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What the New Google Privacy Policy Really Means

By Glenn P. Warmuth

Twenty years ago I became a fan of the television series *Twin Peaks*. I don't spend much time thinking about *Twin Peaks* anymore. Yet a few weeks ago I was using Gmail, Google's email service, and an advertisement appeared promoting a new band called Silent Drape Runners. The concept of silent drape runners was a running theme on *Twin Peaks* and this piqued my interest so I clicked on the link. The band seemed interesting and I purchased some songs. Somewhere along the line I must have written an email about *Twin Peaks* and that Google must have saved that information and used it to determine which ads to show me. The band got a new fan. Google made some money. I enjoyed listening to the music. Everyone was happy.

Soon after that transaction Google announced that it was going to change its privacy policies. In the past Google had over 60 privacy policies for its various products and services including Search, Gmail, Calendar, YouTube and Blogger. On March 1, 2012 Google's new privacy policy went into effect. There is now one simplified policy for all products and services. Google announced the change with the slogan: "We're changing our privacy policy and terms. This stuff matters." The policy change has been widely criticized with Congress holding hearings, the White House issuing a set of guidelines entitled the "Privacy Bill of Rights" and the Attorneys General of 36 states expressing "strong concern" about the "troubling" new policy.


Glenn P. Warmuth

Opponents of the new policy claim that it changes the way Google is permitted to share information with itself. This is not accurate. Google already had the right to share information with itself pursuant to

(Continued on page 22)

SCBA Hosts Robing Ceremony


Photo by Marcus Robinson

James A. McDonaugh, left, and Derrick J. Robinson were sworn in as District Court judges by Supervising Judge of the District Court the Honorable Madeleine A. Fitzgibbon.
(See story on page 3.)

PRESIDENT'S MESSAGE

SCBA Community a Source of Pride


Matthew Pachman

By Matthew E. Pachman

As the months fly by toward the end of my tenure as President of the SCBA, I find myself reflecting on why my involvement in this association has been so meaningful and rewarding. I believe I can sum it up in one word - "community."

As it relates to the SCBA, the concept of "community" means several things to me. First, it highlights what is perhaps the greatest benefit of bar membership - the connection between us as attorneys that involvement fosters. We can enjoy our practices more, and serve our clients better, when we are part of a cohesive community of attorneys who share information, mentorship and support.

Second, "community" encompasses our relationship with, and support of, our county judiciary. The efforts to address some of the challenges facing our 18-B system is a great example of the benefits of a close working relationship between lawyers and the courts - the "community" working together to address a problem and doing our best to provide a collective benefit. The bar has also been vocal in support of our local judiciary in the statewide dialogue about the budget crises and the resultant cuts to court budgets.

Third, the SCBA has had a strong and proud history of community support with its pro bono projects.

There is something unique and special about giving back to the community in the form of free legal services. Perhaps it is because only we lawyers can provide this service and it is a service that is needed by all but simply unavailable to some.

(Continued on page 27)

BAR EVENTS

Pro Bono Recognition Night
Thursday, March 22, 6 p.m.
Captain Bill's Restaurant, Bay Shore
Recognizing SCBA Pro Bono Attorneys

Peter Sweisgood Dinner
Hosted by the Lawyers Helping Lawyers Committee
Wednesday, April 25, 6 p.m.
Watermill Restaurant
Honoring the late Eugene J. O'Brien (SCBA Past President 2000 – 2001), a founding member of Lawyers' Committee on Alcohol and Drug Abuse

Annual Meeting
Monday, May 7, 6 p.m.
Location to be announced
Awards of Recognition and Golden Anniversary Awards

Installation Dinner
Friday, June 1 at 6 p.m.
Hyatt Regency, Hauppauge
Installation of officers and directors
For further information call the Bar

FOCUS ON
PROFESSIONAL ETHICS & CIVILITY
SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2011-2012

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.

MARCH 2012

27 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.
27 Tuesday Nominating Committee, 6:00 p.m., Board Room
28 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
29 Thursday Alternate Dispute Resolution (ADR) Committee, 6:00 p.m., Board Room.

APRIL 2012

3 Tuesday Appellate Practice Committee, 5:30 p.m., Board Room.
Joint Matrimonial & Family Law/Family Court Committees, Justice Bivona's Courtroom, 3rd Floor, Supreme Court Central Islip.
Nominating Committee, 6:00 p.m., Board Room.
9 Monday Executive Committee, 5:30 p.m., Board Room.
10 Tuesday Labor & Employment Law, 8:00 a.m., Board Room.
Commercial & Corporate Law Committee, 6:00 p.m., Board Room.
11 Wednesday Education Law Committee, 12:30 p.m., Board Room.
16 Monday Insurance & Negligence - Defense Counsel Committee, 5:30 p.m., E.B.T. Room.
18 Wednesday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
Real Property Committee, 6:30 p.m., E.B.T. Room.
Surrogate's Court Committee, 5:30 p.m., Board Room.
23 Monday Joint Nassau/Suffolk Board of Directors Meeting, 5:30 p.m., Great Hall.
24 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m. Board Room.
25 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
Annual Peter Sweisgood Dinner Honoring former SCBA President Eugene J. O'Brien, Watermill Restaurant, 6:00 p.m., $70 per person. Call Bar Center or register on line at scba.org.

MAY 2012

1 Tuesday Joint Matrimonial & Family Court Committees meeting - Justice Bivona's Courtroom, 3rd Fl. - Supreme Court, Central Islip.
Appellate Practice Committee, 5:30 p.m., Board Room.
Commercial & Corporate Law, 6:00 p.m., E.B.T. Room.
7 Monday SCBA's Annual Meeting, 6:00 p.m., location to be announced.
8 Tuesday Labor & Employment Law , 8:00 a.m., Board Room.
9 Wednesday Education Law Committee, 12:30 p.m., Board Room.
14 Monday Executive Committee, 5:30 p.m., Board Room.
Insurance & Negligence - Defense Counsel Committee, 5:30 E.B.T. Room.
16 Wednesday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
Surrogate's Court Committee, 5:30 p.m., Board Room.
Real Property Committee, 6:30 p.m., E.B.T. Room.

Our Mission

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

Internship & Scholarship Program to Encourage Latino/Latina Representation in Law Kicks Off

Suffolk County District Attorney Thomas Spota, Vice President of the Long Island Hispanic Bar Association Dave Mejias, representatives from Bethpage Federal Credit Union and Touro Law School announced the generous donation by Bethpage Federal Credit Union to the Long Island Hispanic Bar Association to aide Latino/Latina students. District Attorney Spota also announced new summer internship opportunity for Latino/Latino law students as part of the proactive outreach for Latino representation in law enforcement.

Two Latino American Touro Law students will be chosen in May to participate in a summer internship at the offices of the Suffolk County District Attorney. The funds will be used to supplement the students' income allowing them to devote their time to hands-on experiences interning at the District Attorney's office.

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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SCBA Hosts Judicial Swearing-In and Robing Ceremony

By Laura Lane

Becoming a member of the Judiciary is perhaps one of the greatest honors any member of the legal profession can hope to achieve. Two Suffolk County Bar Association members joined the ranks of the Judiciary on Friday, March 2, at a Judicial Swearing-in and Robing Ceremony held at the SCBA bar center. The Supervising Judge of the District Court the Honorable Madeleine A. Fitzgibbon administered the oath of office to James A. McDonaugh and Derrick J. Robinson that was witnessed by a standing-room only crowd.

SCBA President Matthew Pachman remarked that it really didn't matter when a ceremony of such importance occurred in any given year. It is what it means that is important.

"This marks the beginning of a new chapter in the lives of those who we honor today and with this, comes new dreams and expectations," he said. "It is the hope of the members of our association that the judges being sworn in today realize their dreams and aspirations, of bringing excellence, honor, distinction, and most of all revitalized respect to the legal system, to the judiciary and to the entire legal profession."

Laura Lane

During his opening remarks Suffolk County Administrative Judge C. Randall Hinrichs touted the special relationship that Suffolk enjoys between the bench and bar. He referred to Mr. McDonaugh and Mr. Robinson as "highly qualified individuals who will bring a wealth of experience to the bench." Judge Hinrichs added that he believed that both have the temperament and patience required to be successful judges.

Donagh McDonaugh sponsored his son, James, remarking that his son was an excellent father, husband, and a truly good person.

When James McDonaugh took the podium he said he was humbled by the large turnout at the ceremony. After thanking the SCBA for hosting the event he attributed his parents for helping him achieve what he had today. "I wouldn't have gone into law were it not for my father, a practitioner for two decades, my mother is the closest thing to a saint," he said. Both Mr. and Mrs. McDonaugh came from Virginia to witness their son's robing.

During a lighter moment, Mr. McDonaugh remarked that he had been appointed by County Executive Steve Bellone who he opposed in a race in 2005. "I can't thank him enough for giving me this opportunity," he said. "This is something I've wanted for as long as I can remember."

Dr. Pamela Allen Robinson sponsored her husband, Derrick Robinson. She described him as someone who has always been a person of integrity. "He approaches all tasks with grace, dignity and honesty," she said.

Mr. Robinson equated the robing ceremony as an opportunity to say thank you. As someone who grew up in modest and what he referred to as challenging circumstances, he said he has always been inspired by the achievements of our founding fathers. "I will strive to never forget the real world consequences of my decisions as a judge," he said. "This signifies that dreams do come true. I am an ordinary person blessed with extraordinary opportunities."

In his closing remarks Honorable C. Randall Hinrichs said aloud what was more than likely on most people's minds at the robing ceremony. He said, "You can see by the eloquence by Judge McDonaugh and Judge Robinson just how fortunate we are to have both sworn in today in Suffolk County."

(See more photos on page 14.)

Note: Laura Lane, an award-winning journalist, has written for The New York Law Journal, Newsday, and several other publications. She is the Editor-in-Chief of The Suffolk Lawyer.

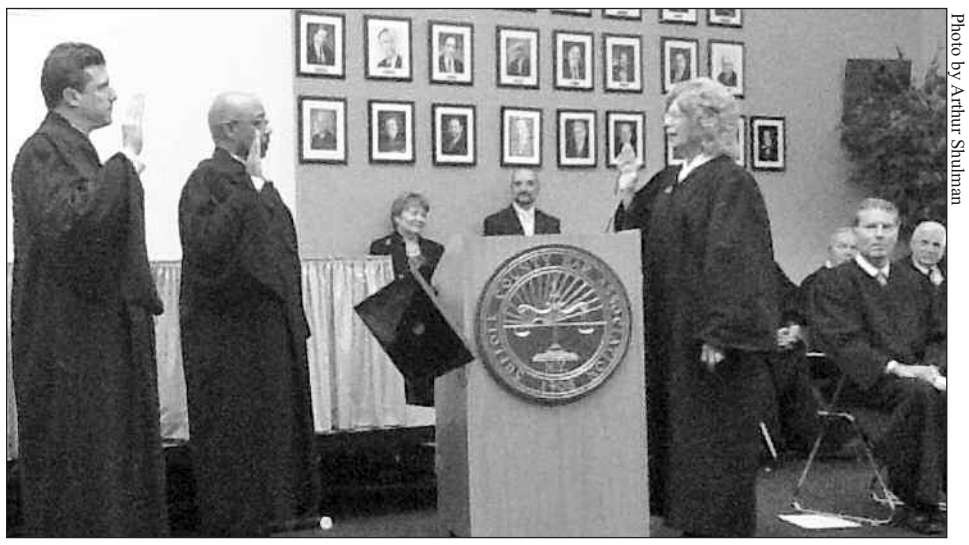


Photo by Arthur Shulman

James A. McDonaugh, left, and Derrick J. Robinson were sworn in as District Court judges by Supervising Judge of the District Court the Honorable Madeleine A. Fitzgibbon.

Photo by Laura Lane

Adding dignity to the event there was a Presentation of the Colors by the Suffolk County Court Ceremonial Unit at the Judicial Swearing-In and Robing Ceremony.

Meet Your SCBA Colleague

Cheryl Mintz, **a general practice attorney represents individuals and businesses. She comes from a family of lawyers but was never encouraged or discouraged to be one too. Instead, she was encouraged to always have other options.**

By Laura Lane

Coming from a family so entrenched in the profession of law you must have wondered why no one seemed to assume you'd join them. The first time I was in court was with my father, who was an attorney. I was 22 months old and I remember that. I worked in my father's library growing up updating his books. It was just that my family thought I had other talents and knew the legal profession was a tough one. When I was away at college I studied communications and political science. I decided finally to become a lawyer because it was what I always thought I would do. I went to law school right after college.

Today you work in a small family firm and your partner is your father, Joseph Rosenthal. Did you have other plans originally? Actually criminal work had always interested me. After my summer internship at the US District Court I wanted to go to the US Attorney's Office but there was a hiring freeze. I could have interned at the District Attorney's Office but that wasn't a reality. I needed to pay off my school loans. So I got a job as an associate in Manhattan at a general practice law firm that concentrated in commercial and civil litigation. My job involved a great deal of research and writing. I loved it and it didn't matter that it wasn't criminal.

That was in the 90's. What was it like for you, a woman, in the profession at that time? I wore a pants suite in 1995 in Federal Court and one of the attorneys jokingly made a crack about what I was wearing. No one really treated me with disrespect, but there was a different mentality toward me than the other attorneys who were men. There was a "little girl" mentality. When I was about to leave my second job I realized that I was the only woman attorney for the majority of my stay there. Every place I've ever been I've been the only woman attorney. And the partners have always been men. But I have to say I've never felt treated differently or looked down upon.

Do you think you perhaps had a certain comfort level that was different than other women attorneys at that time due to your experiences before becoming an attorney? I did grow up knowing many of the attorneys because I grew up in the courts. My father was a law secretary. Even now at my firm where I am a managing partner I am still the only woman.

What do you enjoy about civil litigation? I enjoy finding something new and challenging and trying to find an answer. Sometimes in private practice the business aspect overshadows everything else. But you always try to find the best solution for everyone involved - something everyone can afford. And I like people in general as well.

When did you join the SCBA? I think I may have been a member in law school but I can't remember. When I got a job in Manhattan I joined the bar there. I joined the SCBA in the late 1990's when I came to Suffolk to practice law. I couldn't imagine practicing law in Suffolk County and not joining. My upbringing taught me that you belong to organizations that support whatever you are involved in. My parents were involved in their synagogue and in community groups. I've never known it any other way.

Once you joined, did you get involved? Right away, first at the Academy and then later as a member of the Board of Directors – I'm in my third year on the board.

Why would you recommend attorneys join the SCBA? Join for the camaraderie. There's nothing more comforting and confidence building than walking into the courtroom and knowing the faces. When I get motions in from attorneys and I know the name on the paper from the SCBA everything runs more smoothly. I honestly believe that the more you give in life the more you get.

Some people believe that Suffolk County is a bit unique in some ways. Do you agree? Suffolk possesses a small town mentality. Many of the practices are small time lawyers. We represent our friends and neighbors. And yet even though Suffolk is rural, we are so large. The SCBA is the one thing that connects us. You find your niche and make it your world and the SCBA helps with that a lot.

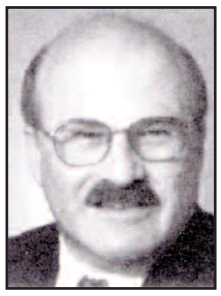
Photo courtesy of Cheryl Mintz

Cheryl Mintz

These days success in the legal profession is so connected with opportunities to network. Do you find opportunities at the SCBA? Yes. I have made fabulous connections and good friends at the SCBA. There are excellent CLE courses and they are far superior to anywhere else I've attended. And there's one more thing. I believe if you are a member of a profession you should give back. Being a member in the SCBA and active is an opportunity to do that.

NY Lawyer to Lead ABA in 2013-14

By Scott M. Karson



Scott M. Karson

James Silkenat of New York will assume the presidency of the American Bar Association for a one-year term beginning in 2013, making him the first New Yorker to hold that position since Robert MacCrate served as ABA President in 1987-88. Silkenat's designation as President Elect Nominee was announced to the 560-member ABA House of Delegates at its February 6, 2012 meeting, which took place during the 2012 ABA midyear meeting in New Orleans. Silkenat will assume the office of President Elect at the conclusion of the August 2012 annual meeting in Chicago, and will become president of the association at the conclusion of the August 2013 annual meeting in San Francisco. He will succeed current ABA President Elect Laurel G. Bellows of Illinois, who will succeed current ABA President William T. Robinson III of Kentucky at the conclusion of the 2012 annual meeting in Chicago.

In his first address to the House of Delegates as President Elect Nominee, Silkenat identified some of the priorities he intends to pursue: guaranteeing adequate funding for state courts; increasing ABA membership and enhancing member services; improving legal education; and expanding employment opportunities for lawyers by improving access to justice. Silkenat summed up his vision for the ABA as follows: "Among the many important roles played by the ABA, and by other bar associations in the United States, is that they help us be better lawyers and judges and educators and citizens: better able to help our clients and better able to serve the public and our justice system."

In his remarks to the House of Delegates, current ABA President Bill Robinson warned that the most pressing issue facing the legal system today is under-funding of the state courts, a situation which he characterized as a threat to our liberty. Robinson said, "An adequately funded independent court system is the key to constitutional democracy, and constitutional democracy is the key to freedom." Robinson noted that 42 states have reduced court budgets, 34 have reduced staffs, 39 have stopped filling clerk vacancies and 23 (including New York) have reduced courthouse operating hours. Furthermore, although the courts constitute a co-equal branch of

(Continued on page 23)

BENCH BRIEFS

Decisions from Five Judges

By Elaine M. Colavito

Elaine M. Colavito

SUFFOLK COUNTY COUNTY COURT

HONORABLE JAMES F. QUINN

Motion for order directing judgment of divorce pursuant to DRL§ 170(7) denied; plaintiff not entitled to a divorce on the conclusion of the plaintiff's case alone; defendant with the right to set forth a defense.

In *Sorrentino v. Sorrentino,* Index No.: 13315/11, a matrimonial action, decided on January 12, 2012, plaintiff sought a divorce pursuant to DRL §170(7). At the conclusion of plaintiff's case, she moved for an order directing a judgment of divorce, indicating that DRL §170(7) only required the testimony of the plaintiff and that the court should conform the pleadings to the proof.

In opposing the motion, the defense argued that an affirmative defense was raised and that the defendant was entitled to present a case. The court reserved decision and directed that the defendant put forth his case. In deciding the case, the court noted that the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continued to believe that the breakdown was not irretrievable and/or that there was still some possibility of reconciliation. The court found that in the case at bar, the defendant clearly disputed the breakdown of the marriage and in fact, made allegations that the plaintiff was of advanced age, frail and not in her right mind, and that she was subject to the undue influence of her children. The court noted that these are affirmative defenses under CPLR §3018(b), which the court was required to consider. The court further recognized that the legislature did not abrogate fault nor did it relieve any provision under DRL §170 from the requirements of particularly in specific actions of CPLR §3016. As such, the court found that the defendant had the right to put forth a defense. Accordingly, it was the decision of the court that the plaintiff was not entitled to a divorce on the conclusion of the plaintiff's case alone, and her motion for a divorce was denied.

However, upon hearing all of the evidence in the case, including the defendant's testimony, it was the court's determination that the parties' relationship had so deteriorated irretrievably for a period in excess of six months and that the defenses of fraud, and undue influence, and incapacity were without merit, the plaintiff was entitled to a judgment of absolute divorce.

SUFFOLK COUNTY SUPREME COURT

HONORABLE W. GERARD ASHER

Motion for summary judgment granted; while cause of action relating to the November 2009 accident was asserted in plaintiffs' amended verified bill of particulars, it was not alleged in plaintiffs' complaint; bill of particulars is simply a device to amplify existing claims and is not a device to add a new legal theory or cause of action.

In *Kariel Sweeney, infant by her mother and natural guardian Cindy Sweeney, and Cindy Sweeney, Individually v. Long Island Cheer,* Index No.: 30340/09 decided on August 23, 2011, the court granted the defendant's motion for summary judgment. The facts were as follows: infant plaintiff was participating in cheerleading practice at a cheerleading training facility owned by the defendant Long Island Cheerleading when she allegedly was injured and fell

(Continued on page 24)

ENVIRONMENTAL LAW

Local Zoning of Hydrofracking - An Overlooked Remedy

By Robert R. Dooley

To date, the focus on hydrofracking has been on the regulations being worked on in Albany. Each meeting discussing hydrofracking seems to turn into a debate. Opinions within communities are sharply divided on the topic. The DEC's regulations will be approved and the regulations will dictate how the controversial drilling technique takes place. Recent State Supreme Court decisions look at the issue from a different angle: local zoning. The decisions held that municipalities are authorized to prohibit hydrofracking in their zoning districts. In other words, the state will say "how" to hydrofrack but the municipalities will have the final say on the "if" and "where."

Both *Cooperstown Holstein Corp. v. Town of Middle Field* (Otsego Supreme Court, Index No.: 2011-0930) and *Anschutz Exploration Corp v. Town of Dryden*, et. al. (Tompkins Supreme Court, Index No.: 2011-0902) involve the preemption language from the Oil, Gas and Solution Mining Law (OGSML) set forth in ECL § 23-0303(2), which states that it "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries…" Both decisions concluded that the supersession language does not preempt local zoning prohibiting hydrofracking.

Robert R. Dooley

In *Anschutz*, the court drew on the precedent set in *Frew Run Gravel Prods. v. Town of Carroll*, 71 NY2d 126 (1987) where nearly identical issues were at stake. The *Anschutz* Court held that, as in *Frew Run*, the zoning at issue did not relate to the extractive mining industry but to an entirely different subject: land use. The *Frew Run* decision was very particular in specifying that zoning ordinances have the purpose of managing general land use whereas the preemption language was to the specific operation of mining activities. The supersession clause from the OGSML does not provide any intent to preempt local control over land use and zoning. The purpose of the OGSML is not "to encourage maximum ultimate recovery of oil and gas regardless of other considerations, or to preempt local zoning authority." Rather, the preemption language pertains to "regulation of development and production only in locations where such activities may be conducted in compliance with applicable zoning ordinances governing land use…"

> **"...the state will say "how" to hydrofrack but the municipalities will have the final say on the "if" and "where."**

Diving more into the legislative intent of the OGSML is *Cooperstown*. Initially, the court looked to Article 3-A of the ECL from 1963 noting that the 1963 legislation failed to address any land use issues which would otherwise fall to a local municipalities zoning authority. A 1963 letter from the "Conservation Commissioner" stated that the legislation would make the "Conservation Department" responsible for oil and gas "operations" and "regulations." 1978 legislation amended ECL § 23-0301 and replaced the phrase "foster, encourage and promote" oil and gas development with "regulate." The "foster, encourage and promote" language was reserved in Energy Law 3-101(5), effectively transferring the promotion of energy to the Energy Office. The court noted that the amendments clearly recognized the need to centralize the promotion of the state's energy resources under one administrative body (the Energy Office) and that the regulatory function should be streamlined through the DEC. Again, there was no reference in the legislation pertaining to the preemption of local municipal land use management.

1981 legislation responded to the energy crisis of the time and promoted the development of domestic energy supplied by New York State. The legislation created the supersession clause as currently contained in ECL § 23-0303(2). Nonetheless, the court found no language supporting the conclusion that the clause was intended to impact, diminish or eliminate a local municipality's right to enact legislation pertaining to land use.

The court concluded that there was no support in the legislative history leading to the 1981 amendment that would support a finding that a municipalities' authority to zone was preempted. "The OGSML supersession clause preempts local regulation solely and exclusively as to the method and manner of oil, gas and solution mining or drilling, but does not preempt local land use control."

Both decisions largely relied upon on *Frew Run* and *Gernatt* in their opinions. Interestingly, the *Gernatt* decision addresses the question of whether this sort of zoning would qualify as exclusionary zoning. *Gernatt* was another mining case where zoning was passed prohibiting mining and a challenge was made arguing preemption and exclusionary zoning. The preemption argument was dismissed for the reasoning discussed above. Citing *Berenson v. Town of New Castle*, 38 N.Y.2d 102, the plaintiffs argued that the exclusionary zoning was unconstitutional. The *Berenson* exclusionary zoning test, however, was intended to prevent a municipality from improperly using the zoning power to keep *people* out not to keep *industry* out. "A municipality is not obliged to permit the exploitation of any and all natural resources within the town as permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the com-

(Continued on page 22)

Malpractice Avoidance for All

By Sheryl L. Randazzo

Practicing law within the bounds of the Rules of Professional Conduct ("the Rules") can be easily accomplished and readily achieved by all attorneys. Compared to other professions and industries, lawyers have it easy if they intend to do the right thing; we actually have a set of clear guidelines that spell out the minimum standard of acceptable professional behavior. The sad part is, so few practicing attorneys take the time to read the Rules, or to refer to them, and many are unwilling to acknowledge the Rule's applicability to their everyday practice as a lawyer.

The Rules were adopted and became effective in New York on April 1, 2009. Prior to that, the Disciplinary Rules within the Code of Professional Responsibility, which were similar in content but different in format, had been the minimum standard since 1970. By 1974, passage of a course in professional ethics was a requirement for all students at ABA-accredited law schools. Currently, 47 states in the United States, including New York, require passage of the Multistate Professional Responsibility Examination for bar admission.

Notwithstanding all of these requirements, malpractice and disciplinary proceedings abound in our profession and, again, sad as it is to say, without any end in sight. This is true notwithstanding my belief that no one goes to law school saying – "I will lie to a client," or "I shall make misrepresentations to a court," or "I intend to take money I did not earn that belongs to someone else."

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The minimum expectation is that every lawyer be familiar with and uphold the requirements contained in the Rules. If it has been a while since you have read the Rules, or if you are one of many who have never read them in the first place, either because it was not required of you at the time of your admission or because the Rules were adopted after you were admitted, ***read them***.[1] We all know that ignorance of the law is no excuse.


Sheryl L. Randazzo

The Rules themselves are very informative, interesting to some, and, in part, quite helpful. Beyond the obvious - don't lie, cheat, steal, misrepresent, or take advantage of anyone, - they offer practical direction in many aspects of the practice of law. On issues from advertising to handling clients with diminished capacity to conflict avoidance to fee setting, the Rules provide meaningful guidance while setting the minimum threshold of attorney conduct. Every attorney can benefit by familiarizing him or herself with this information.

But malpractice avoidance is about more than just doing the minimum. It is about trying to do the best for our clients, who place their trust in us during typically challenging times in their lives, based upon our professional knowledge, expertise and abilities. This involves a broader perspective than merely what not to do; it creates an affirmative, fiduciary duty for an attorney to strive to achieve effective and efficient results in accomplishing our clients' objectives.

The following is a short list of some of the most valuable reminders to help an attorney serve all of his or her clients well, effectively and ethically:

1. Stay up on the law. Competence is more than an ethical requirement. When you are on top of your practice area(s), you will sleep better at night, enjoy your day more, experience less stress, and make fewer mistakes.
2. Accept your role as a problem solver. Clients do not seek out an attorney because they are having a good day or can confidently handle something on their own. Recognize that your clients are under stress, whether or not you can fully appreciate the magnitude, and have compassion and empathy in trying to assist them.
3. To loosely paraphrase Plato, remember that everyone you meet is fighting their own battle every day. This is true of not only your clients, but also your opposing counsel, the judge you are appearing before, and the person who cuts you off on your way to the office. Keeping this perspective goes a long way in setting the tone for often very challenging days in the practice of law.
4. Zealous advocacy does not mean taking on a client's cause as your own. You are not your client, no matter how strongly you feel about his or her cause. Losing that perspective will impact on your effectiveness, professionalism and reputation.
5. Be reasonable with yourself, and especially with your expectations as to what you can accomplish in a day. We cannot be everything to everybody, and certainly not all at the same time. Manage your time as the valuable commodity that it is.
6. Ask for help – if you cannot find an answer, get in over your head, or just need a little reinforcement. None of us have all of the answers, no matter how smart we may believe we are or think we are expected to be. Your time is well-spent by being involved in bar associations and committees, networking with colleagues, and interacting with respected peers. Do not forget that we are members of an honorable profession with a long history of fellowship from which we all may benefit. You do not need to go it alone.

Malpractice avoidance has less to do with the Rules and more to do with good time management skills and business management practices while maintaining a healthy perspective…but reading the Rules won't hurt either.

Note: Sheryl L. Randazzo, is the immediate Past President of the Suffolk County Bar Association and, among numerous other roles within the association and the professional community, a member of the SCBA's Professional Ethics and Civility Committee. She is also an Adjunct Professor of Law Practice Management at Touro College Jacob D. Fuchsberg Law Center.

1. The Rules of Professional Conduct may be readily accessed at http://www.nysba.org/Template.cfm?Section=Attorney_Resources

The Suffolk Lawyer wishes to thank Special Ethics and Civility Special Section Editor Patricia Meisenheimer for contributing her time, effort and expertise to our April issue.


Patricia Meisenheimer

Not Among Our Law School Goals

UNMANAGEABLE STRESS CLINICAL DEPRESSION
ALCOHOL DEPENDENCY SUBSTANCE ABUSE
SLEEPLESS NIGHTS PHYSICAL DYSFUNCTION

Sound familiar? You're not alone.

Lawyers rank first in incidence rate for clinical depression among 105 professions surveyed. Do you need help or do you just want to talk about it?

The Lawyer Assistance Foundation and Lawyers Helping Lawyers Committee of the Suffolk County Bar Association can help. We can provide necessary assistance, whether a sympathetic ear or a referral for professional assistance when necessary.

There is no charge. No stigma. Everything will be kept strictly confidential.

Interested?

Call: **Rosemarie Bruno (631)979-3480,**
Arthur Olmstead (631) 754-3200 from the Lawyers Helping Lawyers Committee;
Barry L. Warren, Managing Director of The Lawyer Assistance Foundation (631) 265-0010;
Jane LaCova, Executive Director, Suffolk County Bar Association – (631) 234-5511, Ext. 231.
Let Us Help You.

SIDNEY SIBEN'S AMONG US

Congratulations…

Siben & Siben, LLP is this year's honoree at the Great South Bay YMCA Boulton Center Gala on May 12th, 2012. Though founded by Sidney R. Siben in 1934 in Central Islip, Sidney and his brother Walter moved the firm to Bay Shore in 1945 upon their return from active duty in WWII. This is a great tribute for the firm, which is one of Bay Shore's oldest businesses. The Boulton Center is located on Main Street, Bay Shore. The evening will be great fun, catered by The Lake House, with entertainment by the group, Rockapella.

New York Agri-Women, a NYS association of women involved in agriculture, presented **Vicki S. Gruber** with its 2012 President's Award for Outstanding Service at its annual meeting in Riverhead. Ms. Gruber is a corporate attorney in Melville who currently serves as NYAW's Long Island District and Suffolk County Leader, and chair of its Legislative & Governance Committee.

To **Nancy Burner** who was reappointed to serve a three year term by the NYS Court of Appeals as a trustee to the Lawyers' Fund for Client Protection. Nancy is the Fund's Vice-Chairman and was first appointed as a Trustee in 2002. Her law practice concentrates on trusts and estates, estate planning and elder law.

To **Richard Schaffer** who was recently appointed by County Executive Steve Bellone as Babylon Town Supervisor. Richard Schaffer is also chairman of the Suffolk County Democratic Committee.

Disabled and Alone/Life Services for the Handicapped, Inc. presented **Brian Andrew Tully**, JD, CELA, Founder, and **Kenneth Winkelman**, JD, CPA, LLM, Partner, The Elder Law Office of Tully & Winkelman, P.C. with its Partnership Award on Feb. 17. The award was given in recognition of the law firm's leadership in estate planning and cooperation with non-profit organizations in helping people with disabilities and their families.


Jacqueline A. Siben

Congratulations to **Mike and Elysee Besso**, (of Monarch Graphics, the bar's official printer) on the birth of their first grandchild, a boy, Max, born February 28, 7 lbs.2 oz. and 20" long.

On the Move…

James F. Hagney, Joseph A. Quatela, Dawn L. Hargraves and **Theresa A. Mari** have formed a new law firm, Hagney, Quatela, Hargraves & Mari, PLLC located at 888 Veterans Memorial Highway, Hauppauge, NY. They can be reached at: (631) 482-9700.

SCBA Member **Michael B. Solomon** (formerly Sanders & Solomon P.C.) has moved his law office to 555 Broadhollow Road, Suite 274, Melville, NY 11747, (631) 427-3333; (fax) (631) 427-3342, e-mail: sandsol1@optonline.net; www.solomondivorcelaw.com

Thomas J. Vicedomini has moved his office to 357 Veterans Memorial Highway, First Floor, Commack, New York 11725. He can be reached at, (631) 543-1911 or by fax at (631) 543-1990.

Julie L. Yodice has joind the firm of Ingerman Smith LLP located in Hauppauge.

Announcements, Achievements, & Accolades…

The law firm of **Futterman, Lanza & Block, LLP** is offering a free two-hour seminar, "Medicaid Planning & Asset Protection," which will take place March 28 at the law office, located at 222 East Main Street, Suite 314, in Smithtown. The morning seminar runs from 10 a.m. to noon, and the evening seminar is from 6 p.m. to 8 p.m.

Ingerman Smith LLP, partners **Neil M. Block**, **Christopher J. Clayton** and **Christopher M. Powers**, is partnering with the Theatre Three Touring Company, a performing arts organization that provides educational programs to schools, to present a multidisciplinary symposium for Long Island educators focused on bullying in schools on April 23 from 4 to 6 p.m. The symposium, held at Nassau BOCES Cultural Arts Center, 239 Cold Spring Road, Syosset, will feature an in-depth legal discussion of bullying, including New York State's new anti-bullying law, The Dignity for All Students Act, which will take effect on July 1, 2012.

The Elder Law Office of **Tully & Winkelman, P.C.** will host a workshop on March 27 from 7 to 9 p.m. and on March 29 from 10 a.m. to noon on "Special Needs Planning in a Changing World" at its office, located at 150 Broadhollow Road, Suite 120 in Melville. Guest speakers include **Brian Andrew Tully,** JD, CELA, Founder, Tully & Winkelman, P.C. and Craig Marcott, Special Needs Consultant. The workshop will focus on the critical ages and timeline for the family; guardianship; preserving government benefits; supplemental needs trusts; funding of the supplemental needs trust; estate planning; and the New York State 1115 Waiver.

The following attorneys from Lamb & Barnosky, LLP have been involved legally as speakers and participants: **Richard K. Zuckerman,** participated on a panel at NYS Bar Association's Labor and Employment Law Section Annual Meeting, on Jan. 27, on the topic "My Employee/Your Employee/Co-Employee?;" **Sharon N. Berlin,** spoke at the March 3, New York Agri-Women's Second Annual Meeting "Shared Challenges, United Goals" on the topic "Human Resources 101 for Farms and Agri-Businesses;" **Robert H. Cohen,** spoke on the topic "Special Education Law and Municipal Law" at the 13th Annual Members Only Conference of the Long Island Association of Special Education Administrators ("LIASEA") held on Jan. 18, in Montauk, NY; **Hon. Michael F. Mullen,** will be speaking on "Thomas Francis Meagher, Irish Nationalist, American General and Montana Governor" at the Huntington Lawyers' Club.

Regina Brandow participated on March 7 at the Three Village Central Schools first

(Continued on page 23)

Non-Waivable Conflict of Interest

By Patricia Meisenheimer

Prior to accepting representation of a client, an analysis must be done as to whether a prospective client's interest would be compromised by the attorney's representation. It is a well-established rule that a lawyer may not represent multiple clients in a matter where the interests of each client would be materially adverse to each other.

Rule 1.7(a) of the New York Rules of Professional Conduct states that, "Except as provided in paragraph (b) a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

Rule 1.0(f) defines, "different interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

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Rule 1.7(b) states: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) they reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; (4) each affected client gives informed consent, confirmed in writing."

Patricia Meisenheimer

Even with consent, a conflict may be non-waivable. Where a lawyer cannot reasonably provide competent and diligent representation, where loyalty may be divided or professional judgment impaired, consent to a representation cannot be waived. As can be seen from the decisional law in this area, a client's consent to a non-waivable conflict is invalid and ineffective.

A classic example of a non-waivable representation occurs in a personal injury case involving the dual representation of both the driver of an automobile involved in an accident and a passenger in the same automobile. This representation is fraught with the potential for incompatible conflict even after full disclosure has been made and the consent of the clients obtained. *Green v. Green,* 47 N.Y.2d 447, 418, N.Y.S.2d 379 (1979). Even when the driver and passenger are family members, concurrent representation will result in a conflict of interest due to their differing interests. It is improper for an attorney to represent both the parents and the child in an automobile accident action brought against the owner and driver of the other vehicle. *Sidor v. Zuhoski,* 261 A.D.2d 529, (2d Dept. 1999).

Not only is there a potential for the passenger to assert a claim against the driver for the negligent operation of the vehicle, there is a conflict in the pecuniary interest between the passenger and an owner of the vehicle who gave permission for the driver to use the vehicle. This is seen very often in an action where one parent is driving, the other parent is a passenger owner of the vehicle and there is a child passenger.

In *Dorsainvil v. Parker*, 14 Misc.3d 397, 829 N.Y.S.2d 851 (Sup.Ct., Kings County, November 21, 2006), the parents apprised of a potential conflict between them, nevertheless consented to joint representation. The defendants asserted a counter-claim against the mother claiming negligent operation of the vehicle. The assertion of the counter-claim placed the mother's pecuniary interest in conflict with that of her husband and daughter passengers. Additionally, the husband's pecuniary interest was adverse to the claims of the daughter, as he was the owner of the vehicle which rendered him personally liable for any injuries caused by the negligent operation of the vehicle by the wife. The conflicts of interest between the parents and the daughter were not waivable by the daughter, as she was an infant and did not have the capacity to consent to a waiver. Even in the situation where full disclosure and consent were given, the interests were so adverse that dual representation was improper. Continued representation would violate the duty to preserve a client's confidences as well as the rule requiring an attorney to represent a client zealously.

An attorney's conflicts are imputed to his firm on the presumption of shared confidences. In *Cohen v. Strouch,* 10 Civ. 7828, 2011 U.S. Dist. LEXIS 30778 (March 24, 2011), plaintiff brought an action against defendant driver in Federal Court. Plaintiff's passenger brought a separate action in State Court and was represented in the state action by an attorney "of counsel" to the firm that represented the plaintiff driver in the federal action. This concurrent representation of driver and passenger, albeit in separate jurisdictions, required disqualification of the law firm. The clients' interests were clearly adverse to one another precluding the firm from meeting the "heavy burden" of showing that there is "no actual or apparent conflict in loyalties or diminution in the vigor of representation."

The dual representation of a driver and passenger in a motor vehicle accident case is a non-waivable conflict under Rule 1.7(b)(3), as each client's position is aligned directly against each other in the same litigation. This presents an irreconcilable situation where a reasonable lawyer's independent professional judgment is likely to be impaired, where preserving a client's confidences is jeopardized or where the lawyer's duty of loyalty to his client is placed in issue.

Note: Patricia Meisenheimer practices in the area of personal injury, medical malpractice, products liability and general litigation with Bracken Margolin Besunder, LLP, Islandia. Patricia is the co-chair of the Professional Ethics & Civility Committee, is a past director of the SCBA and a past dean of the Suffolk Academy of Law.

Retained on Eve of the Trial

By Caren Loguercio and Evie Zarkadas

You walk into the courthouse on a Monday morning to move forward on a litigated matrimonial case, *Smith v. Smith,* after having spent countless hours over the weekend preparing. When you check in with the court officer in the part as attorney for the wife, you are surprised to find out that the husband has discharged his counsel and a new attorney is appearing for the husband. Pursuant to the court rules, specifically 22 N.Y.C.R.R. §125.1(g), the court had issued a trial order, directing that the matter go forward on this date. This is the fourth lawyer for Mr. Smith. What comes next? Of course all of the matrimonial lawyers reading this know - lawyer number four for Mr. Smith is going to make an application to adjourn the case since he/she was only retained on the "eve of trial." What should and/or must the judge do?

Unfortunately, this is an oft played out scenario in the matrimonial parts. Yet, it raises various practical and ethical issues for attorneys and judges, who need to keep their cases moving and their calendars as organized as possible. Is it an error for the judge to grant or deny the adjournment? Should the newly retained counsel have declined the representation knowing that the matter was set for trial pursuant to a court order?

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Pursuant to CPLR § 321 when an attorney is relieved, the court is permitted to grant a 30 day stay of the proceedings. Obviously, courts prefer to decide cases on the merits, rather than in the inequitable situation where one party is represented by counsel and the other is self represented. This is evidenced by several Second Department cases where the lower court was reversed for denying an application for an adjournment, though made on the day of even after the commencement of the trial. *See, Alleyne v. Grant,* 51 A.D.3d 828, 858 N.Y.S.2d 357 (2d Dept. 2008); *Cabral v. Cabral,* 35 A.D.3d 779, 826 N.Y.S.2d 443 (2d Dept. 2006); *Cuevas v. Cuevas,* 110 A.D.2d 873, 488 N.Y.S.2d 725 (2d Dept. 1985). Therefore, it's probably a safe bet that the court is going to grant the adjournment. If this is not the first time the litigant has used this tactic, however, the court may deny the request, or grant only a brief adjournment. One way a court can motivate parties to move forward, especially the beneficiary under a *pendente lite* award, is to limit the duration of such award to a finite period, such as 18 or 24 months.

Caren Loguercio

Evie Zarkadas

The newly retained attorney is in a difficult position having been retained by the client knowing that the matter was set for trial. But, in light of the above discussion, as long as the newly retained attorney is qualified to handle the matter (as per rule 1.1 or the Rules of Professional Conduct) and provides proper and timely notice by submitting a notice of appearance to the court and to the adversary, there are no ethical obstacles preventing the new attorney from appearing on the case on the day of trial. While a litigant's adjournment request on the day of trial because he fired his lawyer may be burdensome to the court's calendar and the other side, it is nevertheless permissible. The overarching principle governing this situation is a litigant's right to be represented by the counsel of his choosing and it seems this will in many situations trump the inconvenience and delay caused by the late substitution.

From an ethical perspective, the attorney-client privilege survives the termination of employment. Outgoing counsel should be wary of discussing the case with the newly retained attorney. The Rules of Professional Conduct set forth specific rules addressing disclosure of information received from a client, and unless the client waives the privilege, former counsel should not be discussing matters with the new attorney. Specifically, Rule 1.6 sets forth the parameters and obligations of the attorney whether his status is current or former counsel.

Finally, as a simple matter of professional civility, when an attorney is retained on the eve of trial, he/she should immediately contact his/her adversary and the court to advise of the late substitution and inquire as to whether the adjournment request will be entertained.

Note: Caren Loguercio is a Family Court Judge handling all matters that arise in Family Court. Prior to becoming a judge, she was the Principal Law Clerk to Supreme Court Justice Emily Pines.

Note: Evie Zarkadas is an attorney with more than 20 years experience and practices in Family Court and Supreme Court matrimonial proceedings. She is a member of the Law Guardian and 18-b panel.

Save the Date

Installation Dinner

Friday, June 1 at 6 p.m.

Hyatt Regency, Hauppauge

For further information call the Bar Association

Should We be Paid?

By John P. Bracken and Harvey B. Besunder

Most attorneys are suffering from an ailment known as accounts receivable and inability to collect for services rendered. The dilemma, which plagues us is determining which matters to turn away, which to withdraw from, and how to deal with continuing representation when we are not being paid. Ethical and practical issues must be taken into account in dealing with the problem. We have a duty to our clients to properly represent them and to not prejudice their position. Additionally, we have an ongoing duty to our partners and ourselves to insure that our business continues with cash flow that enables us to meet our business obligations. We must pay our rent and our employees as well as myriad additional costs related to the practice of law.

Can we file a lawsuit to collect fees justly due to us? While the general rule is such action should not be taken except in serious case, the reality is that any such action to collect overdue fees through litigation is likely to be resisted and likely coupled with a counterclaim alleging legal malpractice. Unlike any other business or profession the obligation to establish the reasonableness of our fees lies with us and we must prove that the charges to our clients are reasonable, taking into consideration the rule (former DR 2-106 B now CPC Rule 1.5) which spells out when a fee is "excessive." Additionally and as a predicate to filing suit, we must also offer fee arbitration to our clients in the event that there is a dispute as to the propriety of our earned fees.

The problem has become most apparent in various cases involving contingency and "flat" fee retainers.

In the *matter of Talbot* (Suffolk County Surrogate's Court), the client had consulted with a series of lawyers in the hope of establishing her entitlement to an inheritance. She had consulted with several attorneys however, none of whom would agree to handle the matter on a contingency basis. Since the client was not in a financial position to pay hourly rate fees, she ultimately was able to locate an attorney who agreed to review the file and consider a contingency fee arrangement. After consultation with the attorney who agreed to take the matter with a contingent fee agreement, she then sought a review of the proposed agreement with independent counsel and the written retainer agreement was executed with a "cap" on the final fee of $600,000. The value of the potential recovery was in excess of $4,000,000. The attorney managed to resolve all the potential contests, the client recovered approximately $4,000,000 in liquid assets, and the attorney received the "capped" legal fee. The client executed confirming letters acknowledging her agreement to the terms as well as the legal fee.

John P. Bracken

Harvey B. Besunder

Some two years later, the client contested the payment and the obligation to pay the contingent fee and applied to the Surrogates Court to set aside the legal fee as being excessive. Surrogate Judge Czygier held that "For the Court to (ignore the agreement), would negate the very essence of a contingency fee agreement, which allows an attorney to accept the risk of receiving little or no fee in exchange for the potential of a handsome fee as a result of the attorney's efforts. (See *Decision/Order Hon. John M. Czygier, Jr. Matter of Talbot* decided March 17, 2010 granting summary judgment in favor of the attorney).

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SPECIAL EDITION

The Appellate Division decided that despite the contingency nature of the retainer, the onus remained upon the attorney to establish that the fee was reasonable. They noted that the probate proceeding was settled four weeks after the retainer agreement was signed and noted the factors to be considered in evaluating what constitutes a reasonable attorney's fee. (See Rule 1.7 Rules of Professional Conduct: Matter of Talbot 2011 NYSlip Op 4059)

In a matter decided in Supreme Court Nassau County (2011 NY Slip Op 30173U) the agreed fee for the representation was to be an unconditional and absolute flat amount of $3,000. The firm was to be entitled to the fee regardless of the outcome of the litigation or the timing of its resolution. The firm was entitled to the entire amount of the flat fee "regardless of any change of counsel." The court noted that "…courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable and fully known and understood by their clients." It noted that a client always retains the unfettered right to terminate the attorney at any time with or without cause, and if prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover (only) the reasonable value of services rendered in quantum meruit. Moreover, a client has an affirmative cause of action for rescission of an invalid retainer agreement and restitution or recoupment of legal fees paid in excess of the reasonable amount due to the attorney for services actually rendered. The court held that the retainer agreement in this case constituted a non-refundable retainer, thus unenforceable whether or not the services contracted for were completed and relegated the firm to quantum meruit.

In the *Matter of Jack Fisher*, the attorney was asked by a client to aid in the recovery of insurance proceeds on the life of her husband who she was in the process of divorcing. The policy had lapsed for failure to pay premiums. Since the client was not pleased with paying hourly rates she requested and willingly entered into a contingency fee agreement with counsel. Notwithstanding that the policy had "legally lapsed" the proceeds were recovered, the check endorsed by the client, deposited into the attorney's escrow account and distribution made in the amount of 1/3 to the lawyer and 2/3 to the client in accordance with the agreement.

Two years after the distribution of the funds, the client after consultation with her accountant (who was also an attorney) concluded that the fee was excessive and brought action to recover the fee, interest, punitive damages and reimbursement for her own legal fees incurred in bringing the law suit. In addition, a grievance was filed against the attorney for, among other things, violation of then DR 2-106. Subsequent to the settlement of the lawsuit in which the attorney repaid the legal fees, the interest and the attorney's fees, the grievance committee charged *Fisher* with a series of violations including charging an excessive fee. The complainant acknowledged that upon the death of her husband (and immediately after finding the invoice for the life insurance premium) she contacted her matrimonial attorney and demanded that the unused portion of the hourly rate fee be returned to her. The hearing officer sustained the charge which alleged a violation of DR 2-106 (now Rule 1.5), and the court suspended *Fisher* for one year.

The accountant/attorney who originally advised the complainant that the fee was excessive, and referred the matter to litigation counsel to commence the action received a "forwarding fee" of one third of the total legal fee collected. He did not have a retainer agreement or a written statement assuming joint liability.

There is hope. The Court of Appeals has held that "In general, agreements entered into between competent adults, where there is no deception or overreaching in their making, should be enforced as written. Accordingly, the power to invalidate fee agreements with hindsight should be exercised only with great caution. It is not unconscionable for an attorney to recover much more than he or she could possibly have earned at an hourly rate. Indeed, the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing. If courts become too preoccupied with the ratio of fees to hours, contingency fee lawyers may run up hours just to justify their fees, or may lose interest in getting the largest possible recoveries for their clients" where does this quote begin? (*Lawrence v. Miller* 11 NY 3d 588 affirming 48 AD 3d 1).

Retainer agreements should be clear and contemporaneous time records kept even in contingency fee matters.

Note: John P. Bracken, of Bracken Margolin Besunder, LLP, Islandia, New York, is Past President of the Suffolk County Bar Association, the New York State Bar Association and the Suffolk County Criminal Bar Association. Mr. Bracken is a Fellow and former Director of the New York State Bar Foundation, a Fellow of the American Bar Foundation, a Fellow of the American College of Trial Lawyers and is certified as a Civil Trial Advocate by the National Board of Trial Advocacy.

Note: Harvey B. Besunder was admitted to the practice of law in 1967, and from 1991-2010 had had his own law practice in Suffolk County. In September 2010 he merged his firm with that of Bracken & Margolin, to form Bracken Margolin Besunder. From 1993-1994, Mr. Besunder served as President of the Suffolk County Bar Association, and has been a member and/or Chair of that Association's Condemnation Committee, Grievance Committee, Judiciary Committee, and Bench-Bar Committee. Mr. Besunder is also an active member of the New York State Bar Association and has lectured extensively on behalf of the Suffolk Academy of Law.

A View From the Trenches

Divorce Italian Style

By Edwin Miller

Edwin Miller

(This is a true story. The judge's name has been withheld out of respect.)

The Banns were posted

She was 65 and widowed. He was 69 and a widower. The year was 1967. Both had emigrated from small towns south of Naples with their parents when they were in their late teens. Both had heavy accents. They did not know each other in Italy. They were introduced by a friend of her family. They both lived in Suffolk County. She went to view his house and she said "it looked like the end of the world." They decided to get married anyway. They contacted their parish priests in Italy and had the wedding banns posted in their churches in their home towns. They got married and moved into his house.

A marriage not made in heaven

From the very beginning of the marriage there was a problem. He was impotent. This was the result of a prostate operation and diabetes. He did not tell her this before the marriage. He claimed he did but she swore otherwise. However, she said that he wanted her to wear silk gloves and to do "all sorts of things." She said that if she wanted to do "those things" she could have been a millionaire a long time ago! In addition, when she became angry at him she would grab his newspaper, roll it up, and hit him over the head with it! When asked about his response, she said, "Italian men don't like to get hit over the head with newspapers!" As the fighting escalated, he kept ordering her to get out of his house. She finally left and he promptly had his lawyer serve her with a complaint for a separation based on abandonment!

The litigation

She counterclaimed for a divorce or annulment. She preferred the annulment. In 1967 when a matrimonial action was commenced, the parties had to appear before an appointed Matrimonial Conciliator who had to certify that the marriage could not be saved in order for the action to continue. The parties passed the test with flying colors.

The trial

The case came on for trial. At that time the Suffolk matrimonial cases were all tried in Nassau County. However, the judge in this case was from Suffolk County. Before the trial started, however, she remarked on her husband's clothes. She said he purposely dressed like a rag picker so that the judge would think him too poor to pay any alimony. The parties were only married for two years. The case was tried in the afternoon.

We had secured a court order for a urologist to examine the husband with regard to his impotency. The doctor examined him, found impotency, and was the first witness at the trial. He was not cross-examined. Our client then testified as to both cruel and inhuman treatment and the undisclosed impotency. During the testimony, she was telling the judge about her husband calling her a prostitute and all of the priests and lawyers crooks, and she noticed that the judge had closed his eyes and was apparently dozing off. She then screamed that "he said the judges are all crooks too!" This woke the judge up and he gave her a funny look. The defendant testified and tried to convince the judge that he had told her about his impotency before the marriage. The judge was unconvinced. He granted the wife an annulment with alimony of $25.00 per week.

Epilogue

After the annulment was granted, we left the courtroom and I questioned my client about her testimony that "the judges were all crooks too" since she had never told me this during our preparation for trial. She winked at me and said, "I had to do something to wake him up!"

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

WE WELCOME NEW CONTRIBUTORS TO *THE SUFFOLK LAWYER*

The Suffolk Lawyer would like to welcome the following SCBA members as new Frequent Contributors to our publication:

Patrick McCormick
Lance R. Pomerantz

and our law school student contributor:

Maria Veronica Barducci

We thank you for your efforts and encourage all SCBA members to commit to writing for *The Suffolk Lawyer*. If interested contact editor Laura Lane at scbanews@optonline.net.

LAND TITLE LAW

Evidentiary Problems in Adverse Possession

By Lance R. Pomerantz

Two Appellate Division decisions dealing with evidentiary problems in adverse possession cases were handed down recently. While they dispose of the controversies presented, the opinions raise additional questions of interest to land title practitioners.

Shilkoff v. Longhitano

In *Shilkoff v. Longhitano*[1] the trial court denied plaintiffs' motion for summary judgment awarding them title by adverse possession. In order to meet the "usual cultivation or improvement" requirement of former RPAPL §522, the plaintiffs claimed that their predecessor had planted a row of arborvitae in the disputed area. The trial judge held that an affidavit submitted by the defendant that *her* predecessor in title had planted them raised a triable issue of fact.

The Appellate Division found that the affidavit constituted inadmissible hearsay. Defendant had only purchased her property in 2007 and she failed to indicate whether she had personal knowledge of the original planting or subsequent cultivation. Although the decision does not detail plaintiffs' proofs, the Second Department found that they established all the requirements for adverse possession. The case was reversed and remitted to the trial court for entry of judgment awarding title.

Comment

The case was decided under the law as it stood prior to the 2008 amendments to the adverse possession statutes.[2] If the new statutes controlled, the plaintiffs' planting activity in *Shilkoff* might not pass muster under current RPAPL §543, which deems "hedges, plantings [and] shrubbery ... to be permissive and non-adverse."

Wilcox v. McLean

The second case, Wilcox v. McLean,[3] determined that the plaintiffs failed to establish a claim of adverse possession.

The description of defendant's lakefront parcel extends to the high water line of Lamoka Lake, but the rights conveyed in his deed extend to the low water line, subject to the rights of other owners to launch and dock boats, and to swim in the lake.

Lance R. Pomerantz

Each of plaintiffs' deeds grant a right to use a particular dock space located along the shore, but lack a precise description of each dock space. Thus, they don't specify whether the space extends above the high water line. Other than stating that the plaintiffs have a "permanent right to use said dock space," the uses to which the dock space may be put are also not specified. The deeds also grant non-exclusive rights-of-way "to the east shore of Lamoka Lake for the purpose of access to said dock space."

So the arrangement seems straightforward - defendant owns a parcel that is burdened with two "easements" in favor of plaintiffs. One "easement" is the right to use the dock space and the other is a right of way to get to the dock space. Moreover, the right of way easement ends where the dock space easement begins.

Plaintiffs claimed title to part of the adjacent upland by adverse possession. They contended that the claimed area is located "between the dock space and the common right-of-way," but the court held that the area "is necessarily located within the common right-of-way." However you slice it, the court and the plaintiffs agreed that the area was not within the indeterminate "dock space."

Plaintiffs alleged that they had "mowed, cleaned, repaired, excavated, and repaved the parcel, as well as picnicked and congregated there, and that each summer they placed seasonal items thereon such as lawn furniture, a portable storage shed, and a temporary deck."

After reiterating that the claimed area was not within the dock space deeded to the plaintiffs, the court then held that "permission to use the area immediately adjacent to [the dock space] in a seasonally appropriate manner that does not conflict with the record owner's rights…may be inferred from [the] grants." Further, permission "can be inferred from [plaintiffs'] affidavit testimony that their use of the parcel was never challenged and that an amicable relationship prevailed among the owners before defendant acquired his property." As a result, the claimed activities were insufficient to establish the "hostility" that is elemental to adverse possession. The court also explained that the plaintiffs never engaged in activity that "indicates that they assumed a hostile attitude toward the record owner's rights," such as ejecting trespassers, marking boundaries, landscaping, erecting permanent structures or making any other "changes in the parcel that would have signaled continuous occupation beyond the summer season."

Comment

After parsing the opinion, *Wilcox* seems to be saying that activities that are reasonably contemplated within the dock space (by the grant of the dock space itself) are also "permitted" within the area of the right of way for the "purpose of access to said dock space." It reaches this result by construing both grants together, *as a matter of law*. The question of permissive use, however, is one of *fact*.

The decision affirmed summary judgment for the *defendant*. When it comes to fact questions on such a motion, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties.[4]

Plaintiffs seemed to be relying on the established principle that once all of the other required elements of adverse possession are shown, hostility will be presumed. While there is a "permissive use" exception to this principle, the burden is on the defendant to come forward with evidence showing permission. Once that showing is made, the burden shifts back to the plaintiff to produce evidence of hostile use.[5] There is nothing in the *Wilcox* opinion to indicate that the *defendant* offered any proof of permission. Indeed, the defendant's posture indicates that he believed the activities to be in violation of the original grant!

Even if, as appears here, the court *sua sponte* thought that an inference of permissive use could be drawn from the motion papers, summary judgment should have been denied and the case remitted to the trial court for findings of fact on the issue.[6]

Typically, "permission" is shown through explicit verbal or physical acts ("It's ok with me if you put up a fence") or an implicit relationship or accommodating posture, like family-ties or long-term cooperation between the parties.[7] In either case, it's characterized by a recognition of the owner's underlying right to prohibit the activity and his decision not to do so. In addition, the grant of "permission" that will defeat a presumption of hostility can be revoked at the pleasure of the owner. If the right to engage in the activity is granted by a legal instrument, the burdened owner lacks this "right to prohibit" and "permission" is not needed. The *Wilcox* opinion blurs this distinction.

A frustrating aspect of this case is that the court accepted that the disputed area was outside of the "dock space" description. As a result, it essentially construed the plaintiffs' seasonal activities to be "for the purpose of access to said dock space" over the right of way area. This construction seems to be at odds with the language of the grant and it would have been helpful to understand how the result was obtained. Unfortunately, for the practicing bar, clarification will have to come at a later date.

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

1. 2011 NY Slip Op 09305 (2nd Dept., December 20, 2011).
2. L 2008, ch 269, § 5. See *Hogan v. Kelly*, 86 AD3d 590 (2nd Dept., 2011).
3. 2011 NY Slip Op 09230 (3rd Dept., December 22, 2011).
4. *Nicklas v.Tedlen Realty Corp., et al.,* 759 N.Y.S.2d 171 (2nd Dept. 2003).
5. See e.g., *Chaner v. Calarco*, 77 AD3d 1217 (3rd Dept., 2010), *Koudellou v. Sakalis*, 29 AD3d 640 (2nd Dept. 2006).
6. *Harrington, Trustee, et al, v. Estate of Crouse* 1 A.D.3d 778 (3rd Dept. 2003); *Levy v. Morgan,* 31 A.D.3d 857 (3rd Dept., 2006).
7. *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,* 192 AD2d 501, 503 (2nd Dept., 1993).

PRACTICE MANAGEMENT

The Shoemakers' Children

Lawyers need to plan too

By Alison Arden Besunder

Scene 1: The usual Monday. Except this - You receive a frantic call from a solo practitioner's paralegal. The attorney was in a terrible skiing accident over the weekend and, while not fatal, she is unconscious and may be incapacitated and out-of-commission – and communication – for a prolonged period of time. The paralegal tells you that her boss said (in passing) that anyone should call you "in case of emergency." This, naturally, is the first you've heard of it.

Scene 2: Now imagine that *you* are the attorney who suffers an unexpected tragedy. What would happen to your clients and ongoing matters? Who would know how to pick up where you left off? Could, or should, the firm continue without you? What would happen to all that unbilled time being carried around nowhere other than your head, or your "conflict system" stored in that same corner of your brain? Would they be able to in light of confidentiality and privacy restrictions? What plans do you have in place to direct a point person in your absence, whether because of disability or death?

Alison Besunder

As lawyers, we frequently devote our time and energies to help our clients prepare for worst-case scenarios but neglect to take care of planning for ourselves. When a lawyer dies, whether she or he is in a law firm partnership or a solo practitioner, the failure to plan can add multiple layers of chaos to an already emotional and complicated situation. It can also cause an unwitting ethical violation or, in the case of a missed deadline or statute of limitations, a claim against your estate or posthumous malpractice claim. This article addresses some considerations for all practitioners, but particularly solos, to address. (Assuming I myself plan correctly), future articles will address formulating a business "disaster" interruption plan; how to implement succession planning in a law firm after a partner dies or is disabled; and considerations for the lawyer who assumes responsibility for the client files of a deceased or disabled lawyer.

ABA Opinion 92-369 provides:

> *To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.*

Here are some fundamental mechanisms that will ease the burden on anyone undertaking to oversee the management of client files of a deceased or disabled lawyer:

Organize Your Contact Database

Solos should ensure that their contacts are up-to-date and properly categorized or "tagged" as clients, adversary attorneys, adversary parties, or other categories relevant to the particular practice. Basic software like Outlook or attorney-specific software like Abacus, Time Matters, or Amicus can assist in this process. Other applications like Plaxo or LinkedIn can help keep that contact information up to date. This allows anyone to quickly generate a list of people to be contacted by email or phone. Everyone should enter a separate contact for "ICE – In Case of

(Continued on page 22)

LANDLORD/TENANT

Equity Relieves Tenant of Failure to Timely Exercise Option to Renew

By Patrick McCormick

It has been recognized that an option to renew a lease is a valuable right.[1] The Appellate Division, First Department, in *135 East 57th Street v. Daffy's Inc.,*[2] in which the tenant failed to give timely notice of its election to exercise its option to renew its lease, refused to enforce the lease holding that strict enforcement would result in forfeiture. The court came to this conclusion even though the tenant had not produced evidence that it made substantial improvements to the leased premises. The court determined that the tenant had "garnered substantial goodwill in its approximately 15 years at the location, which goodwill was a valuable asset that would be damaged by its ouster from the premises." The Appellate Division found that this goodwill was an asset sufficient to warrant equitable relief. The facts of this case and the court's application of the relevant law to the facts provides significant guidance to practitioners who find themselves representing tenants who may be at risk of losing valuable renewal rights.

The facts in *Daffy's Inc.* are straight forward. The lease term commenced November 7, 1994 and expired January 31, 2011. The lease contained two five-year renewal terms. The first renewal was to be exercised "no later than January 31, 2010." Due to an internal bookkeeping error, tenant did not timely give the requisite notice—the notice was given by letter, by e-mail and fax on February 4, 2010, although the letter was dated January 30, 2010. The late notice was rejected by the landlord by letter dated February 5, 2010, and noted that the tenant's letter was "fraudulently backdated" and not "delivered in the manner prescribed by the lease." The tenant sent another "renewal letter in the manner prescribed by the lease on February 9, 2010." Landlord then commenced a declaratory judgment action seeking a declaration that the tenant had not timely renewed the lease, that the option was terminated and that the lease would expire January 31, 2011. The trial court, after a nonjury trial, found the tenant entitled to equitable relief and excused the late renewal notice.


Patrick McCormick

Citing to *Vitarelli v. Excel Automotive Tech. Ctr., Inc.,*[3] the Appellate Division recognized that equity will relieve a tenant from its failure timely to exercise a renewal option if: "(1) the tenant in good faith made substantial improvements to the premises and would otherwise suffer a forfeiture, (2) the tenant's delay was the result of excusable default, and (3) the landlord was not prejudiced by the delay." The Appellate Division quickly found that the landlord was not prejudiced by the late notice and that the delay was excusable and focused its attention on the "forfeiture" element.

Referencing the Court of Appeals decision in *J.N.A. Realty Corp. v. Cross Bay Chelsea,*[4] which held that "the loss of an option does not ordinarily result in the forfeiture of any vested rights" and therefore equity generally will not save a tenant that fails timely to exercise an option, and the fact that the tenant in this case did not make substantial improvements to the premises, the Appellate Division was forced to find another ground upon which to base equitable relief. Goodwill was found to be that base.

At the trial, the tenant established that the leased premises "had become highly successful and popular, that the company had searched for alternative space into which to relocate the store and had not identified any prospects, and that even if it found a viable site, it would require the better part of a year to open the new store." On these facts, the Appellate Division found that "given the loss of goodwill that would accompany the loss of the store, enforcing the lease's time restraint for renewal would result in a forfeiture that warranted the court's consideration of whether equity ought to intervene." In deciding in the affirmative, the Appellate Division considered the fact that the store closing would cause most of the store's 114 employees to lose their jobs and benefits, no alternate store location was available, that the tenant made an inadvertent mistake in failing to timely send the renewal notice, that this store was a top producing location and that landlord would not be prejudiced.

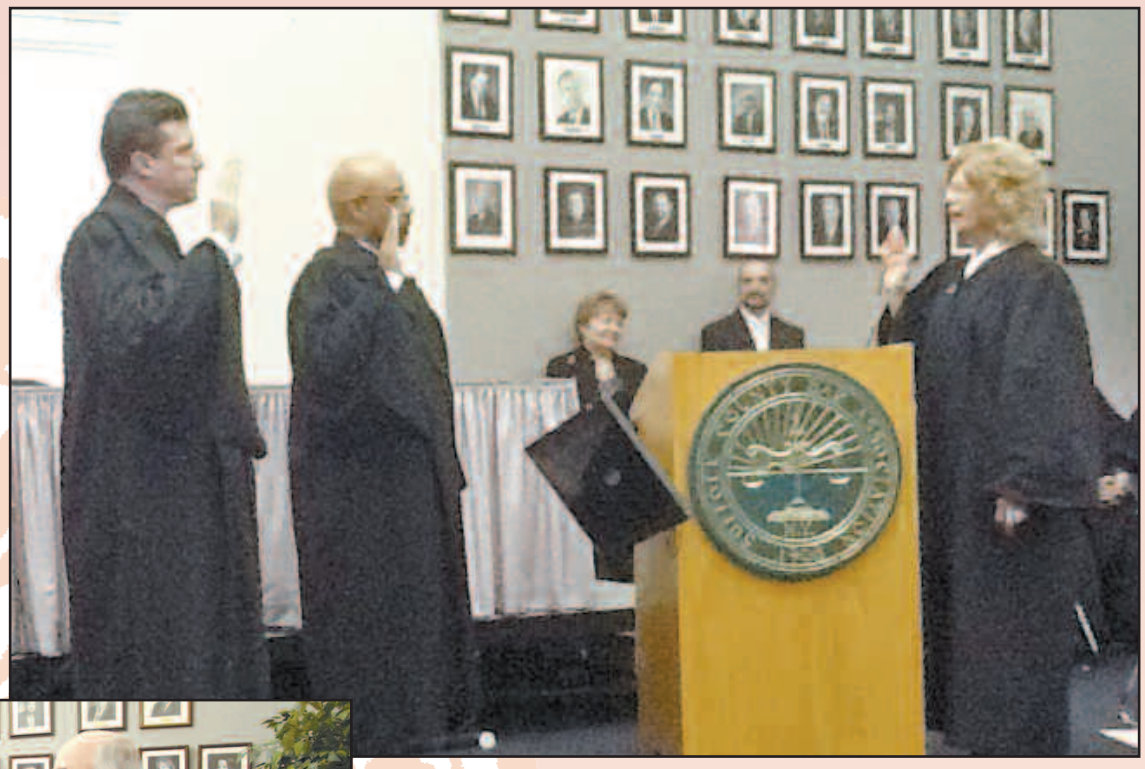
The court concluded that on these facts equity would intervene to excuse the tenant's late notice and affirmed the trial court's judgment declaring that the late notice of lease renewal be excused "on equitable grounds."

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. See e.g. Rizzo v. Morrison Motors Inc, 29 AD2d 912, 289 N.Y.S.2d 903 (4th Dep't 1988)
2. 91 AD3d 1 (1st Dep't 2011)
3. 25 AD3d 691, 811 N.Y.S.2d 689 (2d Dep't 2006)
4. 42 N.Y.2d 392, 397 N.Y.S.2d 958 (1977)

Judicial Swearing-In & Robing Ceremony – District Court

Photo by Marcus Robinson



"Courting Justice" at the SCBA

Photos by Laura Lane

FREEZE FRAME

Photo courtesy Touro Law Center

The Touro team at the 37th Annual Western New England University Law School Invitational Basketball Tournament. The team is currently participating in the New York City Lawyer's League in the Law School division. Top row left to right: Maks Reznik, Mike Pernlisiglio, Patrick Fedun, Anthony Luckie, Kevin Etzel. Bottom Row Left to right: Josh Friedman, Walter Newsome, Seth Schlessel.

FREEZE FRAME

Photo by Annamarie Donovan

Congratulations to SCBA member Annnamarie Donovan and her niece Danielle Burns who were joined by their family at Danielle's admission to the Bar at the Appellate Division, Second Dept., March 7, 2012.

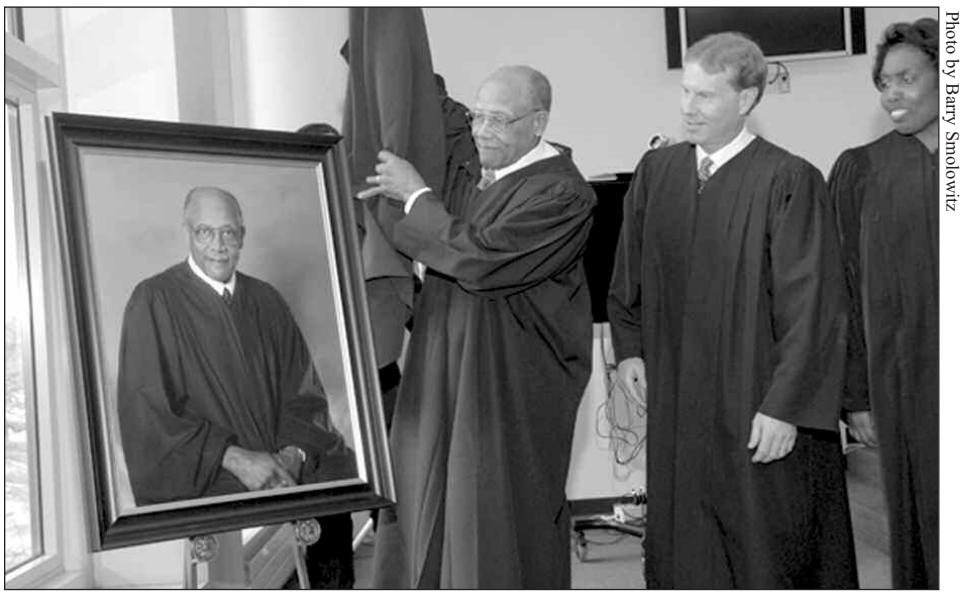


Photo by Barry Smolowitz

Former Supreme Court Justice Marquette L. Floyd unveils his portrait with District Administrative Judge C. Randall Hinrichs and District Court Judge Toni Bean at his side.

Honoring Justice Marquette L. Floyd

The annual Black History Month celebration, postponed in February, was held on Friday, March 9 in the Central Jury Room at the John P. Cohalan Court Complex and included the unveiling of former Supreme Court Justice Marquette L. Floyd's portrait. The event was very well attended by justices, judges, attorneys, friends and family and was a true testament to the great character, wonderful temperament and splendid reputation for integrity, honesty and loyalty that Judge Floyd possesses.

Justice Floyd's accomplishments are many. He served as a District Court Judge for 19 years, as a Supreme Court Justice from 1989 until his retirement in 2002. Justice Floyd also served as Presiding Justice of the Appellate Term for the 10th Judicial District from 2001-2002. He was a member of the SCBA's Board of Directors and was appointed to New York State Bar Association's House of Delegates by the Board and served with distinction. His many contributions to his community are chronicled in *Who's Who in Black America.* He remains committed to the advancement of people of color.

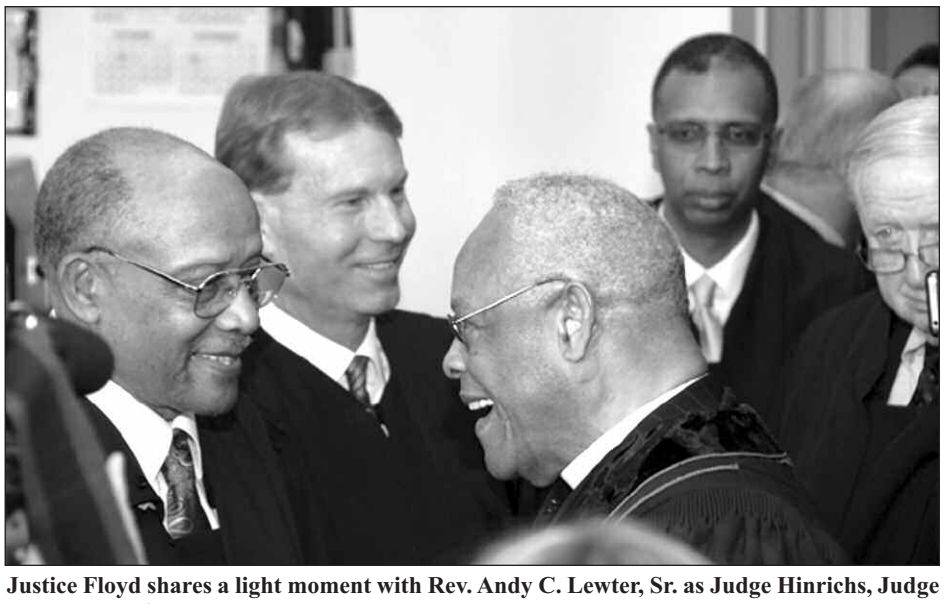
Special thanks go to our NYS Chief Judge the Honorable A. Gail Prudenti who attended the ceremony and gave a very special tribute to Justice Floyd, District Administrative Judge C. Randall Hinrichs, Vincent J. Berger who spearheaded the arrangements for Judge Floyd's portrait, and to District Court Judge Toni Bean who produces a Black History Month program every year for all of us to attend and enjoy. We would also like to thank Acting Supreme Court Justice Stephen M. Behar for giving the Invocation and to Rev. Andy C. Lewter, Sr. for the Benediction.

I've had the privilege of knowing Justice Floyd for many years. His good judgment, patience and congeniality made him invaluable both to his colleagues and the citizens he represented. His selfless devotion to the best interests of the legal profession has garnered him the respect and affection of the bench and bar seldom equaled.

- Sarah Jane LaCova
Executive Director

Justice Floyd and Vincent J. Berger after the unveiling.

Former Supreme Court Justice Marquette L. Floyd.



Justice Floyd shares a light moment with Rev. Andy C. Lewter, Sr. as Judge Hinrichs, Judge Ford and Retired Judge Doyle look on.

REAL PROPERTY

Agreeing to Disagree

By Andrew Lieb and Ivan Young

As the co-chairs of the Real Property Committee, we had met to set an agenda for the committee into the New Year. At one of these meetings, the co-chairs began a heated debate about the pros and cons of short sales and agreed to share our positions with the local bar. As you can tell, we have agreed to disagree, but we ask you to join our debate and consider your own position when providing legal services to distressed homeowners.

Short Sales – A Great Option

By Andrew Lieb

Andrew Lieb

A short sale benefits the homeowner

If you picked up your telephone and your attorney said to you that he just got you $200,000 in a settlement, you would jump up and down thinking the world was just right. Yet, when a short sale attorney calls the same client to say that the mortgagee/bank has waived their potential deficiency judgment of $200,000 and will accept the proceeds in full satisfaction of the note, everyone acts like the homeowner got nothing. This is simply not true. The homeowner got the benefit of not owing $200,000 and this is a huge windfall. Yes, the homeowner is not walking away with a wad of cash in his pocket, but he is avoiding a judgment that can haunt him for the next 20 years. Moreover, if the homeowner is utilizing the Home Affordability Foreclosure Alternatives Program, they will also receive $3,000 in relocation assistance. So, this homeowner who has not paid their mortgage note, is in default and potentially owes hundreds of thousands of dollars is being paid to quietly leave. This does not sound so bad.

A cash for keys scenario, called a Deed-in-Lieu may also be a good option, but lenders are typically looking for the distressed homeowner to attempt a short sale before going down this route. It's simple. A Deed-in-Lieu requires a lender to take a home, than to sell that recently acquired home; whereas a short sale is a 1 step process of just selling the home without ever taking a deed with all of the transaction costs inherent therein. Therefore, lenders prefer short sales. Further, the application package is substantially similar for both types of workouts and therefore a good short sale attorney will have the requisite documentation prepared for either option that the lender prefers in each specific tailored situation. The key to working with distressed homeowners is not being a short sale attorney, a Deed-in-Lieu attorney or a Bankruptcy attorney, but instead serving as a general foreclosure defense attorney who uses all tools in his arsenal in order to avoid a deficiency judgment being placed upon your client.

Being in default hurts your credit

We are not dealing with credit worthy clients when we are representing distressed homeowners and credit should be the least of their worries. Yet, it must be specified that a proper short sale includes a waiver of a deficiency judgment and therefore a judgment remaining on a client's credit report is a misnomer. Moreover, short sales, typically entitled "settled for less" on a credit report usually result in a FICO score decline of approximately 100 points compared to a 200 point decline for a foreclosure. To be clear, a foreclosure generally remains on a

(Continued on page 25)

Short Sales – Not Always Best Option

By Ivan Young

Ivan Young

In today's troubling economic climate, more and more homeowner's find themselves in a distressed financial situation either delinquent in paying their mortgage or are paying a mortgage on a house that is "underwater" (i.e., the outstanding mortgage exceeds the current market value of the property). Although there are many options for distressed homeowner's (i.e., loan modification, foreclosure defense, forbearance and/or repayment agreement, deed-in-lieu, partial claim, short refinance, and cash-for-keys), one of the most widely known and heavily advertised option is the "short sale."

Generally speaking, a short sale is when the bank or an investor agrees to the sale of a real estate property for an amount less than the full amount of the outstanding balance that is owed on the property. The difference between the selling price of the property and the full amount of the outstanding balance owed on the same to the bank or the investor is known as a deficiency.[1] Distressed homeowners are usually solicited by their bank, investor, real estate agents, and general information websites which represents that a short sale will "cure" their distressed situation. This is simply not true.

Listed below are four specific reasons why a short sale almost always does NOT benefit a distressed homeowner:

A short sale benefits many people other than the distressed homeowner

A short sale benefits the mortgage lender, the investor, the realtor and the purchaser of the property greatly. In a short sale, the mortgage lender doesn't have to foreclose (and pay for the foreclosure related fees, property taxes, homeowner's insurance, maintenance fees, eviction costs, REO broker commission fees nor wait the 24-60 months it may take to actually foreclose). The realtor selling the property will get a commission from the sale, usually around 6 percent of the sale price. Lastly, the purchaser usually gets a move-in ready home for under market value. In contrast, the distressed homeowner, who is the only party that receives no monetary benefit at the closing, must leave their home, disrupting their family's life particularly with children that must change schools, and begin the insurmountable task of finding a rental with no cash in their pocket and terrible credit.

If the distressed homeowner were not to do a short sale, they could save their money for as many months as it takes to foreclose on them, then usually negotiate with the lender to pay them a few thousand dollars for cash-for-keys to leave the property without destroying it nor forcing the lender to perform an eviction proceeding.

(Continued on page 27)

COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Reinstatements Granted

The application by the following attorneys for reinstatement was granted:

Carmine DeSantis
Andrew G. Maloney
Kathleen Paolo

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Steven Elliot Cohen: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee regarding misappropriation of client funds. Respondent acknowledged his inability to successfully defend himself on the merits against any charges predicated upon his misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Suspended:

Timothy F. Daly: The Grievance Committee moved to suspend the respondent from the practice of law, and for authorization to institute and prosecute a disciplinary proceeding against him. The court found that the respondent was guilty of professional conduct based upon his failure to cooperate with the Grievance Committee, as well as other evidence of misconduct involving, *inter alia,* neglect of client matters. The respondent failed to oppose the motion. Accordingly, based upon the uncontroverted record, the respondent was suspended from the practice of law and the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him.


Ilene S. Cooper

Allen S. Gold: The Grievance Committee moved to suspend the respondent from the practice of law, and for authorization to institute and prosecute a disciplinary proceeding against him. The court found that the respondent was guilty of professional conduct based upon his failure to cooperate with the Grievance Committee, as well as other evidence of misconduct involving, *inter alia,* neglect of client matters, and purported misuse of client funds. The respondent failed to oppose the motion. Accordingly, based upon the uncontroverted record, the respondent was suspended from the practice of law and the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him.

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 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.

JOB OPPORTUNITY

The Suffolk County Bar Association is seeking a part time Public Relations professional to work 2-2 ½ days per week to aid the Association in getting the word out to current members, lawyers who are not members, and the community at large about the activities, programs, clinics and services offered by the Association, as well as the benefits of membership. We are looking for an innovative professional who can provide new ideas and methods for educating the local community about the good work done by the SCBA and its members on a daily basis.

The ideal candidate for this position would have local media connections in the New York metro area, but particularly on Long Island, including connections to local publishers in Suffolk County. These might include the Long Island Business News, Newsday, the New York Law Journal and local weeklies. The ideal candidate would also have experience doing public relations work for lawyers and/or other bar associations and strong experience using social media to promote law firm or law association activities. The candidate must be willing to attend bar events and meetings. Interested candidates should contact Jane LaCova, Executive Director of the SCBA at (631) 234-5511, ext. 231 or jane@scba.org to request a complete job description and submit their resume and salary requirements for consideration.

Support One of Our Own Serving in Afghanistan

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

Please send your cards and letters to Bethany at:

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

Bethany Green worked in the domestic violence bureau.

FUTURE LAWYER'S FORUM

Speed Dating for Future Lawyers

By Maria Veronica Barducci

Maria Veronica Barducci

As if mastering every course in law school was not enough, a new added challenge for law school students is mastering the art of finding a job. With massive amounts of resumes being submitted for a single position, competition is extremely high for both summer internships and post-graduation employment. Due to this overload, students are left with a hiring process that impedes them from showing the employer who they really are as a person.

The initial obstacle to mastering the art of finding a job is conquering the challenge of being able to sell oneself via the dreaded single-sided piece of paper, also known as the resume. With the resume still being a mystery of life, what exactly do I write on it? How do I sum up a five-year job in two lines? Do I include that I am proficient in Word or is that implied nowadays?

The resume has become a hurdle because the slightest mistake can make a big difference in how far you get in the hiring process. For example, two people may have the same work experience, but if one of the candidates uses better descriptive words and is more eloquent in describing their position, they can gain an advantage over the other. Consequently, every word must be strategically placed so that the least amount of information portrays the candidate in the best way possible.

The next hurdle in mastering the art of finding a job is the interview process. Interviews today are like speed dating sessions, where you only have a limited amount of time to leave an impression before the interviewer goes on to the next person. Therefore, like a first date, you debate about what to wear, what to say, what not to say, and how to speak with confidence but not with too much confidence - you don't want to come off as arrogant. And after the jitters, the sweaty palms and overt thinking everything, all that really matters is whether you made a connection with your interviewer. This becomes an obstacle because as students we are not used to having only five to ten minutes to make that connection and realistically there is only so much that you can learn about someone within such a short span of time. Even though it is understandable that an interviewer does not have all day to get to know you, the real problem is that between the resume and a five-minute interview it is almost impossible to show someone who you really and so the job search becomes even more exhausting because everything is so impersonal.

And so as students, we go through the process by trial and error and we progressively learn that interviews are 50 percent skill and 50 percent luck; and as we give up our personal lives and dedicate countless hours to mastering law school, we hope that we leave at least one lasting impression so that we get a call back for a second date.

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

Television's Golden Age

The gold was in the film

By William E. McSweeney

William E McSweeney

"Live" televised productions were good during the '50s. With my mother, I, a pre-teen, regularly watched The Alcoa Hour, Kraft Television Theatre, The Philco Television Playhouse, Playhouse 90, and Studio One. "Legitimate" actors did solid work in worthy teleplays—Everett Sloane in Rod Serling's hard-edged "Patterns," Rod Steiger and Betsy Blair in Paddy Chayefsy's heartrending "Marty." And the productions also held variety, surprise: action-star Buster Crabbe gave a moving performance opposite Brandon DeWilde in "A Cowboy for Chris," the outsize Sterling Hayden gave an understated one in William Faulkner's "The Old Man," and comedian Jackie Gleason was grim, cynical—the play's title eludes me, but not Gleason's perfect turn—as a rooming-house boarder who, made suddenly popular among fellow-boarders by his serial winnings on a game show, spitefully "threw" the final game and went home penniless.

I watched these plays and their like. They were good. And there was much talent: Directors John Frankenheimer and Arthur Penn; actors James Dean, Dennis Hopper, and Paul Newman; writers Robert Alan Arthur and Horton Foote—all contributed to worthy teleplays and applied this experience to their later film careers. For them, work in television served as an internship, with the viewers being the beneficiaries of their artistic experiments. One experiment especially successful was the wise casting of screen tough guy (boxer-turned-actor) Jack Palance as the pathetic "Mountain" Rivera in Rod Serling's brutal "Requiem For A Heavyweight."

But before Palance was "Mountain" - before he was Jack Palance, for that matter - he played, as Walter Jack Palance, the central character in Elia Kazan's film, "Panic In The Streets." "Panic" follows Palance, a murderer on the run - a plague-carrier - in his descent into the underworld of New Orleans, his infected path being gingerly tracked by naval health officer Richard Widmark and detective Paul Douglas, uneasy allies, joined in an attempt to capture and quarantine a man before his physical and psychic malignancies can spread.

This was one excellent film, and it was "softly" screened, one of thousands of films similarly screened on television in the very early '50s - when the new medium needed product - without any previewing, without any showcasing, without any other fanfare. You didn't know what film would be telecast on a given afternoon or evening. Which is exactly what formed the excitement for a movie-loving pre-teen who hadn't yet discovered reading - namely, televisions largely unannounced, seemingly inept programming made manifest in its haphazard, catch-as-catch-can screening of films.

The trove I remember from those years was cumulatively rich and eclectic: John Ford's subdued, poetic "The Long Voyage Home" and his hell-for-leather "Stagecoach;" Rene Clair's charming "I Married A Witch," his magical "It Happened Tomorrow," his wicked "And Then There Were None"; Max Ophuls'

affecting "Letter From An Unknown Woman," and his gripping "Caught"; Jean Renoir's austere "The Southerner;" an adaptation of Andre Gide's "*Symphonie Pastorale;*" Gabriel Pascal's adaptations of George Bernard Shaw, "Major Barbara" and "Pygmalion;" the Powell-Pressburger delights, "I Know Where I'm Going" and "Tight Little Island."

My favorite films however, were the unrelentingly driven "caper" films; their close allies, the ugly "nest-of-vipers" films (their characters' corruption so complete that only their inevitable self-triggered implosion would serve as fit conclusion to their lives); and the breathless, then-novel, police procedurals. All three of these genres would ultimately appear under one rubric, to be collectively styled and celebrated as *film noir*. *Noir* was the fusion of its somber theme - a chaotic world, marked by betrayal and brutality - with its singular *mise-en-scene*—central within the array of all visual elements was a signature low-key, high-contrast lighting style that created an atmosphere of despair. Its main characters were the weak and dim-witted, who were gobbled up, for the nourishment they provided, by the shrewd and predatory. *Noir's* leading practitioners were those directors largely drawn from that benign Berlin gang of the 30's, who had escaped to America, in flight from that other Berlin gang, the malignant one. All of these directors held a cynical view of human nature, formed by their experience in Germany, a view which found expression in and permeated their work. Principal among these men were Fritz Lang ("The Big Heat"); Robert Siodmak ("The Killers"); Edgar Ulmer ("Detour"); Billy

(Continued on page 25)

SCBA Courts Justice

By Laura Lane

The Suffolk County Bar Association and the Suffolk County Academy of Law hosted, with the help of District Court Judge William Ford, a presentation by Dr. Ruth B. Cowan of her film "Courting Justice." The documentary film shown at the bar that evening documents the evolving role of the judiciary in South Africa's democracy from the perspective of six female judges.

Dr. Cowan, who is the Creator and Executive Producer of the film, said she believed it was important for attorneys to see "Courting Justice."

"I believe it is important to reach out to this audience, one that has receptivity to the legal aspects of the film," she said. "Many of the experiences of the judges were universal with themes that go beyond the experience of apartheid in Africa. This film is about the concept of justice, that sense of what we are all responsible for."

"Courting Justice," filmed from 2007 to 2009, delves into South Africa's transformation to democracy. The female judges reflect the changes that have occurred in South Africa in regards to race and gender since the country changed over to a human-rights based constitution where there has been an establishment of an independent judiciary to guard those rights.

Judge Ford said he believed SCBA members would find the film fascinating and was grateful it was shown to association members.

"One reason why I wanted to have the film shown at the SCBA was because when I viewed it I was genuinely touched," he said. "What the judges experience in South Africa resonated so strongly with me as a new judge because I was now looking at the experiences of victims and defendants in criminal court in a way that I hadn't as a lawyer. "

The 1994 post apartheid Constitution in South Africa guarantees dignity, human rights, justice and equality. "Courting Justice" provides a compelling opportunity to see the challenges, hopes, and unyielding determination experienced by those entrusted in making the new Constitution a reality – the indomitable women judges of South Africa.

For further information on "Courting Justice" go to www.courtingjustice.com.

Photo by Laura Lane

Dr. Ruth B. Cowan is joined by, from left, SCBA President Matt Pachman, Judge Derrick Robinson, Judge Richard Horowitz, Judge William Ford and District Administrative Judge C. Randall Hinrichs at the SCBA.

(For additional photos see page 15.)

Note: Laura Lane, an award-winning journalist, has written for The New York Law Journal, Newsday, and several other publications. She is the Editor-in-Chief of The Suffolk Lawyer.

PRACTICE MANAGEMENT

Do's and Don'ts of Email Marketing

By Allison C. Shields

Email newsletters can be a fun and effective way to stay 'top of mind' with clients and strategic alliances, and to create relationships with potential clients, but if done improperly, they can be a waste of time or worse – they can actually damage your reputation.

When embarking on an email newsletter campaign, consider the following:

Purpose

As with all marketing and business development initiatives, you must begin by identifying *why* you have decided to use email marketing and what result you would like to see. Are you starting the newsletter to increase the amount of business you receive from existing clients? Are you hoping to attract new clients? Do you want to educate referral sources? Establish yourself as an expert in your field?

Keep your purpose in mind when creating content for your newsletter and in measuring its success.

Target Audience

Who is your newsletter intended for? Your target audience may include not only current clients and potential clients, but also business colleagues, strategic alliances and former clients. You may choose to direct your email newsletter to a single audience (such as clients you represent only in a particular practice area), develop separate newsletters for separate audiences, or create separate sections that target different audiences.

Your target audience will inform all of the other decisions about your email newsletter.

Logistics

Will you send out your e-newsletter quarterly, monthly, weekly? Whatever the frequency, be consistent so your audience will come to expect (and look forward to) your newsletter. Send your newsletter regularly to stay 'top of mind,' but don't overload your audience.

Experiment with sending your newsletter at different times and/or on different days to see what your audience responds to best.

Do not send your email newsletter by using your regular email account, showing the addresses of everyone on your list, or making it possible to send a 'reply all' message to others on the list.

Use a reputable email service such as Aweber, InfusionSoft, MailChimp or Constant Contact. These services not only send out your emails, keep track of your statistics and open rates and manage your list, but they will also help you by requiring an "unsubscribe" link at the bottom of your messages and they provide other built in precautions to help keep you from running afoul of the spam rules.

Allison C. Shields

Build Your List

Be sure to get permission before sending your newsletter to a new recipient. Don't assume that everyone you meet, or everyone who gives you a business card is 'fair game' to be added to your newsletter list.

Make sure you can demonstrate the value of receiving your newsletter; readers need a reason to want to receive your newsletter. Don't just invite them to subscribe to (yet another) email newsletter – tell them how receiving it will help them. Give prospective subscribers a preview of your content by directing them to articles, blog posts, etc. that might be of interest to them, and then post links in those places to your newsletter sign up page.

Make the sign up process easy. Many people are reluctant to put their telephone number into an email newsletter signup because they think that you are going to call them and solicit them for business. Ask only for information you need.

Provide incentives for people to sign up for your newsletter: offer some content (in the form of a white paper, book, video, checklist, etc.) for free, with the newsletter as the 'added bonus.'

Offer your newsletter when you meet people 'offline' by putting the information about your newsletter on your business card. Follow up offline meetings by emailing and including a link.

Allow readers to forward your newsletter to others, and be sure that there is a link in every edition to your newsletter signups for new readers to subscribe.

Integrate your newsletter with other marketing efforts. Include your contact information and links to your website and other online activities in each edition of your newsletter. Post links to your newsletter content and signup on social media and in your email signature.

Content

How long will your newsletter be? Will it contain one long article, multiple news items, short items of information or a combination? Who will provide the content for the newsletter? Will it be written by one person or multiple people?

Use both HTML and plain text in email, as some people prefer plain text (or read on a mobile device and may not be able to view your HTML content or visual elements).

Make it interesting: include some personality in your newsletter, but don't get too personal. Include information about your successes to build your credibility and create continued confidence in your expertise. Use case studies and or testimonials (where permitted in your jurisdiction) so clients and referral sources understand what you do and for whom.

Make it easy to read: use language clients and potential clients can understand. Don't be boring or use 'legalese' or jargon (unless it is the jargon your clients use and relate to).

Don't send a canned email, especially if your audience is likely to receive more than one e-newsletter from individuals in your industry. Nothing looks worse than receiving the exact same email newsletter from two completely unrelated sources. And canned emails don't showcase the unique culture and personality of your firm, so they are a missed opportunity.

Include a calendar of events so that your audience can see what you are doing and where. This helps to build your credibility, demonstrate your expertise, and cross-market your other services.

Your email newsletter can serve several purposes, but the most important is to provide value to your audience. Sometimes that value comes from highlighting the accomplishments or work of others within your firm (or even outside of your firm). Provide links to articles, information and resources that may be of interest to your audience. Don't make it all about you. Use email marketing to announce upcoming events, new services or general news about you, your firm and your strategic business partners.

Incorporate photos and other graphics to create visual interest and break up text. Use white space liberally.

Be sure to include your contact information and links to your website and other online activities. Check your newsletter for compliance with the CAN-SPAM act, and include an unsubscribe link.

If your newsletter is done well, you'll find that clients and colleagues actually look forward to receiving it, and you'll stay in the forefront of their consciousness when the opportunity to refer work comes along.

Note: Allison C. Shields is the Founder of Legal Ease Consulting, Inc., which offers management, productivity, business development and marketing consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com. Portions of this article have previously appeared on the Legal Ease Blog and the Sociable Lawyer blog.

Share What's Important To You

"Among Us" is for all SCBA members

Sidney Siben's column, "Among Us" has served as an excellent opportunity for members to connect with each other by sharing information that is important to them for many years. And there are many categories to take advantage of each month. Members can announce an office relocation, an addition of a new member to their firm, a professional change of employment, any special occasion like the birth of a child or wedding, or even an upcoming lecture or past presentation a member may be a part of. The opportunities are endless. Take a few moments and share what is important to you with your colleagues at the SCBA. Send your information for "Among Us" to the editor, Laura Lane at scbanews@optonline.net.

TRUSTS & ESTATES

By Ilene Sherwyn Cooper

Summary Judgment Denied on Issue of Loan v. Gift

In a contested discovery proceeding, the executor of the estate sought repayment of alleged loans made by the decedent to her son, amounting to $375,000. The son post-deceased his mother, and the fiduciary of his estate moved for summary judgment dismissing the proceeding on the grounds, *inter alia,* that the proceeding was barred by the statute of limitations and the doctrine of quasi-estoppel, and that the note purportedly evidencing the loans was unenforceable for indefiniteness.

The record revealed that when the decedent's son became seriously ill, she began to assist him in covering his expenses. Substantiation of this assistance was in the form of 117 canceled checks written by the decedent to her son, as well as a promissory demand note, which left the amount payable blank. Although the son's estate maintained that this note was not enforceable, the executor of the decedent's estate argued that he was not seeking to enforce the note, but rather to utilize the instrument as evidence of the decedent's intent, and the son's acknowledgment, that the transfers in issue were loans and not gifts.

In further support of his contention, the executor submitted the affidavit and deposition testimony of the decedent's nephew, an attorney who allegedly prepared the note at the decedent's request, and an affidavit from the decedent's sister, all attesting that the subject transfers were intended to be loans and not gifts.

The court opined that although the affidavits and deposition testimony were excludable at trial as hearsay, they could be considered on a motion for summary judgment if offered together with other admissible evidence to create a question of fact. Within this context, the court concluded that the promissory note and the canceled checks in combination with the hearsay statements of the witnesses were sufficient to deny summary relief to the son's estate.


Ilene S. Cooper

Further, the court concluded that a triable issue of fact existed on the issue of quasi-estoppel. To this extent, the son's estate argued that inasmuch as the executor failed to include the alleged loans as an asset of the decedent's estate on the estate's federal and New York estate tax return, the decedent's estate was estopped from claiming them as such in the proceeding *sub judice.* The court noted that the doctrine of quasi-estoppel, or estoppel against inconsistent positions has been applied in a situation when a party asserts a position in court that is contrary to a position taken on a tax return. Nevertheless, the court held that inasmuch as the executor claimed that he did not know of the alleged loans at the time the tax returns were filed, a question of fact had been presented requiring that summary judgment on this ground be denied.

However, the court granted partial summary judgment on the issue of the statute of limitations holding that the claim for recovery of funds based upon checks predating May 10, 2004, i.e. six years prior to the commencement of the proceeding, was time barred. The court reasoned that for purposes of computing the statute of limitations each transfer by check was a separate loan payable on demand, and that the cause of action thereon accrued as of the date of the check.

***In re Appleby,* NYLJ, Sept. 12, 2011, at 32 (Sur. Ct. New York County) (Sur. Glen).**

Witness' Assertion of Privilege against Self-Incrimination Not a Bar to Deposition

In a miscellaneous proceeding challenging, *inter alia,* the validity of certain trusts and transactions involving the decedent's assets that occurred shortly prior to his death, the petitioner, surviving spouse and limited administrator of the decedent's estate, sought an order directing, *inter alia,* the resumption of the respondent's deposition and compelling him to respond to certain questions.

The record revealed that during the course of the respondent's deposition, he was advised by counsel to refuse to answer certain questions posed to him on the basis of the Fifth Amendment privilege against self-incrimination.

The court noted that a witness' refusal to answer a question during a deposition is governed by 22 NYCRR 221.2, which provides, in pertinent part, that a witness shall respond to all questions at a deposition, and an attorney shall not direct a witness not to answer a question, except as provided in CPLR 3115, or in order to preserve a privilege or right of confidentiality. The rule further provides that if the witness does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

The court found that the privilege against self-incrimination, asserted by the respondent, exists under both the United States Constitution, as well as the New York Constitution. The privilege will apply even when a resulting prosecution is possible, but not definite, and where the party's testimony may provide only a portion of the total proof necessary for prosecution of the witness. Nevertheless, the court opined that the availability of the privilege is not simply based upon a witness' declaration that an answer would be incriminatory. Rather, it is dependent upon the court's assessment of whether the claim is justified.

In opposition to the petitioner's application, respondent's counsel alleged that while the respondent did not fear criminal prosecution as a result of any response to the questions posed, he was concerned that the questions might elicit responses indicating a "scintilla of belief" that his conduct was inappropriate, and thereby jeopardize his right to obtain a liquor license necessary to his business involving the sale of alcoholic beverages.

The court disagreed and refused to extend the privilege against self-incrimination to circumstances in which a party asserting a question posed during a deposition might reflect poorly on his conduct or impact upon his livelihood. Nevertheless, the court was sensitive to the claims of the respondent that a response to a question might result in self-incrimination. Given the uncertainty of the situation, the court concluded that an *in camera* conference was appropriate. Accordingly, the respondent was directed to appear with counsel to testify, *in camera,* regarding the facts underlying his refusal to answer the questions presented by opposing counsel, so that a determination could be made regarding the application of the privilege, and the scope of his continued deposition.

***In re Vescio,* Sept. 27, 2011, File No. 355398/F, Dec. Nos. 27394, 27475 (Sur. Ct. Nassau 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 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.

COMMERCIAL LITIGATION

"Affiliate" Relationship Insufficient to Found Economic Interest Defense

By Leo K. Barnes Jr.

In *Due Pesci v. Sustainable* (New York County Index No. 651879/10), plaintiff Due Pesci Inc. brought suit against defendants Threads for Thought, LLC ("TFT") and Sustainable Apparel Group, LLC ("Sustainable"), asserting, *inter alia*, a cause of action against Sustainable for tortious interference with contract, which Sustainable moved to dismiss pursuant to CPLR § 3211.

According to the decision by New York County Commercial Division Justice Eileen Bransten, defendant TFT designs and distributes clothing apparel lines and Sustainable is an affiliated operating company that conducts the business operations related to the distribution of TFT's apparel lines. The court noted that both TFT and Sustainable were "affiliated entities with common ownership" due to the fact that Jonathan Wiesner ("Wiesner") is a principal and member of both companies. Specifically, Wiesner owned a 50 fifty-percent interest in TFT and was the sole owner of Sustainable.

In October 2008, a contract was entered into between TFT and plaintiff, which is a sales agent for garment manufacturers, that provided that plaintiff would sell TFT's clothing to retail outlets and department stores within a certain exclusive sales territory. In exchange, TFT agreed to pay plaintiff commissions for orders placed through plaintiff's customers for TFT clothing. In addition, the agreement provided for an early termination provision, wherein either party could terminate the agreement "by giving the other party notice in writing of termination within 90 days prior to the end of the current term."


Leo K. Barnes Jr.

The relationship between the parties soured approximately two years later. In the complaint, plaintiff alleged that during July 2010, TFT began selling its apparel within the plaintiff's exclusive territory through Sustainable, rather than through plaintiff, and that such activity was in violation of the agreement between the parties.

In response to the motion to dismiss, Sustainable disputed plaintiff's claim for tortious interference and argued that Sustainable could not have interfered because TFT had effectively terminated the contract between the parties pursuant to the early termination provision. Sustainable specifically referenced an email sent out by Wiesner on August 30, 2010 to plaintiff that stated: "We have been informed by ENK/Coterie that you have told them that you are no longer representing Threads for Thought. While this is a somewhat unusual method to submit your resignation as our sales agent…through a third party, we accept your resignation effective immediately." In addition, Sustainable argued that it was economically justified in interfering with plaintiff's contract with TFT in that both TFT and Sustainable were affiliated entities with common ownership.

The court rejected Sustainable's arguments and denied its motion to dismiss the tortious interference with contract cause of action. In its analysis, the court addressed each element required for a cause of tortious interference with contract, which requires the plaintiff to sufficiently allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of contract without justification, actual breach of the contract, "damages resulting therefrom" (*Due Pesci*, NYLJ 1202542251827 at *5-6, quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 [1996]), and finally that the contract would not have been breached "but for" the defendant's interference.

The court held that the plaintiff sufficiently plead all six elements to the cause of action, and focused the majority of the opinion discussing two elements in particular relating to Sustainable's arguments: (1) intentional procurement of the breach, and (2) economic justification.

In addressing the intentional procurement of breach element, the court noted, after reviewing the affidavits of third party buyers submitted in opposition by the plaintiff, that although many of the instances where the third party buyers were contacted by Sustainable occurred prior to the contract between TFT and plaintiff, there were two instances (in September of 2010 and March 2011) where Sustainable allegedly contacted the stores after the contract was effective. Sustainable argued that the email sent by Wiesner on August 30, 2010 terminated the agreement and therefore the two instances of alleged interference occurred after the contract's termination. The court, however, rejected this argument and held that the plaintiff sufficiently alleged that the contract was in effect at the time in which Sustainable contacted buyers within plaintiff's exclusive territory because TFT did not properly provide plaintiff notice of termination with 90 days notice under the terms of the agreement, and plaintiff responded to the Aug. 30, 2010 email on two separate occasions rejecting TFT's termination of the contract.

Next, the court addressed Sustainable's argument that TFT and Sustainable were affiliates of one another and thus Sustainable was economically justified in interfering with TFT's contract. Pattern Jury Instruction § 3:56 with respect to Tortious Interference with Contract provides:

> The defendant CD has the burden of establishing that (he, she, it) was justified in causing the breach of contract. In order to decide whether the defen-

(Continued on page 24)

VEHICLE & TRAFFIC LAW

Chemical Test Refusal Finding Vacated Upon Judicial Review

By David A. Mansfield

Defense lawyers representing clients at the Department of Motor Vehicles Chemical Test Refusal Hearings pursuant to §1194 are well aware of the difficulties of having the hearing closed without an adverse finding.

The required elements of proof to be set forth by substantial evidence upon the record are set forth §1194(4) (c). Did the police officer have reasonable grounds to believe such person had been driving in violation of §1192? Was a lawful arrest made? Was your client given sufficient warnings in clear or unequivocal language of the consequences of the refusal? Did your client refuse to submit within the meaning of the law?

The rules governing the conduct of these hearings can be found at 15 NYCRR Part §127.

The basic facts of the recently reported case Matter *Prince v. DMV 2011 NY Slip Op 33134(U)* were that the petitioner brought a CPLR Article §78 action pro se in the Supreme Court, New York County for judicial review of an adverse determination by the Department of Motors Appeals Board based upon an administrative finding of a refusal to submit to a chemical test. The petitioner was acquitted of the criminal charges as a defendant under §1192, but the dismissal is independent of the Department of Motor Vehicles administrative finding.


David A. Mansfield

The petitioner's defense was that she was experiencing an asthma attack when requested to submit to the Chemical Test. She asked the police officers to take her to an emergency room for treatment before taking the test. The petitioner was eventually transported for emergency room treatment.

The Petitioner maintained that she was never warned of the potential license revocation as a consequence to the refusal.

The essence of the case was that the verified petition, which is one of the pleadings in the CPLR Article §78, complained about the conduct of the administrative hearing by the administrative law judge. The petitioner felt that the administrative law judge prosecuted the case for the police officer by asking leading questions designed to ensure a finding against her. One of the key issues was that the officer at the hearing didn't testify that he read her all the statutory warnings until prompted by the Administrative Law Judge.

The Report of Refusal was executed by a police officer who did not testify at the hearing. The arresting officer did testify at the Administrative Hearing but never offered or identified the Report of Refusal for purpose on introducing the document into evidence. The Administrative Law Judge apparently produced the report and identified it in front of the witness.

There was a defect in the Report of Refusal which failed to specify which type of test was offered by checking the appropriate box for blood, urine, saliva or breath. The arresting officer did testify that the petitioner was complaining of an asthma attack, but the Administrative Law Judge appeared to decline to properly credit the police officer's or the petitioner's testimony.

The petitioner testified that that she was suffering an asthma attack and was so sick that the police had to secure an ambulance. The petitioner also claimed that the arresting officer never specified the type of test involved. The court found that the conduct of the hearing deprived the record of substantial evidence to any refusal as predicated on the petitioner being read the statutory warnings as required by law. The court vacated the finding of refusal and declined to remand for a new hearing.

What is interesting about this case is that it was decided by a state Supreme Court justice with an unusual fact pattern. Petitioner had a documented medical condition which was not in dispute that would have impeded her ability to submit to a chemical test. The officer who completed the Report of Refusal, which was apparently incomplete on its face, did not testify at the hearing which is also highly rare in our experience in Suffolk County.

This case was brought on as a CPLR Article §78 for judicial review and decided by a State Supreme Court Justice in New York County. When commencing such actions in State Supreme in Court in Suffolk County, ordinarily most CPLR Article §78 actions will be transferred under CPLR §7804(g) to the Appellate Division, Second Department for questions of substantial evidence, arbitrary and capricious issues of excessive administrative punishment as a result of adverse determinations by state agencies after administrative hearings which are upheld upon administrative appeal. This being a First Department case, it was disposed of in a different fashion.

This case makes for very interesting reading and stands for the general proposition that fair hearing standards do apply to these types of administrative hearings under 15 NYCRR Part §127.

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

CONSUMER BANKRUPTCY

Some Abstract Companies Don't Know Bankruptcy Law

Non-lien judgments are totally discharged in bankruptcy

By Craig D. Robins

Every other year or so I get a frantic phone call from a former bankruptcy client or their real estate attorney, saying that there is a crisis because they are about to go to closing on the purchase or sale of real estate, and a judgment search yielded an old judgment that must be satisfied, even though the judgment creditor was scheduled in the bankruptcy case.

I just got off the phone with the frantic real estate attorney for one such former Chapter 7 client. He said, "The client inherited some property over a year after the bankruptcy was concluded and we've scheduled a closing to sell it – but the abstract company won't let us close until we remove the judgment of record."

What's wrong with this story? As long as the debt was scheduled in the bankruptcy, no further work is necessary!

Putting this situation into other words, here is the typical scenario. A consumer debtor files for bankruptcy. The debtor has a judgment against him which is properly scheduled in the bankruptcy petition. The debtor does not have any real estate at the time the bankruptcy is filed. The debtor receives a discharge. The debtor acquires property thereafter.

What happens to the judgment? The obligation to pay the judgment is discharged. It is forever eliminated. The fact that the creditor obtained a judgment does not give the creditor any greater rights — even if they recorded the judgment with the County Clerk. Bankruptcy Code § 524 provides that a discharge, "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged..." (Section 524(a)(1)).


Craig D. Robins

The judgment can never became a lien on property the debtor later acquires because the judgment can only become a lien if it attached to property prior to the bankruptcy. Here, the debtor did not own any property at the time the judgment was entered against her, and she did not own any property at the time she filed for bankruptcy. Thus, the judgment never attached to any real estate.

The judgment nevertheless remains on record with the County Clerk because it is a valid court document. However, it no longer has any effect after the bankruptcy court grants a discharge. Some non-bankruptcy attorneys erroneously believe that an additional step is necessary to remove the judgment from the judgment roll at the County Clerk.

I explained to the client's real estate attorney (an old-timer who admitted he did not know anything about bankruptcy) that the abstract company was incorrect with their position that the judgment lien required attention.

> **"If you are dealing with an abstract company that is giving you a hard time, insist that they clear the matter with the title insurance company."**

It seems that a reader at the Abstract Company inexplicably did not know the law, and told the real estate attorney that the judgment had to be removed. This was grossly incorrect. Since the debt that was the subject of the judgment was discharged at the time the debtor emerged from bankruptcy, the judgment could never attach to any subsequently obtained real estate. Thus, the judgment could not become a judgment lien when the debtor later inherited title to the property.

The real estate attorney, now knowing how bankruptcy law worked after I explained it to him, was able to resolve the problem, although the abstract company did call me to request a copy of the Schedule of Creditors to make sure the debt was listed.

The United States Supreme Court has recognized that judgments which have been discharged in bankruptcy may not be kept "alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective." *Local Loan Co. v. Hunt*, 292 U.S. 234, 343 (1934). Put simply, judgment liens do not attach to a defendant's after acquired real property. *Bank of New York v. Nies*, 96 A.D.2d 166; 468 N.Y.S.2d 278; 1983 N.Y.App.Div Lexis 20313.

Please note that dealing with judgment liens as indicated above only applies when the debtor did not own any real estate at the time the debtor filed for bankruptcy relief. If the debtor did own real estate, then the obligation to pay the judgment is discharged, but the lien remains.

Here's why some practitioners are confused about judgments. New York Debtor and Creditor Law § 150 (1) states that "At any time after one year has elapsed since a debtor in bankruptcy was discharged from his debts, the debtor may apply, upon proof of the debtor's discharge, to the court in which a judgment was rendered against him, for an order, directing that a discharge be marked upon the docket of the judgment." [edited for clarity].

Some attorneys think that since a debtor can have a judgment marked "discharged" by the County Clerk pursuant to D&C § 150, doing so is necessary. However, that is not true. Federal bankruptcy law clearly discharges the obligation to pay the judgment. Although a debtor can go to the extraordinary length to have the County Clerk officially mark the judgment as "discharged," this is not necessary, and I have never heard of this ever being done.

D&C § 150 is an antiquated and misunderstood statute that has relatively little application in state court proceedings and can often cause confusion. Any situation requiring removal of a judgment lien in a bankruptcy proceeding, when appropriate, is best done by bringing the application in bankruptcy court pursuant to the Bankruptcy Code, rather than state court, pursuant to D&C § 150. This is because bankruptcy judges are very familiar with the issues involved, and the Bankruptcy Code provisions are relatively straight forward in this area.

In taking a quick look at some New York cases that referenced D&C § 150, I was amazed to see a decision issued just last year from a respected Supreme Court judge who totally misunderstood the application of D&C § 150. In that case, the Supreme Court had issued a judgment against two individuals on a pre-petition debt half a year after they filed their bankruptcy petitions. Thus, the judgment was in violation of the automatic stay pursuant to Bankruptcy Code § 362(a).

The debtors' state court attorney filed a motion to remove the judgment and the court granted that motion citing D&C § 150. The outcome was sort of correct (the judgment should have been removed), but the judge incorrectly supported his decision with a statute that had nothing to do with the situation. Actually, a motion was not even necessary.

When the Supreme Court entered the judgment post-petition, it was an inadvertent violation of the automatic bankruptcy stay. It appears that none of the parties advised the court that the two

(Continued on page 27)

New Google Privacy Policy (Continued from page 1)

its prior privacy policies. The new policy is not very different from the old policies. What is changing is the way Google intends to implement the new policy. User information stored by Google with respect to one account, for example a Gmail account, will now be shared with other accounts the user has such as YouTube and the Android operating system. Google isn't collecting any more information about users. It is only using the information it collects in a different and more efficient manner. According to Google this will allow Google to better meet the needs of its users. According to critics this is an invasion of privacy which leaves customers few options.

When I began working on this article I started by trying to determine what information Google knew about me. After reviewing Google's new privacy policy and the helpful cartoons Google created to explain it, I learned that Google knew much more about me than I ever expected. I signed in to my Google account by going to Google.com and clicking the sign in button on the top right of the screen. The sign in button was then replaced with my Gmail address. Clicking on my Gmail address brought up options including "account settings." There was then a link to "go to web history." My web history showed each and every one of the 8,335 searches I had completed between December 2, 2007 - 9:34 a.m. - "horse assumption of risk" and February 27, 2012 - 5:34 a.m. - "google calendar privacy." I then found a small tab on the left side of the screen entitled "trends." The trends screen broke the volume of my searches down by month, day of the week and hour. I searched most often in January, on Fridays and between 4-5 p.m. The trends screen also showed my top 10 queries along with top 10 sites and top 10 clicks. My top 10 queries included Tour de France, weather and flowers. I have little interest in flowers and have no idea why it appears. You can also find all news searches, image searches, blog searches, etc.

Having determined that Google knew far more about me than I ever expected, I moved on to checking YouTube to see what information was stored about me there. I was less surprised at this point to find a list of every search I have ever done on YouTube together with a list of every video I had ever watched. It turns out that several years ago I watched a video in which a kitten wrestled a watermelon. I didn't remember it but it looked so intriguing on my history list that I watched it again. Now YouTube thinks I really like that video.

Under Google's new privacy policy YouTube will find out that I like the Tour De France and flowers and Google will find out that I like to watch kittens wrestle watermelons. For me this is not an issue. However, some people are concerned that if they use one account at home and another at work, Google's new privacy policy may lead to the disclosure of private information. An employee who uses a Google product at work might not want advertisements associated with private off work activities popping up on while they are at work. You can imagine your own embarrassing scenarios.

The Federal Trade Commission is in the best position to take action with respect to the new privacy policy. Pursuant to the Federal Trade Commission Act the FTC can regulate activities which affect commerce. In 2010 the FTC issued a complaint against Google with respect to Google's Google Buzz service. Google Buzz was Google's initial foray into social networking (Google's answer to Facebook) and has now been replaced by Google+. The complaint alleged that Google used information from users' Gmail accounts to populate Google Buzz and that this was in violation of Google's privacy policies.

The complaint was settled in 2011 with the parties entering into a consent order. The pertinent portion of the agreement states that Google shall not misrepresent 1) its privacy policies; 2) the purposes for which it collects information; or 3) the extent users can control the use and disclosure of information.

When Google announced its new privacy policy, the Electronic Privacy Information Center ("EPIC"), a public interest research group known for monitoring privacy issues, claimed that the new privacy policy violated the settlement agreement and demanded that the FTC take enforcement action. The FTC declined. The Chair of the FTC described Google's new privacy policy as "clear." EPIC filed a federal action in the District of Columbia seeking to compel the FTC to enforce the settlement agreement. The lawsuit was dismissed by order dated February 24, 2012 with the court finding that the FTC has "absolute discretion" and that judicial review was unavailable. EPIC reportedly plans to appeal.

There are ways to opt out of the various ways in which Google tracks information. In Steven Spielberg's 2002 sci-fi film *Minority Report* retinal scanners are used for government tracking and targeted advertising. In its most memorable scene a fugitive Tom Cruise has his eyes replaced so that he can once again move freely in society. This is an extreme example of opting out.

The easiest way for users to opt out of Google's privacy policy is not to use any of Google's products or services. The FTC has referred to this as "a fairly binary and somewhat brutal choice." Users can also manage the information Google has stored about them. All of the history information I found on my Google and YouTube accounts can easily be deleted. Users can also stop Google from storing information by using privacy settings. A quick click of the "pause" button in the settings of Google's web history will stop Google from associating any searches with that particular user's account. Of course by opting out in this way you diminish the quality of service you receive. If Google Search can't use your stored information to help guess what you are looking for it is less likely to give you a correct response. Users interested in removing data from Google should consult www.dataliberation.org which is a website set up by Google which explains in detail how to move and/or remove data.

Note: Glenn P. Warmuth has been working at Stim & Warmuth, P.C. for over 25 years. He is an Officer of the Suffolk Academy of Law and teaches a number of courses at Dowling College including Entertainment & Media Law. He can be contacted at gpw@stim-warmuth.com.

The Shoemaker's Children: Lawyers Need To Plan Too (Continued from page 12)

Emergency" and enter the contact information for that person (and, if it doesn't already sync to your mobile devices, enter it there too). Regularly update the contacts with notes from meetings or telephone calls whenever possible.

Keep a List of Clients and Matters

Separate from your contacts keep a list of client matters. This can simultaneously serve as a conflict check system. Software such as Access or Excel can help. Keep columns or fields for whether the matter is open or closed, whether a non-retention or closing letter has been sent and on what date, the location and box number of any files sent to storage (or destroyed or returned to the client), and any Index numbers and court information for litigated matters. This will allow a person unfamiliar with your systems to easily identify which individuals and courts need to be contacted, and how to "triage" matters with upcoming deadlines and priorities.

Prepare a Written Procedure Manual

Prepare and update a written operating manual that includes your specific procedures and policies for checking conflicts, calendaring deadlines, how open and active files are kept and closed, how bookkeeping is kept, etc. The manual should include a Law Office List of Contacts with the name, phone number, and email of your appointed Assisting Attorney/Agent and Executor, your insurance agents with policy names and numbers, landlord, and the location of all your important documents.

Keep Your Billing and Time Records Up To Date

Need I say more?

Prepare and Execute Your Law Firm's "Estate Planning Documents"

A law practice is its own separate "estate" and should be treated as such. The New York State Bar Association website has invaluable resources of forms that should be completed, such as special provisions for the attorney's will; an authorization and consent to close a law practice; a Limited Power of Attorney to Manage Law Practice at a Future Date (or special forms for appointing an appropriate agent for a PC or PLLC). You can also consider including a provision in your retainer agreements to state that you have arranged for an assisting attorney to deal with your practice in the event of your death, disability, or incapacity, and even name that attorney. *See* http:/www.nysba.org/Content/NavigationMenu/Publications/ForSolosPlanningAheadGuide/Download_interactive.htm; Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement, or Death (*http://www.nysba.org/Content/NavigationMenu/Publications/ForSolosPlanningAheadGuide/PlanningAheadGuide_FINAL_PRINTED_VERSION_OCT_2005.pdf)*

Once you have the necessary documents in place, the NYSBA Guide recommends meeting with your assisting attorney on a regular basis to provide him or her with updated documents and information and review the plan.

Taking the time to implement these steps protects your clients and your own reputational legacy.

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

Local Zoning of Hydrofracking (Continued from page 5)

munity as a whole." *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 688, 642 N.Y.S.2d 164 (1996).

A possible amendment to the OGSML seems unlikely for political and historical reasons. While a relatively new headline, hydrofracking would not be the first controversy faced by the mining industry. Mining has taken place in New York for nearly a century, if not longer. Natural gas has been mined for decades. Despite the industry's long presence in the state, local zoning has not been preempted. Despite local zoning, mining of one sort or another has taken place in the state. Support of an amendment changing the preemption language to include local zoning is an overtly high risk political step. State legislators would alter a clear precedent from the Court of Appeals coupled with the inherent split in public opinion related to the process. It is much less risky for the State Legislators to continue to allow municipalities to zone consistent with the pulse of its population.

In Suffolk, developers meet with community groups to persuade the active population that projects will be beneficial to the community, paving a pathway for local political support. These developers add stores, gyms, restaurants – even revitalizing abandoned buildings – and we expect this. Why would the state lessen expectations when natural resources are being extracted from under the earth's surface?

A solution to the debate has presented itself through our judiciary. State legislative action seems unlikely. State Executive regulations are inevitable. The decision as to where or if the process is going to occur in a community will rest with the community. With an abundant local source of energy, reducing the dependence on foreign sources, and the potential to improve main street economies the value and power of voicing an opinion to the local representatives in a community must be emphasized. An electorate's conversation with locally elected officials is the most practical way to ensure that a particular community moves forward in the direction of a community's will.

Note: Robert R. Dooley is the Co-Chair of the Environmental Law Committee and is an associate with the Law Office of Frederick Eisenbud where his practice is concentrated in environmental, municipal and commercial litigation.

Among Us (Continued from page 7)

annual Transition Agency Fair. Additionally, she has worked as a Stony Brook Rotary Club board member on the upcoming "Dancing with the Stars," a fundraising party to be held at Flowerfield, 199 Mills Pond Road, Saint James on May 15 from 6:30 to 10:30 p.m. Proceeds will benefit Stony Brook Children's Hospital and other local charities.

Edward J. Nitkewicz conducted a free seminar, sponsored by the Sanders Law Firm, entitled "How to effectively work with your School District to obtain Special Education services for your child" on March 22 at the Huntington Hilton.

James F. Gesualdi, a sole practitioner in Islip, will be serving as a panelist at a March 23 program, "It Needn't Be Dog Eats Dog: The Application of Mediation and Collaborative Practice to Animal Law Conflicts" at St. John's University Law School. The program is jointly sponsored by St. John's Law School, The American Bar Association–Tort Trial and Insurance Practice Section Alternative Dispute Resolution Committee, The Animal Law Committee, and The Law Student Task Force.

A. Thomas Levin, a Member of the law firm of Meyer, Suozzi, English & Klein P.C. will serve as a judge at the 25th annual *We the People: The Citizen and the Constitution National Finals* to be held at George Mason University in Vienna, Virginia, April 27 through May 1.

Douglas J. Good, a senior partner at Ruskin Moscou Faltischek, PC, has been appointed as the firm's first General Counsel. He will be involved, in that capacity, in advising the law firm regarding professional ethics, and various compliance issues.

Speedy Recovery…

The Officers, Directors, Members and staff wish **Andrea Amoa** a speedy recovery from her auto accident.

Condolences….

The Officers, Board of Directors, members and staff send their heartfelt sympathy to wife Carol (Voss) and family of honorary member **Henry S. Beers, Jr.,** who passed away on February 29, 2012.

The association was saddened to learn of the passing of Clara Cannavo on February 26th, the wife of the late **Justice Jack J. Cannavo**.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Eric Bashian, Susan J. Bereche, Jacqueline Blauvelt, Joseph M. Burke, Vincent A. Candurra, Kathleen A. Casey, Daniele G. Dezago, Kristi L. DiPaolo, Gregory A. Goodman, Ashley Hall, Jason Klimek, Kevein G. McClancy, Francis X. McQuade, Lisa Milas, Gina M. Pellettieri, Kenneth S. Pelsinger, Michele T. Pilo, Victor Regal, John J. Ricciardi, Joel R. Salinger, Daniel J. Solinsky, Tina Marie Specht, Lesel T. Spencer, Robert J. Storti, Megan M. Tomlin, John D. Toresco, Charles Wallshein and Michael P. Ward.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Jennifer L. Ceglinski, Kim DiMartino, Maxine Garrell, Michael Maio, Christina R. Pisani, Nabiha Rahman, Gina M. Rodgers and Nicole Sottilo.**

On the Move – Looking to Move

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

Firms Offering Employment

General practitioner, with Patchogue law office, seeking full-time attorney.
Reference Law #1.

Attorney with West Sayville office, looking to expand his practice, seeking newly admitted or experienced attorney. Will look at all resumes of interested parties.
Reference Law #4.

Members Seeking Employment

Experienced Family Law attorney, some Matrimonial Law experience, seeking full-time, part-time employment, per diem assignments, court appearances, drafting, etc. See resume for particulars.
Reference Att#40

Recent law school graduate awaiting admission to the New York State Bar with legal experience in corporate, litigation, real estate, personal injury, and immigration law, seeks an entry-level attorney position in any area of the law. Fluent in Greek and Albanian.
Reference Att#41

Recently admitted attorney seeking part-time or contract employment. Experienced in immigration law. Capable of learning new areas of the law quickly. Strong writing and communication skills. Self-motivated with ability to multi-task.
Reference Att#42

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

NY Lawyer to Lead ABA (Continued from page4)

government, state courts typically receive only three to four percent of state budgets. Robinson recounted the ongoing efforts of the ABA to combat this funding crisis, including the ongoing work of a task force co-chaired by nationally-known attorneys Theodore B. Olson and David Boies.

The House also heard from Chief Judge Eric T. Washington of Washington, D.C., the President of the United States Conference of Chief Justices. Chief Judge Washington joined with the other speakers in expressing concern over the state court funding crisis, noting that 95 percent of the cases brought in the United States are brought in the state courts. The Chief Judge expressed the view that resolution of the crisis will require money, as well as enhanced civics education to ensure that citizens understand the critical role played by the courts in a constitutional democracy. He thanked the ABA for its advocacy on behalf of state courts, and gave his support for the theme for Law Day 2012: "No Courts. No Justice. No Freedom."

The meeting of the House of Delegates was the culmination of the ABA midyear meeting in New Orleans, which ran from February 1 – 7, 2012. It is estimated that 4,500 attorneys attended, the largest turnout ever for an ABA midyear meeting.

Of course, one memorable highlight of the midyear meeting was Super Bowl Sunday. The lawyers from New York who are members of the House of Delegates (there are about 40 of us) gathered at a restaurant in the fabled French Quarter of New Orleans to cheer the Giants to victory over the Patriots. Many New Orleans locals supported the Giants as well, inasmuch as the first family of football, the Manning family, including father Archie and his sons Peyton and Eli hail from the Crescent City.

Another highlight of the midyear meeting was the appearance of Associate Justice Antonin Scalia of the United States Supreme Court. In what was styled as "A Conversation with Justice Scalia" he spoke to a packed room of ABA members on a wide-range of topics. For example, Justice Scalia opined that the quality of advocacy before the Supreme Court had improved considerably during his 25 years on the court, probably due to the development of a Supreme Court Bar consisting of lawyers who concentrate on arguing cases before the court. When asked about the most difficult case he had to decide during his tenure on the court, he replied that it was probably some little-known patent case. As to his views on the United States Constitution, Justice Scalia stated that the most important part of the Constitution is not the Bill of Rights but, rather, the structure of the federal government which the Constitution created. According to Justice Scalia, by establishing three co-equal branches, the Founders wisely prevented a concentration of power in any one branch.

At the 56th Annual Awards Banquet of the Fellows of the American Bar Foundation, which was held at one of New Orleans' treasures, the National World War II Museum, Justice Scalia received a Distinguished Honorary Fellow Award. Among the other honorees were New York's Michael H. Byowitz and Sharon Stern Gerstman, who were recognized for their work as State Co-Chairs of the Fellows.

The February 6 meeting of the House of Delegates was called to order by Linda A. Klein of Georgia, the Chair of the House. Following the Presentation of Colors and a stirring Invocation by Justice Bernette Joshua Johnson of the Supreme Court of Louisiana, the Delegates heard welcoming remarks from New Orleans Mayor (and lawyer) Mitchell J. Landrieu. Mayor Landrieu discussed the disasters that have befallen New Orleans in recent years, including Hurricane Katrina, Hurricane Rita and the BP oil spill. He joked, "We're waiting for locusts now." However, Mayor Landrieu got serious in discussing his city's rebuilding effort. He said that unemployment is declining, property values are rising and the city has been "a laboratory for innovation and change." Mayor Landrieu noted with pride that the New Orleans Superdome, once a symbol of the city's "shame," is now a fully-rebuilt showcase, and that the city has reconstructed its education system and built 88 health care clinics as well.

Among the notable resolutions debated and adopted by the House of Delegates were several pertaining to the criminal justice system: approving the black letter *ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records;* a recommendation that governments adopt pretrial discovery procedures in criminal cases requiring laboratories to produce comprehensive and comprehensible laboratory and forensic science reports for use in criminal trials; a recommendation that certain identified factors be considered in determining the manner in which expert testimony should be presented to a jury in a criminal trial and the manner in which a jury is instructed to evaluate expert scientific testimony; a recommendation that public housing authorities reevaluate rules so as to protect the safety of residents while not unfairly punishing persons with criminal records; supporting policies and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual; and urging the adoption of jury instructions which are in language understandable by jurors who are untrained in the law and in legal terminology, in the penalty phase of criminal trials in which capital punishment may be imposed, to be provided to jurors in written form.

Among other resolutions passed by the House were: approval of certain amendments to the *Model Rules for Fee Arbitration*; a recommendation for bar admission authorities to adopt rules that accommodate the unique needs of military spouse attorneys who relocate frequently in support of the nation's defense; urging entities that administer law school admission tests to provide appropriate accommodations for a test taker with a disability to best ensure that the exam results reflect what the exam is designed to measure and not the test taker's disability; adopting the *ABA Standards for Language Access in Courts,* and urging the federal and state governments to provide adequate funding to courts and other adjudicatory tribunals to fully implement language access services; supporting the principle that "private" lawyers representing governmental entities are entitled to claim the same qualified immunity provided to "government" lawyers when they are acting "under color of state law" in connection with claims brought pursuant to 42 USC § 1983; urging government bodies and agencies to enact laws and implement policies to ensure that persons with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations pursuant to the regulations implementing the Americans with Disabilities Act; and supporting the consent jurisdiction of United States Magistrate Judges as being consistent with, rather than violative of, Article III of the United States Constitution.

Following tradition, the meeting of the House ended with a resolution thanking New Orleans as the host city, followed by an invitation to the Delegates from the Illinois delegation to attend the next meeting – in this case, the annual meeting in Chicago in August 2012.

Note: Scott Karson is a partner at Lamb & Barnosky, LLP in Melville. He concentrates his practice in municipal, commercial, land title and appellate litigation. He is a former president of the SCBA.

Bench Briefs (Continued from page 4)

while practicing a stunt. The complaint alleged that the defendant was negligent in failing to supervise the cheerleading practice in a safe manner and in failing to properly train the team members.

According to the bill of particulars, infant plaintiff was injured again on November 9, 2009 at the subject premises due to defendant's failure to repair a broken gym mat. In granting the motion for summary judgment, the court noted that by engaging in a sport or recreational activity, a participant consented to those commonly appreciated risks which were inherent in and arise out of the nature of the sport generally and flow from such participation. The court further pointed out that a party consents to the risk of those injury causing events which are known, apparent or reasonably foreseeable consequences of the participation, and cheerleading is the type of athletic activity to which the doctrine of primary assumption of the risk applies. Here, the court found that the evidence demonstrated that the infant plaintiff was an experienced cheerleader and that she had performed the stunt which caused her to be injured hundreds of times. The record also demonstrated that a coach employed by Long Island Cheer, as well as infant plaintiff's high school coach were nearby at the time of the incident. The court found that plaintiffs failed to raise a triable issue of fact as to whether defendant exercised ordinary reasonable care in protecting in fact plaintiff from unassumed, concealed, or unreasonably increased risks. Furthermore, the evidence submitted by plaintiffs failed to demonstrate an issue of fact as to whether inadequate supervision or instruction of the cheerleading activities unreasonably increased the risk of injury to infant plaintiff. As to the incident that occurred in November of 2009, plaintiffs contended that the doctrine of assumption of the risk did not exculpate a landowner form liability for ordinary negligence in maintaining a premises. However, while a cause of action relating to the November 2009 accident was asserted in plaintiffs' amended verified bill of particulars, it was not alleged in plaintiffs' complaint. The court stated that the bill of particulars was simply a device to amplify existing claims and was not a device to add a new legal theory or cause of action. Accordingly, defendant's motion for summary judgment was granted.

HONORABLE PETER FOX COHALAN

Motion to dismiss granted; plaintiff failed to appraise that the admitting physician in the emergency room was a potential defendant, and failed to provide any explanation for the inordinate delay of six years in identifying the potential defendant.

In *Melissa Davis Wright, as ancillary Administrix of the Estate of Loretta Kayton, deceased v. Brookhaven Memorial Hospital Medical Center, Inc., Robert N. Prichep, M.D., Frank T. Sconzo, Jr., M. D. and Alan Nemeth,* Index No.: 09097/05, decided on October 22, 2010, the court granted the motion by Dr. Alan Nemeth seeking to dismiss the amended complaint pursuant to CPLR §3211 (a)(5).

In granting the motion, the court noted that in this court's prior order dated February 18, 2009, the court granted the unopposed motion requesting the substitution of the estate and for leave to serve a late notice of medical malpractice. In amending the action's title, plaintiff added Nemeth's name to the action. The plaintiff admitted that she never sought permission to join Nemeth and claims that the addition of his name was in error and not intentionally captioned in the action. The defendants disagreed with the claim of unintentional mistake. The plaintiff subsequently served Nemeth for the first time with the summons and amended complaint on April 3, 2009, without seeking permission of the court. The hospital moved for dismissal of the action as against Nemeth pursuant to CPLR §3211(a)(5) because the statute of limitations on this action expired on April 30, 2005. The plaintiff opposed the motion and cross moved for an order *nunc pro tunc* seeking to amend the caption of the action, seeking leave to serve an amended complaint already served or compelling the defendants to accept the amended complaint with Nemeth named. Here, the court found that the amended pleading was a nullity from its inception as Nemeth was never properly added as a defendant and the plaintiff failed to make any showing that Nemeth was united in interest with the hospital. The court also pointed out that the original complaint alleged not that "John Doe" emergency room physician was negligent in his care and treatment of the decedent, but that a doctor "John Doe" whose name was unknown participated in the operation and after care treatment of the decedent in a negligent manner, thereby failing to appraise Nemeth or the named defendants that the admitting physician in the emergency room was a potential defendant. Finally, the court concluded that the plaintiff failed to provide any explanation for the inordinate delay of six years in identifying a potential defendant and the prejudice to Nemeth and indeed, all the named defendants was readily apparent six years after.

HONORABLE JOSEPH FARNETI

Motion for an order granting a default judgment denied; plaintiff's attorney refused personal service of answer, and her attorney was personally served thereafter.

In *Mary Evelyn Endsley v. Robert Brian Black,* Index No.: 34461/10, decided on September 26, 2011, the court denied the motion by the plaintiff for a default judgment. In denying the motion, the court noted that this was a plenary action commenced to enforce the terms of the parties' separation agreement as incorporated into their judgment for divorce, plaintiff sought a default upon the grounds that the defendant allegedly failed to answer or otherwise move in response to the plaintiff's verified complaint, which was served personally on the defendant on October 12, 2010, with an additional mailing to defendant on April 27, 2011, pursuant to CPLR §3215(g)(3).

In opposition to the motion, the defendant contended that he had not defaulted in the matter. He further advised the court that his attorney attempted to personally serve a verified answer to the complaint upon the plaintiff's attorney on November 12, 2010, but that such service was refused. Thereafter, the defendant alleged that his attorney served the verified answer on the plaintiff's attorney in court on November 15, 2010, which was accepted and had not since been rejected. Based upon the circumstances, the court found that the defendant was not in default and the motion was denied.

HONORABLE PAUL H. MAYER

Stay denied; death of the decedent did not affect the merits of the case

In *Elaine Brewer and John H. Brewer v. Dr. Brian M. Mehling, Mehling Orthopedics, P.C., Mehling Orthopedics of New York, PLLC and Good Samaritan Hospital,* Index No.: 46719/09*,* decided on September 6, 2011, the court declined to stay the action pending the substitution of a representative for the decedent.

The court noted that a letter dated July 18, 2011 in which plaintiffs' counsel informed the court that John H. Brewer recently died. The court pointed out that where a party's demise did not affect the merits of the case there was no need for strict adherence to the requirement that the proceedings be stayed pending substitution. Here, the court held that the death of the decedent did not affect the merits of the case as his wife was the only plaintiff and she had a clear identity of interest with the decedent. Thus, the action was to proceed despite the court's notification of the death of the plaintiff John H. Brewer.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. To be considered for inclusion in the May 2012 issue, submission must be received on or before April 1, 2012. 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.

Affiliate Relationship Insufficient (Continued from page 20)

dant CD's conduct was justified, you should consider the nature of the rights interfered with, the relation between defendant CD and the parties to the contract, and the interests that the defendant CD sought to protect, in other words, whether defendant CD's interest is equal to or superior to the plaintiff AB's interest. [where appropriate, add:] and the social interests involved).

If you decide that defendant CD's conduct was justified, as I have explained that term to you, then you must next consider whether plaintiff AB has established that the defendant acted with malice or used wrongful means. If you find that the defendant CD has acted with malice or used wrongful means, then you will find for the plaintiff on this issue. If you find that the defendant did not act with malice and that the defendant did not use wrongful means, then you will find for the defendant on this issue.

One factor which courts analyze in determining whether a defendant is entitled to assert an economic interest defense to a tortious interference cause of action is the nature of the relationship between the defendant and the party which had a contract with the plaintiff. "When defendant's interest is equal or superior to that of plaintiff, defendant is privileged to interfere with plaintiff's rights, provided defendant does so by lawful means, and does not act for the sole purpose of injuring plaintiff." *Id*., at 571.

The *Due Pesci* court rejected the argument by the defendant because Sustainable did not state that it was "reasonably concerned that allowing the agreement to continue would damage its economic interest." *Due Pesci*, NYLJ 1202542251827 at *14. Specifically, the court found that Sustainable did not conclusively establish that it interfered with the agreement based on its economic interest because plaintiff promptly refuted TFT's claim that plaintiff held out that it was no longer TFT's sales agent after plaintiff received the August 2010 email. In addition, the court found that Sustainable did not establish that it interfered with the agreement in order to protect the financial health of its affiliate TFT. Because plaintiff alleged that TFT gained over $2 million from sales made by plaintiff, the court found that in fact Sustainable's alleged interference appeared to harm, rather than help, TFT's economic interest, thereby undermining the motion to dismiss.

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

Television's Golden Age *(Continued from page 18)*

Wilder ("Double Indemnity"); Fred Zinnemann ("Act of Violence").

Though home-grown, another director with a dark vision - his combat experience in World War II having placed him among the traumatized, among those thereafter blinded to favorable outcomes - was Samuel Fuller, who would be later recognized as an *auteur*. His work routinely appeared on the small screen. "The Baron of Arizona," "The Steel Helmet," "I Shot Jesse James" - all on television within scant years of their theatrical release, with the last-named film being elevated, on the instant of its television screening, to a cult favorite. Fuller's influence on later filmmakers would be recognized. In the recent documentary, "The Typewriter, The Rifle, And The Camera," Fuller's exploits - as a journalist, an infantryman, and a director - are celebrated, and his strong guidance of actors, as reflected by their good work under him, is especially noted by Tim Robbins, Martin Scorsese, and Quentin Tarantino.

"Throughout 'Jesse James,'" Scorsese states, "John Ireland has a haunted look, the memory of what his character has done (betrayed his friend, irredeemably, by firing a fatal bullet into his back) not allowing him to find any earthly peace."

Ireland was one of many actors who enjoyed only a limited stardom, marked by a suppressed glow, one principally within the tight, largely fixed constellation of "B" films; this isn't to say that some stars didn't occasionally rise and brighten. Now and again "B" actors made lofty ascents into supporting parts in big-studio films - in Ireland's case, in good roles in MGM's "Vengeance Valley" and Columbia's "All The King's Men," in which his Jack Burden serves as the lens through which the viewer observes the inexorable corruption of Willy Stark. But these stars were for the most part locked in a lowly firmament that brushed the earth. Don ("Red") Barry, Lloyd Bridges, Hillary Brooke, Rod Cameron, Reed Hadley, Mary Beth Hughes, John Ireland, Robert Lowery, Tom Neal - all worked in low-budget Lippert films variously entitled "The Jungle," "Rocketship XM," "Little Big Horn," and "Red Desert." (An eclectic array!)

As to *Film Noir*, arguably the tangiest, most bittersweet items to be found in the overflowing cornucopia - the "*noir*-est" of the *noir* - were the brilliant films of Anthony Mann: "Railroaded," "He Walked By Night," "T-Men," and "Raw Deal," these last three having as their cinematographer John Alton, he who painted with light. Among these films, my favorite remains "Raw Deal." To a *noir*-impoverished generation, the title could conjure a vehicle starring Arnold Schwarzenegger, who plays an avenging sheriff from the American South (?!). That film is forgettable, though its star did nonetheless read one good line - When his drunken wife hurls a newly-baked cake at him, Ahhh-nold, dripping with icing and irony, retorts, "Vun should-dunt dri-innk, und ba-aake."

The real "Raw Deal," the real "Deal," was released in 1948, and the *New York Times* - in prose seemingly as hyped as that of any tabloid - summarized it as a "pistol-powered crime melodrama." But this wasn't hyperbole. A jail break; an evasion by the protagonist of both police officers and hitmen; a kidnapping; an inadvertent near-capture of the protagonist by a posse hunting an unrelated third-party; a vicious brawl, with intervening gunfire; another kidnapping; a shoot-out; a second shooting-cum-brawl; a vengeful, fiery, vertiginous conclusion - the film simply never lets up.

Two sequences stay with me across the decades, one of which dramatizes Art's predictive quality. Long before the "Stockholm Syndrome" had been recognized and coined, an abducted Marsha Hunt falls in love with her abductor, Dennis O'Keefe, seeing in him someone who, though having taken wrong turns remains redeemable. After shooting hitman John Ireland - yep, Ireland again - to save the life of O'Keefe, Hunt races from the scene along a deserted beach. O'Keefe catches her, holds her, and assures her that Ireland has survived.

"Ann," he says, "think of it this way—you were doing it to protect me, even if I'm not worth it."

"Oh, Joe, you *are* worth it," she says.

A love scene ensues, one which has been long deferred, and its power is gained by the deferment - the scene's tenderness and compassion intensified by its contrast with an otherwise unrelentingly violent context.

The other sequence: toward film's end, Ireland and other hitmen, guns drawn, wait in a fog-enshrouded alley - the soupy nighttime San Francisco itself playing a crucial role - against the moment when O'Keefe will arrive to rescue Marsha Hunt, now held by gang-boss Raymond Burr in his nearby apartment. As the hitmen stand by, a boy rolls on skates through the fog. An unnerved Ireland handles the boy roughly and snarls, "Go home, punk, it's past your bedtime." The boy skates on, and the camera tracks him for a few seconds until he bumps into O'Keefe, who for his part, gently acknowledges the boy with a nod, and registers that he is upset.

In the aggregate, these short, intense scenes - with the boy's rolling progress serving as their unifying factor - could stand as a model of dramatic compression: the viewer's nerves jump, because he realizes - through means of the tight time-span between the boy-Ireland encounter and the boy-O'Keefe encounter - that mere *feet* separate the fog-blinded antagonists; each man's reaction to the boy reveals each man's essential character; the savvy O'Keefe immediately knows the cause of the boy's tears, and by them is alerted to the nearby danger; finally, O'Keefe sees in the boy the innocent he once was - the person Marsha Hunt has seen all along - and as the boy, in valedictory, vanishes into the mist, O'Keefe determinedly walks down the alley to rescue Hunt and vindicate her faith in him.

"Raw Deal," and other crime films of the time, marked as they were by a near-unremitting violence, would nowadays likely be deemed "inappropriate" viewing for a 12-year-old. And my mother, often viewing these films alongside me, would be seen as endangering the welfare of a minor. I see now that my tribute to these films is as well a tribute to her. Not to her tolerance - it wasn't a matter of tolerance, though she *was* tolerant; rather, her enjoyment of these films, her openness to them - on behalf of both of us - spoke of her affirmative, all-encompassing embrace of art. Chairman of the Art Department at McKinley Junior High School, she painted, read, played classical piano. As I recall her attentive aspect while she watched the alley sequence in "Raw Deal," I'm reminded of the Biblical aphorism, "A prophet is not without honor, save in his own nation." "Raw Deal's" cinematographer, John Alton, *was* recognized in his own nation, and in his own time, finally, as a 92-year-old honoree at the 1993 Telluride Film Festival, where his entire body of work, and its enduring influence on younger cinematographers, were celebrated. In her own appreciation for a fellow artist, then, as she watched "Raw Deal" before its cinematographer had been widely appreciated, Mom was 40 years ahead of her time.

Even the trash I watched - representatively, Universal's "Flash Gordon" serials - weren't shutoff. Mom didn't view "Flash Gordon" with me - there were limits to what she'd sit through - but, with an enigmatic grin, she'd now and again pass through the living room on trips to her studio. Today I can resolve that enigma: on the sound track - accompanying Flash and Dale Arden as they ever-evaded the clutches of Ming the Merciless - blared the brass, sang the strings, thundered the percussion, altogether resounded the melodic glory of Franz Liszt. Mom, the educator, knew I was being subliminally formed into an appreciator of classical music. The appreciation has stuck: Liszt's *Les Preludes* accompanies me as I approach this essay's conclusion.

Just as surely, the appreciation of film stuck. To state this is in no way to demean the worth of the teleplays that were produced live in those days. Even at their most mediocre, they nonetheless surgeon-like excised sludge from the airwaves; at their best, they were thought-provoking, compelling dramas. All told, they provided a vibrant workshop to writers, actors, producers, and directors. Some few of the telecasts were preserved on kinescope recordings, but the great majority of them went unrecorded, and, having vanished were thus foreclosed from reaching posterity.

And because those that have vanished perforce can't be revisited, they can – mischievously - all be held out nowadays as outstanding pieces of work. Some were most weren't. In short, Television's "Golden Age," with respect to live productions, contained some gold, much dross. I was there; I know; I remember.

Happy to report, the films I've herein mentioned, because they are films - preserved, in some cases enhanced, can be reviewed, the memory of their quality tested. And I'm very recent to this discovery. Before this discovery, mine had been a lonely vigil. I had vainly gazed at the night sky, peering into its darkness, seeking stars that had, I was convinced, long ago dimmed and then vanished.

And then my wife took me by the hand. And she led me to the Internet. She said, "Behold, 'Half-Bay.'" And it was good. A poor cousin of "E-Bay," "Half-Bay" nationally links film-fans, and as its name would suggest, lists films now on video and disk - films that are obscure, all-but-forgotten (but not by me) - for sale at prices as low as $4.00. Eureka! Golconda! El Dorado! The Seven Cities of Gold exist!

Within days, at my request my wife had ordered "Salome, Where She Danced," starring David Bruce, Rod Cameron and Yvonne DeCarlo; "Casbah," starring Yvonne DeCarlo and Tony Martin, with an original, thrilling score by Harold Arlen; and one which I protest is for the grandchildren, "Abbot and Costello Meet Frankenstein." ...By now, you get the drift.

In the person of my patient wife, I have at my disposal a savvy video clerk - proven by a recent conversation with her in front of her computer:

Me: "No, no—I didn't say, 'Let *Him* Have It!'" And then I went on, tediously. "That's the recent English film about the mentally challenged man convicted of killing a cop, whose execution was instrumental in the abolishment of capital punishment in Britain, starring Christopher Eccleston. I said, 'Let '*Em* Have It!' - a gangster flick of the '30s. Bruce Cabot stars as the homicidal Joe Keefer. Toward film's end he has plastic surgery performed on his face as a means of evading capture. The doctor who operates knows, as a reward for his services, he'll be murdered, conclusively silenced. Soon after the cutting and the killing, Joe slowly unbandages his face. His gang recoils at the revealing. Joe runs to a mirror. Inscribed widely, jaggedly, in his cheeks are the initials 'J.K.,' and then—-"

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. His written work has appeared in the Quinnipiac Law Review, the ABA Journal, The New York Law Journal, and the New York Times. He preserves many of the films noted in his essay for the enjoyment of his seven grandchildren.

Short Sale Benefits Homeowner *(Continued from page 16)*

credit report for seven years. Moreover, a foreclosure and a Deed-in-Lieu must be indicated on a Uniform Residential Loan Application, Form 1003, for seven years whereas a short sale is not expressly questioned thereon.

Income tax is typically waived incident to a short sale

Pursuant to the Mortgage Forgiveness Debt Relief Act of 2007 (the Act), cancellation of debt income is a forgiven incident to a short sale for up to two million through 2012. Yes, to qualify under the Act, the debt must expressly relate to a distressed homeowner's principal residence without any prior cash out having derived from a refinance where the utilization of the cash was not related to the principal residence, but as you can see cancellation of debt income is forgiven without tax. Therefore, a short sale attorney should check their client's HUD-1 Statements from a refinance to corroborate the homeowner's explanation of the utilization of the funds. Yet, insolvent clients can also avoid cancellation of debt income regardless of property type, so this avenue for avoiding income tax should also be explored.

Saving face

Yes, a homeowner can simply file a Chapter 7 Bankruptcy and avoid a deficiency judgment. Yet, many homeowners cannot emotionally coup with bankruptcy. Moreover, a Chapter 7 Bankruptcy is only available to homeowners who pass the means test and have not filed in the prior eight years. Therefore, many distressed homeowners will not qualify. To not favor a treatment, does not mean a practitioner should avoid a treatment option. The foreclosure defense attorney's job is to zealously advocate for their distressed homeowner's legal rights. In such, all legal strategies should be explored and a tailored approach should be selected that both meets the client's legal needs and emotional desires.

It is this attorney's opinion that short sales are good for some clients and a benefit has nothing to do with impropriety. In fact, incident to every short sale a client is required to sign an Arms-Length Affidavit evidencing that the purchaser is not related in blood or business to the seller. Moreover, short sales transpiring under the Home Affordability Foreclosure Alternatives Program require that purchasers not sell the property within 90 calendar days of closing. To learn more about every workout option, the practitioner is directed to the Making Home Affordable Program Handbook at the following web address: https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/mhahandbook_32.pdf

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a family- also the founder and lead instructor of the firm's New York State licensed Real Estate School, which serves as the Pro Bono arm of Lieb at Law offering continuing education courses to Real Estate Agents and Brokers. Additionally, Mr. Lieb actively instructs continuing legal education, holds a Masters of Public Health, is an Adjunct Professor at Nassau Community College, a former Faculty Member of the Suffolk Academy of Law, and a former Associate Instructor at Indiana University.

ACADEMY OF LAW NEWS

iPAD for Lawyers

A Complimentary, Cutting-Edge Seminar for SCBA Members

By Dorothy Paine Ceparano

If you were among those who stood on line for the release of the new iPAD in mid-March – or even if you have a prior version – you'll want to enroll in the Academy's *free* seminar, **"iPAD for Lawyers,"** scheduled for lunchtime on Friday, April 20, 2012. The program will teach you all sorts of new tricks for the device, many of which you will undoubtedly find to be true time-saving, practice enhancing applications for the busy attorney.

The afternoon begins with lunch at noon; the presentation follows from 12:30 to 2:10 p.m.

Instruction will be primarily by Michael Glasser of Glasser Tech, LLC (which will also underwrite the cost of the pre-program luncheon). Mr. Glasser, a consultant to the legal community for more than 20 years, has numerous certifications on legal specific software applications, and he will share incomparable, easily accessible tips and techniques with those in attendance. Comments from the lawyer's perspective will be added by Barry M. Smolowitz, Esq. (SCBA Technology Director and Past SCBA President), John R. Calcagni, Esq. (former Academy Dean and a current member of the SCBA Executive Committee), and Allison Shields, Esq. (principal of *Legal Ease Consulting* and a member of the Academy of Law's Advisory Committee).

The program agenda includes such topics as documentation, collaboration, legal research, connecting to your office, applications that are legal specific, and, in the words of Mr. Glasser, "so much more." Mr. Glasser pledges that "current and prospective iPad owners will walk away empowered to increase their productivity immediately."

As a result of the program, you might even make a decision (if you haven't already) as to whether or not to invest in the newest Apple release – starting at $499 – or to take advantage of pricing for second-generation iPads, now available starting at $399. There *are* differences between the two, but whether or not they are important seems to be an individual decision.

In early March, a few weeks before the imminent sale of the new iPad, *The New York Times* described the product in its Business Section[1], stating "Apple updated the iPad...with a high-definition screen, a faster wireless connection, and several other refinements, all packaged in a device without any major design changes."

Are these "refinements" important to you? Perhaps. Perhaps not. The *NY Times* article goes on to note that the product, according to Apple executives, has "a screen that provides a comparable level of clarity to the iPhone's 'retina display' with higher resolution than conventional high-definition televisions." The new iPad will operate on "LTE," the fourth-generation cellphone network technology. It will get data from AT&T's and Verizon's networks. And even though Apple did not include SIRI (voice-command virtual assistant feature that is on the iPhone 4S), users *will be* able to dictate e-mail.

Finally, if screen clarity *is* of great importance to you, note that the *NY Times* article said that "the new iPad, the third generation of the device," while heavier than and "nearly indistinguishable from its predecessor," has as its most visible change the screen, "which can display text and images that appear as they would on the printed page." That screen, according to Apple, has "more than 3.1 million pixels," or "four times more" than the second generation iPad.

The Academy anticipates that its April 20 complimentary lunch program on "iPads for Lawyers"will fill up early. To reserve your spot in the lecture hall, please call the Academy (631-234-5588) to enroll as soon as possible. If you must cancel after registering, please let the Academy know so that the spot may be given to another.

Bring your iPad if you have one. We look forward to a fun and informative afternoon indeed!

Note: The author is the executive director of the Suffolk Academy of Law

1. *The New York Times Business* – Thursday, March 8, 2012

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 SCBA online calendar for course descriptions and registration details. For information, call 631-234-5588.

APRIL

5	Thursday	**RESPA.** Real Estate Lunch Series 12:30–2:10 Sign-in and lunch from noon.
12	Thursday	**CPLR Series – Part I.** 6–9 p.m. Sign-in and light supper from 5:30
12	Thursday	**SCPA 1404 Exams & Objections to Probate –** *East End.* Bridgehampton Bank. 6:00–8:00 p.m.
13	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
18	Wednesday	**Emergency Applications (Family Court)** – *East End.* Seasons of Southampton. 6:00–8:00 p.m.
19	Thursday	**CPLR Series – Part II.** 6–9 p.m. Sign-in and light supper from 5:30
20	Friday	**iPad for Lawyers.** Complimentary program. 12:30–2:10 Sign-in and lunch from noon.
24	Tuesday	**Salient Issues in Elder Law.** Noon. Details TBA.
26	Thursday	**CPLR Series – Part III.** 6–9 p.m. Sign-in and light supper from 5:30
27	Friday	**Law Practice Management Symposium.** At Touro Law Center. Day program. Details TBA

MAY

1	Tuesday	**Trial Skills Series.** 6–9 p.m. Sign-in and light supper from 5:30. Continues on May 8 and May 15.
2	Wednesday	**Bankruptcy & Matrimonial Law.** 6–9 p.m. Sign-in and light supper from 5:30
4	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
9	Tuesday	**IRA Trusts & Retirement Trusts** (Sy Goldberg). Breakfast Seminar. Details TBA
11	Friday	**Legal Research – Presentation from *Lexis-Nexis*.** Lunch.
22	Tuesday	**Bankruptcy Basics.** 6–9 p.m. Sign-in and light supper from 5:30

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

Five Spots Open on Academy of Law Board at the End of May

On May 31, 2012, five Academy Officers – Herbert Kellner, Marilyn Lord-James, Lynn Poster-Zimmerman, George R. Tilschner, and Hon. Stephen Ukeiley – will complete four years of service, the mandatory limit under Academy Bylaws. Hence, five spots for new officers become available.

If you have an interest in applying for one of these positions, please let the Academy know by calling Rick Stern, Chair of the Academy Nominating Committee, or Dorothy Paine Ceparano, Academy Executive Director. Please provide a resume that includes service to the SCBA or Academy.

The Academy would like to receive applications by mid-to-late April and will hold its Election Meeting before or during the first week of May.

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Short Sale Not Always The Best Option *(Continued from page16)*

A short sale hurts your credit

Don't believe the hype being put forth today by various industries and media outlets. A short sale causes the same harm to your credit as a foreclosure or a bankruptcy, if not more, should the lender or investor obtain a deficiency judgment against a homeowner which is reported on their credit for the next 20 years. At least with bankruptcy (i.e. Chapter 7), the homeowner is discharged of their debts and can begin rebuilding their credit within months after filing for bankruptcy.

You may owe taxes as the result of a short sale

Distressed homeowner may receive a 1099-C reflecting the difference between what they owed and what the mortgage lender agreed to accept in a short sale. *This amount is considered income, and the homeowners will have to pay taxes on it.* There are some exceptions to this general rule, such as insolvency and certain types of mortgage debt, so the homeowner is best advised to first consult with their tax adviser, which will usually cost them more money as well before proceeding with the short sale. *(See the Mortgage Forgiveness Debt Relief Act of 2007.)*

The debt might not be forgiven

In many cases although the lender agrees to remove the lien from the property so it can be sold, the homeowner's personal obligation for the debt is usually not released. In other words, the lender isn't accepting the short sale amount as payment in full. This is particularly true of second mortgages.

It is this attorney's opinion that if a short sale somehow benefits the homeowner it is probably because something is being done illegally (i.e. the homeowner remains in the house after the short sale, house is being sold to a family member or close friend or receives money at the closing.) Should any of these situations occur when representing a party at a short sale, I urge that you ask many questions about any part of the transaction and have documentation for any questionable part of the transaction. Being a participant to any illegal scheme of a short sale is not worth your practice, law license or reputation.

Note: Ivan E. Young is Principal Counsel at the Young Law Group, PLLC founded for the sole purpose of providing a new level of legal experience and expertise to individuals and businesses that are experiencing one or more financial hardships and/or financially related legal predicaments. Mr. Young's area of practice includes but not limited to foreclosure defense, modification, bankruptcy, real estate, criminal, family law, motion practice. Mr. Young is the Co-Chair of the Real Property Committee and a member of the Suffolk County Bar Association, of the New York State Bar Association, of the American Bar Association, of Amistad, of the Long Island Hispanic Bar Association and a member of the National Hispanic Bar Association.

1. http://en.wikipedia.org/wiki/Short_sale_%28real_estate%29

President's Message *(Continued from page 1)*

The American Bar Association recommends that lawyers contribute 50 hours of legal services without an expectation of a fee. Many of our attorneys do much more than that.

For example, many of you are no doubt aware of the wonderful things that our members have done for our community through the Pro Bono Foreclosure Settlement Conference Project under the leadership of its coordinator Barry Smolowitz. Over the last 2 ½ years, dedicated SCBA members have volunteered to handle over 1,600 cases, and have successfully disposed of over 600 of these matters.

These are just a small sampling of the benefits of membership. As always, I invite any attorney who is interested in becoming more involved in our exciting and vibrant community to contact the SCBA.

Consumer Bankruptcy *(Continued from page 20)*

individuals had sought bankruptcy relief. It is a well-settled law that any order entered in violation of the stay is void and not voidable. The attorneys who represented the plaintiff should have advised the court that the judgment was improperly issued against the debtors. No motion was necessary.

Practical Tips: Abstract companies often do not know bankruptcy law. However, the title policies that they prepare are underwritten by the major title insurance companies. These title insurance companies have law departments who do know the law. If you are dealing with an abstract company that is giving you a hard time, insist that they clear the matter with the title insurance company.

To demonstrate that a judgment has been discharged, you need only show a title company proof that the bankruptcy was filed after the judgment was entered and proof that the judgment creditor was scheduled in the petition.

Note: Craig D. Robins, a regular columnist for this paper, 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.LongIslandBank-ruptcyBlog.com.