorneys the full complement of credits required for the full year.
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **17 Hours** [Transitional or Non-Transitional]

Evening Program

MEDIATION: HOW TO SETTLE CASES WITHOUT GOING TO TRIAL

March 23, 2016 6:00 -8:00 p.m.

Formulated specifically for plaintiffs' counsel, this program will provide an overview of the mediation process from the perspective of an experienced mediator. The program will cover how to identify cases that are good candidates for mediation, how to select a mediator, what the mediation statement should include, what to consider in pre-mediation negotiations, and general do's and don'ts during the mediation itself.

Faculty: Joseph C. Tonetti, Esq., sponsored by the Jansen Group, Inc.
Time: 6:00 p.m. – 8:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **2 Hours Professional Practice** [Transitional or Non-Transitional]; $60

WINTER 2015-2016 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) Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	12 Sess. Pass	CLE Bundle	DVD	Audio CD	Printed Course Materials
The ABCs of the Grievance Process in Suffolk County	$30	$0	$40	Yes	Yes	N/A	N/A	$25
The Intersection of Bankruptcy & Matrimonial Law	$90	$0	$120	Yes	Yes	$115	$115	$25
Cyberinsurance and Cybersecurity: When Hackers Strike Your Practice, Will You Be Prepared?	$60	$0	$80	Yes	Yes	$85	$85	$25
Mediation: How to Settle Cases Without Going to Trial	$60	$0	$80	Yes	Yes	$85	$85	$25
Researching Expert Witnesses	$30	$0	$40	Yes	Yes	N/A	N/A	$25
Trust Decanting	$30	$0	$40	Yes	Yes	$55	$55	$25
Advanced 1031 Exchange Concepts and Related Tax Issues	$60	$0	$80	Yes	Yes	$85	$85	$25
Bridge The Gap CLE Weekend	Full Weekend: $195; 2015 attendees:$170 Day 1 OR Day 2 only: $125	$0	Full Weekend: $195; 2015 attendees:$170 Day 1 OR Day 2 only: $125	Yes	Yes	Day 1 only $150	Day 1 only $150	TBA

** **MATERIALS**: All materials will be provided electronically via an internet link to a PDF. Bring your laptop or other mobile device if you wish to access the materials during the program. Printed materials can be provided for an additional charge (*see above*) and must be ordered in advance.

FINANCIAL AID: Call 631-234-5588 for information.

Name: _____

Address: _____

Phone: _____ Email: _____

TOTAL TUITION $_____ **+ optional tax-deductible donation** $_____ = $_____ **TOTAL ENCLOSED**

METHOD OF PAYMENT ____Check (*check payable to Suffolk Academy of Law*) ____Cash ____12 Session ____CLE Bundle

Credit Card: __American Express __MasterCard __VISA __Discover
Account #_____ Exp. Date:_____ Signature:_____

ACADEMY OF LAW NEWS

Academy of Law Resources and Opportunities

By Allison Shields

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides quality continuing legal education programs at a discounted rate for SCBA members, some of which are highlighted below, or can be seen in the centerspread of this paper. But in addition to our live programs, the Academy also offers live webcasts of many of our programs, as well as a full array of online, on-demand CLE programs and CLE programming available on DVD or CD. These additional formats allow attorneys to take advantage of the learning opportunities and CLE credits available from the comfort of their home or office (or even on the road!).

To view the online, on demand programs available, go to scba.org, click on *MCLE* and then *Online video replays and live webcasts* to search for the programs. If you prefer to purchase a CD or DVD of one of our programs, you can go to scba.org, click on *MCLE* and then *DVDs and CDs of prior programs* to access our recorded program library.

Academy and SCBA website

The Suffolk County Bar Association website, scba.org, provides valuable and resources and information to both members and non-members alike, but unfortunately, many of our members do not take advantage of the wealth of information available on the website. In addition to the availability of online, on-demand and DVD programming, you may register online for any of our live Academy programs through the scba.org site by clicking on *MCLE* and then *Register for a Live CLE program.*

Want to know what's happening at the SCBA or the Academy? Head on over to the website at scba.org and click on *Calendar*. Here you can view all of the information about upcoming events, including committee meetings, monthly Academy meetings, social events and Academy CLE programs. Links from each event to registration and detailed flyers are available (if applicable). It's a good idea to double-check the calendar before coming to the SCBA for a committee meeting or program.

The SCBA website also contains information about other events in the legal community in addition to the events at the SCBA. Go to scba.org and click on *Calendar of other Legal Community Events* to find out what other legal associations and our specialty bars have planned — and contact Jane LaCova () to have your event listed on our Legal Community Events calendar.

Finally, the SCBA website sidebar contains the latest news about the Bar Association and the Academy — this news can be found right on the home page. But if you want the most updated information, sign up for the *SCBA member's alert system* and receive text messages about closings, postponements and other important up to the minute announcements affecting the profession. (This is especially important during the winter months, when weather can be unpredictable).

How to Register for the SCBA alert system:

To register to receive text messages about SCBA, court closings, delayed openings, schedule changes, and other important notices:

Text: "follow scbaalerts" (without the quotes) to the SMS address 40404

You will receive an automated reply from Twitter saying that you are "following scbaalerts." You may also be invited to "join the conversation" on Twitter, (but you do not need to join to receive the alerts). Please note: The scba alerts Twitter account does not accept messages.

How to opt out:

To stop receiving scba alerts fast follow Twitter text messages:

Text: "off scbaalerts" (without the quotes) to SMS address 40404

Standard data fees and text messaging rates may apply based on your plan with your mobile phone carrier. As mobile access and text message delivery are subject to your mobile carrier network availability, access and delivery are not guaranteed.

Leadership opportunities

The Academy is beginning the process of seeking applicants for positions on the Academy Board as Academy officers for the 2016-2017 academic year, which begins on June 1, 2016. There will be five positions available. Interested applicants should send a resume and letter indicating their interest to the Academy Executive Director Allison Shields by email at or regular mail at 560 Wheeler Road, Hauppauge, 11788. All SCBA members in good standing who have participated in the Academy's educational programs and have attended Academy meetings as volunteers are eligible to apply.

In addition to our board of Academy Officers, much of the work of the Academy is done by volunteers. Academy volunteers help develop and coordinate Academy programs, recruit speakers and sponsors, sit on Academy committees, aid in the promotion and marketing of Academy programs, and participate in Academy programs as speakers and moderators.

There are many benefits of getting involved with the Academy. They

(Continued on page 30)

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 Centerfold for course descriptions and registration details. For information, call 631-234-5588.

FEBRUARY

4 Thursday	**The Intersection of Bankruptcy and Matrimonial Law**, 5:00 p.m.-8:00 p.m., 3 credits, $90. A light supper will be served.
9 Tuesday	**Cyber Insurance and Cyber Security: When Hackers Strike Your Practice, Will You Be Prepared?**, 6:00 p.m.-8:00 p.m., 2 credits, $60. A light supper will be served.
11 Thursday	**Researching Expert Witnesses** 1:00 p.m.-2:00 p.m., 1 credit, $30. A light lunch will be served.
24 Wednesday	**The ABCs of the Grievance Process in Suffolk County**, 12:30 p.m.-2:00 p.m., J. Condon's courtroom, Riverhead,1 credit, $30.
25 Thursday	**Trust Decanting**, 6:00 p.m.-7:00 p.m., 1 credit, $30.

MARCH

15 Tuesday	**Advanced 1031 Exchange Concepts and Related Tax Issues**, 4:00 p.m.-6:00 p.m., 2 credits, $60. A light supper will be served
18 Friday	**Bridge the Gap, Day 1** This full day program will be offered both live *and webcast* and will cover Professional Practice and Ethics Credits. Day 1 or 2 live - $125; Full weekend live - $195. Continental breakfast and a light lunch will be served.
19 Saturday	**Bridge the Gap, Day 2** This full day program will be offered live, and will cover Skills and Ethics credits. Day 1 or 2 live - $125; Full weekend live - $195.Continental breakfast and a light lunch will be served.
23 Wednesday	**Mediations: Effective Case Management for Plaintiffs**, 6:00 p.m.-8:00 p.m., 2 credits, $60. A light supper will be served

Please note: **Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge.**

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Arthur E. Shulman
Leonard Badia
Vincent Danzi
Paul Devlin
Jeffrey Horn
Cory Morris *Secretary*
Janna Visconti

Academy of Law Resources and Opportunities *(Continued from page 30)*

include opportunities to network and develop relationships with members of the SCBA who practice in many different areas of the law, chances to present at Academy programs, learning cutting edge information to aid your practice and your representation of clients, the ability to develop public speaking and leadership skills and more. Many of our Academy officers have gone on to serve on the SCBA Board of Directors and on the SCBA Executive Committee.

The Academy welcomes new volunteers to join us at any of our monthly Academy meetings, usually held on the first Friday of the month at 7:30 a.m. No need to RSVP — just join us — but watch the calendar for schedule changes! An added bonus for attendance at Academy meetings is our traditional full breakfast offered to all. Check the calendar at scba.org to confirm Academy meeting dates and times. Our next two meetings are scheduled for Thursday, February 11, 2016 and Friday, March 11, 2016, at 7:30 a.m.

Ethics CLE programming

On January 12, 2016, the Academy held its first ever Game Night Ethics CLE program. Attendees earned 2 ½ ethics credits playing *Jeopardy!*® in teams while enjoying game night munchies, a special hot chocolate bar, and homemade baked goods with host Honorable Andrew Tarantino, channeling his inner "Alex Trebek." Those who participated loved the format — some comments included, "Very creative format." "Lots of fun and very informative." "Would love to see more programs in the future." If you missed it this year, mark your calendars now for next January, when we plan to do another fun and interactive ethics game night!

If you need ethics credits before next January and are looking for another fun and interactive format, keep your eye on the calendar for our annual Ethics Night at the Movies, which will once again be presented in July.

Can't make either of these large live programs? Consider attending the program, The ABCs of the Grievance Process in Suffolk County, a one credit lunch and learn program, coordinated by the County Court Committee, scheduled for February 24 from 12:30-2:00 p.m. in Hon. William Condon's courtroom in Riverhead. Many of our subject matter programs also include ethics credits, or you can keep checking our online and DVD offerings in the ethics category.

More new programs from the Academy

Another new program on our schedule this winter is the February 9 program, Cyber-Insurance and Cyber-Security: When Hackers Strike Your Practice, Will You Be Prepared? which will cover this very hot topic. It's no longer a question of *whether* your practice will get hacked — it's only a question of *when*. This program will tell you what you need to do to be prepared, how to protect your data and your clients' data, and what you need to do when you get hacked. Don't get caught unprepared — come to this program which features attorneys, insurance and IT professionals on February 9, from 6-8 pm.

On February 11, the Academy will be presenting a lunch and learn program on Researching Expert Witnesses at the SCBA center. You'll learn all about online tools you can use to research experts both for identification purposes and to discover facts about the experts that may help your case.

On February 25, a one hour evening program will cover the ins and outs of Trust Decanting with Joseph LaFerlita, Esq. On March 15, a two credit program on 1031 Exchanges will be presented at the Bar Center. And on March 23, Joseph Tonetti, Esq. will be presenting a program on how plaintiff's attorneys can use Mediation and Arbitration for Effective Case Management. Details about all of these programs can be found in the center spread of *The Suffolk Lawyer*.

Bridge the Gap Training for New Lawyers — an economical option for a full year of credits

The New York State CLE Board has made some changes to the rules regarding CLE credits for newly admitted attorneys, and these changes went into effect as of January 1, 2016. While veteran attorneys (admitted more than two years) do not need to distinguish between Skills and Areas of Professional Practice or Practice Management credits, newly admitted attorneys have a specific credit requirement for Skills. Newly admitted attorneys are required to take a minimum of 16 credits per year: 7 in Areas of Professional Practice or Law Practice Management, 6 in Skills, and 3 in Ethics.

In the past, newly admitted attorneys (those to whom Bridge the Gap is directed) were required to take all of their credits at live programs. Those restrictions have now been relaxed somewhat, and certain credits are permitted to be taken either in recorded form or as live webcasts. As a result, we have changed the format of our Bridge the Gap program putting all of the credits that are eligible to be taken as a webcast on one day, and all of the programs that must be taken live on the alternate day. This will not only allow us to offer part of our Bridge the Gap program to individuals across New York State, but it will also permit local attorneys to appear live for only one day of programming if they wish.

Our Bridge the Gap 2016 program offers 17 CLE credits (one more than required per year) and was specifically formulated to ensure that those who attended in 2015 can also attend in 2016. The Friday program will be given live *and will also be webcast live, in accordance with the new rules.* This year's weekend program includes segments on the following topics: Practical Ethics, Handling a Civil Case, Handling a Criminal Case, Practicing in Family Court, Foreclosures, Grievances, Forming a Small Business, Wills, Trusts and Estates, Residential Real Estate, Elder Law, and New York Notary Law.

Best of all, the Suffolk Academy of Law's Bridge the Gap program is offered for $195 total for both days of programming, a significant discount over other Bridge the Gap programs, so register now.

Now that you know all of the opportunities available at the Academy, we hope you'll join us for some of our programs and become involved!

Want to learn about upcoming programs?

If you're missing Academy programs, perhaps it's because you're not receiving our email blasts! The Academy has "gone green," and is no longer sending out paper flyers for our programs. Instead, you can find information on upcoming Academy programs by reading the *Suffolk Lawyer*, by looking at our Academy calendar at scba.org, or by receiving our email blasts. Blasts are usually sent twice a week and include links to view the electronic flyers and to register for our programs. If you're not receiving our email blasts, please email and let us know you want to be added to our Academy email list.