THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

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So you want to be a rock n' roll star

Successful strategies for law practice efficiency

By Dennis R. Chase

Oxymoronic... *the more things change, the more they stay the same.* Jean-Baptiste Alphonse Karr (November 24, 1808 – September 29, 1890) was a French critic, journalist, and novelist. His brother Eugène was a talented engineer, and his aunt Carme Karr was a writer, journalist and suffragist in La Roche-Mabile. Karr is often credited with this epigram translated from the original French expression "plus ça change, plus c'est la même chose"—"the more it changes, the more it's the same thing." So, who, may you ask, even cares?

If you'd like to step in to the 21st century, stop saying you're not a "computer guy;" or "there is no way to digitize our practice;" or, the worst of all possible excuses, "where do I possibly begin?" Lawyers are typically extremely reticent to accept any kind of change. Some of us really like our fancy litigation cases, eschew internet based legal research for those handsomely expensive law books lining our shelves making for really professional backdrops for the firm's profile photographs; can't break the incredible addiction to jot our notes on those really cool looking yellow legal pads; and forever efficiently (?) organize our offices with kind, stable, effective *Post-it*© notes. Let's face facts, we're too far gone to change now, and changing would be too

(Continued on page 20)

Photo by Barry Smolowitz

SCBA hosts Cohalan Cares

Committee members worked tirelessly to make the fundraiser for Cohalan Cares for Kids the success that it was when the SCBA hosted it in February. (See story on page 6 and more photos on page 14 to 15.)

PRESIDENT'S MESSAGE

Making transition to new SC Traffic and Parking Violation Agency easier

Arthur Shulman

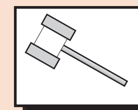
By Arthur Shulman

Read all about it: Local ground hogs predict only six more weeks of winter! That is welcome news for those of us looking forward to the arrival of spring and for whom the vagaries of the weather impact our daily activities and plans for the future.

Although the SCBA has fully recovered from Sandy, many of our members and other residents of Suffolk County are still suffering the after-effects of the storm. The SCBA has, and will continue, to participate with the Touro Law Center and the New York State Bar Association to help victims of Sandy deal with various state, federal and local agencies as well as insurance companies. With the participation and guidance of NYS Bar President Seymour James, myself and the leaders of other downstate bar associations have been conducting phone conferences every two to three weeks to come up with solutions to the multitude of problems that one day of bad weather inflicted. We are grateful for all of our volunteer attorneys who have expended hours of their time to assist the Suffolk County community with the challenges faced by so many and for the cooperation of the Touro Law Center.

Fortunately, the generosity of our membership goes beyond post-Sandy relief, extending to assisting, on a pro bono basis, Suffolk County's returning military veterans to cope with our legal system. To all of our members who stepped forward and offered their services after attending the Academy of Law's three-hour CLE seminar specifically designed to prepare them to deal with the type of legal problems returning veterans routinely encounter, thank

(Continued on page 20)



BAR EVENTS

Installation Dinner Dance

Friday, June 7, at 6 p.m.
Cold Spring Country Club
The dinner will be an occasion to honor and install the new SCBA President Dennis R. Chase, Officers, and Directors.
$135 pp.

Academy Happenings

Law and the Workplace

Friday, March 8, from 8:30 a.m. to 4 p.m.
Touro
This is the annual conference. It will cover key waiver and employment statutes. The program is for labor and management, public and private sectors.
$175, lunch included

Cloud Computing: Tips & Caveats
Tuesday, March 12, 12:30 to 2:10 p.m.
Lunch included

Matrimonial Mondays
March 4, 11, 18 and April 1, from 6 to 9 p.m.
Bar association
Light supper
See CLE spread

FOCUS ON
LABOR & EMPLOYMENT LAW
SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar of Association Meetings and Events

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.

FEBRUARY 2013

25 Monday Board of Directors, 5:30 p.m., Board Room.
26 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., E.B.T. Room.
Nominating Committee, 5:00 p.m., Board Room.
27 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
28 Thursday Taxation Law Committee, 6:00 p.m., Board Room.

MARCH 2013

4 Monday Executive Committee, 5:30 p.m., Board Room.
6 Wednesday Appellate Practice Committee, 5:30 p.m.,E.B.T. Room.
Valuable New Member Benefit Disability Insurance Meeting - Discount for Members. Presented by John J. Marcel, CLU, CFP, Madison Park Consultants, Inc., 5:30 p.m., Board Room.
8 Friday Labor & Employment Law Committee, 8:00 a.m., Board Room.
Law in the Workplace, a day-long symposium on: Employment Law, Public & Private Sector Labor Law, 8:30 a.m., Touro Law Center.
12 Tuesday Surrogate's Court Committee, 6:00 p.m., Board Room
13 Wednesday District Court Committee, 8:00 a.m.,Cohalan Court Complex, C.I., Attorney's Lounge.
Education Law Committee, 12:30 p.m., Board Room
18 Monday Board of Directors, 5:30 p.m., Board Room.
19 Tuesday Solo & Small Firm Practitioners, 4:30 p.m., Board Room.
20 Wednesday Elder Law & Estate Planning Committee, 12:00 p.m., Great Hall.
Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
21 Thursday Pro Bono Foundation meeting, 7:30 a.m., Board Room.

APRIL 2013

3 Wednesday Appellate Practice Committee, 5:30 p.m., Board Room.
8 Monday Executive Committee, 5:30 p.m., Board Room.
10 Wednesday District Court Committee, 8:00 a.m., Cohalan Court Complex, C.I., Attorney's Lounge.
Education Law Committee, 12:30, Board Room.
12 Friday Labor & Employment Law, 8:00 a.m., Board Room.
16 Tuesday Surrogate's Court Committee, 6:00 p.m., Board Room.
17 Wednesday Elder Law & Estate Planning Committee, 12:00 noon, Great Hall.

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."

SAVE THE DATE

Honorable C Randall Hinrichs
District Administrative Judge of Suffolk County
and the
Suffolk County Women in the Courts Committee
Requests you
SAVE THE DATE
Friday, March 22, 2013 at 2 p.m.
Central Jury Room, Cohalan Court Complex, Central Jury Room
Women's History Month Celebration
Celebrating Women in Science and the Law

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

Thomas More Group Twelve-Step Meeting

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

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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Veterans need our help

By Glenn P. Warmuth

Veterans face many legal challenges including foreclosure, matrimonial and family law issues and even end up as defendants in our criminal courts. Often they lack the financial resources necessary to hire an attorney. To help deal with this growing problem the Suffolk Academy of Law and the SCBA Military & Veterans Affairs Committee put on a free CLE program on January 18, 2013, *Representing Veterans & Active Service Personnel*.

The quid pro quo for the free program was a request that all participants in the program take on at least one pro bono case for a veteran. The program was well attended and it was inspiring to see the number of attorneys who signed up to provide free legal services.

Glenn P. Warmuth

The Hon. Peter Mayer, who co-coordinated the program with Ted Rosenberg, Esq., began the program by citing sobering statistics indication that soldier suicides are outpacing combat deaths. He called for all attorneys in attendance to reach out and connect with veteran clients as we work to help them with their legal problems.

The Hon. Allen S. Mathers gave an overview of the Soldiers and Sailors Relief Act and The Uniformed Services Employment and Reemployment Rights Act (USERRA). One of the more interesting provisions discussed was the 6 percent cap on interest charged to those engaged in active military service. This cap requires creditors, upon service of the proper notice, to forgive any interest over 6 percent. He also discussed provisions that allow for the termination of residential and automobile leases and a guarantee of re-employment on returning to the workforce. The specifics of the guarantee depend on the length of activation but they include uninterrupted seniority rights, uninterrupted benefit accrual and immunity from discharge for up to one year.

Support Magistrate Cheryl Joseph-Cherry of the Suffolk County Family Court gave a detailed and informative presentation on veterans' issues with child support, spousal support and violation of support orders. Magistrate Joseph-Cherry discussed the inclusion of military benefits, such as money for education, in the establishment of support orders, dealing with delays in applying for modifications based on a substantial change in circumstances which can occur when service personnel are called to active duty and the problems such as obtaining compliance with income withholding orders.

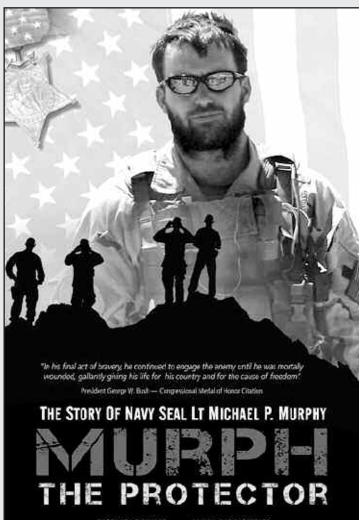
The Hon. John J. Toomey, Jr. gave a heartfelt presentation about the Suffolk County Veterans' Court. Judge Toomey sits in the Veterans' Court which is a specialized part of the Suffolk County District and County Courts. Clients in the Veterans' Court plead guilty and enter into a contract which is signed by the veteran, the assistant district attorney and the court. A treatment team then develops a program for the veteran and the veteran is assigned a mentor. Many of the mentors, including those from the Long Island Chapter of the Vietnam Veterans of America, were in attendance at the program.

Judge Toomey cited their service and their dedication to the program as instrumental to its success. If the veteran successfully completes the program they are permitted to withdraw their guilty plea and plead guilty to a lesser charge. Graduation ceremonies are held at the courthouse for those who choose to attend. Judge Toomey reports that the program has been very successful and is personally rewarding to all involved.

These are just three of the many informative presentations given at the program. As I learned, our veterans truly need and deserve our assistance. When dealing with a veteran it is vital to seek out the special resources which are available to veterans. Thanks go out to the Long Island State Veterans Home ("LISVH") which provided dinner to all who attended the program. The LISVH is a 350-bed skilled nursing facility which provides many services for Veterans including short term rehabilitation services, adult day health care and speech therapy.

Note: Glenn P. Warmuth is a partner at Stim & Warmuth, P.C. where he has worked for over 25 years. He is a director of the Suffolk County Bar Association and an officer of the Suffolk Academy of Law. He teaches a number of courses at Dowling College including Entertainment & Media Law. He can be contacted at gpw@stim-warmuth.com.

Film on life of Lt. Michael P. Murphy set for national release



Murph: The Protector, a documentary about SCBA member Dan Murphy's son, Navy SEAL Lt Michael P. Murphy, will be released nationwide on March 22 by MacTavish Studios and will play at Regal Theaters across the nation. *Murph: The Protector* is a feature-length documentary based on LT Michael Murphy's entire life of honor, courage and commitment, as told by his friends, family and teammates.

Lt. Murphy was the The film will be playing at the Regal theaters in Ronkonkoma, Deer Park, Farmingdale and Lynbrook in Nassau County with the premiere on March 22, 2013. A listing of theaters where the can be seen is available at www.murphmovie.com/breakingnews/.

Meet Your SCBA Colleague

Donna England, **a general practitioner focusing on matrimonial and family law, and the current second vice president, has always been exposed to the law. Her mother, Catherine England, was a family court judge twice, a Supreme Court judge once, and an SCBA President (1983-1984) as was her brother Louis (1998-1999).**

By Laura Lane

You've have so many family members in the legal profession. How has this affected you? My mother, who I've always been very close to, always encouraged me to become a lawyer. She's always been a presence in my life. Mom was the first woman president of the SCBA in 1983 and my brother is a past president too.

You are in line to be president in a few years too, right? Yes. Louis became president 15 years after Mom and I will be president 15 years after him. It is the first time this has happened at the bar association.

What was your childhood like? My childhood was interesting, so different from other children. I went to Catholic school and no one's mother worked, let alone was a professional. My sister, who became a nurse manager, is seven years older than me and my brother is ten years older. So Mom would drag me to her closing at the courthouse when she did arraignments. And she took me to the office too, so I was exposed to the law for a very long time. As a result I was quite precocious.

And you were always at the bar association too? Mom always worked full time. I used to go to the monthly meetings with my mother and knew many of the lawyers in the community. I went to the installation dinner and bar association functions.

Even so, you didn't go into law right away. Why was that? I had thought of becoming a lawyer when I was in high school but decided to work for five years after high school to be sure that this is what I wanted. That's when I realized that I really did like the law and it wasn't just because I'd always been exposed to it.

Once you did become an attorney you joined the family business? I always practiced with my brother. Our office is in Centereach.

Your resume indicates that you've worked a great deal to advocate for children. You've been on the Appellate Division Panel of Law Guardians in the Supreme, Family and Surrogate's Courts since 1989. How did you end up there? Once I became a lawyer I joined the law guardianship panel to gain experience as an attorney and to work on cases a little different than what I was working on in my practice. I enjoyed working with children and advocating for them.

Did this work help you in any other way in your practice? Working as a lawyer for children gives you an insight into the needs of the child to help mentor them during and after divorce. It helps me with my practice. When you represent the child you see the struggles children have when there is a breakdown in the family.

What do you enjoy about being an attorney? I really enjoy trying cases and the whole trial process. There are a lot of things going on in court and I like the challenge of being able to put all of those pieces together. The most important part of being an attorney is to help people make changes that will benefit their lives.

When did you join the SCBA and why? I joined in 1987, but the SCBA had been a big part of my life even before I was a member. When I was admitted to the bar in 1987 my brother was already on the executive committee. I think that involvement in the bar is as important a part of your profession as practicing law. I got involved right away in different committees and became involved because it is important to do so.

Why would you recommend people join the SCBA? I believe the SCBA gives members an ability to know many more lawyers outside of their specific practice area. The SCBA's purpose is among other things, to act as a vehicle to help lawyers in their practice. I also think that the networking that the bar provides is important.

What else do you believe membership offers? One of the many aspects of the bar is to help improve and make daily practice for lawyers more efficient and make them current. The SCBA helps supplement the lawyer through education to be a better lawyer. And it can also be very fulfilling to work on projects through the bar to better your profession.

Donna England

What have you enjoyed most as a member? The SCBA presented my name to the Appellate Division to serve on the Grievance Committee for the 10th Judicial District where I served for eight years. I found it to be such a great learning experience. It was very fulfilling to work with a committee dealing with very different situations that help promote the practice of law in Suffolk and Nassau Counties.

VIEWS FROM THE BENCH

No harm, no foul - expert disclosure rules

By Hon. Stephen L. Ukeiley

This month's column focuses on expert discovery and sanctions for noncompliance which was recently addressed by the Appellate Division, Second Department in a medical malpractice action. *Rivers v. Birnbaum*, 953 N.Y.S.2d 232 (App. Div., 2d Dep't 2012).

The history of expert disclosure

In 1962, expert discovery was generally exempt under CPLR § 3101 absent undue hardship or injustice. The legislative history suggests this was an attempt to preserve the privacy of counsel's tactical considerations.

However, in 1985, the Medical Malpractice Reform Act was enacted which requires certain pre-trial disclosures of expert witnesses. The purported reason for the change was to foster settlements at an earlier stage of the litigation.

Statistics reveal that on average only 7 percent of the approximate 4,000 medical malpractice cases filed annually in New York proceed to verdict. Interestingly, nearly 45 percent of those cases settled after an average of 1,119 days, or approximately 3 years and 1 month, of litigation. *See Med Mal Litigation in New York: Time to Change the Status Quo*, Hon. Ann Pfau, N.Y.L.J., at 3 (June 14, 2012).

CPLR § 3101- experts expected to testify

CPLR § 3101(d)(1)[I], which applies to all types of civil actions, requires the production "upon request" of (1) the identity of each expert expected to testify at trial; (2) subject matter of the testimony; (3) substance of the facts and opinions expected; (4) qualifications of the expert; and (5) a summary of the grounds for the opinion. The statute does *not* include a deadline for responding to a timely request and further fails to identify a sanction for noncompliance.

Stephen L. Ukeiley

To the contrary, the law contemplates noncompliance and expressly provides that expert testimony "shall *not*...be precluded...solely on grounds of noncompliance." The statute further authorizes a motion, before or at trial, by a party or the Court *sua sponte*, upon which the court "may make whatever order may be just." CPLR § 3101(d)(1)[I].

It is noteworthy that no disclosure is required under the section until the party makes a determination that it "expects" to call the expert as a witness. This determination is subjective, and, of course, a party may retain an expert to assist in the preparation of a case without "expecting" to elicit the witness' testimony at trial. The standard under the Federal Rules of Civil Procedure is slightly different as a party must disclose any individual who "may" be called as an expert witness. Fed. R. Civ. Pro., Rule 26(b)(4)(A).

CPLR § 3101(d)(1)[ii] allows for the deposition of experts in medical, dental and podiatric actions. Relevant to this article, a party receiving a request for the deposition of an expert witness has 20 days to "accept or reject" the request.

Trial court has discretion in imposing sanctions for noncompliance

In *Rivers v. Birnbaum*, the issue was whether expert testimony should be precluded on a motion for summary judgment where the party failed to previously disclose the expert. The facts were relatively straightforward.

In June 2008, the injured and her husband commenced a malpractice suit claiming defendants failed to properly diagnose and treat metastatic choriocarcinoma, a gynecological cancer. Approximately five months after making a timely request for expert disclosure, plaintiffs filed a note of issue and certificate of readiness for trial.

Shortly thereafter, several of the defendants moved for summary judgment. Attached to their motions were the affirmations of several expert physicians who had not been disclosed during discovery.

The trial court rejected plaintiffs' claim that the experts' statements should *not* have been considered. In doing so, the trial court clearly distinguished CPLR § 3101(d)(1)[I] and [ii], noting the former does *not* include a specific date by which objections must be raised and the latter specifically states that objections to a request to take the deposition of an expert witness must be made within 20 days of the request. In *Rivers*, it was noted that there was no indication of willful disregard of the discovery rules by defendants or any discernible prejudice to plaintiffs.

The Appellate Division, Second Department agreed that the experts' statements could be considered on a motion for summary judgment. The court noted that where the legislature "includes particular language [regarding a deadline to respond] in one section of a statute but omits it in another section of the same act, it is generally presumed [the Legislature] acts intentionally and purposefully in the disparate inclusion or exclusion". *Rivers*, 953 N.Y.S.2d at 238-39.

Accordingly, the court held that the trial court has the discretion to consider, reject or otherwise rule in any "just" manner regarding previously non-disclosed experts' statements submitted in

(Continued on page 19)

BENCH BRIEFS

By Elaine M. Colavito

Suffolk Country Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for summary judgment denied; movant must support the application with a complete copy of the pleadings.

In *Ocean Drive Inc. v. Plaza Surf & Sports II, Inc.,* Index No.: 35020/2011, decided on January 14, 2013, the court denied the motion by plaintiff for summary judgment on its complaint to recover payment for goods sold and delivered to defendant. In denying the motion, the court noted that an application for summary judgment must be denied if the movant fails to support the application with a complete copy of the pleadings. Here, plaintiff did not submit a complete copy of its complaint, only the first page with the first four paragraphs of the allegations. Defendant's answer submitted with the motion papers indicates that there were eight paragraphs of allegations in the complaint. Consequently, plaintiff's motion was denied.

Honorable Arthur G. Pitts

Motion to vacate granted; reasonable for plaintiff's counsel to conclude that the defendant's motion for summary judgment would be withdrawn.

In *Genesis Genao, an infant by his mother and natural guardian, Alexandra Genao, Alexandra Genao, individually and Fidelina Travarez,* Index no.: 34100/2007, decided on May 2, 2012, the court granted plaintiff's motion to vacate the decision and order of the court dated January 25, 2011 to the extent that motion sequence 002 was restored and placed on the motion calendar and the plaintiff was directed to serve and file answering papers. The court noted that by decision and order dated January 25, 2011, the defendant's motion for summary judgment as to plaintiff Alexandra Genao only, was granted on default. In support of the instant motion, plaintiff's counsel alleged that the defendant's insurer had agreed to binding arbitration as to plaintiff's claim and had assured that defendant's counsel would withdraw the motion. Based upon those assurances, the plaintiff did not submit opposition papers. Plaintiff's counsel did not become aware that the motion had not been withdrawn until he received a copy of the decision. In granting the application, the court reasoned that negotiations between a plaintiff and the defendant's insurer have been held to constitute an excusable default for CPLR 5015 purposes. The court further pointed out that it was reasonable for plaintiff's counsel to conclude that the defendant's motion for summary judgment would be withdrawn.

Elaine M. Colavito

Motion to quash denied; reliance on medical and psychiatric history in the sentencing phase of criminal trial was waiver of right to confidentiality of those records in a subsequent civil action

In *Michael M. Slovitsky, individually and as Executor of the Estate of Katheryn P. Underdown v. Nicole Shellard and Peter Most,* Index No.: 28271/2010, decided on January 17, 2013, the court denied the defendants' motion to quash the subpoena duces tecum issued by this court on October 9, 2013 and served on Suffolk County District Attorney's Office to obtain copies of any documents submitted by the defendant Nicole Shellard or the defendant's criminal defense counsel to the office of t eh Suffolk County District Attorney in the matter of the *People v. Nicole Shellard*. The instant matter was a civil action subsequent to a criminal matter. In support of their motion, the defendants averred that the defendant had not affirmatively placed her physical or mental condition in issue in the within action, she had not executed any HIPPA compliant authorizations and as such, had not waived her patient doctor privilege pertaining to her medical records. In rejecting the defendants' arguments, the court found that it was undisputed that Shellard, at her sentencing in the related criminal action, proffered a report prepared by her retained expert, a clinical psychiatrist, for the court to consider in determining the length of her sentence. In imposing its sentence, Judge Efman specifically referred to that report. Defendants' reliance on Shellard's medical and psychiatric history in the sentencing phase of her criminal trial were waivers of her right to confidentiality of those records in a subsequent civil action. Accordingly, the motion to quash was denied.

Honorable Peter H. Mayer

Motion to dismiss granted as to first cause of action; New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal.

In *Jayme Conklin v. Darlene Arroyo, Benjamin L. Sugrue and Ida Sugrue,* Index No.: 25378/2011, decided on May 31, 2012, defendants' motion to dismiss the complaint was granted with regard to the First Cause of Action only. The court pointed out that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the allegations in the complaint should be accepted as true. Further the court stated that such a motion should be granted only where, viewing the allegations as true, the plaintiff, cannot establish a cause of action; however, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to

(Continued on page 21)

Not Among Our Law School Goals

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SLEEPLESS NIGHTS PHYSICAL DYSFUNCTION

Sound familiar? You're not alone.

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Arthur Olmstead (631) 754-3200 from the Lawyers Helping Lawyers Committee;
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Jane LaCova, Executive Director, Suffolk County Bar Association – (631) 234-5511, Ext. 231.

Let Us Help You.

Those days, those nights in the Bronx

Interview of the overage hire and early days at the workplace

By Bill McSweeney

In the spring of 1987 I underwent a succession of interviews for the position of Bronx County Assistant District Attorney. The interviews went well enough, including the final one with Mario Merola, District Attorney. That interview's substance:

"Well, Mac," he asked, "why do you wish to go into public service, when you could make more money in the private sector?"

I liked his calling me "Mac;" it was "City;" it was regular; it consisted with the man. Merola was burly, balding, strong-voiced, his skin, near-mahogany in tone and texture, no stranger to the outdoors. In the military, it's called 'command presence,' in the law it's called 'courtroom presence.' Merola, not enjoying height, the physical attribute that most tends to impress, had 'belly,' Mario Puzo's term for a man whose ample, mature physique commands respect. Belly, courtroom presence, whatever it was styled, Merola had this. Happy to state, my stature was akin to Merola's, and looking like the boss was of a higher order of things than merely dressing like the boss. With a 19-inch collar I could serve as a model of the proverbial 'bull-necked prosecutor.'

At all events, because Merola had power, he could choose to be affable, choose to put an applicant at ease, hence his use of 'Mac.' Mac did put me at ease; it conjured pleasant years of growing up in Brooklyn, and its familiarity implied a hiring, but I puzzled by his question regarding public service. At 47 years, the overage product of a third-tier law school (evening division, at that), a graduate of that half of my law-school class that made possible the top half, I stood little chance of being noticed, let alone hired, by the private sector. I could only assume the District Attorney, a veteran in his position, a man who regularly conducted such interviews, asked this question mindlessly, by rote.

Bill McSweeney

Equally by rote, but mindfully, I answered: "Well, I taught public school for 18 years, sir, and after that I was, and am now, an assistant Suffolk County attorney for three and a half years; I've been in public service for a total of 21 years, and enjoy public service. Being an assistant in your office would be an extension of what I've done all of my working life."

"All right, Mac," he said, smiling. "We'll be in touch."

The law works on presumptions, and I had all presumptions in my favor when I went to the Merola interview: A good resume, one which spoke of legal experience, as well as published writing samples, dealing with history, biography, and the law, these had accompanied my cover letter of application. This paperwork conferred a presumptive credibility on its producer, even before he crossed the threshold of the district attorney's office. Moreover, the District Attorney wouldn't have taken the time to meet with applicants, those relatively few who had survived interviews by his subordinates, unless he intended to hire them. When I arrived for the interview, I was shaved, bathed, alert, and didn't trip over any furniture; I was responsive to questions; I sat up straight while talking; I nodded slightly, respectfully, to Mr. Merola when entering and leaving his office. In short, I did nothing to rebut, and everything to validate, the overriding presumptions in my favor: I could indeed read, write, speak, and think like a lawyer.

Most important, I knew and by means of my even, direct gaze at Merola toward interview's conclusion, I delivered that I knew what this interview was all about. It was not pro forma, not one which saw a boss rubberstamp his approval of a subordinate's choice. The interview had a subtext, one which I was savvy to and respectful of. As did Mayor Richard Daley of Chicago, Merola wanted his face to be the final face seen by all new hires. The subliminal message - never forget, I'm the one who hired you, your loyalty at all times flows toward me.

Within two weeks of the interview, I was on the ground floor of the Bronx County Criminal Court, an ADA writing complaints.

"You're a throwback," one gray-haired police officer said, approvingly, to me one gray hair to another, as I wrote up his case on my first day in the complaint room. I alternately puffed on my Camel, put it on the edge of my desk, wrote a paragraph in the DA's complaint jacket, put my pen down, puffed on my Camel, this alternation being now and again augmented, made more various, by my sipping a cup of black coffee.

"Yeah," I answered, with a taut grin, the laconic 'yeah' and the taut grin of a piece with the portrait of me as throwback. That, I clearly was, being then some two decades older than the average hire, a gap that would only widen during my eight years as an assistant. For, during those years, I could compare myself only to new hires.

By which I mean, notwithstanding that, in time, I developed a decent enough reputation, I never sought, nor had thrust upon me, any elevation in rank or title. I came in as a line assistant; I left as a line assistant. I was, in a span embraced by ages 47 and 55, an ADA; new hires, typically aged 25 through 30, were ADAs — in short, as a consequence of my not being a careening careerist, speeding along the success expressway, negotiating turns on two smoking wheels, no distinction as between new hires and myself existed, either in rank or title.

The only way, then, to justify my age, to downplay it, would be to bridge the chasm between ignorance and knowledge; to attain the skill one would otherwise deem commensurate with my years; to attain it quickly; and having attained it, to manifest

(Continued on page27)

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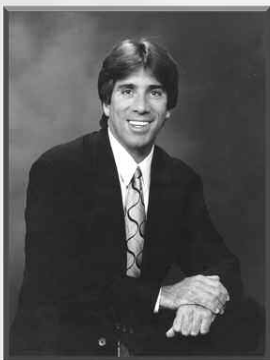

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Cohalan Cares for Kids

Photo by Barry Smolowitz

Carrie Vasiluth, left, Terri Mari, Jane LaCova and Colleen West were on the committee to make Cohalan Cares for Kids a success at the SCBA.

By Jane LaCova and Laura Lane

There was a whole lot of love present at the second annual Cohalan Cares for Kids at the SCBA on Feb. 7. The salute to Valentine's Day included centerpieces at all of the tables that were reminders of children with little pink construction paper cutouts of children's hands, lots of Hershey kisses, and different silver heart and red balloons. The holiday, a day set aside to celebrate love, coincided with the love that is felt for children and the need that they have to experience love, compassion and caring when their parents are in court.

The EAC Cohalan Court Children's Center is located on the second floor in the Cohalan Court Complex. The center is child friendly, safe and has a warm, welcoming atmosphere. Children from 6 weeks to 12 years can be dropped off there while parents are attending to court matters, a place that can frighten any child. This program has become an important resource for the Suffolk County court system and is in jeopardy of closing due to lack of funding. The fundraising event at the association will help to keep the center open to serve children and families in the community.

Not only were there festive decorations, refreshments, and entertainment, but at the head of the room an entire table was filled with a variety of Chinese auction baskets. It was indeed an evening of giving at the SCBA.

"The SCBA was proud to host the Cohalan Care for Kids fundraising event at its bar center considering the important function this group performs in caring for young children while their parents are involved in emotional family disputes," said SCBA President Art Shulman. "Congratulations to all the members of the planning committee for putting on such a great and worthy event."

Thank you to the Matrimonial Bar, the Long Island Hispanic Bar, Suffolk County Women's Bar, the Criminal Bar Associations and Enright Court Reporting for their special contributions and commitment to this wonderful event. The benefit featured assorted wines from Rad Grapes, and delicious food courtesy of Fireside Caterers of East Northport with entertainment by Gerard Donnelly, Esq. and Richard Lauria The gift basket raffles was very well received, especially the special Montauk Ocean Beach Getaway donated by SCBA member Val Manzo. The 2013 Event Committee worked tirelessly to make this the special event it was and we are grateful for their continued support. (See photos on page 14)

Note: Jane LaCova is the Executive Director of the SCBA and Laura Lane is the Editor-in-Chief of The Suffolk Lawyer.

SAVE THE DATE

Installation Dinner Dance

Friday, June 7, 2013, 6 p.m.
at the Cold Spring Country Club
Cold Spring Harbor, N.Y.

The dinner will honor and install the new SCBA President, Dennis R. Chase, Officers, and Directors.

Tickets are $135 per person.

The SCBA has decided to raise the Bar this year - new venue, new food and new format!

SIDNEY SIBEN'S AMONG US

On the move…

Tamir Young has joined the Weber Law Group (WLG) as partner and head of litigation.

Congratulations…

To the Honorable **Richard Horowitz** who has been appointed by Chief Administrative Judge Hon. A. Gail Prudenti, as the Supervising Judge of the Suffolk County District Court.

Long Island financial attorney **Leslie Tayne**, and her firm, **The Law Offices of Leslie H. Tayne P.C.**, were recently recognized among the Melville Chamber of Commerce's Businesses of the Year for 2012. Tayne was among nine other businesses and professionals awarded for their achievements and chamber involvement during the Melville Chamber of Commerce's Welcome to the New Year Celebration held at Colonial Springs Golf Club in East Farmingdale, NY.

Announcements, Achievements, & Accolades…

Scott M. Karson, who served as President of the Suffolk County Bar Association in 2004-05, has been elected Vice President of the New York State Bar Association for the Tenth Judicial District (comprised of Suffolk and Nassau Counties). Mr. Karson was elected by vote of the NYSBA House of Delegates at its meeting on January 25, 2013 in New York City and will take office on June 1, 2013 to serve a three-year term. As Vice-President, Mr. Karson will serve on the NYSBA Executive Committee. Mr. Karson also serves on the NYSBA Committee on Courts of Appellate Jurisdiction, Audit Committee, President's Committee on Access to Justice and Leadership Development Committee. He is also the SCBA's delegate to the American Bar Association House of Delegates and is a member of the ABA Council of Appellate Lawyers. Mr. Karson continues to serve the SCBA as a member of its Appellate Practice Committee, Bench-Bar Committee and Nominating Committee. He is a partner at Lamb & Barnosky, LLP of Melville.

Jacqueline Siben

James M. Wicks, a commercial litigation partner at Farrell Fritz, PC was appointed to the New York Federal-State Judicial Council's Advisory Group, effective January 1, 2013. The Federal-State Judicial Council, chaired by Judge Graffeo of the New York State Court of Appeals, is comprised of five judges each from the federal and state judiciary who work together on issues of common concern. The Advisory Group consists of approximately 35 lawyers and judges from the state who work closely with the Judicial Council.

Farrell Fritz trusts and estates partner **Ilene Sherwyn Cooper** has been elected to serve as the Suffolk County Bar Association's (SCBA) representative to the New York State Bar Association's (NYSBA) House of Delegates. She will serve a one-year term beginning June 1, 2013.

Murph: The Protector, a documentary about SCBA Dan Murphy's son, Navy SEAL LT Michael P. Murphy, will be released nationwide on March 22 by MacTavish Studios and will play at Regal Theaters across the nation. *Murph: The Protector* is a feature-length documentary based on LT Michael Murphy's entire life of honor, courage and commitment, as told by his friends, family and teammates.

The film will be playing at the Regal theaters in Ronkonkoma, Deer Park, Farmingdale and Lynbrook in Nassau County with the premiere on March 22, 2013. A listing of theaters where the can be seen is available at http://www.murphmovie.com/breakingnews/.

Robert M. Harper, an associate in Farrell Fritz's trusts and estates department, has been named co-chair of the New York State Bar Association (NYSBA) Trusts and Estates Law Section's Legislation and Governmental Relations Committee.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Anthony V. Falcone, Alison R. Gladowsky, Andrew Meaney** and **Daniel J. O'Connell**.

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Paul L. Scrom**.

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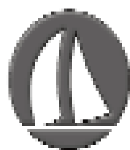

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NEWS FROM TOURO

Disaster Relief Clinic starts at Touro Law Clinic

Committed to helping residents with Sandy legal problems

Touro Law Center has launched a Disaster Relief Clinic to assist community members with legal problems arising from Hurricane Sandy, the recent superstorm that affected the tri-state area in October 2012 causing widespread devastation and destruction. Students will work with newly hired Visiting Professor of Law Benjamin Rajotte to provide no cost legal assistance with insurance claims, environmental remediation, government assistance programs including FEMA, insurance and consumer fraud concerns and other legal problems that are a result of the storm.

"Touro Law Center has long recognized the need for legal relief work in the wake of a disaster based on our history of providing assistance in the Gulf Coast region's post- Katrina efforts," said Dean Patricia Salkin. "When our local area was affected we took action immediately and remain committed. I am really proud that we have launched this clinic, enabling Touro Law to continue serving the local community."

The clinic provides hands on legal training for the students and Salkin said it is a valuable resource for those in need, taking Touro's early hurricane emergency relief efforts to the next level.

Under close supervision of Visiting Professor and Clinic Director Benjamin Rajotte, students working in the clinic will interview and counsel clients, negotiate on their behalf, prepare cases for presentation to courts and administrative forums. Students will work cooperatively with established disaster relief networks and local institutions to address issues. They will also visit shelters and community organizations and work with elected officials to provide education about and referrals for available benefits. Clients have already been referred to the clinic through the Touro Law Center Hurricane Emergency Assistance and Referral Team (TLC-HEART) and additional referrals are expected to continue throughout the semester.

Professor Rajotte brings a rich experience to Touro Law. He has taught at Northeastern University School of Law, Florida Coastal School of Law, and Western New England University School of Law, and was a clinician at Vermont Law School. He received a J.D. from Loyola Law School, Los Angeles and an LL.M. from New York University School of Law. He has practiced predominantly in civil litigation in New York in large firms and as a sole practitioner and worked with students as pro bono counsel for a community group for years.

"I am honored to be joining the Touro Law family and working as director of the newly created Disaster Relief Clinic," said Professor Rajotte. "I look forward to working with students to resolve legal problems in the community while teaching important legal skills to the next generation of lawyers."

Photo courtesy Touro Law Center

Visiting Professor and Clinic Director Benjamin Rajotte will supervise students working in the clinic.

The funding to begin the clinic was largely provided by a generous donation from Reva and Martin Oliner. Mr. Oliner is an attorney who has engaged in private practice since 1972, and he has taught at Touro Law Center. His legal practice principally involved international tax and workouts. He has extensive experience in international finance, investment banking, real estate, corporate organization and reorganization matters.

Mr. Oliner is a member of the Executive Board of Touro College, and has served as a trustee of Touro College for more than 20 years where he has been integral to its growth. He is founder of the San Francisco School of Osteopathic Medicine. He is currently the Mayor of the Village of Lawrence on Long Island, an area hard hit by the disaster. Mr. Oliner has been has been a leader in assisting victims of the south shore communities of Nassau County overcome the devastation caused by Hurricane Sandy.

"I am glad to be able to help fund this worthy endeavor," stated Mr. Oliner. "I know that the clinic will have far reaching benefits for families struggling to overcome the endless legal issues that face so many whose lives have been displaced."

Touro Law's clinical program teaches practice-ready skills required for effective advocacy while providing no cost legal services for the community. Students work under close faculty supervision to provide legal assistance to actual clients. Currently, Touro Law offers several clinics including; Advanced Bankruptcy Clinic, Civil Rights Litigation Clinic, Elder Law Clinic, Family Law Clinic, Mortgage Foreclosure and Bankruptcy Law Clinic, Not-for-Profit Corporation Law Clinic, and the newly instituted Disaster Relief Clinic.

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Resurgence of the NLRB beyond social media

By Sima Ali

Recent decisions by the National Labor Relations Board (the administrative body which enforces the National Labor Relations Act) are reflecting a closer scrutiny and stringent review of all company policies, not just social media policies. The NLRB's rulings are significant for all private employers (not just ones with a unionized workforce).

As explained by the NLRB in an October 31, 2012 News Release, "an employer violates the act by maintaining work rules or policies that explicitly prohibit NLRA-protected union or concerted activity, such as joining a union or discussing terms and conditions of employment with coworkers. Even if not explicit, a rule can be unlawful if employees would reasonably construe the language to prohibit such activity."

Throughout the past several months, the NLRB has been closely reviewing policies of employers in order to determine whether any published policy could be considered to affect employees' rights to freely discuss their terms and conditions of work — online or otherwise. They have declared certain policies invalid when they used broad and sweeping terms that could possibly be misconstrued as limiting employees' rights.

FOCUS ON LABOR & EMPLOYMENT LAW SPECIAL EDITION

Since the NLRB's decisions and advice memos have called into question many "standard" policies, it's important to review the decisions and understand the new focus of the NLRB.

Social Media policies

In *Costco Wholesale Corp., 358 NLRB No. 106* (Sept. 7, 2012), the NLRB concluded that the broad prohibitions in the company's "Electronic Communications and Technology Policy" had a "reasonable tendency to inhibit employees' protected activity." According to the NLRB, the policy's "broad prohibition against making statements that 'damage the Company, defame any individual or damage any person's reputation'" clearly encompasses concerted communications protesting the company's treatment of its employees. Soon after the *Costco* decision, an Administrative Law Judge struck down another company's social media policy in *EchoStar Corp., Case No. 27-CA-066726* (Sept. 20, 2012), holding that prohibitions against "disparaging or defamatory" comments or comments that "undermined" the company violated the NLRA.

Sima Ali

Confidentiality and non-disparagement policies

In *Quicken Loans, 28-CA-075857*(January 8, 2013*)*, an NLRB judge found that the company's prohibition of disclosures of non-public information relating to the company's business, personnel and personal information of co-workers would "substantially hinder employees in the exercise of their Section 7 rights." In complying with the proprietary/confidential information provision, employees would not be permitted to "discuss with others, including their fellow employees or union representatives, the wages and other benefits that they receive, the names, wages, benefits addresses or telephone numbers of other employees." In addition, the judge found the non-disparagement provision violated the act, explaining that "Within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support."

At-will statements

In *American Red Cross Arizona Blood Services Region*, 28-A-23443 (February 1, 2012), the NLRB challenged the company's at-will employee acknowledgement. At issue was the "Agreement and Acknowledgement of Receipt of Employee Handbook" document employees were required to sign. This document stated that the employment relationship is at-will and that "the at-will employment relationship cannot be amended, modified or altered in any way." The Administrative Law Judge found that this document contained "overly-broad and discriminatory language that had a chilling effect on the employee's Section 7 rights," and therefore violated the NLRA.

The NLRB's Advice Memos (issued on October 31, 2012) further clarified this area by stating that the particular wording of at-will statements matter. For example, a statement that suggests an employee's at-will status can never be changed will be problematic since it could infringe on employee's willingness to engage in discussions about unionization or the terms and conditions about employment.

Workplace investigations and disciplinary action policies

In the *Banner Health System* decision, 358 NLRB No. 93 (July 30, 2012), the board found that a blanket policy prohibiting employees from discussing an on-going investigation impinges on their right to engage in concerted activity. Here, the case focused on the fact that the company's human resources consultant routinely asked employees making a complaint not to discuss the matter with their coworkers while the investigation was ongoing. The NLRB determined that this instruction violated the NLRA because the company's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." The opinion, however, does acknowledge that the circumstances of a particular incident may justify a requirement that employees not discuss the investigation. However, it is the employer's burden to determine and demonstrate there is a legitimate business justification for the prohibition.

In light of these decisions, it's imperative that companies and their legal counsel take a closer look at employee policies and agreements to ensure they are in compliance with these stricter guidelines. These policies should be specific, be narrowly tailored, and explain exactly what type of conduct is restricted.

Note: Sima Ali provides a full range of representative services, primarily for management, in all areas of labor and employment law. Ms. Ali has represented clients before federal and state courts, administrative agencies, and other tribunals. Along with her 15 years of experience, Ms. Ali offers an exceptional level of personalized service. She helps clients understand the complex laws and regulations which govern employment so they can take a proactive approach. Ms. Ali is also an engaging speaker who presents seminars on employment law throughout the New York metropolitan area.

Courts split on Civil Service Law Section 115

By Terry O'Neil and Richard S. Finkel

Civil Service Law Section 115 provides that state employees shall receive "equal pay for equal work." As its title indicates, Section 115 embodies the "policy of the state." Can a declaration of policy provide a remedy enforceable by a court in the event it is disregarded? After decades of settled law, the answer to that question now depends upon which court you ask.

Gladstone v. City of New York, 49 Misc.2d 344 (Sup. Ct. Kings Co. 1966) *affd.* 26 AD2d 838 (2d Dept. 1966) *affd* 19 NY2d 1004 (1967) *cert denied* 389 US 976 (1967) long ago held that Section 115 "merely enunciates a policy and confers no jurisdiction on a court to enforce such policy."

The Third Department agreed that Section 115 did not provide a court with jurisdiction to enforce its policy directive. *Matter of Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. State of New York Unified Court System*, 35 AD3d 1008 (3d Dept. 2007).

FOCUS ON LABOR & EMPLOYMENT LAW SPECIAL EDITION

The First Department was in accord. *See Matter of Goldberg v. Beame*, 22 AD2d 520, 522 (1st Dept. 1965) *revd on other grounds* 18 NY2d 513 (1966); *Bertoldi v. State of New York*, 275 AD2d 227 (1st Dept. 2000) *lv denied* 96 NY2d 706 (2001)[citing *Gladstone* favorably].

That harmony is now gone. The First Department's recent decision in S*ubway Surface Supervisors Association v. New York City Transit Authority*, _AD3d_, 2013 NY Slip Op 00276 (1st Dept. 2013) distances itself from its own prior holdings and creates a divide amongst the judicial departments by holding that the policy directives contained in Section 115 are indeed enforceable by a court.

Factually, *Subway Surface* involved the Transit Authority's Station Supervisor title, which has two assignment levels (SS-I and SS-II). While the skill and testing requirements for the positions are identical, the functions and duties of each assignment level differed. Reflecting that difference, the original salary for the SS-II assignment carried a higher salary than the SS-I assignment.

Each assignment level is represented by a different union, and each negotiated a series of multi-year collective bargaining agreements on behalf of its members.

It was alleged that over a period of time, work was shifted between the assignment levels, to the point that there was no longer a significant distinction between the work performed under each assignment level. The union for the SS-I workers brought a proceeding demanding equal pay for equal work under Section 115. It also set forth equal protection claims under the State and Federal Constitutions.

The Transit Authority responded to the petition with a motion to dismiss, arguing that the claim related to terms and conditions of employment required to be negotiated through collective bargaining, thus implicating the Taylor Law and invoking the exclusive jurisdiction of PERB.

Terry O'Neil

Richard S. Finkel

The Authority also maintained that the union should be estopped from challenging salary levels that it negotiated over a series of contracts.

The *Subway Surface* majority was not moved by the Authority's position. Affirming the lower court's denial of the motion, the court wrote that the Third Department's reliance upon *Gladstone* was misdirected as that case "overstated the holdings of the cases it cited." As to its own prior holdings in *Goldberg* and *Bertoldi*, the court interpreted language from each that the policy need not be applied "in all cases under any and all circumstances" as a "clear implication…that there are circumstances in which the principle of equal pay for equal work must be applied and that this court has the power to apply it."

As to the union's equal protection claims, the First Department held that "the issue here is not whether the union negotiated an unfavorable deal but whether the TA has violated public policy. Such disputes are amenable to review by the courts." Moreover, the court held that the union "has no ability to control pay disparity through collective bargaining."

The decision was approved by a 3 to 2 majority. The dissent agreed with existing precedent, while also observing that the majority had ignored its own precedent to the extent *Gladstone* had been cited favorably.

The dissent also rejected the notion that a union could assert an equal protection claim after negotiating a salary schedule through collective bargaining.

Given the two dissenting votes, and the newly created split in authority, *Subway Surface* is ripe for Court of Appeals review.

Note: Terry O'Neil heads the Garden City office of Bond, Schoeneck & King, PLLC. He has lectured extensively on numerous labor topics throughout the United States and was selected by the New York State Bar Association ("NYSBA") as one of only eight editors of the First Edition of Public Sector Labor and Employment Law. He is Past President of the New York State Public Employer Labor Relations Association, is on the Executive Committee of the NYSBA Labor and Employment Law Section, and is on leave as an Adjunct Professor at St. John's Law School where he teaches "Public Sector Labor Law."

Note: Richard Finkel is Senior Counsel to Bond, Schoeneck & King, PLLC. He is the former Town Attorney for the Town of North Hempstead, and was a member of the Hofstra University Law Review. His practice is concentrated in the areas of labor and employment law, municipal law, and land use.

Non-compete agreements - well worth the paper on which they are written

By Marc S. Wenger

Employers hesitant to implement restrictive covenants, such as confidentiality and non-compete agreements, for current and new employees. They may want to reconsider. Three recent decisions, in three separate courts, support the principle that employers benefit from well-drafted, enforceable non-compete agreements. These cases demonstrate that non-competes can be strengthened with the addition of tolling provisions and arbitration clauses and these terms will be enforced when challenged.

When drafted according to the purpose for which they are intended, non-competes provide employers with a powerful tool to protect their intellectual property, customer relationships, and overall business interests. To be enforceable under New York law, non-competes must be "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."[1] Employers should not be intimidated by these criteria. When appropriate, non-compete agreements can be used like any other instrument of business and personnel management.

By Marc S. Wenger

The value of tolling provisions

In *Delta Enterprise Corp. v. Cohen*,[2] the Appellate Division, First Department unanimously modified the lower court's decision declining to enforce the tolling provision contained within the restrictive covenant. Tolling provisions stop the clock on expiration of the non-compete while the former employee is in violation of the agreement. The First Department held that plaintiff demonstrated its entitlement to a preliminary injunction and that the tolling provision contained within the agreement was enforceable. Rejecting defendant's argument that a tolling provision violates public policy, the court recognized that defendant "consulted with counsel before executing the agreement, that he received $50,000 in consideration thereof, and there [were] significant and multiple indications of his bad faith."[3] Thus, the court had no sympathy for this former employee's breach of the non-compete. In applying the tolling provision, the court extended the preliminary injunction in favor of the employer for an additional year or until the matter's resolution at trial, whichever occurs first.

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Arbitration Clauses valid and enforceable

As of late, the United States Supreme Court has shown great affection for enforcing arbitration agreements. Consistent with its recent enthusiasm for the Federal Arbitration Act,[4] the United States Supreme Court issued a per curiam opinion on November 26, 2012 upholding an arbitration clause in a non-compete agreement. In *Nitro-Lift Techs., L.L.C. v. Howard*, the confidentiality and non-compete agreements of two former employees contained a clause requiring arbitration for resolution of disputes[5] When these former employees left and began work for a competitor, Nitro-Lift served them with a demand for arbitration. The employees sought a judicial declaration in Oklahoma state court that the agreements were null and void. Ultimately, the Oklahoma Supreme Court held that judicial review was appropriate even in the face of the arbitration clause. The United States Supreme Court vacated this decision holding that "the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'"[6] Thus, the validity of the agreement must be left to an arbitrator to decide, because that

(Continued on page 12)

ADA and NYS Human Rights Law

By Kathryn J. Russo

Under the Americans with Disabilities Act ("ADA") and the New York State Human Rights Law, an employer unlawfully discriminates against an employee when the employer fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," so long as the accommodation does not impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A); N.Y. Exec. L. § 296(3)(a). The items to be considered with regard to undue hardship are: (i) the overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget; (ii) the type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and, (iii) the nature and cost of the accommodation needed. N.Y. Exec. L. § 296(3)(b).

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Although it is generally the responsibility of the individual with the disability to inform the employer that an accommodation is needed, an employer's obligations under the ADA are triggered when the employer knows, or reasonably should know, that the employee is disabled. *Brady v. Wal-Mart Stores*, 531 F.3d 127 (2d Cir. 2008). The employee does not need to mention the ADA or use the phrase "reasonable accommodation" — a "plain English" request is sufficient.

Kathryn J. Russo

"In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." *EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship*. The text of the ADA and the EEOC's Regulations provide a host of potential accommodations including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 29 C.F.R. § 1630.2(o)(2). See also N.Y. Exec. L. § 292.21-e; 9 NYCRR § 466.11(a).

Once the employee requests a reasonable accommodation, the employer and the employee should engage in an informal "interactive process" to evaluate the request. The employer may ask questions to enable it to make informed decisions about the request, including the medical condition and the limitation of the employee, and may ask for documentation when the need for an accommodation is not obvious. The EEOC recommends a four step approach to determine the appropriateness of a reasonable accommodation: (1) analyze the particular job involved and determine its purpose and essential functions; (2) consult with the disabled individual to ascertain the precise job related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation; (3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each other have in enabling the individual to perform the essential functions of the position; and, (4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. 29 C.F.R. Pt. 1630, App. § 1630.9.

In the past year, some of the more notable "reasonable accommodation" litigation has focused on the following topics:

- **Inflexible leave policies.** The EEOC entered into several multi-million dollar settlements with employers who have inflexible leave policies that do not consider possible leave extensions, or other reasonable accommodations, upon the expiration of a fixed leave period. On the other hand, employers are not required to provide indefinite leave and need not hold jobs open indefinitely. See *Robert v. Board of County Commissioners of Brown County, Kansas*, 691 F.3d 1211 (10th Cir. 2012); *Forgione v. City of New York,* 2012 U.S. Dist. LEXIS 130960 (E.D.N.Y. Sept. 13, 2012).

- **Job reassignment.** In *EEOC v. United Airlines, Inc.,* 693 F.3d 760 (7th Cir. 2012), the Seventh Circuit Court of Appeals joined the Tenth Circuit and the D.C. Circuit in holding that the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations do not create an undue burden or run afoul of a collective bargaining agreement. In *Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012), the Tenth Circuit held, as a matter of law, that transferring an employee to another location so that she could obtain medical treatment or therapy may be a reasonable accommodation.

- **Light duty**. In *Wardia v. Justice & Pub. Safety Cabinet Dep't of Juvenile Justice*, 2013 U.S. App. LEXIS 238 (6th Cir. Jan. 3, 2013), the Sixth Circuit held that an employer is not required to convert a temporary, light-duty job into a permanent one.

- **Failure to engage in the "Interactive Process" in good faith.** Employers may not make stereotyped assumptions about the physical capabilities of disabled applicants or employees, and must make good faith efforts to conduct an "individualized assessment" as part of the "interactive process" required by the ADA. See *Keith v. County of Oakland,* 2013 U.S. App. LEXIS 595 (6th Cir. Jan. 10, 2013) (employer refused to hire deaf applicant for lifeguard position); *Braheny v. Commonwealth of PA.,* 2012 U.S. Dist. LEXIS 5456 (E.D. Pa. Jan. 18, 2012) (employer made little or no effort to have "interactive dialogue" with employee); *EEOC v. Dura Automotive Systems, Inc.,* Case No. 09-CV-00069 (M.D. Tenn. 2009) (September 2012 settlement of $750,000, after the employer drug tested employees for twelve substances, including prescription medications, and would not permit employees to work if they used certain medications).

Note: Kathryn J. Russo is a partner at Jackson Lewis LLP in Melville, New York, where she defends employers in employment disputes in federal and state courts and before administrative agencies and arbitration panels. Ms. Russo also is one of the leaders of the Firm's Drug Testing and Substance Abuse Management Practice Group.

The Suffolk Lawyer wishes to thank Labor and Employment Law Special Section Editor Sima Ali for contributing her time, effort and expertise to our March issue.

PRACTICE MANAGEMENT

Is Your Website Mobile Friendly?

By Allison Shields

By Allison Shields

The Cisco Visual Networking Index predicts there will be 788 million mobile-only Internet users by 2015[1]. According to the International Data Corporation (IDC), a market research company, more United States consumers will access the Internet on mobile devices than computers by 2015.[2] That means that by 2015, lawyers whose information cannot be easily found and viewed on a mobile device may be left behind.

If your target audience is likely to search on a mobile device and cannot find your site using the mobile search engine or your site provides a poor mobile user experience, you risk losing potential clients, since many won't return to a site where they've had a bad experience.

In September of 2011, Google released a statement informing website owners that mobile website optimization would affect their keyword quality, impacting their Adwords performance. Google also claimed that most mobile Internet users will not revisit a website from their phone if they had trouble doing so the first time.

Does that mean you need a mobile version of your website? If you don't already have one, now might be the time to look into it.

Designing the mobile version of your website

As with any other marketing initiative you consider for your law firm, the first thing you want to consider is how your target audience (potential clients, referral sources and existing clients) uses mobile devices, whether they are likely to use their mobile device to search for you or for information that might be on your website (and therefore land on your website), and if so, what are they searching for? Is it the same or different than what they would be searching for on their desktop or laptop computer?

These answers will help you determine what should be included in your mobile site.

What is the experience of viewing a regular website on a mobile device like?

- Type is small.
- Load time is long.
- Flash doesn't play.
- Navigation is difficult.
- Buttons are too small to click on with a thumb.
- You can't access sub-menus (the menus that pop up when you roll your mouse over the main navigation point.

You will also want to look at the bounce rate and conversion rate for your site. Are there more bounces when your site is viewed on a mobile device? Are there fewer conversions (visitors that take action on your site, whether that is downloading free information, sending an inquiry or calling for a consultation) from your site when it is being viewed on a mobile device?

These are the issues that need to be addressed when designing your mobile site. To take advantage of all of those potential clients using mobile devices for search, your site must be mobile friendly: it must be simple, clean, load quickly and include easy navigation.

Make your website mobile friendly

More people are using mobile devices for reading, so if your site includes a blog (or is a blog), numerous articles or an RSS reader, you'll probably want to make sure your site is mobile-friendly (or at least tablet friendly).

Here, again, you'll want to think about your web visitor. What content is your typical client, potential client or referral source looking for? Are there graphic elements on your site that would be unnecessary on a mobile site?

Some additional tips for making the mobile site work for your visitors include:

- Simplify – include the key information your visitors need on the go, but not everything. Keep the number of pages down and the layout simple.
- Keep branding consistent with your main site – include your logo and ensure colors remain consistent.
- Don't use pop-ups.
- Limit the amount of text entry required – use dropdowns and checklists where possible[3].

Mobile website options

There are several ways you can address the mobile issue: you can create two separate sites, one regular, and one specifically for mobile, or you can create one site that is re-formatted to be mobile-friendly. Last, you can create a mobile app.

For some law firms, optimizing their site for mobile users may require a redesign, or creation of a mobile optimized site that can be added to their existing site. When someone accesses your site through a mobile device, they will be automatically redirected to the mobile site. In these instances, it is always still a good idea to give users the option to click through to the full site with all of your content.

If your existing site uses Wordpress or Drupal or has an updated content management system, plug-ins or add-ons are available that will display a mobile version of your site with almost no work on your part. Otherwise, you may want to hire a professional to ensure your mobile web visitors are getting the information they need in an easily readable and navigable format.

While some lawyers have been considering mobile apps for their law firms, I see little utility for those apps, unless you're talking about an app that gives existing clients access to a secure client portal to get information on their individual case. It is unlikely that potential clients or referral sources will install a law firm app unless there is something really unique that they can use on a daily or at least weekly basis. Most people use apps for fun or to make their lives easier. If your app doesn't qualify, just focus on making your website mobile friendly instead.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers social media, business development, marketing, management, productivity and client service consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com. A version of this article originally appeared onLawyerist.com.

1. http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html
2. http://www.idc.com/getdoc.jsp?containerId=prUS23028711
3. Many of these tips are from the Social Media Examiner: http://www.socialmediaexaminer.com/9-tips-for-optimizing-your-website-for-mobile-users/

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COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Reinstatements Granted
The following attorneys have been reinstated to the roll of attorneys and counselors- at- law:

Jeffrey Bettman
Barry R. Feerst
Vincent J. Grande III
Robert A. Macedonio
Christopher T. Maffia
William R. Rothman

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Shmuel B. Klein: By affidavit, respondent tendered his resignation on the grounds that he is the subject of pending charges of professional misconduct, including his conviction after trial of a "serious crime" within the meaning of the Judiciary Law Sec. 90(4)(d), and that he failed to re-register as an attorney with the Office of Court Administration. He stated that his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Ilene S. Cooper

Michael S. Krome: By affidavit, respondent tendered his resignation, indicating that he pled guilty to one count of conspiracy to commit securities fraud, wire fraud, and mail fraud. Respondent acknowledged that he would not be able to successfully defend himself on the merits against charges predicated on the foregoing. He stated that his resignation was freely and voluntary rendered, and affirmed that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured

James N. Hulme: Motion by the Grievance Committee to impose discipline on the respondent based upon acts of professional misconduct, involving dishonesty, fraud, deceit or misrepresentation. In determining the proper measure of discipline to impose, the court noted that the conduct complained of took place over 15 years ago, and was an isolated incident that occurred as a result of a mistake in the law. Respondent admitted his errors and accepted responsibility for same. In addition, he submitted substantial support for his good character. Accordingly, under the circumstances, including the absence of actual harm, the respondent was publicly censured for his misconduct.

Attorneys Suspended

Michael Bolduc: The Grievance Committee advised the court that the respondent had been convicted of seven misdemeanors, of which two constituted serious crimes, to wit, Class A misdemeanors. The respondent failed to notify the court of his misdemeanor convictions as required by Judiciary Law Sec. 90 (4)©. Accordingly, the respondent was suspended from the practice of law as a result of his convictions, and the Grievance Committee was authorized to institute a disciplinary proceeding against him.

Anthony C. Donofrio: The Grievance Committee served a petition upon the respondent containing six charges of professional misconduct and the matter was referred to a special referee. The referee sustained all six charges and the Grievance Committee motion to confirm the report was granted. The charges against the respondent included allegations that he misappropriated funds entrusted to him. In determining an appropriate measure of discipline to impose, the court noted that the respondent was married with five young children, and took full responsibility for his escrow violations. The court further noted that all of the clients involved received the money to which they were entitled. The respondent's prior disciplinary history indicated that he had previously been suspended, and had received two Letters of Caution and one Letter of Admonition. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of two years.

Attorneys Disbarred:

Allen S. Gold: By decision and order dated January 17, 2012, the respondent was suspended from the practice of law, and the Grievance Committee was authorized to institute a disciplinary proceeding against him. The petition against the Respondent alleged *inter alia* that the respondent had engaged in acts of dishonesty, fraud, deceit or misrepresentation, and failed to cooperate with the Grievance Committee. The respondent failed to answer the petition and the Grievance Committee moved for an order deeming the charges in the petition established. The respondent failed to answer the motion or request an extension of time to do so. Accordingly, based upon the circumstances, the charges in the petition were deemed established, and the respondent was disbarred from the practice of law in the State of New York.

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

Academy offers advanced foreclosure defense issues seminar

By Craig Robins

After a wave of foreclosure proceedings hit Long Island during the past several years, a number of our members took advantage of learning about advanced foreclosure defense issues by attending a two-part Suffolk Academy of Law seminar, *Behind the Curtain: Advanced Standing Issues in Securitized Mortgage Foreclosure*.

The seminars were held on November 19, 2012 and January 14, 2013. At the first session, attendees learned about the intricacies behind mortgage transfers and assignments. The second session highlighted various defenses attorneys can assert on behalf of their homeowner-clients.

Photo by Craig Robins

At the January Suffolk Academy of Law seminar session from left were, Hon. Peter Mayer, Hon. C. Randall Hinrichs, Charles Wallshein, Hon. Jeffrey A. Spinner and Richard L. Stern, who moderated both sessions. Hon. Dana Winslow and Hon Arthur Schack were additional panelists for the November session.

Non-compete agreements *(Continued from page 10)*

was agreed to by the parties.

Enforcement of non-competes does not cause former employees irreparable harm

An employee seeking to enjoin his former employer from enforcing a valid non-compete must meet the high burden of proving irreparable harm.[9] In *Hyde v. KLS Professional Advisors Group, LLC*, former employee Bruce Hyde sought to restrain his former employer from enforcing its restrictions against "contacting any of the firm's 'past,' 'present,' or 'potential' clients for three years following his departure . . . and from indefinitely disclosing the firm's client list."[7] Hyde argued that enforcement of this restriction would cause a loss of employment that was sufficient to prove irreparable harm. Noting that irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction,"[8] the Second Circuit held that "[a]bsent a 'genuinely extraordinary situation,'" loss of income, insufficiency of savings, and difficulty in obtaining subsequent employment are not circumstances that meet irreparable harm. With this decision, the Second Circuit armed employers with potent language for non-compete disputes. It will be interesting to see if future litigants seek to extend the holding of this case to support the reasonableness of non-competes in general.

Employers should be buoyed by these decisions and seriously consider implementing appropriate restrictive covenants, or revising existing agreements, to protect their business interests. As demonstrated by these decisions, non-compete agreements hold up under judicial scrutiny and are well worth a second look by any employer.

Note: Marc S. Wenger is a Partner and the Litigation Manager in the Long Island, New York office of Jackson Lewis LLP. Mr. Wenger has been representing companies for twenty-four years in matters relating to restrictive covenants, equal employment opportunity, employment litigation, wage/hour and related matters. He has lectured on the FLSA, ADA, FMLA and Title VII, including presentations to the Nassau and Suffolk Count Bar Associations' Labor and Employment Subcommittees.

1. *Reed Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307 (1976).
2. *Delta Enter. Corp. v. Cohen*, Index No. 650528/11 (1st Dep't Mar. 1, 2012).
3. *Id.*
4. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011)(held that the Federal Arbitration Act preempts a California state law deeming class-action waivers in arbitration agreements unenforceable).
5. *Nitro-Lift Techs., L.L.C. v. Lee*, 568 U.S. ___ (2012)(*per curiam*).
6. *Id.* (slip op. at 5)(*citing Concepcion*, 131 S.Ct. at 1745).
7. *Hyde v. KLS Professional Advisors Group, LLC*, No. 12 Civ. 1484 (2d Cir. Oct. 12, 2012).
8. *Id.* (*citing Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 119 (2d Cir. 2009).
9. *Id.* (*citing Sampson v. Murray*, 415 U.S. 61 (1974); *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988)).

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INTELLECTUAL PROPERTY

A look ahead to 2013

Part II – copyright law in the digital age

By Gene Bolmarcich

This month we look at copyright law. I will briefly touch on three topics of great current interest. These are: the problem of "orphan works," the battle between Google and the owners of copyrights in books over Google's goal of digitizing all of the books ever published for online viewing, and the controversy surrounding the Digital Millennium Copyright Act (DMCA).

An orphan work is an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law. Under current law, anyone who uses an orphan work without permission runs the risk that the copyright owner(s) may bring an infringement lawsuit for substantial damages, attorneys' fees, and/or injunctive relief unless a specific exception or limitation to copyright applies. In such a situation, a productive and beneficial use of the work may be inhibited, not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license, but merely because the user cannot identify and/or locate the owner and therefore cannot determine whether, or under what conditions, he or she may make use of the work. This outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public (e.g., for use in research, education, mainstream books, or documentary films). Accordingly, finding a fair solution to the orphan works problem remains a major goal of Congress and a top priority for the Copyright Office.

Both the 109th and the 110th Congresses considered the orphan works problem, in each case introducing legislation that built upon many of the Copyright Office's recommendations. The proposed legislation would have:

(1) limited remedies available under the Copyright Act when a user is unable to locate the copyright owner or other appropriate rights holder after conducting a good faith reasonably diligent search; (2) been applicable on a

case-by-case basis, meaning that users could not assume that an orphan work

would retain its orphan status indefinitely; and (3) permitted the copyright owner or other rights holder later to collect reasonable compensation from the user, but not statutory damages or attorneys' fees. Although Congress came close to enacting legislation shortly before the presidential election in 2008, it failed to do so before adjourning.

Gene Bolmarcich

Recent high-profile litigation raised additional questions and concerns regarding orphan works in the context of mass digitization of books. The possibility of mass digitization was not addressed by Congress in its proposed legislation. Ultimately, the issues at the heart of mass digitization are policy issues: the works may in fact have copyright owners, but it may be too labor-intensive and too expensive to search for them, or it may be factually impossible to draw definitive conclusions about who the copyright owners are or what rights they actually own. Presently, the U.S. Copyright Office is reviewing the problem of orphan works in continuation of its previous work on the subject and in order to advise Congress as to possible next steps during 2013.

As mentioned above in 2005 Google announced plans to scan and digitize "the world's books." The Association of American Publishers (AAP) and the Author's Guild (AG) both filed lawsuits against Google immediately following this announcement. In October 2012 AAP and Google settled their lawsuit. In a joint statement it was stated that as a result of the settlement, the Google Library Project will receive access to publishers' copyrighted books. Both parties also said that U.S. publishers can "choose to make available or choose to remove their books and journals digitized by Google for its Library Project." In the statement, AAP and Google said: "Apart from the settlement, U.S. publishers can continue to make individual agreements with Google for use of their other digitally-scanned works."

This settlement doesn't affect the litigation between Google and the Author's Guild. The AG responded to AAP's settlement with Google in a statement:

"Google continues to profit from its use of millions of copyright-protected books without regard to authors' rights. Our class-action lawsuit on behalf of U.S. authors continues."

The controversy thus continues.

The Digital Millennium Copyright Act of 1998 (DMCA) is a controversial piece of legislation. While much of the criticism of the law is misplaced, there are definite problems with it. The law contains an immunity provision for most websites that contain content submitted by third parties without the involvement of the website operator (e.g. search engines, social networking sites, etc.) known as a "safe harbor" precluding any copyright infringement lawsuit for monetary damages being filed against a website in which a third party has posted an allegedly infringing item. In order to receive this protection the website operator must "take down" the allegedly infringing material without further inquiry. The copyright holder can only go after the party posting the content, not the website. When a person receives a DMCA complaint notice from a site, they often complain the site isn't deciding the matter in their favor. The problem is the site is not involved in the interpretation of the merits of the claim. The DMCA indirectly requires the site to not make such a determination. If it does, the site loses its immunity.

Sites such as Facebook, YouTube, Twitter and any forum could not exist without the DMCA. They would be put out of business by an avalanche of copyright infringement lawsuits. Google gets 1.6 million DMCA complaints a week. Without the DMCA being in place, a significant percentage of these complaints would convert to lawsuits in which Google would be named as a defendant in addition to the party allegedly posting infringing content. It would be impossible for the company to function.

An individual who thinks their content was taken down unfairly does have a potential course of action. They can file a counterclaim with the site in question. This counterclaim information is then forwarded to the copyright holder. The copyright holder than has a set time period of roughly two weeks to file a lawsuit against the person posting the content. If that occurs, the "fair use" argument can be asserted as a defense in the action. And if the lawsuit isn't filed the website operator can repost the content at issue.

One major problem with the DMCA is copyright holders sending out automated notices lacking a valid claim. A person impacted by the claim has the right to sue the copyright holder but there is a major problem. One has to prove the copyright holder "knowingly" misrepresented material facts in their claim. This is not an easy burden to meet as the other party can often just claim they negligently made a mistake, which does not meet the burden of proof.

DMCA complaints are now used not so much to protect copyrighted material, but to gain competitive advantages. It is not uncommon for parties to send out notices to try to take down competitor content or to erase negative remarks and reviews online. This is a problem that needs to be addressed soon. Google estimates that of the millions of DMCA complaints it receives, 35 percent are nonsense. DMCA is a law that needs fixing and 2013 could be the year we see some legislative action taken.

Note: Gene Bolmarcich is a trademark attorney and Principal of the Law Offices of Gene Bolmarcich in Babylon, NY, with a national clientele. In addition to being an independent contractor on trademark matters for other law firms, he offers a virtual trademark registration service at www.trademarksa2r.com. He can be contacted at gxbesq1@gmail.com.

LAND TITLE

When private property becomes a public nuisance

By Lance R. Pomerantz

A curious case that has been rattling around in both the state and federal courts raises serious concerns about the lengths to which a municipality may go in mandating the use to which private lands must be put without compensation. John and Marguerite Viteritti were initially rebuffed by Nassau County Supreme Court in their efforts to use their land as they saw fit.[1] In January, the U.S. District Court for the Eastern District of New York, for the second time, rebuffed their effort to obtain damages for the taking of their property without just compensation.[2]

The status of the property

For a case that is so controversial, the facts are surprisingly straightforward.[3] The Viterittis reside in the Incorporated Village of Bayville, on the North Shore of Nassau County. They own two lots on opposite sides of a private road known as Shore Road.

In 1976, pursuant to an "easement agreement" among the owners of properties abutting Shore Road, including the Viterittis, John Viteritti erected a barricade across Shore Road. At the time the first action was commenced, the barricade consisted of "decorative boulders," a fence, shrubs, grass, and Belgium blocks and was 29 feet long and 4 1/2 feet high.

Lance R. Pomerantz

Over the years, different village officials requested the barricade be removed, but never brought an action until 2005. Thus, the barricade had existed in the same location for 29 years before legal proceedings were commenced. During this period, vehicular traffic had been unable to use this portion of Shore Road, but every parcel in the area had vehicular access over other streets.

Shore Road was shown on a filed subdivision map that contained an irrevocable offer of dedication of the roads on the map"to the municipality having jurisdiction thereof." Nevertheless, Nassau County Supreme Court determined that the Village never accepted the dedication. Hence, "Shore Road [had] not been dedicated to the Village of Bayville as a public street."

Supreme Court also determined that the disputed portion of Shore Road had not become a public street pursuant to Village Law §6-626.[4] Because there was no public use of the disputed portion of Shore Road since 1976, "the court conclude[d] that Shore Road ha[d] not become a public street by prescription."

Despite finding that the disputed portion of Shore Road was not a public street, the court nevertheless concluded that the barricade constituted a "public nuisance on private property." The village was permitted to remove the barricade and charge the cost of removal to the Viteritti![5]

The concept of "Public Nuisance"

"A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a *common right of the public*, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center,* 96 NY2d 280, 292, (2001) [emphasis supplied]. It is well settled that the unlawful obstruction of a *public* street creates a public nuisance, *id.* at 292-293.

If the owner of a private road permits the public to use the road, a village may impose reasonable maintenance standards to protect public safety, *D'Angelo v. Cole,* 67 NY2d 65 (1986), but there is no case that requires a private road owner to open the road to public use against his will.

How did this happen?

The court juxtaposed the public nuisance concept with the scenario presented in *Perlmutter v. Greene,* 259 NY 327 (1932). In *Perlmutter*, the State Superintendent of Public Works had wanted to construct a barrier along a portion of a state highway to obscure a distracting billboard. The billboard had been erected on private property adjoining the highway. The Court of Appeals upheld the superintendent's actions as reasonable to protect the driving public from harm.

More important for the case at hand,

(Continued on page 23)

SCBA hosts Cohalan Cares

Photos by Barry Smolowitz

Photos by Barry Smolowitz

KIDS CORNER

SCBA member Amy Chaitoff's children Tegan Kathleen and Riely Chaitoff.

Kids Corner is a new section created by the paper to share photographs of member's children. To have your children's photo included, send it to scbanews@optonline.net.

We are pleased to announce the addition of

Robert A. Lifson
Former Supreme Court Justice
Appellate Division, Second Department

as Appellate Counsel with the firm

and

Robert M. D'Angelillo
Senior Counsel

who will be joining

Robert J. Cimino
John Halloran, III
and
Raymond Loew

in the firm's Trusts and Estates Practice

Mr. D'Angelillo's practice will concentrate in Elder Law and Medicaid Planning

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PRO BONO

Pro Bono Attorney of the Month - William M. Gearty

By Stephen L. Ham

The Suffolk Pro Bono Project is pleased to honor William M. Gearty as its Pro Bono Attorney of the Month. Mr. Gearty has a particularly distinguished record of pro bono bankruptcy representation and has received this award from the Pro Bono Project previously along with a similar award for his work as a law guardian. His enduring commitment to doing his part for Suffolk County residents in need earns him this distinction once again.

After receiving his undergraduate degree from Catholic University in Washington in 1978, Mr. Gearty worked at the White House as Assistant to the Staff Secretary. Following a six-month stint with the Democratic National Committee during the 1980 general election, he entered Albany Law School of Union University, receiving his J.D. in 1983. Before starting his own firm in Nesconset in 2006, Mr. Gearty practiced for the Automobile Club of New York, the Legal Aid Society in Hauppauge, and a local law firm. His practice in Nesconset today focuses on federal bankruptcy litigation, asset protection, military disciplinary proceedings, and maritime personal injury.

Now in his twentieth year of providing pro bono services to Long Islanders with unmet legal needs, Mr. Gearty displays an extraordinary commitment to public service. He has represented over 125 individuals in their bankruptcy proceedings and attempts to take seven bankruptcy cases each year on a pro bono basis. “Many people look at pro bono work as work that’s unpaid and unglorified, but the satisfaction you get from your clients more than makes up for the lack of financial compensation,” he said.

Mr. Gearty was moved by one particularly grateful client whose small token of holiday cookies expressed her appreciation for Mr. Gearty’s representation. Maria Dosso, Nassau Suffolk Law Services’ Director of Communications and Volunteer Services noted that, “Mr. Gearty can always be relied on to accept a bankruptcy referral on a regular basis. His generosity and ongoing participation in the Pro Bono Project exemplifies the true spirit of pro bono.”

In addition to his pro bono bankruptcy work, Mr. Gearty is an instructor for the U.S. Coast Guard and is a member of the Admissions Management and Advisory Board at the U.S. Coast Guard Academy in New London, Connecticut. The Board counsels the Academy’s admissions officers in their search for the next generation of Coast Guard officers. He is also a member of the Suffolk County Bar Association.

William M. Gearty

Mr. Gearty has three children. His daughter Briana is attending graduate school to become a physician’s assistant. His oldest son, Ian, is working towards practicing as an electrician. Younger Alexander studies journalism at Suffolk County Community College.

William M. Gearty’s pro bono representation of bankruptcy clients underscores his dedication to help less fortunate Long Islanders resolve their legal problems. It is with great pride and gratitude that we honor him 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 towards 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 funded primarily by the Legal Services Corporation to provide 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 Maria Dosso, Esq. (631) 232-2400 x 3369.

HEALTH AND HOSPITAL LAW

When the residents’ agents become payment “guarantors”

By James G. Fouassier

Legal issues unique to skilled nursing facilities (SNF) aren’t usually the subject of my articles but any health law practitioner learns something about nursing home financial issues as he or she goes along. I came across a recent case that made me think about how a resident’s agent or attorney in fact may find himself or herself financially responsible for a nursing home bill despite the regulatory prohibition against an SNF requiring a third party’s guarantee.

No reader need be reminded that as the “Boomers” continue to age-out access to long term rehabilitative and/or custodial care is becoming critical. Most health insurance policies and benefit plans do not provide for post-acute (i.e. post discharge) institutional care; those more generous and expensive plans that do only cover relatively brief encounters. For those who maintain eligibility, Medicare will pay for up to 100 days of continuous rehabilitative (not custodial) skilled nursing care. [1] Few have the financial wherewithal to accommodate long term care needs from personal assets and resources, or the foresight and income to afford premiums on “long term care” policies that will pay for such care. Consequently, the question of who will pay for necessary long term custodial care must be answered as we move into the brave new world of health care reform.

The lack of payment sources is a principal barrier in hospital discharge planning. When a patient no longer is acutely ill and no longer benefits from inpatient hospital care the hospital must effect a discharge. At the same time hospital discharges must be medically appropriate given the patient’s needs and the availability of appropriate post-discharge care. This is frustrated when the patient requiring followup or custodial care has no way to pay. Hospitals cannot withhold necessary medical care and treatment and must admit when indicated, but SNFs are not so constrained. [2] Long term rehabilitative and custodial skilled nursing facilities, however, can reduce the risk of financial loss from nonpayment by requiring as a condition of admission that payment streams be guaranteed, whether by assignment of available benefits or the commitment of significant cash assets. No payment sources, no admission. [3]

James G. Fouassier

Some medical conditions lend themselves to advance planning; when an unfortunate family member begins suffering from the noticeable effects of Alzheimer’s Disease, for example, there often is time to make contingency plans for eventual institutional care. In many cases, however, the hospitalization resulting from a fall or stroke (or, often with younger patients, a severe automobile accident) requires prompt action by the family to line up financing for long term care placement. When time is of the essence families have to make critical decisions under significant emotional stress and financial pressure. Spouses and siblings often are not of a like mind regarding treatment options. Residential rehabilitative care that otherwise may be appropriate is delayed. The issues abound.

When a family member or friend presents at the residential facility’s admitting office he or she is given an admission agreement to sign. An element of every agreement is a guarantee of a source of payment. An SNF may not secure a payment guarantee from a resident’s family or friends. [4] The federal Nursing Home Reform Act, 42 USC § 1395i-3[c][5][A][ii], prohibits an SNF from requiring a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility. [5] It is precisely when families are most vulnerable, particularly after a lengthy hospitalization of a loved one who then requires long term custodial or rehabilitative care, that facility operators are prevented from taking advantage of emotional weakness by compelling a family member to act as a financial guarantor of a large nursing home bill.

In most cases the condition of the applicant requires that a family member or close friend act as a “representative” or agent of the resident, exercising authorities derived informally as a co-owner of bank accounts or other assets, or formally pursuant to some legal process like a power of attorney or a guardianship. The facility operator will insist that any such “representative” make the assets of the resident available to pay the nursing home bills by requiring the representative to sign an agreement to that effect. The agreement will make clear that, while the assets of the agent are not pledged to pay the resident’s debt, the failure of the representative to act in accordance with the requirements of the agreement will result in liability against him or her personally. Typical language may read as follows:

> *The Responsible Party is not obligated to pay for the cost of the resident’s care from his/her own funds. By signing this agreement, however, the Responsible Party personally guarantees continuity of payment from the resident’s funds to which he/she has access or control and agrees to arrange for third-party payment if necessary to meet the Resident’s cost of care. The Responsible Party personally agrees to pay any deductibles, coinsurance or co-pays and the daily basic rate and pharmacy charge from the resident’s funds to which he/she has access or control until Medicaid covers such charges. The Responsible Party personally agrees to use his/her access to the resident’s funds to ensure continuity of payment under this agreement, and agree not to use the Resident’s funds in a manner that places the facility in a position where it cannot receive payment from either the resident’s funds or from Medicaid. If the Responsible Party receives a transfer of assets from the resident that causes such non-payment, the Responsible Party agree to use such assets or an amount equal to such assets to assure continuity of payment until Medicaid covers such costs.*
>
> *The Responsible Party agrees to use their personal resources if necessary to pay damages to the facility resulting from a breach of their personal and independent obligations to the facility as set forth in this agreement. Such damages include collection costs and attorney fees.*
>
> *Damages resulting from a breach of this agreement also will be due if the Responsible Party refuses to pay amounts due from the resident’s funds upon request when delivery of such funds is feasible and necessary to meet the resident’s obligations; and/or transfers resident assets and thereby prevents the Facility from receiving payment for services.*

Is this legal? In *Sunshine Care Corp. v Warrick,* 2012 N.Y. App. Div. LEXIS 8064; 2012 NY Slip Op 8111, the Second Department drew a distinction between prohibited third party guarantees and independent obligations assumed by third parties purporting to act as representatives of nursing home residents:

> “[W]ith respect to contracts with legal representatives, (federal law) shall not be construed as preventing a facility from requiring an individual, who has legal access to a resident’s income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident’s income or resources for such care. Here, the admission agreement did not require the (agent) to guarantee payment for her husband’s care as a condition of his admission to, or his continued stay in, the nursing home. The agreement stated, *inter alia*, that the designated representative agrees to ‘provide payment from the resident’s income or resources *to the extent that he/she has access to such income and resources without the designated representative incurring personal financial liability*’ (emphasis added). However, the agreement goes

(Continued on page 22)

WHO'S YOUR EXPERT

The effects of untimely CPLR 3101[d] disclosures

Better Late than Never

By Hillary A. Frommer

Litigants very often attempt to bar either an expert's testimony at trial or the use of an expert's report on summary judgment based on a party's failure to timely give notice under CPLR § 3101[d].[1] However, a late disclosure does not automatically result in having the expert precluded. With respect to trial testimony, there are several factual questions that a court must resolve in determining whether the expert may testify. First, because the statute itself does not set forth the timing for the disclosures, the court in its discretion determines what constitutes an "untimely" notice.[2] Unfortunately, in this arena, there is no definition. Second, CPLR § 3101[d][1][i] expressly provides that "where a party for good cause retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on the grounds of noncompliance with this paragraph." Thus, on a motion to preclude, "good cause" is the central factual issue that the court will determine by considering the following: when the expert was retained; why the expert was retained at that particular stage in the litigation; when the disclosure was made vis-à-vis the retention and whether it was deliberately delayed; and what if any prejudice the movant will suffer if the expert testifies.

Hillary A. Frommer

For example, in *Quinn v. Artcraft Construction, Inc.*[3] the Second Department affirmed the trial court's order precluding the plaintiff's expert from testifying, upon finding that the plaintiff failed to show good cause why she did not retain her expert until a few days before the trial began and three years after the defendant made a demand under CPLR § 3101[d].

Similarly, in *Corning v Carlin*,[4] the plaintiff's expert was barred from testifying because the plaintiff failed to show good cause why she did not retain an expert until the eve of trial and disclose his existence until after the parties made their opening statements.

In *Lissak v Cerabona*,[5] a medical malpractice action against a hospital and two physicians, the defendants served a series of expert notices over the course of four years of pre-trial litigation. The plaintiff rejected the first two disclosures as insufficient, but accepted the third notice which reflected the defense strategy that the care provided by all of the defendants was within the accepted standards of practice. Subsequently, the plaintiff settled with the hospital and one doctor, and proceeded to trial against the remaining physician.

On the eve of trial, the lone defendant served yet another CPLR § 3101[d] notice which not only identified new testifying experts, but also raised a new legal theory: the doctor who had settled pre-trial was negligent. The trial court denied the plaintiff's motion to preclude

(Continued on page 22)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Attorney's fees

Before the Surrogate's Court, Suffolk County, in *In re Adams,* was a contested accounting in which the parties settled their differences and agreed, *inter alia,* to submit the issue of whether respondent's attorney's fees should be an expense of the estate.

The court noted that generally, a party is not entitled to recover attorney's fees from an opposing party as the same are considered incidents of litigation. Nevertheless, an exception to the general rule exists when it is demonstrated that the services performed by counsel benefitted the estate as a whole, not merely the objectant. To prevail, the objectant must establish the benefit inuring to the estate by clear and convincing evidence.

The record revealed that the parties were engaged in settlement discussions prior to the commencement of the litigation. As such, the court concluded that while the litigation may have propelled those discussions to fruition, it did not benefit the estate as a whole. Specifically, the court found that estate was not enlarged in any significant way, but rather, it diminished the estate by the legal fees incurred in the defense of the action. While the court noted that fees could be awarded in a proper case where a matter is settled prior to trial, there had no factual showing of any wrongdoing or conversion of assets by the fiduciary.

***In re Adams,* NYLJ, Nov. 27, 2012, at 35 (Sur. Ct. Suffolk County).**

Order Denying Summary Judgment Affirmed

In *Matter of Eshaghian,* the Appellate Division, Second Department, affirmed an order of the Surrogate's Court, Queens County (Kelly, S.), which denied petitioners' motion for summary judgment dismissing a claim against the estate. In support of their motion, the petitioners' alleged that a certain written agreement forming the basis of the claim was not genuine or was procured through improper means and was void, or was legally unenforceable.

Ilene S. Cooper

The court found that petitioners impermissibly attempted to establish their entitlement to judgment as a matter of law principally pointing to deficiencies in the respondent's proof. Further, the court found that petitioners failed to establish, as a matter of law, that a copy of the subject agreement would be inadmissible at trial under the best evidence rule. Finally, the court concluded that none of the other evidence submitted by the petitioners in support of their motion established that the subject agreement was not genuine, was procured by improper means, was void and/or was unenforceable. Thus, the court held that the Surrogate's Court properly denied the petitioners' motion, regardless of the sufficiency of the opposing papers.

***Matter of Eshaghian,* NYLJ, Nov. 16, 2012, at 27 (App. Div. 2d Dep't.)**

Summary Judgment

In *In re Feinberg,* the court granted summary judgment to the petitioner and dismissed the objections to probate. On the issue of due execution, the petitioner submitted a copy of the will, which contained an attestation clause and self-proving affidavit, as well as transcripts of the SCPA 1404 examinations of the attesting witnesses and the attorney who supervised the execution of the instrument. Based on these submissions, the court found that petitioner had established a prima facie case of due execution and testamentary capacity. In opposition to the motion, the objectant alleged that an issue of fact existed on the issue of due execution inasmuch as the attesting witnesses had failed to recall the will signing. However, these witnesses, who were either employed by or had been employed by the attorney draftsman, both testified that there was a standard procedure utilized in the office for the execution of a will, which complied with the requirements of EPTL 3-2.1. The court held that the inability of the witnesses to recall the will execution ceremony was insufficient to overcome the presumption of due execution that arose from an attorney-supervised will execution ceremony, or the existence of a self-proving affidavit. The court rejected the objectants' claim that the presumption of due execution did not apply because the draftsman was associated with the petitioner. Rather, the court found that the drafting attorney had more than a ten year professional relationship with the decedent prior to the execution of the propounded will, and that the decedent, together with his wife, had selected counsel. Indeed, it appeared that although the attorney knew the petitioner, and at times spoke with him on the phone, he had never met him in person prior to the execution of the will, or acted to any extent under his direction.

The court also held that the existence of staple holes in the instrument did not undermine its due execution. Specifically, it appeared that there were additional staple holes in the pages of the will that were obscured by the will's cover sheet. Neither the attorney who supervised the execution of the will nor the attesting witnesses had an explanation for the staple holes. Nevertheless, the court opined that the mere removal of staples or re-fastening of a will does not render the will invalid if the language of the pages is coherent and con-

(Continued on page20)

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LANDLORD TENANT

Is it a license or a lease?

By Patrick McCormick

Perhaps the better question is not whether the relationship at issue is one between a landlord and tenant or between a licensor and license, but whether it matters legally or practically? The short answer is that it does matter both legally and practically. But first, what is the distinction between a lease and a license?[1]

The Court of Appeals, long ago, described a license as "a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein." Licenses are commonly used for kiosks found in shopping malls or for cellular towers on roofs of buildings. Under a lease, the landlord surrenders "absolute possession and control of property to another for an agreed-upon rental."[2] Thus, the primary factor is whether the occupant has the exclusive right to use the premises. If the use is exclusive, the relationship is most likely a landlord/tenant relationship. If not, a licensor/licensee relationship likely exists.[3] As will be discussed below, there may be reasons a landowner may want a licensor/licensee relationship but it is important to note that courts will analyze the relationship to determine whether it is a licensor/licensee or landlord/tenant relationship and will not simply acquiesce in the characterization of the relationship used by the parties.[4]

Patrick McCormick

In addition to obtaining the exclusive use of premises that is the hallmark of a lease, one needs to think about the other factors to consider when deciding whether to enter a license or lease. The most obvious consideration relates to termination of the relationship and resulting eviction. Initially, as set forth above, the license may be revoked at any time. Thus, absent an agreement, the revocation, and thus termination of the license can generally come with no notice whatsoever. Any resulting eviction requires service of a 10 day notice to quit before commencement of a summary proceeding. Notably, the 10 day notice to quit is also required if the license term expires.[5]

Another significant factor involves the ability of a licensor to exempt himself from liability for damages resulting from his own negligence. New York General Obligations Law §5-321 generally provides that a lease clause attempting to exempt a landlord from damages resulting from his own negligence is void as against public policy and is thus not enforceable. There is no analogous statutory provision applicable to a licensor. Thus, it is possible for a licensor to exempt himself from damages caused by his own negligence.[6]

Yet another consideration is whether a licensee is able to obtain a Yellowstone injunction. As discussed in a prior article, to obtain a Yellowstone injunction to toll the running of a cure period, one of the requisite elements to be shown by the party seeking the injunction is the existence of a commercial lease. If no lease exists, it follows that a Yellowstone injunction is not available. Also, because a license is revocable at will, there will not likely be a cure period to be tolled by a Yellowstone injunction.

Thus, a licensee may not enjoy all the rights enjoyed by tenants but is protected by some procedural safeguards. In evaluating whether to enter into a license or lease, both the owner and potential tenant/licensee need first to evaluate whether the exclusive right to possess the subject premises is important and, if not, whether the protections available to tenants but not licensees is significant given the particular circumstances at hand. Whether a license or lease is ultimately chosen, the most important factor is that both parties understand the nature of the relationship from the beginning so that there are few surprises if the relationship turns sour.

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

1. *Greenwood Lake & P.J.R. Co. v. New York & G.L.R. Co.,* 134 N.Y. 435, 440 (1892)
2. *Davis v. Dinkins*, 206 A.D.2d 365,366 (2d Dep't 1994)
3. See, *Tsabbar v. Auld*, 276 A.D.2d 442 (1st Dep't 2000)
4. *Federation of Organizations, Inc. v. Bauer*, 6 Misc.3d (App. Term 2d Dep't 2004)
5. RPAPL 713(7)
6. See, *Balyszak v. Siena College*, 63 A.D.3d 1409 (3d Dep't 2009)

COMMERCIAL LITIGATION

Indemnification under the BCL for counsel fees incurred

By: Leo K. Barnes Jr.

This month we review an individual's right to indemnification pursuant to the New York Business Corporation Law ("BCL") for counsel fees incurred to defend a civil action or proceeding, other than a derivative suit.

In typical fashion, directors and officers are sued for conduct in the course of their duties as directors or officers of a corporation. Indemnification of expenses granted pursuant to, or provided by, the BCL is not to be deemed exclusive of any other rights to which a director or officer seeking indemnification may be entitled to, whether contained in the certificate of incorporation or the by-laws or, when authorized by such certificate of incorporation or by-laws, (i) a resolution of shareholders, (ii) a resolution of directors, or (iii) an agreement providing for such indemnification. N.Y. BCL § 721. However, no indemnification may be made to or on behalf of any director or officer if a judgment (or other final adjudication adverse to the director or officer) establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled. N.Y. BCL § 721.

Whether the defendant is entitled to indemnification in defending such an action depends on the particular facts and circumstances of the case and whether those facts fit into the provisions of the BCL that allow for indemnification. In that regard, the indemnification statutes under the BCL fall into two categories: (1) those allowing for permissive indemnification by the corporation; and (2) those where a court will require mandatory indemnification. Under the permissive indemnification framework, a corporation may indemnify any person made a party to a civil action (other than one by or in the right of the corporation to procure a judgment in its favor [a derivative suit]) against judgments, fines, amounts paid in settlement and reasonable expenses, *including attorneys' fees*, if such director or officer acted in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation. N.Y. BCL § 722(a).

Leo K. Barnes Jr.

Permissive indemnification is allowed only if it is authorized by the corporation. N.Y. BCL § 723(b). Authorization under the BCL occurs: (1) by the board of directors acting by a quorum consisting of directors who are not parties to the action or proceeding, upon a finding that the director or officer to be indemnified has met the standard of conduct set forth in BCL § 722 (that the person has acted in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation), or established pursuant to BCL § 721 [N.Y. BCL §§ 723(b)(1)]; or (2) if such a quorum is not obtainable or, even if obtainable, a quorum of disinterested directors so directs, by the board of directors upon the written opinion of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct has been met by such director or officer, or by the shareholders or members upon a similar finding [N.Y. BCL § 723(b)(2)].

If the corporation does not choose to indemnify the officer or director at its own volition (*i.e*., there is no permissive indemnification), a director or officer can still apply to the court for mandatory indemnification under BCL § 724. BCL § 723(a) mandates indemnification of a person who has been completely successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding. Pursuant to BCL § 724(a), notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board, indemnification shall be awarded by a court to the extent authorized by BCL sections 722 and 723(a). Note that the BCL statutes requiring a corporation to indemnify officers and directors who successfully defend non-derivative actions in which they are parties for both liability and litigation costs *do not* independently provide for the recovery of fees incurred by a corporate officer in obtaining indemnification. *Baker v. Health Management Systems, Inc.*, 98 N.Y.2d 80 (2002). Consistent with BCL § 722(a) and § 723(a), the standard for indemnification under BCL § 724 is whether the officer or director acted in good faith, for a purpose believed to be in the best interests of the corporation.

However, counsel must keep in mind that notwithstanding anything in the BCL sections set forth above, the BCL provides that no indemnification, advancement, or allowance can be made in any circumstance where it appears: (1) that the indemnification would be inconsistent with the law of the jurisdiction of incorporation of a foreign corporation which prohibits or otherwise limits such indemnification; (2) that the indemnification would be inconsistent with a provision of the certificate of incorporation, a bylaw, a resolution of the board of directors or of the shareholders or members, or an agreement or other proper corporate action, in effect at the time of the accrual of the alleged cause of action asserted in the threatened or pending action or proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or (3) if there has been a settlement approved by the court, that the indemnification would be inconsistent with any condition with respect to indemnification expressly imposed by the court in approving the settlement. N.Y. BCL § 725(b).

Recently, the right of an officer and 50 percent shareholder to indemnification was addressed in *Tulino v. Tulino* (Nassau County Index No. 7081/09). In *Tulino*, plaintiff Antonio Tulino entered into a written agreement to sell his 50 percent interest in Tulino Realty, in which the corporation's main asset was a commercial building. Plaintiff's brother (Defendant Michele Tulino), who owned the other 50 percent of Tulino Realty, refused to consent to the sale.

Plaintiff brought an action both individually and on behalf of the corporation seeking an order compelling defendant Michele Tulino, as president of Tulino Realty, to issue a stock certificate representing Plaintiff's 50 percent interest in the corporation. In addition, Plaintiff alleged breach of fiduciary duty, and sought a declaratory judgment that Michele did not have a right of first refusal with regard to Antonio's shares. In the amended answer, defendants Michele Tulino and Tulino Realty asserted various counterclaims against Antonio.

After the action was filed, plaintiff cancelled the contract to sell the 50 percent interest in Tulino Realty. Thereafter, plaintiff voluntarily discontinued the claims asserted in the complaint without prejudice. However, the stipulation of voluntary discontinuance provided that the action was to continue as to defendants' counterclaims.

Subsequently, defendant Michele Tulino moved for an order directing plaintiff Antonio Tulino and Tulino Realty to reimburse Michele for his attorneys fees incurred in defending the actions pursuant to § 724 of the BCL. The Court held that permissive indemnification was inapplicable because plaintiff Antonio, as a 50 percent shareholder, objected to the corporation's reimbursement of defendant Michele's legal fees. With regard to defendant's right to mandatory indemnification, the court found "plaintiff's voluntary discontinuance without prejudice as a 'settlement' of the main action, rather than a 'completely successful' disposition in favor of the defendant." *Id*., at 4. As such, the court held that Michele was not entitled to indemnification pursuant to BCL § 723. Further, the court held that there was no basis upon which the court could determine that Michele's actions were taken in the best interests of Tulino Realty, and thus it was not shown that defendant Michele Tulino was entitled to indemnification under BCL § 724.

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

EDUCATION LAW

New gun control law impacts schools

By Candace J. Gomez

Governor Andrew Cuomo signed into law the nation's first gun control legislation on Jan. 15, 2013 called the New York Secure Ammunition and Firearms Enforcement Act of 2013 (New York SAFE Act). The new law contains three provisions specifically aimed at helping school districts.

First, it adds a section to the Education Law establishing School Safety Improvement Teams. These teams may be comprised of representatives from the Division of Homeland Security and Emergency Services, the Division of State Police, the Division of Criminal Justice Services and the Education Department. School districts and BOCES may voluntarily, but are not required to, submit school safety plans to be reviewed and assessed by the School Safety Improvement Teams, and these teams may make recommendations to improve such plans. The "Big Five" school districts (Buffalo City Schools, New York City Schools, Rochester City Schools, Syracuse City Schools and Yonkers City Schools) are not included in this provision.

Candace J. Gomez

Second, a new building aid category has been created in the Education Law to apportion funds to school districts for the purchase of stationary metal detectors, security cameras, safety devices for electrically operated partitions and room dividers. This new aid category provides a reimbursement rate that is 10 percent higher than a school district's current building aid ratio and pertains only to projects approved by the commissioner of education after July 1, 2013 and before July 1, 2016.

Third, the law increases the penalty for criminal possession of a weapon on school grounds from a misdemeanor to a Class E felony.

There is also a new reporting requirement for mental health professionals, which are defined pursuant to this law as including physicians, psychologists, registered nurses and licensed clinical social workers. When a mental health professional is providing treatment services to a person that is likely to engage in conduct that would result in serious harm to self or others, that mental health professional is required to report the individual to the Director of Community Services. The Director of Community Services is the chief executive officer of the county's mental health/hygiene department. If the Director of Community Services agrees that the person is likely to engage in harmful conduct, the director will then report to the Division of Criminal Justice Services and the Division determines whether the individual is ineligible for a firearm license, should have his or her license suspended or revoked, or is no longer permitted to possess a firearm.

Mental health professionals will not be subject to civil or criminal liability based on their decisions to report or not report, provided that their decisions are made reasonably and in good faith. The law is not clear as to whether this reporting requirement applies to school based mental health professionals since such professionals do not customarily provide "treatment services" to students in a school setting.

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

View from the Bench (Continued from page 4)

connection with a summary judgment motion. *Id.*, at 240-41; *see also* Kozlowski v. Oana, 2013 N.Y. Slip. Op. 185 (App. Div., 2d Dep't Jan. 16, 2013) (same). Further, the court clarified that its prior holdings suggesting that expert disclosure was "untimely if...made after the filing of the note of issue and certificate of readiness" do *not* accurately reflect the existing law. *Rivers*, 953 N.Y.S.2d at 242-43.

Conclusion

It will take years to fully grasp the impact of the *Rivers* decision. Regardless, counsel should recognize the trial courts are vested with the discretion to adjudicate noncompliance involving expert disclosures in connection with a motion for summary judgment. Succinctly stated, there is no mandatory preclusion of sworn statements in connection with a motion for summary judgment from experts not previously disclosed.

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

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

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LEGAL MEDIA PUBLISHING

President's Message (Continued from page 1)

you for your kindness. We still need additional volunteers, so please step up to the plate and call SCBA Executive Director, Jane LaCova (631) 234-5511, our coordinator in matching our volunteers with the many veterans who need help.

On February 7 the SCBA once again hosted the Annual Cohalan Cares for Kids charity to benefit the Cohalan Children's Center. Thanks to everyone who attended this event and made it so successful.

As you may already know, the old Traffic Violations Bureau run by New York State will be replaced with a new Suffolk County Traffic and Parking Violation Agency (TPVA) as of April 1, 2013. In anticipation of this new agency which will be substantially different in its operations and therefore will effect the practices of many of our members, I appointed William Ferris (Bill) and Barry Smolowitz to act as our liaisons with the new agency. I also asked Bill and Barry to contact and work with Ira Rosenberg, President of the Suffolk County Criminal Bar Association, in order to arrange for a meeting with the newly-appointed executive director of the TPVA, Paul J. Margiotta of the Suffolk County Executive's office.

Prior to setting up this meeting with Mr. Margiotta, Bill and Barry met with the SCBA's District Court Committee to get input on the concerns about the expected operations and consequences of the TPVA, after which Bill, Barry and Ira met with Mr. Margiotta on February 1, 2013. Bill and Barry have reported back to me that their meeting was very productive and that Mr. Margiotta was very receptive to most of the suggestions they presented to him.

Bill and Barry will continue to work closely with Mr. Margiotta as this new agency comes into existence. We are also planning to have a joint CLE lunch and learn with the Criminal Bar Association prior to the April 1 implementation of the TPVA to further determine how to best represent our clients whose actions become the subject of this new agency. The SCBA will send out an email announcement indicating the date for this special CLE. Bill and Barry have also reported to me that they toured the new facilities at the H. Lee Dennison Building in Hauppauge while under construction and that the TPVA should be fully ready as of April 1. Bill and Barry suggested to Mr. Margiotta that some of our member attorneys participate in a mock run-through along with TPVA personnel of the new procedures prior to the actual April 1 start-up. We appreciate Mr. Margiotta's cooperation to enable us to adapt to the entirely new facilities and procedures.

On February 15, Jane LaCova, SCBA's Executive Director, and I had the honor of representing the SCBA at the Black History Month Celebration held at the Central Islip courthouse, an event to specifically celebrate the 150th Anniversary of the Emancipation Proclamation and the 50th Anniversary of the March on Washington. As usual this yearly event was extremely well attended, thoroughly enjoyable and memorable. Congratulations to all of the court personnel, led by the Honorable C. Randall Hinrichs, the District Administrative Judge of the Suffolk County Court, the Amistad Long Island Black Bar Association and all of the other people who worked so hard on this program.

By the time you read this article, the SCBA's Nominating Committee will have interviewed and nominated members of our Bar Association for the various positions of leadership on our Board of Directors and Executive Committee. Voting for the nominated slate of Directors and Officers will take place at the SCBA Annual Meeting on Monday, May 6. For those of our members who put their names forward but were not selected, I ask that you not be discouraged - your next effort might be successful. For those of our members who have not placed their names in contention and are willing to take on leadership positions in the SCBA, I encourage you to put your name in for consideration next year. As my term of office will conclude in three months, I can only envy our future leaders, knowing the great joy and satisfaction that they will have in the future as a leader of the SCBA.

So you want to be a rock 'n roll star (Continued from page 1)

darned expensive.

The single biggest obstacle in revolutionizing the manner in which we practice law has little to do with cash reserves or investment opportunities. The longest journey does, indeed, begin with but a single step. The most difficult change... is merely a change in mindset. We need to readily accept the change shall (lawyers' love the word "shall") not occur overnight. No law office can change from paper to paperless overnight. Perhaps, the second most important realization is that maybe there will always have to be some paper... but printing emails... who are we, The Flintstones?

The first step in the process is evaluating the technical needs of your particular office, both in terms of hardware and software. For the solo practitioner, the evaluation can begin and end with the purchase of an efficient laptop computer; an internet service provider; and a relatively inexpensive printer. Fairly reliable multi-function devices (printer/copier/scanner) can be purchased for as little as $125.00... and are small enough to be portable... if actually needed at all. What will you do, however, if you're on the run and need printed documents? How about just e-faxing them to a local fax machine? E-what?

The simplest step to alleviating your dependence on paper is by creating an electronic facsimile account. Traditional facsimile machines maintain absolutely no technical advantage over forwarding information over the internet, using technologies such as email, scanner, and graphics file formats (i.e., PDF); however, they appear to be extremely simple to use: put the documents to be faxed in a hopper, dial a phone number, and press a button. Although the traditional fax machine continues to be used over the telephone network at locations without computer and internet facilities and is sometimes used to fax a document requiring a person's handwritten signature, electronic transmission of data over the internet allows the same transmission of data without an actual fax machine at either or both ends.

Depending on the specific method/implementation, advantages of using the internet can include: no hardware; no software; no extra physical telephone line required for fax paperless communication, integrated with email; the ability to send and receive multiple faxes simultaneously; a reduction in phone costs, along with lower costs than traditional fax; the ability to send and receive faxes from any location that has internet access; and the ability to send and receive faxes from mobile devices, including smartphones and tablets.

Let's talk implementation. The most common type we'll call simply internet facsimile transmission which achieves a dramatic reduction in communication costs, especially when long faxes are frequently exchanged with overseas or distant offices. Since there is no telephone connection charge when sending a fax over the internet, the cost of sending faxes is covered entirely by the fixed line internet connection fee set by your internet service provider and a very minimal flat monthly fee for the use of a fax number. The recipient machine can be either an e-fax or a physical fax machine. Hardcopy is converted to TIFF or PDF files and attached to an e-mail in MIME format (so you can scan any document, save it in either a TIFF or PDF format, and attach it to an email using your email account which has been linked to your e-fax number). Then, taking advantage of a connection to the office LAN (local area network) or your Wi-Fi connection, data is sent via TCP/IP directly to any internet fax on the intranet or internet; internet faxes do not incur long-distance transmission costs and reception is verifiable. Now, in English, use a provider for this service.

The service, however, may be offered by the same company providing your office with VoIP or voice over internet protocol. In the early days of VoIP, people ran to companies like Vonage but thought it seemed way too good to be true. They thought correctly; service was inconsistent and quality was extremely poor. The problems, however, were not completely limited to the provider's infrastructure, moreover, the quality of the actual VoIP telephones left much to be desired, and the speed internet service providers were previously able to provide pale in comparison to what you can get now. To determine the speed your internet service provider provides, try visiting www.speedtest.net. Within a matter of seconds, you can determine the throughput (download speed/upload speed) of your service. No matter how reliable the company you select to provide VoIP, and the relative quality of the equipment you use, if your service is slow, VoIP will not provide the professional quality you seek. No provider can offer higher throughput speeds on a commercial level currently than Verizon FiOS (www.verizon.com/FiOS) that offers 300 mbps (megabytes per second) download and 65 mbps upload. Believe it or not, the upload speed is extremely crucial for quality VoIP.

The bottom line... instead of having a machine that continuously adds to your insatiable desire for paper in your office (also continually draining office resources in the form of paper and toner), why not institute a plan to switch to internet facsimile transmission and simply click and drag PDF files to client folders on your computer (or server) and only print them if required? Saving paper is good; being able to permanently access the information is *priceless.* Finding the right VoIP provider can be a challenge, feel free to discuss with me our experiences and the vast research involved prior to contracting with our provider.

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

Trusts and Estates Update (Continued from page 17)

nected. To this extent, the court found that the propounded will mirrored the provisions of the will of the decedent's wife, that the pages were numbered serially, and each page was initialed. Furthermore, the evidence revealed that the will was executed in the presence of the decedent's attorney and the attesting witnesses, and was kept in the office of the attorney until it was offered for probate.

On the issue of testamentary capacity, the court held that the testimony and affirmation of the attorney-draftsman, together with the testimony and affidavit of the attesting witnesses, established a prima facie case of due execution. The record revealed that at the time of executing his will, the decedent was actively engaged in running a business and maintaining rental property, and that he and his wife came to counsel with a testamentary plan in mind that they discussed with counsel over a several month period. Further, multiple drafts of the instrument were sent to the decedent for review, and the instrument was read and discussed prior to its execution. Further, no medical evidence was submitted suggesting that the decedent's faculties were impaired at the time the instrument was executed.

Nevertheless, the objectant maintained that the decedent was not fully knowledgeable of his assets, to the extent he had mistaken his ownership interest in tow corporations, and the attorney had not discussed the value of his assets with him. The court found these claims unavailing, holding that the decedent need only have a general, rather than a precise knowledge of his assets.

Finally, the court found the record devoid of proof that the will was the product of fraud and/or undue influence.

***In re Feinberg,* 2012 NY Slip Op 51904U (Sur. Ct. Queens County).**

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

CONSUMER BANKRUPTCY

Extreme makeover - new bankruptcy petition forms coming

By Craig D. Robins

The official bankruptcy forms are routinely updated from time to time with minor changes. Later this year, however, it appears that the entire bankruptcy petition and schedules will see a major overhaul and extreme makeover.

The proposed version being circulated for review looks nothing like the bankruptcy petition we have become rather familiar with over the past two decades. The new petition also comes with one or more pages of instructions for each schedule - something like the instructions the IRS provides for preparing various tax forms.

Who Is Responsible for Revising the Forms?

The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States is responsible for amending the official bankruptcy forms. This is a subcommittee of the Judicial Conference Committee which is a federal agency created by Congress a century ago and headed by the Chief Justice of the United States.

Several months ago, the Advisory Committee began circulating proposed modifications, requesting members of the bar to comment on them. The official comment period ends Feb. 15, 2013.

The committee hopes to prepare a final proposal by early April when it will have a formal meeting. The revisions to the bankruptcy forms would become effective Dec.1, 2013, if they are approved by the rules committee and the Judicial Conference.

What Are We In Store For?

In short, the new forms are totally different than what we have become accustomed to. Implementing them will certainly create an initial shock to bankruptcy practitioners throughout the country until we get used to them. The forms are laid out much differently. The draft versions could use some tweaking, and likely will be. The new means test forms for Chapter 13 cases provide for forward-looking adjustments required by the Supreme Court case.

What's Different With the New Forms?

I recently participated in a seminar offered by the National Association of Consumer Bankruptcy Attorneys which discussed various issues regarding the new bankruptcy forms and schedules. The only forms with significant changes are the budget forms and the means test forms.

What the look of the forms will be

The forms adopt an entirely new graphical layout which is supposed to be more appealing to the eye and easier to understand. I anticipate that all schedules will undergo the same changes to graphical layout as the forms that contain substantive changes.

Craig D. Robins

One objective in changing the graphical look is to make the forms more user friendly. This is part of a special Forms Modernization Project to make the forms easier to read. However, some colleagues have complained that some of the forms may be harder to understand, use too much paper, and will require too much ink. Nevertheless, the forms do look somewhat smarter and cleaner.

The forms are many pages longer than the versions we have now. For example, the budget schedules which we currently have — Schedules I and J — are a total of two pages. The new forms for these schedules total five pages. One reason the new forms are much longer is because the graphical layout utilizes overly-generous amounts of white space. In addition, there is overly generous utilization of gray-shaded background areas which will require much more toner when printing.

Considering that there are about a million and a half bankruptcy filings a year, and that each attorney likely makes at least one draft copy and several final copies, we're talking about as many as a hundred million extra pages a year. That's a lot of paper and a lot of ink.

As an attorney who signs many hundreds of petitions a year, I can say my hand gets sore from signing the petitions in so many places. Right now, each Chapter 7 petition I have to sign, including all local forms, requires my John Hancock six times. Each debtor signs the petition nine times.

It is my understanding that the new petition and schedules will require fewer signatures. Hopefully the local rules in our judicial district will be revised thereafter to reduce the signatures necessary on other local forms.

It also appears that some of the schedules that are routinely signed now will instead require a mere "X" instead of a full signature. This will be a relief for debtor and attorney alike.

Some of the wording is being changed to make it easier for debtors to understand and read. However, some colleagues say that the new layout on some of the schedules, including the means test forms, actually makes it more difficult to read, and the use of simpler words does not guarantee that debtors, especially pro se filers, will understand them.

One of the biggest gripes that I have with the existing budget schedules is that they do not contain sufficient line items for certain common categories such as miscellaneous expenses, house wares, pet expenses and contributions towards an emergency fund.

Everybody has miscellaneous expenses such as buying postage and stationery, purchasing nominal birthday gifts, etc. Every other person has a pet. Consumers buy house wares such as linens, minor appliances, cookware, etc. These line items continue to be lacking in the new forms. On a positive note, there are now expense categories for personal care products and housekeeping supplies.

The proposed Chapter 13 expense form contains not one, but two columns to list expenses. Debtors will be required to list their anticipated expenses at the time of filing, which is how it is currently done, but they will also have to project the amounts of what their expenses will be at the time of confirmation. This will undoubtedly create some confusion, and I can already anticipate arguments and disagreements with the Chapter 13 trustees over this.

New Means Test Forms

We currently have two means test forms — one used in Chapter 7 cases and one used in Chapter 13. The new forms include a total of five versions for both chapters and an additional version for individuals filing for Chapter 11. There are separate forms for below-median and above-median debtors.The new forms initially appear forbiddingly complex — even more complex than tax forms — and will certainly confuse any debtor seeking to file without counsel.

The current means test for Chapter 13 cases is just one form, and it is technically called the "Statement of Current Monthly Income" — Form B22C. The new version is now two forms. The first form, "Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period," (Form 22C-1) contains the calculations for determining if the debtor is below-median, which results in a three-year plan, or above-median, which requires a five-year plan.

The second form, "Chapter 13 Calculation of Your Disposable Income," (Form 22C-2) contains the various means test deductions to determine the minimum amount a debtor must pay into the plan.

The landmark Supreme Court *Lanning* case stands for the proposition that the means test should take into consideration reasonably anticipated changes to income or expenses in unusual cases. Thus, even though the means test takes a mostly backward-looking approach, accordingly to *Lanning*, the court should take a forward-looking approach when it is virtually certain the debtor's income or expenses will change. *Hamilton v. Lanning* (130 S.Ct. 2464, 2010).

Thus, rather than mechanically applying the calculation of "current monthly income," which looks at the debtor's income for the six full calendar months before the filing of the petition, the court can take into consideration changes in income or expenses that have occurred or are virtually certain to occur at the time of confirmation. As for criticisms about these forms, first, there is virtually no space to explain the reason for the change. Second, it requests information about changes expected to occur 12 months after the bankruptcy petition is filed, whereas *Lanning* has no such 12-month limitation. Another concern is that a debtor should be able to apply the *Lanning* adjustment to the first form, Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, rather than the second form. This is because an adjustment may render the debtor to be below-median, but that is not how the forms are currently set up.

In addition, *Lanning* adjustments should only be made in exceptional or unusual cases. Yet the form and instructions require the debtor to list all potential changes. Having potential adjustments across the board is inconsistent with the *Lanning* requirement of being an unusual case.

It is ironic that one Congress's objectives with the means test in the first place was to remove judicial discretion as much as possible from determining the means test results; yet, the Lanning case and the revised Chapter 13 Calculation of Your Disposable Income form will only result in a great deal of increased judicial discretion.In sum, the new forms will require more paper, more ink, and more aspirin. Copies of the new forms are on my blog under the "Articles--*Suffolk Lawyer"* category.

Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past 20 years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Bench Briefs *(Continued from page 4)*

state a cause of action. Here, with regard to plaintiff's first cause of action, the court reasoned that it was well settled that New York did not have a common-law negligence cause of action to recover damages for injuries caused by a domestic animal. Since plaintiff's first cause of action sounded in negligence, and New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal, the first cause of action was dismissed.

Motion to amend denied; affidavit of proof defective

In *Glengariff holding Corporation v. Barbara Brostek v. Barbara Brostek*, Index No.: 40235/2010, decided on October 31, 2012, plaintiff moved for an order amending its complaint to seek damages in the sum of $38,650. It further sought summary judgment on the amended complaint. Defendant opposed both branches of the motion arguing that triable issues existed as to whether the alleged contract between herself and Glengariff was valid, whether her alleged personal guarantee of the decedent's debts was precluded as a matter of law, and if so, whether she entered a valid contract personally guaranteeing decedent's nursing home debts. The branch of plaintiff's motion to amend the pleadings was denied. The court noted that the affidavit of proof by Maria Rodriguez offered by Glengariff Holding Corp. in support of its motion was defective, as it explicably alleged that Ms. Rodriguez was employed by "Glengariff Corp." rather than "Glengariff Holding Corp." Neither the affidavit nor the plaintiff's moving papers addressed whether the affidavit was merely erroneous, or whether the corporations were separate but interrelated entities. As such, the affidavit provided inadequate factual support for the requested amendment. It was further noted that the admissions agreement contacting defendant's purported personal guarantee was entered with "Glengariff Health Care Organization," rather than "Glengariff Corp.," "Glengariff Holding Corp." or "Glengariff Health Care Center." The branch of the motion for summary judgment was also denied as the affidavit of its purported employee was defective and the motion was not otherwise supported by the affidavit of a person having personal knowledge of the salient facts of the case. In any event, the court concluded that plaintiff failed to eliminate triable issues such as whether the decedent was a recipient of Medicaid and/or Medicare, and if so, whether plaintiff was precluded from requiring a third-party personal guarantee as a condition precedent to admission or continued stay in the nursing home facility.

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 & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Health and Hospitals (Continued from page 18)

on to state that the designated representative would incur personal liability 'if her actions or omissions have caused or contributed to the nonpayment of Facility's fees,' and that such actions or omissions included 'a failure to utilize the resident's funds to pay for the resident's care at the Facility when the designated representative has control over the resident's funds by way of a Power of Attorney [or] access to joint accounts, [or] misappropriating the resident's funds.' Thus, *the (agent) could be held personally liable for the cost of the decedent's care if it was shown that she breached the terms of the agreement by impeding the nursing home from collecting its fees from the decedent's funds or resources over which the defendant exercised control.' (Emphasis mine.)*

How close to the proverbial line must the agreement come before a court will find that the duties and obligations imposed by the facility are so burdensome and so likely to result in a breach, inadvertent as it may be, as to constitute a *de facto* prohibited guarantee of payment ? The *Sunshine Care* court may have been sufficiently impressed by the facts as not to focus on the breadth of the agreement or the exigent circumstances, if any, under which it was elicited. The agent was the resident's wife and the co-owner of significant assets. She agreed in her capacity as designated representative to pay the cost of care provided by the nursing home from her husband's income and resources beyond that which was covered by Medicare or insurance. In an earlier deposition she claimed that at the time of her husband's admission as well as at the time of his death her husband had ample resources to pay the cost of the room, board and care rendered to him by the nursing home; assets which she controlled. Finally, she admitted to expending the bulk of the parties' joint assets while her husband was a resident. What if the equities were not so clearly on the side of the facility?

Let us reexamine the language of the boilerplate agreement and see just what exposure is faced by a representative acting in complete good faith. In doing so keep in mind that in most cases the family member who is being asked to act gratuitously as the resident's agent is under significant emotional and financial pressure; precisely the kind of emotional distress and turmoil that prompted the proscription of an agent's personal guarantee in the first place. Anyone who has experienced such turmoil will acknowledge that the process of finding a medically appropriate placement is difficult, time consuming and psychologically and physically exhausting, and most families are not in a position to negotiate the details of the admission agreement.[6] It usually is presented by the SNF as a "take it or leave it" contract, and we know what those kinds of contracts sometimes are called.

The concept of "access and control" is vague. Does this mean that the agent has the sole and exclusive authority to dispose of the resident's assets? That the agent can act unfettered by other serious concerns ? What if he or she does not have exclusive control and has to deal with other co-owners who may not be of like mind? What if the agent decides to pay a property tax bill or fire insurance premium on the residence rather than the last SNF statement ? Or a hospital bill for a child ? Pay for a child's wedding ? How about replacing the ten year old car she uses to visit her husband with a two year old Camry ? A new Mercedes ?

How about this situation? The resident is presumptively eligible for Medicaid but the agent is physically, mentally or emotionally unable to advance the application. It takes nine months to get a completed application to the local DSS office, so even if the application is approved Medicaid rules allow only for the last three months to be covered. Is the agent responsible for six months of the resident's costs because he "neglected" to secure an available asset ? What if, through no fault of his or her own, the agent cannot find required documentation and DSS declines to conduct a "collateral investigation"? [7] What if the agent simply forgets to do the required periodic Medicaid eligibility "recertification" and the resident's Medicaid coverage is terminated ?

In all of these circumstances keep in mind the broad holding of the court: "*the (agent) could be held personally liable for the cost of the decedent's care if it was shown that she breached the terms of the agreement by impeding the nursing home from collecting its fees from the decedent's funds or resources over which the defendant exercised control."* I suppose we might say, "Well, these are questions of fact." Does it serve any benefit to the public or to the parties themselves by encouraging litigation, burdening court calendars and forcing agents to expend the residents' limited assets on legal fees?

Perhaps one idea is for the courts take into account the circumstances of the execution of such agreements and, in appropriate cases, decline to enforce those portions that impose liability for acts of ordinary negligence. As a condition to liability under such agreements courts may require showing of intent to conceal or divert assets, or some indicia of improper personal financial gain. **8** In these ways cases cannot proceed without some *prima facie* showing of wrongdoing (or at least unclean hands). A better idea may be a legislative or regulatory remedy that will prescribe more precisely the language of agent liability that may be contained in the admission agreement process. Specific exceptions to the duty to use funds for the resident may be carved out for medical bills for dependents, for the maintenance of jointly owned property, for essential family transportation, etc. Ordinary negligence may be excluded as a basis of liability.

The financial reality of the future of health care is one of reduced provider reimbursement and increased demands for additional and more costly services. Caregivers of all kinds, including nursing home and other long term providers, have to maximize revenues, and that in turn means pursuing every avenue of recovery for the costs they incur. As we Boomers come to require more of these services the question of how to pay for long term care will become real - and imminent - for many millions of families. Do we really want our sons and daughters to face a quagmire of liability in a time of such great emotional distress, when their only objective should be to find the best quality of long term care they can provide for a loved one ?

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

Endnotes

1. There must be a reasonable medical likelihood that the rehabilitation will allow the resident patient to improve to the point where he or she will be able to return home. For a summary of applicable provisions see, *"Medicare Coverage of Skilled Nursing Facility Care*" prepared by the Centers for Medicare & Medicaid Services (CMS): http://www.medicare.gov/Pubs/pdf/ 10153.pdf Note that Medicare Advantage plans (i.e commercial Medicare HMOs) often make additional residential benefits available as an inducement to join and /or for an additional premium.
2. An acute care hospital is compelled by the federal Emergency Medical and Active Labor Act (EMTALA) to accept an acutely ill patient presenting through the emergency department (42 USC 1395dd and 42 CFR 489.24) There is no such obligation imposed by law on a subacute, rehabilitation or chronic long term care facility such as an skilled nursing facility.
3. For those interested in the problems of hospital patient discharges generally, see, James Fouassier, "*The Perennial Problem Discharge-How It Hurts the Patient, the Provider, the Payer and the Health Care System"*, Health Law Journal, New York State Bar Association, Winter 2009, Vol. 14, No. 1.
4. *See also*, 10 NYCRR 415.3 [b] [1]
5. The prohibition does not apply to adult homes or assisted living facilities.
6. Oten a patient's particular medical condition requires a long term care bed at a facility specializing in treating that condition; such beds are scarce and promptly must be secured when available, adding additional pressure on family members to act in haste.
7. Social Services Law section 363; s*ee also*, 11 NYCRR 360-2.3(a); 11 NYCRR 351.5

Untimely CPLR 3101[d] disclosures (Continued from page 17)

the testimony, and that decision was reversed on appeal. The First Department found that the defendant's position that it could not assert a claim of negligence against one physician while simultaneously representing the hospital did not constitute "good cause" for failing to timely provide the expert notice. Rather, the court found, the defendant's notice constituted "inexcusable belated service" of new information which "amounted to a material alteration of the theory of defense."[6] Moreover, and contrary to the trial court's conclusion, the Appellate Division determined that the plaintiff was prejudiced because the defendant's last-minute expert designations and new legal theory interfered with the plaintiff's ability to prepare for trial.

However, in *Simpson v Bellew*,[7] a personal injury action stemming from an auto accident, the court rendered the opposite result. There, the court permitted the defendant's expert to testify despite the defendant's last-minute notice. The defendant initially served a CPLR § 3101[d] notice which stated that he did not intend to call an expert witness at trial. During the trial however, a key witness gave surprising testimony which, according to the defendant, required him to present an expert accident reconstructionist in rebuttal. Accepting the defense counsel's representation that he was not aware that the witness - who the defendant had called to testify - would give that new testimony, the trial court permitted the expert to testify. The jury returned a verdict in the defendant's favor, and in a unique turn of events, the trial court set aside the verdict and ordered a new trial based on its own error in allowing the expert to testify where timely notice was not given.

The Appellate Division reversed that decision, concluding that retaining the witness in light of the surprise trial testimony constituted "good cause," and the defendant's failure to give "appropriate notice" standing alone, did not warrant preclusion.

Similarly, in *Allen v Calleja*,[8] a medical malpractice action, the appellate division reversed the trial court's order of preclusion. Although the plaintiff failed to produce his CPLR notice in accordance with the trial court's schedule, he argued that he needed to depose certain treating physicians and review a CT scan in order to comply with CPLR § 3101[d] and provide the substance of the facts and opinions on which the expert would testify.[9] The defendant hospital however, did not provide the names of the treating physicians until after the plaintiff's deadline for expert disclosures passed. The Second Department thus found that "it cannot be said that the plaintiff's failure to disclose the expert witness information was willful or contumacious."[10] Additionally, in *SCG Architects v Smith, Buss & Jacobs, LLP*,[11] the plaintiff also did not succeed in moving to preclude the defendant's expert from testifying. The court found that while the defendant's CPLR § 3101[d] notice was not detailed, it was not inadequate to warrant preclusion, and the plaintiff failed to establish that it was prejudiced by the disclosure.

This case law certainly teaches us that there is no hard and fast rule, and certainly no certainty in precluding the testimony based on the failure to timely serve a CPLR § 3101[d] notice. And, as with most aspects of litigation, this is yet another area of fact-driven unpredictability.

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

1. *See e.g., Quinn v Artcraft Construction, Inc.,* 203 AD2d 444 [2d Dept 1994].
2. *See Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788 [3d Dept 2002] [noting that the trial court has discretion to preclude expert testimony].
3. *See Quinn*, *supra* at 445.
4. 178 AD2d 576 [2d Dept 1991]; *see also Liang v Yi Jing Tan*, 98 AD3d 653 [2d Dept 2102] [affirming the trial court's order precluding the defendant's expert from testifying where the defendant refused to comply with the notice requirements].
5. 10 AD3d 308 [1st Dept 2004].
6. *Id*. at 309.
7. 161 AD2d 693 [2d Dept 1990].
8. 56 AD3d 497 [2d Dept 2008].
9. *Id.*
10. *Id.*
11. 100 AD3d 619 [2d Dept 2012].

ACADEMY OF LAW NEWS

Transitional Training for New Lawyers Scheduled for Late March

The Academy's **2013 Bridge-the-Gap "Weekend"** for new lawyers will take place on Friday, March 22, and Saturday, March 23. The program fulfills a full-year's worth of MCLE requirements for attorneys admitted less than two years: seven credits in areas of professional practice, six skills credits, and three ethics credits, for a total of sixteen.

As in the past, the program features a faculty of experienced practitioners and judges who will share practical insights into an array of subjects. The Friday program, stressing transactional practice, comprises presentations on "everyday ethics," residential real estate, foreclosure, bankruptcy, environmental law, small business formation, wills and estates, and elder law. Saturday, stressing litigation, covers an introduction to the courts, civil practice, federal practice, uncontested matrimonial actions, New York Notary Law, and criminal practice.

Presenters are Barry Warren, Harvey Besunder, Barry Smolowitz, Lita Smith-Mines, Barry Lites, Richard Stern, Frederick Eisenbud, John Calcagni, Richard Weinblatt, George Roach, Hon. Peter Mayer, Hon. John Kelly, Hon. John Flanagan, A. Craig Purcell, James Fagan, David Lazer, D. Daniel Engstrand, Jr., Arthur Shulman, Michael Isernia, Stephen Kunken, and William Ferris. Suffolk Administrative Judge C. Randolph Hinrichs will give a luncheon address at the Friday session.

SCBA members are asked to tell their newly admitted colleagues about this special program. The CLE Spread in this publication provides details.

– Dorothy Ceparano

SAVE THE DATE:

ON TRIAL WITH HENRY MILLER

Henry Miller

The Academy is pleased to announce that the renowned Henry Miller will present a full-day trial skills program on Friday, April 26, 2013. Mr. Miller will cover all facets of a trial, from jury selection through summation and will provide commentary on professionalism, surviving the ordeal of a trial, and, when necessary, accepting defeat. As an added bonus, registrants will receive a copy of Mr. Miller's latest book, *On Trial*.

Emmet J. Agoglia, a prominent Long Island trial lawyer, will join Mr. Miller in the presentation. Mr. Agoglia has lectured with Mr. Miller in the past – to rave reviews – at New York State Bar Association programs held on the Island.

Mr. Miller, as most attorneys know, is a legendary trial lawyer, the senior member of the New York law firm Clark Gagliardi & Miller, PC,, a frequent columnist for the *New York Law Journal*, and an extremely popular lecturer on trial advocacy. He is a former Director of the International Academy of Trial Lawyers and the New York State Trial Lawyers Associa-tion, a past Regent of the American College of Trial Lawyers, and past President of the New York State Bar Association. He was appointed to prestigious law-related commissions by both Governor Mario Cuomo and Governor George Pataki. And, as many might not know, he is also the author of a novel (*More*) and a number of plays.

Mr. Miller's appearance at the Suffolk Bar has been arranged by Rob Harper, an Academy Officer and associate with Farrell Fritz.

The April 26 program is expected to sell out, and registrations will be accepted on a first-come, first-served basis.

– Dorothy Ceparano

When private property becomes a public nuisance *(Continued from page 16)*

Perlmutter did not impose an obligation on the private property owner. The state neither physically removed the billboard nor required that the owner do so.

Using the *Perlmutter* decision as a rationale, the court held that the Viterittis barricade was "a substantial interference with the health and safety of residents south of the barricade because it interfered with their rights to … emergency services. The barricade *also interferes with public access to Shore Road, which would otherwise be unimpeded despite its character as a private street"* (emphasis supplied).

Circular reasoning

The court's holding relies on circular reasoning. By its own findings, the court had determined that there were no public rights in Shore Road, either by dedication or prescription. Despite these findings, the court imposed a "common right of the public" to have emergency services delivered over the disputed portion of Shore Road. The "right" of "public access" found by the court is particularly suspect. In essence, the finding says that since the public would have access to the private road if the owner *did not* prohibit access, then the owner *may not* prohibit access. Of course, this reasoning turns the concept of private property upside-down. The right to exclude others is one of the fundamental aspects of private property ownership.[6]

The aftermath

According to the Viterittis, the Village of Bayville then went beyond the removal permitted by the Supreme Court decision. In a new action filed in Supreme Court, they alleged that the village not only removed the barricade, but also removed their lawn and shrubbery irrigation system from the portion of Shore Road south of the barricade, paved Shore Road and created a "thru-street" across their property. They asserted a taking claim, a due process claim and an equal protection claim, among others. The village removed this action to Federal District Court (*Viteritti III)*.

The Eastern District dismissed the taking claim as unripe. The Viterittis had not alleged that they had attempted to recover just compensation pursuant to either the New York State Eminent Domain Procedure Law or Article I, Section 7 of the New York State Constitution. Accordingly, the court found that the taking claim was not ripe for adjudication in federal court and dismissed it. Similarly, the court found that the Fifth Amendment due process claim was not properly pleaded because it failed to allege a violation by the federal government.

The equal protection claim rested on a "class of one" theory. In order to proceed on this basis, the Viterittis needed to allege that the Village unfairly singled them out for enforcement when other similarly situated persons (called "comparators") were not. Here is where things get interesting. The Viterittis alleged that:

> "(1) there are not less than seven private streets in Bayville that have the same or similar barricades maintained by private property owners as that maintained by plaintiffs herein, (2) [the Village] has not taken actions against these similarly situated property owners and has singled out plaintiffs for disparate treatment, and (3) [t]here is no rational basis for treating plaintiffs differently than the rest of the class of property owners similarly situated to plaintiffs herein." *Viteritti III,* at 594 (internal quotations omitted).

The court found that these allegations insufficiently alleged "the existence of comparators to whom they were 'prima facie identical,'" because none of the other barricades were alleged to have been "judicially declared to be a public nuisance…." The complaint was dismissed in its entirety, although the court did afford the Viterittis the opportunity to seek leave to file an amended complaint, and they filed a motion to amend.

The most recent chapter

The court recently decided the motion to file an amended complaint (*Viteritti IV)*. The newly pleaded cause of action asserted a procedural due process claim. The Viterittis contended that they were entitled to notice and a hearing *prior* to the village's creation of the through street over Shore Road, pursuant to Chapter 64 of the Code of the Village of Bayville. The village contended that the availability of an Article 78 proceeding was sufficient post-deprivation process. The court held that the village's conduct in paving the road and opening the through street was "random and unauthorized conduct" for which an Article 78 proceeding was adequate due process to pursue redress.

The Viterittis also re-asserted their class-of-one equal protection claim, but the court reiterated that they "failed to articulate how their property could be viewed by a reasonably prudent person as being roughly equivalent to the comparator properties…"

Accordingly, the court held that the proposed amendment was "futile" and denied the motion to amend. As of this writing, an appeal to the Second Circuit had not yet been sought.

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

1. *Incorporated Village of Bayville v. Viteritti, et al.,* 18 Misc. 3d 1131A (Sup. Ct., Nassau Cty., 2008) [hereinafter referred to as: "*Viteritti I"*] (*motion for rearg. partially granted,* 2008 NY Slip Op 31533U (Sup. Ct., Nassau Cty., 2008) [hereinafter referred to as "*Viteritti II*"]).
2. *Viteritti v. Incorporated Village of Bayville,* 831 F.Supp.2d 583 (E.D.N.Y., 2011) [hereinafter referred to as: "*Viteritti III*"] (*motion to amend complaint denied and case closed* by Memorandum and Order entered January 4, 2013 in case #10-CV-3283) [hereinafter referred to as: "*Viteritti IV*"].
3. The presentation of facts in this article is a composite drawn from each of the *Viteritti* decisions, so individual citations are omitted. None of the facts were ever seriously disputed by the parties.
4. "All lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such."
5. The rationale for imposing the entire cost on the Viterittis is explained in *Viteritti II.*
6. For reasons that are unclear, the Viterittis did not pursue an appeal of the Supreme Court's decision. See *Order Dismissing Appeal*, 2009 NY Slip Op 73373(U) (2nd Dept., 2009).

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LATE WINTER – EARLY SPRING 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 include those to be presented during March 2013 and some scheduled for April.

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

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

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

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

NOTES:

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

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

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

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

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

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

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

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL MATRIMONIAL LAW UPDATE

Monday, March 4, 2013

Gain insights into the developments and challenges facing matrimonial lawyers at this annual update featuring a foremost practitioner in the area..

Presenter: **Vincent F. Stempel, Jr., Esq.** (Garden City)
Coordinators: Linda Kurtzberg, Arthur Shulman, Debra Rubin
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics)

SEMINARS, SERIES, & CONFERENCES

Extended Lunch 'n Learn

1031 EXCHANGES & OTHER TAX DEFERRAL STRATEGIES

Thursday, March 7, 2013

Developments in the real estate market have revived interest in 1031 exchanges – i.e., the powerful tax deferment tool that enables people to sell income, investment, or business property and replace it with like-kind property without paying federal income tax on the transaction. There are a number of ways to structure such exchanges, and the advantages are manifold. An attorney advising clients on these transactions, however, must ensure that the exchanges are executed properly and that they are in conformity with the regulations. Learn the why's and wherefore's of 1031's and other tax-deferral strategies at this information-packed seminar by an exceedingly knowledgeable faculty.

Faculty: **Michael S. Brady, Esq.** (V.P. and Corporate Counsel, Riverside 1031, LLC); **Joseph M. Insalaco, CPA CFP** (Real Estate Tax Strategies, Inc.)
Time: 12:30–3:10 p.m. (Sign-in from Noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 3 credits (2 professional practice; 1 skills)

Full Day Conference

ANNUAL LAW IN THE WORKPLACE CONFERENCE

Friday, March 8, 2013

This full-day program from the SCBA's Labor and Employment Law Committee focuses on timely issues for labor and management in both the public and private sectors. This year's conference places a special emphasis on key labor and employment statutes, including the ADAAA, FLMA, and FSLA. They day includes keynote addresses by prominent figures in the employment world, updates on public sector labor law and employment law, and break-out workshops on timely matters. Continental breakfast and buffet luncheon are included in the tuition price.

Program Chairs: **Sima Ali, Esq.** and **Troy Kessler, Esq.** (Chairs–SCBA Labor & Employment Law Committee)
Time: 8:30 a.m.–4:00 p.m. Location: Touro Law Center
Refreshments: Lunch and Continental Breakfast
MCLE: 7 credits (6 professional practice; 1 ethics)

Lunch 'n Learn

AN ATTORNEY'S GUIDE TO CLOUD COMPUTING

Tuesday, March 12, 2013

"Cloud computing" refers to the use of hardware and software that are not located on the user's computer or other device, but are delivered over a network like the Internet. Cloud computing brings many advantages to businesses, including law practices, in terms of economy and efficiency. But – especially for lawyers – there are also potential pitfalls. In this program, a quartet of local practitioners discusses what cloud computing *is,* what programs are available, what questions lawyers should ask cloud providers, and what to do about issues of client confidentiality. It is a program for our times. Don't miss it!

Faculty: **Barry M. Smolowitz, Esq.** (SCBA Technology Director); **Allison C. Shields, Esq.** (Principal–LegalEase Consulting);**Glenn P. Warmuth, Esq.** (Stim & Warnuth, PC); **Guido Gabriele III, Esq.** (Geisler & Gabriele)
Time: 12:30–2:10 p.m. (Sign-in from Noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (1 law practice management; 1 ethics)

Three-Part Series

MATRIMONIAL MONDAYS

Mondays, March 11, March 18, April 1, 2013

This year's matrimonial series comprises three seminars, each on an important issue for those who practice in the field. You may enroll in any individual program or SAVE by subscribing to the full series.

Seminar 1: Language Required in Divorce Stipulations for QDROs and Other Retirement Plans
Monday, March 11, 2013
Expert faculty provides language tips for making sure that what was "agreed upon" is properly memorialized and will stand up in court and for the long haul.
Faculty: **Thomas Campagna, Esq; William Burns** (Lexington Pension Consultants, Inc.)
Coordinator: **Arthur E. Shulman, Esq.**

Seminar 2: Direct and Cross Examination of a Forensic Accountant
Monday, March 18, 2013
Income, assets, and financial information in general are often at the heart of a divorce. This seminar provides guidance on how to elicit forensic testimony in an effective way.
Faculty: **Gary Tabat, Esq.; Peter Galasso, Esq.; Steven Eisman,. Esq.; David Gresen, CPA; Louis Cercone, CPA**
Coordinator: **Debra Rubin, Esq.**

Seminar 3: Cross Examination: A Primer for the Family Lawyer
Monday, April 1, 2013
In this program, a highly respected presenter provides tips and strategies for cross examination in a divorce case that will benefit both the attorney new to the practice area and seasoned practitioners.
Faculty: **Stephen Gassman, Esq.**
Coordinator: **Linda A. Kurtzberg, Esq.**

Each Program:
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Evening Seminar – Rescheduled

CHOOSING A TRUSTEE & FAMILY WEALTH SUSTAINABILITY

Wednesday, March 13, 2013

This seminar provides tips and insights for attorneys who advise families on passing wealth down through the generations. Topics include:

- Choosing a Trustee (trustee qualities; trust objectives, etc.)
- Fiduciary Liability (Prudent Investor Act; standards of conduct; investment strategies; more)
- Family Wealth Sustainability (wealth trends; family mission statements; family dynamics; children and philanthropy; more)

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

Lunch 'n Learn

WHAT'S NEW IN IMMIGRATION LAW?

Wednesday, March 20, 2013

This program will cover new developments in immigration law that will benefit many immigrants. Topics include:

- Waivers Available for Immediate Relatives of United States Citizens
- D.A.C.A. (Deferred Action for Childhood Arrivals)
- Special Immigrant Juveniles and Views from the Bench on Guardianships

Presenters: **Victoria Campos, Esq.** (Huntington Station and Bay Shore; Chair–SCBA Immigration Law Committee); **Chartrisse Adlam, Esq.** (Hempstead; Former Chief Counsel for DHS); **Hon. John Kelly** (Suffolk County Family Court);
Coordinator: Aniella Russo, Esq. (Afran & Russo, PC)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (professional practice)

Lunch 'n Learn

ESTATE & ELDER LAW PLANNING: TAX ADVANTAGES; USE OF TRUSTS; LONG-TERM CARE INSURANCE

Thursday, March 21, 2013

This program will covers important issues in estate and elder law planning:

- **Estate & Elder Law Planning** – Presentation will provide an update on the current federal estate tax laws and cover the use of estate and gift tax exemptions, deathbed gifts, and preservation of basis step-up and home exclusion. Various trusts also will be defined and described, with an emphasis on tax considerations and the distinctions between revocable and irrevocable trusts.
- **Use of Long-Term Care Insurance in Asset Protection Planning** – Presentation will cover new long-term-care products that utilize annuities and life insurance benefits as well as traditional long-term-care benefits.

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Presentation will also cover new planning strategies to reduce the impact of IRC Section 1411.
Presenters: **Robert S. Barnett, Esq.** (Capell Barnett Matalon and Schoenfeld, LLP); **Stewart Schoenfeld** (Capell Barnett Matalon and Schoenfeld, LLP); **Henry Montag** (Financial Planner)
Coordinator: **Eileen Coen Cacioppo, Esq.** (Curriculum Chair)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (professional practice)

Transitional Training for New Lawyers
BRIDGE-THE-GAP "WEEKEND"
Friday, March 22, and Saturday, March 23, 2013

This two day training program provides a full year's worth of credits for newly admitted attorneys. All of the key bread-and butter practice areas are covered by a skilled, accessible faculty of judges and practitioners. Enrollment in the full program is recommended, but either day may be taken alone.

DAY ONE (FRIDAY) – EMPHASIS ON TRANSACTIONAL PRACTICE
TOPICS: Everyday Ethics; Residential Real Estate; Foreclosure Basics; Bankruptcy Basics; Environmental Law; Small Business Formation; Wills, Trusts & Estates; Elder Law
Time: 8:00 a.m. – 4:45 p.m. (Sign-in from 7:45 a.m.)
Location: SCBA Center **Refreshments:** Continental Breakfast & Lunch Buffet

DAY TWO (SATURDAY) – EMPHASIS ON LITIGATION
TOPICS: Introduction to the Courts; Handling a Civil Case; Introduction to Federal Practice; Uncontested Matrimonial Actions; New York Notary Law; Handling a Criminal Case
Time: 8:30 a.m. – 4:30 p.m. (Sign-in from 8:15 a.m.)
Location: SCBA Center **Refreshments:** Continental Breakfast & Lunch Buffet
Planning Committee: **Stephen Kunken** and **William Ferris** (Chairs); **Barry Smolowitz; Arthur Shulman**
MCLE: 8 credits each day, for a total of 16 Transitional Credits (7-professional practice; 6-skills; 3-ethics)

Lunch 'n Learn
CRITICAL SKILLS IN ETHICAL LAW PRACTICE MANAGEMENT
Monday, April 8, 2013

Too often, routine law firm management practices may seem benign, but are actually fraught with professional "violations" that may cause future problems. In this succinct, consciousness-raising program, you will learn to assess whether your management practices are within the bounds of the Lawyer's Code of Professional Ethics and gather tips for promoting efficiency and effectiveness without sacrificing ethical mandates.
Presenters: **Sheryl Randazzo, Esq.** (Former SCBA President; Adjunct Professor–Touro Law Center)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (1.5 ethics; 0.5 law practice management)

Evening Seminar
FORECLOSURE FORENSICS
Wednesday, April 10, 2013

This program will drill down into *why* plaintiffs in securitized mortgage foreclosure actions often have a lack of standing. You will learn about the UCC (Article 3, Article 9) arguments plaintiffs routinely invoke and how to refute these arguments. The original transaction, chain of title, relevant documents, pleadings, and more will be examined in detail. You will gain insight into exactly *what* you are looking at, *why* you are looking at it, and, most important, how to utilize this information in representing a foreclosure defendant.
Presenters: **Charles Wallshein, Esq.** (Macco & Stern); **Jay Patterson** (Forensic Accountant; Certified Fraud Examiner in the Field of Mortgage Securitization)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2 professional practice; 0.5 skills; 0.5 ethics)

Rescheduled – Lunch 'n Learn
A MOCKERY OF A CLOSING
Wednesday, April 24, 2013

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

Full Day Program
"ON TRIAL" WITH HENRY MILLER
Friday, April 26, 2013

The renowned trial lawyer Henry Miller will cover everything you need to know from jury selection through summation in this special program at the SCBA Center. Mr. Miller will be joined by a prominent Long Island trial lawyer who will aid in dispensing not only trial techniques, but ethical insights and tips for surviving the ordeal of a trial.
Presenters: **Henry Miller, Esq.** (Clark Gagliardi & Miller, PC); **Emmet J. Agoglia, Esq.** (Agoglia, Holland & Agoglia, PC)
Coordinator: **Rob Harper, Esq.** (Farrell Fritz, PC; Academy Officer)
Time: 9:00 a.m.–4:30 p.m. (Sign-in from 8:30 a.m.)
Location: SCBA Center **Refreshments:** Continental Breakfast & Buffet Lunch
MCLE: 7 credits (3 professional practice; 3 skills; 1 ethics)

Evening Program
BANKRUPTCY ROUNDTABLE
Monday, April 29, 2013

This program, presented jointly with the Nassau County Bar Association, will provide a forum for exploring common issues confronting bankruptcy lawyers. A prestigious faculty will facilitate discussion.
Coordinator: **Richard Stern, Esq.** (Macco & Stern // Past Academy Dean)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Evening Program
APPELLATE PRACTICE
Tuesday, April 30, 2013

This program, developed by the SCBA Appellate Practice Committee, will show you how to develop and bring an appeal. Important issues of all kinds – from standing and certiorari through brief writing and oral argument – will be touched upon by a prestigious and erudite faculty.
Coordinator: **Hon. Sandra Sgroi** (Appellate Division Justice, Second Department); **Aprilanne Agostino, Esq.** (Clerk of the Court – Appellate Division, Second Department); **Harris Zackarin, Esq.** (Rivkin Radler); Others TBA
Academy Liaison: **Glenn Warmuth, Esq.** (Academy Officer)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

MARCH 2013 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	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
Matrimonial Law Update	$125	$50	$150	Yes	Yes	3 cpn	3 cpn	$150	$140	$30
SEMINARS, CONFERENCES, & SERIES										
1031 Exchanges	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	$110	$100	$25
Law in the Workplace Conference	$175	$175	$175	Yes	2 Uses	6 cpn	6 cpn	$250	$230	$50
Cloud Computing`	$50	$35	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$20
Matrimonial Series ☐ Session 1 - Language– QDROs ☐ Session 2 - Forensic Accountant ☐ Session 3 - Cross Examination	$235 $95 each	$110 $50 each	$280 $110 each	Yes Yes	3 uses 1 each	8 cpn 3 each	8 cpn 3 each	$300 $115 each	$290 $110 each	$50 $20 each
What's New in Immigration Law?	$50	$25	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$20
Choosing a Trustee; Family Wealth	$95	$65	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$25
Estate & Elder Law Planning	$55	$25	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$20
Bridge-the-Gap for New Lawyers ☐ Day 1 - Transactional ☐ Day 2 - Litigation	$195 Single Day - $125	$195 Single Day - $125	$195 Single Day - $125	Yes Yes	4 uses 2 uses	14 cpn 8 cpn	12 cpn 7 cpn	N/A	N/A	N/A
Ethical Law Practice Management	$50	$25	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$20
Foreclosure Forensics	$90	$50	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$25
A Mockery of a Closing	$65	$45	$85	Yes	Yes	2 cpn	2 cpn	$100	$95	$20
On Trial with Henry Miller	$200	$150	$225	Yes	Yes	6 cpn	6 cpn	TBA	TBA	TBA
Bankruptcy Roundtable	$75	$50	$100	Yes	Yes	3 cpn	3 cpn	TBA	TBA`	TBA
Appellate Practice	$75	$50	$100	Yes	Yes	3 cpn	3 cpn	$95	$85	$20

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ACADEMY OF LAW NEWS

More Academy News on pages 23
CLE Course Listings on pages 24-25

Conference Addresses Significant Developments Affecting the World of Work

By Dorothy Paine Ceparano

If you represent businesses, a municipality, employees, or just want to be sure you are doing the right thing in your own firm, you won't want to miss this year's Law in the Workplace Conference, scheduled for Friday, March 8, 2013, at Touro Law Center. You also may wish to invite your clients to join you – the program is designed for organizational leaders, labor representatives, and human resource professionals as well as for attorneys (who will receive seven MCLE credits, including one in ethics).

The full-day conference is a joint effort of the SCBA's Labor and Employment Law Committee and the Suffolk Academy of Law. Led by the committee's chairs, Sima Ali and Troy Kessler, a prestigious faculty gathered from a true "Who's Who" list in the field will address challenging issues related to key labor and employment law statutes – i.e., ADAAA, FMLA, FLSA, and other alphabet soup acronyms that can have a tremendous impact on a business or organization, especially if the powers-that-be do not interpret them correctly.

Two panel presentations on "Analyzing Trends in Employment Litigation" anchor the morning plenary session. In the first, "The Interplay Among FMLA, ADAAA, and New York State Law," Kathryn Russo (Jackson Lewis) and Gina Grath (Alan P. Pearl & Associates) discuss the common mistakes employers make when confronted with medical leave issues. Many employers fail to recognize that a leave is FMLA-covered, or they fail to provide the appropriate FMLA notices. They also fail to engage in the required "interactive dialogue" to determine whether a leave is a "reasonable accommodation" and often mishandle communications with employees about their leave issues. Finally, many employers mishandle job entitlement before and after medical leaves. Ms. Russo and Ms. Grath will explain what should be done and look at the litigation that may arise when it's not.

The second morning panel presentation is titled "Exempt or Non-Exempt under the FLSA – You Decide?" John Diviney (Rivkin Radler) and Troy Kessler (Shulman Kessler) will analyze common fact patterns and review litigation trends involving misclassification under the white-color exemptions to the Fair Labor Standards Act. FSLA rulings on minimum wage, overtime, and record-keeping affect both the private sector and Federal, State, and local governments. Mr. Diviney and Mr. Kessler will discuss the serious ramifications of improperly "exempting" employees and show how to avoid such "misclassification."

Afternoon break-out sessions allow for in-depth analysis of important issues affecting both the private and public sectors. The Private Sector Workshop focuses on "The Affordable Care Act for 2013, 2014 and Beyond." The panel – Dawn Davidson Dranch (Counsel – Alcott HR Group), Steven Friedman (Littler Mendelsohn), Jill Bergman (Chernoff Diamond) and Ralph Sepe (Chernoff Diamond) – will look at what employers and advisors need to think about now. The presentation will include a detailed review of the employer mandate ("Play or Pay") and provide strategies for compliance.

The Public Sector Workshop delves into three important topics. David Cohen (Cooper, Sapir & Cohen) will address discipline of employees for other than on-the-job misconduct, including loss of qualifications, pending arrests, and good faith layoffs. Paul Levitt (Vitale & Levitt) will discuss social media and public employee First Amendment rights, including whether "liking" something on Facebook is protected speech. And Philip Maier (PERB Regional Director) will discuss the interrelationship and effect of factual findings made in administrative agencies (e.g., PERB), arbitration proceedings, and Civil Service Law Section 75 proceedings.

Beyond panel presentations, Law in the Workplace comprises a number of lectures on topics of considerable significance in the labor and employment law field. United States Magistrate Judge Gary R. Brown, kicking off the conference with a keynote address on "A View from the Bench," will provide perspectives on assessing credibility in workplace investigations and litigation. Two morning plenary session updates cover new case law: Michael Schmidt (Touro Law Center) in a private sector update on the latest Supreme Court and Second Circuit decisions, and John Crotty (former NYS PERB Deputy Chair and Counsel) on recent labor law decisions affecting municipalities. Finally, at lunch, Tara O'Rourke (NLRB Region 29) looks at trends in recent cases before the NLRB, with a particular focus on employees' use of social media to engage in protected and concerted activity.

The day concludes with an energized presentation on "The Ethical Practice of Employment Law" by Pery Krinsky (Krinsky, PLLC). In an interactive discussion featuring hypotheticals, actual cases and disciplinary matters, Mr. Krinsky will address such issues as distinguishing the corporate client from the individual client in order to avoid future disqualification (and malpractice!); the impact of third-person payment agreements; how the use of confidential information may help your client's case, but ruin the client's life; client-employees posting statements about employers on the internet; and potential conflicts of interest when representing similarly situated employees.

In addition to information-packed presentations, the conference provides continental breakfast, a buffet luncheon, and copious course materials on a flash drive – all for the tuition cost of $175. The day also includes a number of networking breaks that will allow the diverse audience of lawyers, employers, labor representatives, HR professionals and others with an interest in the subject matter to mingle and share issues and insights.

Law in the Workplace 2013 is the product of a year's worth of planning by the SCBA Labor and Employment Law Committee led by Ms. Ali and Mr. Kessler. It is the 23rd annual inception of a conference that always receives rave reviews. This year's program, the committee promises, will be better than ever!

Registration may be accomplished through the CLE Spread in this publication, by calling the Academy (631-234-5588), by returning the registration form on the brochure that was mailed to all SCBA members and other interested parties, or on-line through the SCBA website (www.scba.org).

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

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.

March

1	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
4	Monday	**Matrimonial Law Update** (Vincent Stempel). 6:00–9:00 p.m. Light supper from 5:30
7	Thursday	**1031 Exchanges & Other Tax Deferral Strategies.** 12:30–3:10 p.m. Lunch from noon.
8	Friday	**Law in the Workplace Conference.** 8:30 a.m.–4:00 p.m. at Touro Law Center.
11	Monday	***Matrimonial Mondays:*** **Language Required in Divorce Stipulations for QDROs and Other Retirement Plans.** 6:00–9:00 p.m. Light supper from 5:30
12	Tuesday	**Cloud Computing: What Lawyers Need to Know.** 12:30–2:10 p.m. Lunch from noon.
13	Wednesday	**Choosing a Trustee & Preserving Family Wealth.** 6:00-9:00 p.m. Light supper from 5:30.
18	Monday	***Matrimonial Mondays:*** **Direct & Cross of a Forensic Accountant.** 6:00–9:00 p.m. Light supper from 5:30
20	Wednesday	**What's New in Immigration Law?** 12:30–2:10 p.m. Lunch from noon.
21	Thursday	**Elder Law: Post-Medicaid Issues.** 12:30–2:10 p.m. Lunch from noon.
22	Friday	**Bridge-the-Gap Training for New Lawyers.** Day One: Transactional Law. 8:00 a.m.–4:45 p.m. Continental breakfast and buffet lunch.
23	Saturday	**Bridge-the-Gap Training for New Lawyers.** Day Two: Litigation. 8:15 a.m.–4:10 p.m. Continental breakfast and buffet lunch.

April

1	Monday	***Matrimonial Mondays:*** **Cross-Examination–A Primer for the Family Lawyer.** 6:00–9:00 p.m. Light supper from 5:30
5	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
8	Monday	**Ethical Law Practice Management.** 12:30–2:10 p.m. Lunch from noon.
10	Wednesday	**Foreclosure Forensics.** 6:00–9:00 p.m. Light supper from 5:30
26	Friday	**On Trial with Henry Miller.** Full day program. Continental breakfast and buffet lunch.
29	Monday	**Bankruptcy Roundtable.** 6:00–9:00 p.m. Light supper from 5:30
30	Tuesday	**An Overview of Appellate Practice.** 6:00–9:00 p.m. Light supper from 5:30

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

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LEGAL

REQUEST FOR QUALIFICATIONS

The Suffolk County Board of Ethics is accepting Requests for Qualifications from solo-practitioners and law firms with the following areas of practice:

Municipal Law, Government and Professional Ethics, Administrative Law Hearings, Administrative Law Adjudication, Article 78 proceedings and Civil Litigation.

The Deadline for submitting the completed Request for Qualification is March 15, 2013 at 4pm.

All interested attorneys and law firms can obtain the Requests for Qualification by contacting the Suffolk County Board of Ethics at:
Suffolk County Board of Ethics, 335 Yaphank Ave., Yaphank, NY 11980
(631) 852-4038 (phone) (631)852-4041 (fax)
Attn: Executive Director Samantha Segal

TO PLACE YOUR AD IN THE SUFFOLK LAWYER SERVICE DIRECTORY, CALL 631-427-7000

Those days, those nights in the Bronx *(Continued from page 5)*

it over all of my tenure. No fool worse than an old fool; in a youthful setting, I would be seen as old, but I wanted to be seen as smart, capable; and, as to age, not defensive.

Thus I bravely ventured forth to dine with younger colleagues, and remained equable when our age distinctions displayed themselves in missed points and unrecognized allusions.

Possibly, in those early days, I should have known better than to have extended socializing from the workplace to the play place; as often as not I found myself at a table with someone, representatively, Ed McManus, whom I disliked at the job. I disliked him, not for his youth, a condition he had no power over, but for his arrogance, youth's close cousin, a dubious quality McManus perfectly embodied, and which he chose not to temper.

To illustrate my last remark (as Harold Arlen and Johnny Mercer would have it): Walking into McManus's office one morning to drop off one of his files, I smiled when I saw a female colleague, Jane Figueroa, sitting on his desk with legs crossed.

Holding up my palms to frame the shot, I said, "You two remind me of the leggy Lauren Bacall sitting on the piano of the disconcerted Harry Truman, but Ed doesn't look disconcerted."

An instinctive lady, Jane smiled, notwithstanding that she likely didn't know the photograph I referred to. An instinctive clod, McManus affected a look of non-affect, non-affect being the pop-psychological term de jour; if nothing, McManus was with it, "with" the mores and buzz words of the day.

"Before our time," he said, in response to my allusion.

These *mots stupides* on his part, forming a conversation-killer, could of course have been easily met, easily offset, had I, given voice to my thought: "My friend, *something* is always before *all* of our time, have you ever thought of reading history?"

But I didn't give voice to my thought; I instead deposited his remark in my memory bank, McSweeney's First National Bank of Passive-Aggression, against the time I would draw from this interest-bearing account.

Possibly McManus came naturally to being a clod, but I believe he worked at it. For, not long after the crashed landing of my Bacall-Truman flight, the tapes were still up, forbidding access to the crash site, I again had occasion to witness his clumsiness. The playlet involved the same *dramatis personae*, and ran thus:

Jane: "You smoke 'Camels,' Bill — my father used to smoke them."

Bill: "My son-in-law said to me, that if he smoked, he'd smoke 'Camels,' which"

McManus (interrupting): "And if he's gonna choose a disease, he'd choose lung cancer."

Of course, Jane and I chose the inference that my son-in-law liked me, and that his theoretical statement was a compliment, no matter its prompt, to my taste, to me. And of course, with his show-stopper, McManus, the serial-(point)-killer continued cloddish, continued being gratuitously offensive. Stupidity remains an affliction for which no cure has yet been found.

I won't sand this too thin. In point of fact, as time passed and I attained a degree of comfort at and satisfaction with my job, my age became a non-issue. Moreover, everything that touched on age wasn't painful. There was a light moment at Puglia's, an Italian restaurant that prided itself on its plank-table simplicity. Our group's waiter, himself with belly, walked painfully, gastronomically offended, down the length of the table, suffering a gantlet of inappropriate orders. That playlet:

Twenty-something African-American female ADA: "I'll have a small house salad, vinegar and oil—very light on the oil; do you have Evian Water?"

Twenty-something Hispanic male ADA: "Small dish of pasta - no butter, no sauce, and…uh…I'll have a Diet Coke."

Forty-something Irish-American male ADA, that would be me, alert to the waiter's heightening temper, as evidenced by his throbbing temples, alert to the cynical, cautionary look he casts at a peer of the table: "I'll have veal parmigiana, a side of spaghetti, some garlic bread, and a jug of red!"

"All right!" the waiter shouted, happy that the gantlet had come to an end, satisfied that at least one patron knew what kind of restaurant he was in.

On that note, then, I'll belay the subject of age. In truth, my age would ultimately redound to my favor. In a jury's eyes my gray hair, emphasized by its contrast with a well-worn navy blue suit, would lend me authority, credibility, would confer upon me an earned righteousness, would confer upon me the look of one who, over the course of long years, believed in himself, as himself, and as a proponent of the law—but this was still to come…

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. His essay is part of a larger work that recounts his experience as a Bronx Assistant.

Lamb & Barnosky, LLP is pleased to announce…

Alyson Mathews has become a Partner in the Firm. Ms. Mathews received her law degree from Brooklyn Law School and her undergraduate degree, *cum laude,* from Boston College. She has assisted municipal clients with grievance arbitrations, improper practice charges before PERB, disciplinary charges, contract negotiations and compulsory and voluntary interest arbitration proceedings. Ms. Mathews also has experience with student disciplinary hearings, appeals to the Commissioner of Education and special education law. She is actively involved in the New York State Bar Association and currently serves on the Executive Committee of the Labor and Employment Law Section as the Co-Chair of the Membership Committee and on the Electronic Communications Committee. She is co-editor of the second edition of Impasse Resolution under the Taylor Law. She practices in our Labor, Education and Municipal (ELM) Department.

Jeffrey Mongelli has joined the Firm as Counsel. He received his J.D. from Hofstra University Law School in 1995, where he was a member of the Hofstra Labor Law Journal. He received his Bachelor of Arts in Politics from Fairfield University in 1991. Prior to joining the Firm, he practiced in a Long Island education/labor law firm where he handled general and labor counsel and litigation matters for Long Island school districts. He has experience in budgets and elections, policy development, purchasing and procurement of goods and services, facilities construction and renovation, transportation, liability and negligence, discipline, special education and appeals before administrative tribunals. He has handled litigation involving employment discrimination, special education, contracts and construction. He has attended impartial hearings regarding students with disabilities and handled student disciplinary hearings. He is working in our ELM Department.

Zachary C. Lyon has joined the Firm as an Associate. He graduated from the Georgetown University Law Center in 2011. He was admitted to the New York Bar in October, 2011. He received his Bachelor of Science in Real Estate and Urban Economics from the University of Connecticut. He served as a Research Assistant for the Georgetown Law Journal and as Judicial Intern to a District Court Judge in Suffolk County, New York. He is working in our Banking, Corporate and Trusts and Estates Departments.

Douglas E. Libby has joined the Firm as Counsel. He received his undergraduate degree from Fordham University in 1971 and his law degree from St. John's University School of Law in 1974. Since 1980, he has served as counsel for the Sewanhaka Central School District. Mr. Libby is a past President of the New York State Association of School Attorneys. He has served as Chair of the Nassau County Bar Association's Education Law Committee and as Program Chair for the New York State Association of School Attorneys and the Nassau-Suffolk Academies of Law. He currently serves as Vice Chair of the Education Law Committee of the Nassau County Bar Association. Mr. Libby has lectured at seminars sponsored by the New York State School Boards Association, the Mid-Hudson School Study Council and the Nassau and Suffolk Bar Associations. He has lectured at the Continuing Legal Education Program sponsored by Hofstra University School of Law and has served as adjunct professor at C.W. Post's Graduate Department. He will be working in our ELM Department.

Samantha Kent has joined the Firm as a Law Clerk. She graduated from Cornell University in 2009 with a Bachelor of Science in Industrial and Labor Relations. While at Cornell she served as a research assistant to a professor studying workplace diversity practices for hiring and promotion of employees at Fortune 500 Companies. She received her J.D. from Emory University School of Law, where she was Vice President of the Labor and Employment Law Society and Managing Editor of the Emory Bankruptcy Developments Journal. She passed the July, 2012 New York and New Jersey bar exams and is awaiting admission. She is working in our ELM Department.

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