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April 2013

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APRIL 2013
FOCUS ON
TRUSTS & ESTATES

ABA gathers in Dallas for 2013 Midyear Meeting

By Scott M. Karson

The 75th Midyear Meeting of the American Bar Association was held Feb. 7-11, 2013, at the Hilton Anatole Hotel, in Dallas, Texas. I attended the meeting as the Suffolk County Bar Association delegate to the ABA.

The ABA's policy-making body, the 550-member House of Delegates, met on Monday, Feb. 11, 2013, with Robert M. Carlson of Montana presiding as Chair of the House.

Welcoming remarks to the House were delivered by United States Senator Kay Bailey Hutchison of Texas, who welcomed the House to Dallas and thanked the House for its leadership in maintaining the integrity of the profession and ensuring the quality of judges. She reflected on her travels abroad and stated that there is no democracy without the rule of law and an independent judiciary.

Scott M. Karson

Following Senator Hutchison, Mr. Carlson, as Chair of the House, spoke about Law Day 2013. This year's theme *Realizing the Dream: Equality for All*, connects Law Day to the 150th Anniversary of Abraham Lincoln's issuance of the Emancipation Proclamation and the 50th Anniversary of Martin Luther King's *I Have a Dream* speech. Mr. Carlson encouraged state and local bars across the country to participate in Law Day activities and hopes that all members of the House will encourage this important participation.

The Honorable Myron T. Steele, President of the Conference of Chief Justices, began his remarks by acknowledging the victims of the courthouse shooting that had occurred in his State of

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Photo by Art Shulman

The Surrogates Court Committee held a meeting with Academy of Law program credit on March 12 on "Tips for allocating a fiduciary's' legal fees against a distribute beneficiary in a contested matter" led by speaker John P. Graffeo, Esq.

PRESIDENT'S MESSAGE

SCBA President's reminders and a roundup

Arthur Shulman

By Art Shulman

As this column was being edited for submission, the sad news was delivered that Steve Ceparano, beloved husband of Dorothy Ceparano, our Academy of Law Executive Director, had died. During the past few weeks, with Dorothy ever at his side, Steve had endured great pain, underwent surgery and struggled to recover. To Dorothy, their daughter Donna, grandchildren Samantha, Mandy and Alana, Dorothy's supportive and caring brother-in-law and sister-in-law, and your extended family, my deepest sympathy.

During the course of my term as president in addition to attending numerous New York State Bar and other local bar association functions and meetings with other bar association leaders, I have attended many of the SCBA's committee meetings to learn firsthand the needs of our membership and have worked closely with my Executive Committee and Board of Directors in addressing the concerns of our membership. As increased competition and new regulations imposed upon attorneys are constantly making it harder to practice law, the Executive Committee, Board of Directors and I welcome suggestions from our membership. The leadership of the SCBA is committed to making the lives of our membership easier and more productive.

We owe our gratitude to our colleagues in the Criminal Bar Association for their joint participation with the SCBA regarding the establishment of the new Traffic and Parking Violations Agency (TPVA) and in sponsoring a joint CLE lunch and learn with our Academy of Law on March 20 at the SCBA prior to the scheduled April 1 implementation of the TPVA. This CLE will be extremely helpful in preparing our members for dealing with the new procedures being

(Continued on page 8)

BAR EVENTS

Academy Happenings

2013 Matrimonial Law Series
Cross Examination: A primer for the Family Lawyer
Monday, April 1
Bar Center

Ethical Practice Management
Lunch 'n Learn
Monday, April 8, noon
Bar Center

East End Bridgehampton National Bank
Elder Law Program by George Roach
Wednesday, April 17, 6 to 9 p.m.
Bar Center

Mockery of a Real Estate Closing
Lunch 'n Learn
Wednesday, April 24, noon
Bar Center

Call the Academy for further information on these programs.

Annual Meeting
May 6, at 6 p.m.
Bar Center

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

FOCUS ON
TRUSTS & ESTATES
SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2012-2013

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.

APRIL 2013

2 Tuesday	Commercial & Corporate Law Committee, 6:00 p.m., Board Room
3 Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room
5 Friday	Academy of Law Meeting, 7:30 a.m., Board Room
8 Monday	Executive Committee, 5:30 p.m., Board Room
9 Tuesday	Judicial Screening Committee, 5:30 p.m., Board Room
10 Wednesday	District Court Committee, 8:00 a.m., Cohalan Court Complex, CI. Attorney's Lounge Education Law Committee, 12:30 p.m., Board Room Real Property Committee, 6:00 p.m., Board Room
11 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room
16 Tuesday	Surrogate's Court Committee, CLE, 6:00 p.m., Board Room
17 Wednesday	Elder Law & Estate Planning Committee, 12 Noon, Great Hall Professional Ethics & Civility, 6:00 p.m., Board Room
22 Monday	Board of Directors Meeting, 5:30 p.m., Board Room
30 Tuesday	Solo & Small Firm Practitioners, 4:30 p.m., Board Room

MAY 2013

1 Wednesday	Appellate Practice, 5:30 p.m., Board Room
2 Thursday	Law Day 2013 ***Realizing the Dream***, 10:00 a.m. – 2:00 p.m., Cohalan Court Complex, Central Islip, NY, 2nd floor Mezzanine
3 Friday	Suffolk Academy of Law meeting, 7:30 a.m., Board Room
6 Monday	Annual Meeting & Election of Officers, Directors and members of the Nominating Committee, Awards and High School Scholarship presentations, 6:00 p.m., Great Hall
7 Tuesday	Commercial & Corporate Law Committee, 6:00 p.m., Board Room
8 Wednesday	Education Law Committee, 12:30 p.m., Board Room
10 Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room
13 Monday	Executive Committee Meeting, 5:30 p.m., Board Room
14 Tuesday	Judicial Screening Committee, 5:30 p.m., Board Room
15 Wednesday	Elder Law & Estate Planning Committee, 12 noon, Great Hall Professional Ethics & Civility Committee, 6:00 p.m., Board Room
20 Monday	Board of Directors Meeting, 5:30 p.m., Board Room
21 Tuesday	Surrogate's Court Committee, 6:00 p.m. Board Room
28 Tuesday	Solo & Small Firm Practitioners, 4:30 p.m., Board Room

Our Mission

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

You are invited

Suffolk County District Attorney Thomas J. Spota will be the honored guest as the 2013 Brehon of the Year and the recipient of the Rosemary Nelson Award. The 23rd Annual Brehon Society of Suffolk County Dinner gala event will be held on Thursday, April 18, 2013, 6 p.m., dinner and entertainment at 7p.m., at the Irish Coffee Pub, East Islip, NY. $100/person. Seating is limited-RSVP by April 11, make checks payable to the Brehon Society of Suffolk County, and mailed c/o McGiff Halverson, LLP, 96 South Ocean Avenue, Patchogue, NY (631) 730-8686.

District Attorney Thomas J. Spota

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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Editor-in-Chief

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Sideshow

By Charles Wallshein

I had the opportunity and honor to lecture at a three day seminar sponsored by the Federal Home Finance Administration, February, 20-22 in Washington D.C. I spoke on the subject of securitization failure and various issues affecting title to real property affected by documentary irregularities in RMBS foreclosure. I expected to be putting on a dog and pony show for a room full of government agents and attorneys. When I arrived at FHFA Wednesday morning I realized this was not going to be a routine lecture.

Before I began my lecture I had the chance to read the list of attendees and the positions they held with their respective agencies. In attendance was Department of Justice, Federal Bureau of Investigation, United States Attorneys from five districts, Secret Service, Homeland Security, Troubled Asset Relief Program - Special Investigations Unit, and the Federal Home Finance Agency.

By the middle of my lecture on Thursday I realized that the audience did not come to hear about irregularities in RMBS foreclosure or the misdeeds of the loan servicers. These agencies are investigating and bringing criminal prosecutions against individuals based on criminal violations of various federal statutes. Not being a criminal attorney I had no idea what they would be prosecuting. So I asked.

They are looking into mail fraud, fraudulent misrepresentation to a federal agency, forgery, tax evasion, money laundering and stealing from the Federal Reserve Bank. There were other investigations and a grand jury that nobody could or would talk about. I was there to help them identify the human decision making choke points in the RMBS transaction so they could identify the decision makers. It was not the dog and pony show I expected. Everyone in the room had badges. Many of them had guns also.

If it makes any difference, I want the bar to know these people are serious and they are on a mission. I don't feel bad or less important that these agencies' first concern is not foreclosure fraud. I feel better that they are looking to make individuals accountable for crimes that may have been committed. I will be going back in a couple of months to run special evidentiary workshops for the prosecutors and investigators.

The fight the foreclosure defense bar fights every day uncovered robo-signing, LPS/DOC-X fraud, the MERS mess etc. The courts are listening; judges don't like being lied to. Now the Feds are involved and from my perspective I don't think they are not going to quit until they have some heads on a stick. I think they are for real. Foreclosure fraud may be the sideshow; I am waiting for the main event.

Note: Charles Wallshein is with the firm of Macco & Stern LLP, in Melville focusing his practice on real property, banking and finance. Prior to attending law school he spent several years on Wall Street trading stock index futures and options contracts. Since the banking crisis of 2008 Charles' practice has focused on residential foreclosure defense and commercial loan restructuring.

SCBA Annual Meeting – elections and recognition

By Sarah Jane LaCova

The Annual Meeting is the last important event in our administrative year. This is the occasion that provides an opportunity to conduct necessary business and to pay recognition to our members who have made significant contributions to the association.

As our bylaws dictate, the Annual Meeting shall be held on the first Monday in May (this year it's May 6, 2013). It is also a time to become reacquainted with your colleagues free from litigation or legal dealings.

This year's Annual Meeting will be held at our Bar Center on Monday, May 6, at 6 p.m. Included in the business to be conducted is our annual election. This year's slate includes: William T. Ferris, III, President Elect; Donna England, First Vice President; John R. Calcagni, Second Vice President; Patricia M. Meisenheimer, Treasurer; Justin M. Block, Secretary. Directors who will serve a three year term expiring in 2016 include: Leonard Badia; Cornell V. Bouse; Jeanette Grabie and Peter C. Walsh. Members to be elected for the Nominating Committee for a three year term are: Ilene S. Cooper; Michael J. Miller and Arthur E. Shulman. The incoming President, Dennis R. Chase, by virtue of his election as President Elect last year, does not stand for election this year.

The Awards of Recognition, Golden Anniversary honorees (members who have practiced law for 50 years) and the $1,000 college scholarship for a high school student will be presented at the Annual Meeting. SCBA Directors to be recognized for completion of their three year terms are: Michael J. Miller; Hon. William B. Rebolini; Wayne J. Schaefer and Thomas J. Stock. Outgoing Academy Officers will also be recognized at this meeting. The SCBA leaders are hoping for a good membership turnout for this meeting in order to conduct the association's business and to share in honoring those who have served so admirably.

Meet Your SCBA Colleague

Richard Haley, **a trial attorney, has been a litigator his entire legal career. Once a deputy sheriff-court officer in Massachusetts, he'd seen a great deal even before becoming an attorney. For Haley, becoming an attorney was the only way to go.**

By Laura Lane

You went to school in Massachusetts including law school. Are you from Massachusetts? Yes. I was born in Springfield.

Did you dream of being an attorney as a boy? I always had an interest in politics and current events and was an American history major in high school. Current events and history lend themselves to an interest in a career as a trial attorney.

Before you became an attorney you were a deputy sheriff assigned to serve as a court officer. How did you end up being an attorney? After receiving my bachelors I took a year off and went home. While in Springfield, I decided to help a family friend on his campaign to become sheriff and he won. He offered me the job of deputy sheriff and assigned me to be a court officer. After a year I went to law school at night.

Why was it beneficial? I was happy to take the job because I would be in court all day. I got an invaluable education working as a court officer. I listened to trial after trial in civil and criminal court. And sometimes court would close at 3 p.m. and I was required to stay in the courtroom so I'd use that time to study. I'd sit at the judge's bench with the entire Massachusetts Statutes behind me and study. I was a court officer for two and a half years.

How did you end up at Martha's Vineyard? In the summer they didn't need as many court officers in Springfield so I took a leave of absence and worked at Martha's Vineyard as a police officer.

What was that like? I also interned for the Duke's County District Attorney's office and part of my job was to appear for traffic court issues.

Did you see any famous people while working at Martha's Vineyard? Ted Kennedy was arraigned at the courthouse after Chappaquiddick, and I saw James Taylor, Robert McNamara, Carley Simon and Walter Cronkite while living in Martha's Vineyard.

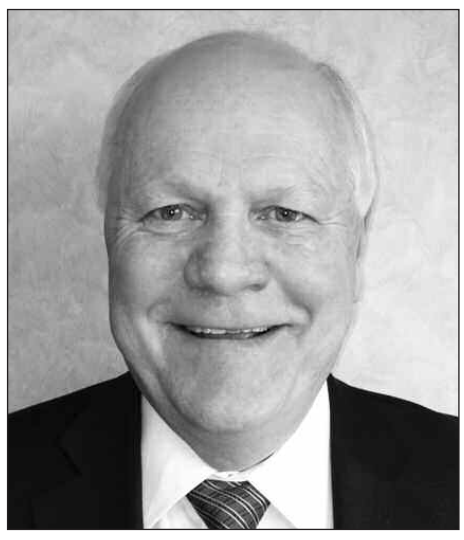
How did you end up in New York? I worked with someone from Levittown. He knew I wanted to work as a trial attorney and recommended I apply for the Nassau County District Attorney's office. I also interviewed at the District Attorney's office in Boston but Dennis Dillon's office made me a better offer.

You worked for the Nassau County District Attorney's Office in the Homicide/Major Offense Bureau for around six years. What was the experience like for you there and how did you end up in Suffolk? I went through the learning process. Initially appearing in traffic court, I learned to be comfortable on my feet before a judge. While at the district attorney's office I built my trial experience and tried a number of cases. The more cases you try the more skillful you become. I got married in 1981 and had children so we needed a bigger home. We looked in Suffolk County and bought a home there so it was a natural progression to go to the Suffolk County District Attorney's office.

You started in the Narcotics and Major Crime Bureau for a year and then became the principal trial attorney for the Federal Litigation Unit at the Suffolk County Attorney's Office. What experience did you get there? I was given civil experience. And because of my experiences I gave a great deal of consideration to becoming a prosecutor. But when I went to the Federal Litigation Unit I was brought in as a defense attorney working several different types of cases including civil rights actions.

How did you end up in your own private practice in 1990? I was representing Suffolk County correction officers in an excessive force case where a federal civil rights action was being brought. In the course of the case the Suffolk County Corrections Officer Association officials, who were following the trial, asked me if I wanted to represent their members if and when I went into private practice. The invitation led me to think about going into private practice because I'd be known as the union attorney if I accepted their invitation and would have clients. I was their attorney for several years until the union leadership changed. But by then I was established as a sole practitioner. In 1994 Richard Weinblatt and John Calcagni joined me to form Haley, Weinblatt & Calcagni, LLP.

When did you join the SCBA and why? It was around 1994 when I formed the partnership. I joined because of the camaraderie associated with the bar.



Richard Haley

What do you enjoy about the SCBA even today? The continuing education programs at the Academy are especially useful.

Have you been involved at the bar? I've been active lecturing on several occasions on criminal trial practice and legal techniques. And I joined other experienced practitioners in a mock trial and will contest for the benefit of bar members. There was standing room only in the courtroom when I did it.

Why would you tell people to join? For the same reasons I enjoy it - the outstanding legal programs. They keep you proficient as a lawyer. Our objective as attorneys is to service your client, which means you need to stay educated with the current legal trends and the SCBA is the best vehicle to do that.

COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney resignations

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

Jennifer Lea Alvarez
Howard Berler
Colin Michael Cherico
Wen Kwan Chow
Meryl C. Cohen
Michael A. Freimann
Andrew M. Friedman
Michael Gentithes
Alicia Gillian George
Yuichi Haraguchi
John C. Holmes, Jr.
Gregg Martin Horowitz
Neil Hutchins
Richard C. Inlow
Gary Neil Jacobs
Jeffrey Marc Juzwiak
Jeffrey J. Keenan
William F. Koegel
John Kozma
Martin Marks
Colin Miller
Megan McLeod
Frederic W. Parnon
Paul S. Rosenstein
Theodore D. Roth

Ilene S. Cooper

Attorney resignations granted/disciplinary proceeding pending:

David M. Green: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee emanating from his misappropriation of mortgage proceeds. 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.

David Allen Linn: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee regarding charges of professional misconduct alleging, *inter alia,* that he failed to preserve funds entrusted to his charge, failed to handle an appeal entrusted to him, and failed to cooperate with the Grievance Committee. Respondent also acknowledged that he was the subject of an ongoing investigation by the Grievance Committee, which revealed that he converted funds from two real estate transactions that were due to his former clients. Respondent stated that his resignation was freely and voluntary rendered, that he was aware of the implications of his resignation, and 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 disbarred:

Christopher George Lazarou: By Order of the Supreme Court of Georgia, the respondent was disbarred in the State of Georgia, and subsequently disbarred in the State of Massachusetts based upon his disbarment in Georgia. The disciplinary matter in Georgia emanated from two complaints that revealed that the respondent failed to preserve funds entrusted to his charge. The Grievance Committee served the respondent with a notice informing him of his right to raise any of the defenses to reciprocal discipline, as well as request a hearing. The respondent failed to respond. Accordingly, reciprocal discipline was imposed upon the respondent, and the respondent was disbarred from the practice of law in the State of New York.

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

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable John J. J. Jones, Jr.

Motion to implead denied; third party action not the forum to adjudicate the potential claims.

In *Roadway Logistics, Inc. v. Fernando Rosario,* Index No.: 31546/10, decided on January 17, 2013, the court denied the application by defendant Fernando Rosario for an order granting leave to implead Carmine Nazzareno and Michael Marksfield. In support of his motion, defendant contended that it was undisputed that Nazzareno, Marksfield, and Rosario were the shareholders of Roadway Logistics and that Nazzareno and Marksfield transferred his interest to them. Rosario further claimed that he never authorized this transfer. Rosario also alleged that Nazzareno and Marksfield signed a non-compete agreement providing that they would not engage in a business that competed with the business of Roadway Logistics and that Marksfield established a company CMC Express, Inc., which competes with Roadway Logistics.

In denying the motion, the court noted that the liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR §1007 should arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action. Here, the court found that Roadway Logistics' claim against Rosario arose from his alleged violation of a non-compete agreement he entered into with the plaintiff.

The fact that Nazzareno and Marksfield were alleged to have independently violated similar agreements with Roadway Logistics, an allegation that they disputed, did not and would not shift the liability from Rosario to Nazzareno and Marksfield. The court concluded by stating that while the denial of leave to implead Nazzareno and Marksfield as third party defendants was in no way a reflection of the potential merit to a separate claim against them by Rosario, a third party action was not the forum to adjudicate those potential claims.

Motion for a trial preference granted; plaintiff established that she has attained the age of 70 years.

In *Helen Stavick v. Kamala S. Browne and Barbara L. Smith,* Index No.: 3032/12, decided on November 30, 2012 the court granted plaintiff's motion for a trial preference. In granting the motion, the court noted that plaintiff moved for a trial preference on the ground that she was over 70 years of age. In support of the motion, plaintiff submitted a copy of her birth certificate attesting that she was born on March 13, 1932 and a copy of her New York State driver's license, both of which established that she had attained the age of 70 years. In granting the application, the court noted that pursuant to CPLR §3403(a)(4) "in any action upon the application of a party who has reached the age of seventy years," such action "shall be entitled to a preference.

Elaine M. Colavito

Honorable Daniel Martin

Motion to change venue denied; untimely

In *Michelangelo Matera, Esq. v. Ronald D. Ingber, individually and as a partner and member of Siler & Ingber, LLP, Jeffrey B. Siler, individually and as a partner and member of Siler & Ingber, LLP, a limited liability partner,* Index No. 14917/12, decided on January 7, 2013, the court denied defendants' motion for an order changing venue. The court noted that the plaintiff commenced the action by filing a summons and complaint in May 2012, which was served upon defendants on or about May 17, 2012. The summons designated Suffolk County as the place of trial, indicating that the basis for same was "plaintiff's place of business." Defendants served a demand for change of venue on plaintiff by regular mail on May 30, 2012. The within motion requesting change of venue was served on plaintiff by regular mail on June 5, 2012. Plaintiff's affidavit of proper venue was dated and served on June 5, 2012.

Defendants now moved for an order changing venue to Nassau County pursuant to CPLR §511(b) on the ground that venue should be based upon residence and not upon plaintiff's place of business. In rendering its decision, the court noted that pursuant to CPLR §511 (b) "the defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within 15 days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Pursuant to CPLR §2103(b)(2) "where a period of time prescribed by law is measured from the service of a paper and service is by mail five days shall be added to the prescribed period." The court found since the defendants served their demand for a change of venue by mail on May 30, 2012, a motion to change the place of trial should not have been made until June 11, 2012. The court found the motion to change venue as untimely, and denied it.

Honorable Peter H. Mayer

Defendant guilty of civil contempt; defendant's actions were calculated to, and actually did defeat, impair, impede and prejudice the rights of the plaintiff.

In *Columbia Capital v. Diego Cuervo, New York State Commissioner of Taxation & Finance, Laura Cruz,* Index No.: 15487/05, decided on June 28, 2012 the court found the defendant, Diego Cuervo guilty of contempt of court. The court noted that the proceeding was brought by the court appointed receiver of real property which was the subject of the litigation to hold the defendant in civil contempt pursuant to section 753 through 756 of the Judiciary Law. In deciding the application, the court pointed out that its order "directed that the defendant and their agents, officers, employees, and contractors deliver and attorn to the receiver all rents lists, shareholder lists, unexpired and expired leases, proprietary leases, agreements, contracts, recognition agreements, corporate by-laws, correspondence, notice registration statements, tenants securities, shareholders, escrows , and lists of current rent or other monies, arrear, relating to space in the mortgaged premises;…and further enjoining and restraining the defendant and their agents, officers, employees and attorneys from (i) collecting the rents of said mortgaged premises; (ii) interfering in any manner with the mortgaged premises or its possession, or with the Receiver's management thereof." The essence of the receiver's claim was that the tenants continued to pay rent to the landlord during and after both the defendant and the tenants received the notice to attorn served by the receiver. Moreover, neither the defendant nor his agents or employees ever delivered any rent lists, unexpired or expired leases, corporate by-laws, etc. In rendering its decision, the court pointed out that to sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge and that as a result of the violation a right of a party to the litigation was prejudiced. It was not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience regardless of notice was sufficient if such disobedience defeated, impaired, impeded, or prejudiced the rights of a party. Here, the court found by clear and convincing evidence that the defendant's actions were calculated to, and actually did defeat, impair, impede and prejudice the rights of the plaintiff. As such, the court found the defendant in contempt.

Honorable Denise F. Molia

Notice of pendency canceled; a notice of pendency is effective only, if within 30 days after filing, a summons is served upon the defendant.

In *Margaret G. Dineen v. Gregory Cote and Loretta Diamond Bernholic,* Index No. 27585/12, decided on January 14, 2013, the court granted defendant's motion

(Continued on page 22)

Estate planning with assisted reproductive technologies

By Alison Arden Besunder

Louise Joy Brown, the world's first test-tube baby, was born on July 25, 1978. Since then, the advancement, development, and expansion of assisted reproductive technology ("ART"), has transformed the meaning of parenthood and biological relationships in a "family." The material ranges from frozen ovaries, stored embryos and fertilized eggs, and beyond. Separately, couples can now store "cord blood" at storage centers around the country for an annual fee in case stem cell research advances to the point of curing chronic diseases such as diabetes or potentially life-threatening diseases such as leukemia.

Leaving aside the question of how the physical genetic material is distributed under the will, the more complex issue is whether children conceived through ART *after* a parent's death can inherit from the deceased parent.

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SPECIAL EDITION

After-born "ART" children

Some states have specific legislation concerning ART children's inheritance rights but there is obviously no unified law as state law dictates inheritance rights. Federal agencies have taken varying positions. ART's ability to provide life after death presents new and unique legal challenges and questions.

Consider that one child may have as many as five individuals involved in his or her birth process. There may be an egg donor, a sperm donor, a surrogate carrier, and two adoptive parents! Current law is not adequately equipped to address this. Anonymous sperm donors are generally protected from estate claims but not completely immune. In contrast, egg donors are not afforded specific protections. There is little legal guidance on the parties' rights in a child's creation in any of the many scenarios that can arise involving ART.


Alison Besunder

Reproductive technologies allow life to be conceived and born after a father's or, in the case of frozen embryos and eggs, the mother's death. Posthumous children are deemed "issue" where: the posthumous child has a biological relationship to the decedent; there is clear consent by the decedent to posthumous conception and to support any resulting child; proper time limitations are met; and notice is given to all parties. *Woodward v. Commissioner of Social Security,* 435 Mass. 536, 760 N.E. 2d 257 (2001); s*ee also Restatement 3rd of Property: Wills & Other Donative Transfers* (a posthumous ART child "must be born within a reasonable time after the decedent's death under circumstances indicating that the decedent would have approved of the child's right to inherit.").

The Uniform Probate Code ("UPC") (which has not been adopted by New York) provides for shares of estates to certain children in the absence of express disinheritance. UPC § 2-302. Under the UPC and the standard in *Woodward*, a decedent's act of cryopreserving genetic material such as gametes, sperm, or embryos provides the requisite intent to be the legal parent of the resulting child.

One New York case, *In re Martin B.,* touched on this issue insofar as whether EPTL § 2-1.3 – dealing with non-marital children – encompasses posthumously conceived children. *In Re Martin B,* 841 N.Y.S.2d 207, 209-10 (N.Y. Surr. 2008). The grantor executed seven trust agreements in 1969 and died in 2001, survived by two of his three children. The grantor's predeceased son left cryopreserved semen for his wife's use. His wife later gave birth to two sons. The grantor's trusts gave discretion to the trustee to sprinkle principal among "grantor's issue" during his surviving child's lifetime, and thereafter to the grantor's "issue" or "descendants." The specific issue presented was whether the term "issue" and "descendants" include children conceived by means of IVF with cryospreserved sperm of a predeceased child. The court held that a child born from biotechnologies with a parent's consent is entitled to the same rights as a natural born child.

EPTL § 4-1.1(c) specifically states that "distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime." Under Section 4-1.1(c), a posthumous child may inherit if he or she qualifies as decedent's "distributee" in intestacy. EPTL § 6-5.7 also specifies that "posthumous children are entitled to take in the same manner as if living at the death of their ancestors," if "a future estate is limited to children, distributees, heirs or issue. . . ." EPTL § 6-5.7(a).

Notably, the EPTL's enactment in 1966 far pre-dates the widespread use of ART. The Uniform Status of Children of Assisted Conception Act (USCACA), Section 4, states that if an individual consents on record to be a parent even if assisted reproduction were to occur after death, and they die before the placement of the egg, sperm, or embryos, the deceased individual will become a legal parent of the child. Only a minority of states have adopted this regulation.

Entitlement to federal benefits

A child is eligible to receive Social Security benefits if he or she can prove dependency on the deceased parent. There are two exceptions: a presumption of dependency for disabled children; and if the laws of the state where the decedent died would have treated the child as the decedent's natural child. SSA benefits therefore turn on state law that is widely varied.

The Superior Court of New Jersey declared a plaintiff's post-humously conceived children with her deceased husband's sperm intestate heirs of the decedent. *In re Estate of Kolacy*, 753 A.R.2d 1257 (March 31, 2000). In *Kolacy*, the children were conceived from the decedent's cryopreserved sperm and born eighteen months after his death. The court held that one who preserves genetic material

(Continued on page 21)

Wills, Trusts & Estates - plain and simple

Joint accounts – who gets the account upon your death?

By Patricia C. Marcin

An account that is titled in your name and that of your child "with right of survivorship" passes to your child upon your death "by operation of law." That is, your will does not control the disposition of this account. When an account is titled in your name and your child's name "as tenants in common," at your death one-half of the account is deemed to be owned by your child and the other half passes into your estate as a probate asset. That is, your will does control the disposition of one half of this account. If the account is titled in your name and your child's name and says nothing else, the banking law *presumes* that it is meant to be a joint account with right of survivorship and so passes to your child on your death by operation of law.

As people get older, they will frequently title an account jointly in their own name and that of a child who lives close to them in order to help with check-writing, bill paying, transfers and withdrawals. These are often called "convenience accounts" and, despite the joint title on the account, the parent does not intend for the assets in that account to pass to the named child upon the parent's death. Rather, the parent intends that the balance of the account at the parent's death be added to the parent's estate and, thus, the parent's will will control the disposition of the assets in that account. Unfortunately, if the account signature card does not specifically state that it is titled jointly "for convenience purposes," joint accounts can be frequent fodder for litigation upon the death of the parent.

Patricia C. Marcin

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For example, let's say Lynn's daughter, Mary, lives close by; and her son, John, lives in Colorado. Lynn opened a joint account with Mary, with no indication of whether the joint title is "with right of survivorship" or "for convenience purposes." Mary sees Lynn frequently, helps her pay her bills and manage her money, takes her to the store and to the doctor. After several years, Lynn dies and Mary claims that the $150,000 remaining in the joint account passes to her by operation of law. After all, it was a joint account and the law presumes it is with right of survivorship, not to mention all the time Mary spent helping Lynn.

John, on the other hand, sees things differently. Lynn had always split everything equally between John and Mary, and Lynn's will bequeaths her estate equally to John and Mary. John's position is that the joint account with Mary was only a convenience account; and the $150,000 remaining in the account should be added to Lynn's probate estate, to be divided equally between John and Mary in accordance with Lynn's will. Hence, the costly litigation begins.

To avoid litigation over joint accounts, you may consider using a durable power of attorney instead, so that your agent can help you pay your bills, write checks, etc. from an account in your name alone. If you prefer to use a joint account for convenience purposes, make sure "for convenience purposes" is in the title of the account on the signature card, unless, of course, you intend the child named on the account with you to receive the account in full upon your death. If you do intend that child to receive the account, you should consider signing a letter which explains this intent; and ask your estate planning lawyer to keep this letter with your original will for safekeeping.

Note: Patricia C. Marcin is an attorney at the law firm of Farrell Fritz, P.C. concentrating in trusts, estates and tax law. She can be reached at pmarcin@farrell-fritz.com or at (516) 227-0611.

We will miss you

The staff and members of the SCBA mourn the sudden and untimely passing of our longtime friend Stephen A. Ceparano, the husband of Academy Executive Director Dorothy Ceparano. We cannot imagine the Academy and the SCBA without Steve. We will miss his good nature and excellent sense of humor. To Dorothy and her family – we all feel a keen sense of loss in Steve's passing and we extend our heartfelt sympathy.

The Board of Directors and members of the SCBA mourn the passing of the Honorable Joel K. Asarch, Nassau County Supreme Court Justice and long time member of the SCBA. He was a man of superlatively high standards, complete integrity, and boundless enthusiasm for whatever task he took in hand. No one whose privilege it was to know him is likely to forget the candor of his speech, the courage of his faith, the warm and glowing brightness of his friendship. He was a Past President of the Nassau County Bar as well as Dean of their Academy of Law. ~LaCova

SIDNEY SIBEN'S AMONG US

On the Move...

Natasha A. Moskvina has joined Ruskin Moscou Faltischek, P.C. as their newest associate and member of the firms' Litigation Group.

Gregory E. Wenz, a newly admitted attorney who took the Oath of Office on February 27, 2013, will be joining his mother, SCBA Member Marilyn Wenz, at her matrimonial and family law firm in Hauppauge as an Associate Attorney.

Tamir Young has joined the Weber Law Group (WLG) as Partner and Head of Litigation. A highly skilled attorney with exceptional litigation experience, Young joins WLG after eight years of senior litigation practice at Cravath, Swaine & Moore LLP.

Announcements, Achievements, & Accolades…

Jacqueline Siben

Alan E. Weiner, CPA, JD., LL.M. has been appointed to a fifth term (2013-2014) as a judge on the New York State Society of Certified Public Accountants' [NYSSCPA]) Excellence in Financial Journalism Awards Committee. He is the founding tax partner, and now Partner Emeritus, at Holtz Rubenstein Reminick (Melville and New York City). The New York State Society of Certified Public Accountants (NYSSCPA) offers its annual Excellence in Financial Journalism Award to recognize reporters from the national and local press who contribute to a better understanding of business topics.

Laura Dunathan, partner in the law firm Twomey, Latham, Shea, Kelley, Dubin & Quartararo LLP, has been named board member of Camp Pa-Qua-Tuck.

Joseph T. La Ferlita of Farrell Fritz, was recently appointed District Representative for Nassau and Suffolk Counties for the New York State Bar Association's Trusts and Estates Law Section.

John Racanelli, a partner at Farrell Fritz, has recently been elected secretary of the Flushing Willets Point Corona Local Development Corporation's (FWPCLDC) Board of Directors. He has served on the board for several years

New Members...

The Suffolk County Bar Association extends a warm welcome to its newest members: **David Boyer, Dennis M. Brown, Patrick Burns, Mark S. Butler, Noel C. Dillon, Stephen V. Dunn, Rebecca Ebbecke, John C. Farrell, Richard S.Finkel, Lindsay Godt, Joseph S. Gulino, Jr., Samuel P. Hechtman, Timothy F. Hill, Frank J. Incantalupo, Thomas John Lavallee, Daniel R. Lebovic, James P. McCarthy, Kevin G. McClancy, James M. Meaney, Jacqueline M. Muratore, Charles J. Ogeka, Hon. Rosann O. Orlando, Christin Paglen, Helen Partlow, Karen L. Podell, Ira C. Podlofsky, Marisa D. Pollina, Nicole Poole, Max W. Romer, Steven A. Salz, Jodi A. Shelmidine, Stephen J.Vargas, Robbie Vaughn, Michael S. Williams and Karen M. Young.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law**: Patrick Brutus, Benjamin Goldberg, Lyndsay Harlin & Samantha Kent.**

Material prepared for litigation examined

By Ilene Sherwyn Cooper

In *In re West,* the Surrogate's Court, New York County (Sur. Anderson), explored the scope and definition of the qualified privilege that attaches to material prepared in anticipation of litigation.

Before the court was an application by the proponent of the decedent's will to compel discovery of the objectants' notes memorializing their communications with non-party witnesses after the decedent's death. Objectants' opposed the application, contending that the notes constituted material prepared in anticipation of litigation and were privileged. Additionally, objectants maintained that the documents fell outside the scope of the three year/two year rule and, therefore, were not subject to discovery.

The record revealed that in the course of deposing objectants, the proponent learned that information contained in the subject notes formed the basis for the objections to probate. The information was derived from telephone calls and in person conversations with third parties pertaining to the decedent's estate plan and will. According to the deposition testimony, at the time of the conversations, the objectants were investigating whether they had grounds for opposing probate.

The court opined that while the provisions of CPLR 3101 generally require "full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3101(d)(2) provides a qualified privilege for materials prepared in anticipation of litigation or for trial. The court found that this privilege is limited to materials which are prepared *exclusively* for litigation, and imposes upon the party seeking to prevent disclosure the burden of proving that the privilege applies. To this extent, when the motive for preparing the materials is mixed, even if a predominant motive is for use in litigation, the privilege does not apply.

In considering whether materials fall within the scope of the privilege, courts have considered the time when the documents were created, the possible uses of the information, and the relationship between the informant and the person to whom the information was provided. Thus, by way of example, the court noted that materials prepared during the investigatory stage of what later becomes a litigation are generally not privileged, as "… reports prepared for the purpose of assisting a party in making the decision to litigate or not are considered to have a mixed purpose, and therefore must be disclosed…" *Plimpton v. Massachusetts Mut. Life Ins. Co.,*50 A.D.3d 532, 533 (1st Dept. 2008).

Based upon the foregoing, the court concluded that when non-lawyers hold conversations to explore the facts that ultimately result in litigation, the notes derived from such conversations are not privileged.

Further, the court held that the subject documents were not shielded from discovery pursuant to the three year/two year rule. While the objectants' argued that the subject notes were prepared after the decedent's death and therefore fell outside the scope of the rule, the court found that because the events described in the notes occurred within the time frame of the rule, they were subject to production.

FOCUS ON TRUSTS & ESTATES SPECIAL EDITION

Ilene S. Cooper

***In re West,* N.Y.L.J., Jan. 7, 2013, at 20 (Sur. Ct. New York County)(Sur. Anderson).**
Disclosure Requirements of SCPA 2307-a and Non-Domiciliaries

In an uncontested probate proceeding, the Surrogate's Court, Richmond County, considered whether the disclosure requirements of SCPA 2307-a applied to a non-domiciliary attorney/fiduciary, so as to preclude him from receiving a full statutory commission. Specifically, the attorney-fiduciary prepared a will for an out-of-state testator, who died a domiciliary of New York, and never executed an affidavit in compliance with the statute prior to death.

The record revealed that the attorney-draftsman and the decedent knew each other for 43 years and had a longstanding friendship. At the time the propounded will was executed in 1998, the decedent and the draftsman were both residents of New Jersey. However, there months thereafter, the decedent relocated to Staten Island, New York, where he remained until his death in 2012.

In addressing whether the requirements of SCPA 2307-a were applicable to the attorney-draftsman, the court reviewed the provisions of the statute and the basis for the legislation underscoring its passage. The court noted that while the statute has been the frequent subject of case law and commentary, there was little guidance regarding the application of the statute to the circumstances *sub judice.* The court found the decision in *In re Newell,* NYLJ, June 6, 2002, at 2, instructive but distinguishable.

In concluding that the attorney/fiduciary was entitled to a full statutory commission, the court found that the statute failed to make a distinction as to whether the attorney-draftsman subject to its terms must be an attorney licensed in New York or an attorney licensed elsewhere. More importantly, however, the court noted that a plain reading of the statute reveals that it was intended to address testamentary instruments to be proven in New York, a condition that could be difficult for an attorney-draftsman to predict. Indeed, the court recognized that an attorney-draftsman cannot always foresee where his client will be domiciled at the time of death in order to comply with the applicable laws of that state.

Within this context, the court held that it was only logical to conclude that if a non-New York attorney drafts a will for a non-New York domiciliary and has no knowledge of the intent of the client to change his domicile, the attorney cannot be expected to comply with a New York based statute, nor a statute of any other state or country to which the client may possibly move. Accordingly, under the circumstances, the court determined that the attorney-draftsman was not required to comply with the requirements of SCPA 2307-a, and was entitled to a full statutory commission.

***In re Restuccio,* N.Y.L.J. 1202584000596, at *1 (Sur. Ct. Richmond County).**

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

S Corp sales, built-in gain, and 2013

By Robert M. Harper*

Surrogate's Court Procedure Act ("SCPA") § 1404 provides potential objectants in a probate proceeding with the opportunity to obtain pre-objection disclosure from the party offering a testamentary instrument for probate before filing objections. While the underlying rationale for such pre-objection disclosure is to afford potential objectants the opportunity to make an informed decision about whether to pursue a will contest, disputes oftentimes arise as to the precise scope of the disclosure to which potential objectants are entitled before filing probate objections. Among the many potential areas of dispute is the application of the so-called "3/2 rule," which limits the period of time for which objectants are entitled to discovery in a probate proceeding, at the pre-objection, SCPA § 1404 stage. This article addresses that issue.

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The 3/2 rule, which is set forth in Surrogate's Court Rule 207.27, provides as follows: "In any contested probate proceeding in which objections to probate are made . . . [, except] upon a showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period."[1] This rule, which is pragmatic in nature, is "designed to [protect parties from] the costs and burdens of 'runaway inquisition.'" Although the rule specifically references examinations, courts have held that it applies with equal force to documentary discovery as it does to depositions.[2]

One issue on which the courts have rendered seemingly inconsistent decisions is whether the 3/2 rule applies to pre-objection discovery conducted pursuant to SCPA § 1404. The reason for such inconsistency is that the 3/2 rule, by its text, applies to contested probate proceedings in which objections have been filed, leading at least one Surrogate's Court to conclude that the rule only governs discovery that occurs after probate objections are filed.[3]

In *Fiddle v. Estate of Fiddle*, the Surrogate's Court, Sullivan County, found that the 3/2 rule does not govern until probate objections are filed. However, practitioners should be hesitant to rely upon *Fiddle* in seeking to limit the scope of pre-objection discovery in a probate proceeding, as the court rendered its finding on the 3/2 rule's application in dicta. There, the party seeking disclosure had already filed objections, such that the court did not need to address the issue of whether the 3/2 rule governed.

Moreover, in every other reported decision in which a Surrogate's Court has addressed the issue of whether the 3/2 rule applies prior to the filing of probate objections, the courts have held that the rule governs whether or not objections are filed. Indeed, in *Matter of Yagoda*, Nassau County Surrogate Edward W. McCarty, III specifically rejected a potential objectant's argument, based upon *Fiddle*, that the 3/2 rule did not apply unless and until objections were filed.[4] Surrogate McCarty reasoned, among other things, that the weight of authority is that the 3/2 rule applies regardless of whether objections have been filed.

Surrogate McCarty's determination in *Yagoda* is consistent with the prevailing view on the 3/2 rule's application to pre-objection disclosure in probate proceedings. Dating back at least as far as former Nassau County Surrogate C. Raymond Radigan's 1999 decision in *Matter of Giardina*, most Surrogate's Courts have held that the 3/2 rule applies whether or not probate objections are filed.[5] The party seeking to avoid the 3/2 rule's application should be prepared to make a showing of special circumstances, a detailed discussion of which will have to await another column.

The lesson to take away from this article is that the 3/2 rule generally applies to discovery in a probate proceeding whether or not objections have been filed. Practitioners seeking to avoid the rule's application and temporal limits on discovery will need to establish special circumstances to justify expanding the scope of discovery that is permissible in probate proceedings.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of trusts and estates litigation. Mr. Harper serves as an Officer of the Suffolk Academy of Law, Co-Chair of the Legislation Committee of the New York State Bar Association's Trusts and Estates Law Section, and a Special Professor of Law at Hofstra University.

1. 22 N.Y.C.R.R. 207.27.
2. *Matter of Fischzang*, N.Y.L.J., Apr. 1, 2009, at 36, col. 5 (Sur. Ct., New York County).
3. *Fiddle v. Estate of Fiddle*, 13 Misc.3d 827 (Sur. Ct., Sullivan County 2006).
4. *Matter of Yagoda*, 38 Misc.3d 1218(A) (Sur. Ct., Nassau County 2013).
5. *Matter of Giardina*, N.Y.L.J., June 15, 1999, at 32, col. 4 (Sur. Ct., Nassau County).

President's Message *Continued from page 1)*

implemented by the TPVA and how to best represent our clients whose actions become the subject of this new agency. Both the SCBA and the Criminal Bar Association are very appreciated of the courtesy and cooperation of Paul Margiotta, director of the TPVA, who worked with our bar associations to facilitate our members' adapting to the entirely new facilities and procedures of the TPVA. After the TPVA is up and running for a few months, with the assistance of attorneys who have practiced in the new environment, the Academy of Law will schedule another training session for our members.

Updating our ongoing efforts to refurbish the attorney's lounge in Central Islip, we have allocated the necessary funds and are waiting to proceed as soon as the two "whisper booths," presently located in the attorney's lounge and used by attorneys to communicate with their incarcerated clients out in Riverhead, are moved to their new locations in the courthouse.

As to the SCBA's efforts in assisting the victims of Sandy, the SCBA has, and will continue, to participate with the Touro Law Center and the New York State Bar Association in helping victims of Sandy deal with various state, federal and local agencies as well as insurance companies. The problem of getting the banks to authorize the release of the monies being paid by the insurance companies continues to be of concern. I am still participating in bi-weekly phone conferences with the NYS Bar President Seymour James and the leaders of other downstate bar associations in identifying the continuing problems and trying to come up with solutions.

We are grateful for all of our volunteer attorneys who have expended hours of their time to assist the Suffolk County community with the challenges faced by so many and for the cooperation of the Touro Law Center.

At the time I wrote my message for the March edition, I commented that local ground hogs had predicted only six weeks more of winter. Today as I write this message, snow flakes are descending and accumulations varying from two to seven inches are being recorded on Long Island. Whether or not we should continue to rely on not-so-cute furry rodents seeing their own shadows to predict our weather is debatable, but the ground hog may without the benefit of computer models, be no less accurate then our local weather forecasters.

Nevertheless, in spite of all the energy we expended during the past couple of months shoveling and deicing our driveways and brushing snow off our cars, our Nominating Committee did a great job in selecting a well-qualified slate of our members to fill the various leadership positions available on our Board of Directors and Executive Committee, specifically Justin Block for the position of Secretary on the Executive Committee and Leonard Badia, Cornell Bouse, Peter C. Walsh and Jeannete Grabie for positions of Directors on the Board of Directors.

Voting for the nominated Officers and Directors will take place at the SCBA Annual Meeting on Monday, May 6. Several of our members will receive awards for their outstanding efforts on behalf of our bar association and those of our members who have been attorneys for 50 years will be presented with Golden Anniversary awards. I look forward to seeing you there.

Last, but not least, congratulations to the Honorable James P. Flanagan for his election to the position of Dean of the Suffolk Academy of Law. Having been a Dean of the Academy many years ago, I know firsthand the hard work such a position requires, and knowing the efforts that Judge Flanagan has already put into the Academy as a volunteer and an officer of the Academy and as a current member of the Board of Directors, I can think of no better candidate for the position of dean. He will be following another great Dean, the Honorable John Kelly, whose two year term will expire on May 31, 2013. Judge Flanagan will be sworn into his position as dean along with the SCBA officers and board of directors at our annual installation dinner to be held this year on June 7, 2013, at the Cold Spring Harbor Country Club. I look forward to seeing you there also.

TECHNOLOGY

One new technology is changing the way business is conducted

By Dennis R. Chase

Dennis R. Chase

For many in our profession, the prospect of running our practice in a paperless environment, storing our data in the cloud, and effectively working from a remote location seems like a quantum leap forward from the days of litigation cases, yellow legal pads, and dare we say, carbon paper. We still denote to whom others may be receiving a particular piece of correspondence (other than the primary recipient) by adding their names to the "cc" list. A random sampling of the next generation of support staff reveals a vast majority have absolutely no idea for what the designation "cc" represents, moreover, when confronted with the prospect said designation represents those individuals to whom a carbon copy shall be sent, few, if any at all, have any concept of what a carbon copy is.

The 3-D printer

Now meet George Jetson, and Jane his wife. The newest innovation in technology enables three dimensional replication of almost anything through the use of a 3-D printer. From replicating prototypes for eventual new products on their merry way to patent protection, to the reproduction of food and working human organs, 3-D printers are re-shaping the way in which we conduct business.

The term of art referable to 3-D printings is called *additive manufacturing* and refers to technologies with the ability to fully create objects through a sequential layering process. Objects that are manufactured additively can be used anywhere throughout the product life cycle, from pre-production to full-scale production, in addition to tooling applications and post-production customization. With the requisite information, individuals can utilize a 3-D printer to easily re-create, at a fraction of the cost, replacement parts for something a simple as wheels for a stroller.

In manufacturing and machining, subtractive methods are typically coined as traditional methods, a word specifically adopted to identify developments in recent years to distinguish it from newer additive manufacturing techniques. Although fabrication has included methods that are essentially "additive" for centuries (such as joining plates, sheets, etc.), it did not include the information technology component of model-based definition. Machining (generating exact shapes with high precision) has typically been subtractive, from filing and turning to milling and grinding.

> **"The evolution of 3-D printing shall have a major impact on the legal field of patents and intellectual property..."**

How does it work?

Additive manufacturing takes virtual blueprints from computer aided design (CAD) and highly advanced software which "slices" them into digital cross-sections for the machine to successively use as a guideline for printing. Depending on the machine used, material or a binding material is deposited on the build bed or platform until material/binder layering is complete and the final 3-D model has been "printed." It is a "what-you-see-is-what-you-get" process where the virtual model and the physical model are almost identical. To perform a print, the machine reads the design from a complex file and lays down successive layers of liquid, powder, or sheet material to build the model from a series of cross sections. These layers, which correspond to the virtual cross sections from the CAD model, are joined together or automatically fused to create the final shape. The primary advantage of this technique is its ability to create almost any shape or geometric feature.

Construction of a model with contemporary methods can take anywhere from several hours to several days, depending on the method used and the size and complexity of the model. Additive systems can typically reduce this time to a few hours, although it varies widely depending on the type of machine used and the size and number of models being produced simultaneously. Traditional techniques, like injection molding, can be less expensive for manufacturing polymer products in high quantities, but additive manufacturing can be faster, more flexible and less expensive when producing relatively small quantities of parts. 3-D printers give designers and concept development teams the ability to produce parts and concept models using a desktop size printer.

The cost of 3-D printers has decreased dramatically between 2010 and today, with machines that used to cost $20,000 now costing less than $1,000. For instance, as of 2012, several companies and individuals are selling parts to build various designs, with prices starting at about $500. The price of printer kits vary from $400 for the open source SeeMeCNC H-1 and $500 for the Printrbot (both derived from the previous RepRap models), to more than $2,000 for the Fab@Home 2.0 two-syringe system. The Shark 3-D printer fully assembled can be purchased for less than $2,000. The open source Fab@Home project has developed printers for general use with anything that can be squirted through a nozzle, from chocolate to silicone sealant and chemical reactants. Printers following the project's designs have been available from suppliers in kits or in pre-assembled form since 2012 can be purchased at prices in the $2,000 range, as well.

Using 3-D printers for medical purposes

To cope with a growing shortage of hearts, livers, and lungs suitable for transplant, some scientists are genetically engineering pigs, while others are growing organs in the lab. For Joseph Vacanti, the quest to build new organs began after watching the death of yet another child. In 1983, the young surgeon was put in charge of a liver transplantation program at Boston Children's Hospital in Massachusetts. While his first operation was a success, other patients died without ever being touched by a scalpel. "In the mid-80s, kids who were waiting for organs had to wait for a child of the same size to die," says Vacanti. "Many patients became sicker and sicker before my eyes, and I couldn't provide them with what they needed. We had the team, the expertise, and the intensive care units. We knew how to do it. But we had to wait."

On the other side of the Atlantic, David Cooper was having the same problem. Having taken part in the first successful series of heart transplants in the United Kingdom, he had moved to South Africa to run a transplantation program at the University of Cape Town Medical School. At the time, people had a 50/50 chance of surviving such a procedure, but Cooper's patients died waiting.

Today, the organ shortage is an even bigger problem than it was in the 1980s. In the United States alone, more than 114,000 people are on transplant lists, waiting for an act of tragedy or charity. Meanwhile, just 14,000 deceased and living donors give up organs for transplants each year. The supply has stagnated despite well-funded attempts to encourage donations, and demand is growing, especially as the organs of a longer-lived population wear out. Faced with this common problem, Vacanti and Cooper have championed very different solutions. Cooper thinks the best hope of providing more organs lies in xenotransplantation—the act of replacing a human organ with an animal one. From his time in Cape Town to his current position at the University of Pittsburgh, he has been trying to solve the

(Continued on page 23)

Are You Experienced?

Grammy Award Winning Terrance Simien & The Zydeco Experience to Headline This Year's Installation Dinner

For more than two decades, Grammy award-winning artist Terrance Simien, eighth generation Louisiana Creole, has been shattering the myths about what his indigenous Creole Zydeco music is and is not. Leading his Zydeco Experience Band, Simien has become one of the most respected and internationally recognized touring and recording artists in roots music today. He has performed over 5,000 concerts, toured millions of miles to more than 40 countries, and reached at least a million people during his eventful 25 year career.

Born in 1965 (appropriately) into the hippie folk and soul music era, Simien grew artistically, being influenced by all of the great music that has defined our country's musical legacy, including music from that era. He was as influenced by Dylan and Simon and Garfunkel as he was by Marvin Gaye, Sam Cooke, and the Meters. Since his family is documented in the history books as one of the first Creole families to settle St. Landry Parish, he was deeply affected by those great Creole Zydeco pioneers like Chenier, Delafose, Chavis, Ardoin, and Fontenot to name a few. He counts himself as one of the fortunate, as he is the last generation with a direct link to these artists, some of whom mentored him as an emerging talent. He has assumed that same role to a new generation of young Zydeco players. He understands how critical mentoring is to the survival of this indigenous music that has become synonymous with the cultural identity of Louisiana, the South, and an important part of the musical landscape of this country.

At the young age of 18, Simien began touring professionally; by 20, he was sharing the stage with Fats Domino and Sarah Vaughn at the Bern Jazz Festival. It just exploded from there and Terrance remains a pivotal part of Zydeco music history. When he began his career in the early 1980's, there were only two emerging bands touring nationally: it was only the young Terrance and Sam Brothers who were perpetuating the traditional indigenous Zydeco roots music of their forefathers. He is critical to the "renaissance" of a music genre that was in jeopardy of dying off. Clifton Chenier had passed away in 1987 and by the end of the 1990's all of the Zydeco pioneers had also died, leaving Terrance as one of the most gifted and knowledgeable artists to carry the Zydeco music torch. His success is earned, not inherited.

Terrance Simien

Simien is blessed with an extraordinary talent that expresses the deepest human emotions through the original instrument: *the voice*. His eclectic fusion of Zydeco takes you on a multicultural musical tour of the world. Incorporating diverse music styles, he creates a hypnotic blend of Zydeco-roots-New Orleans funk-reggae-flavored-Afro-Caribbean-world music that will force you out of your seat and onto the dance floor. He has found a way to express himself as a relevant and evolving artist who remains reverent to his roots and musical legacy. His live performances have garnered him a level of international success and his fully engaged audiences around the globe have become more Zydeco Experienced than ever before!

During the past 25 years, Simien has shared studio and stage with Robert Palmer, Stevie Wonder, Los Lobos, Taj Mahal, Dr. John, the Meters, Alan Toussaint, Paul Simon and Dave Matthews Band to name a few. He has been featured in dozens of films, including the blockbuster hit *The Big Easy*, TV movies and commercials. His music has been heard on public radio, FM and NPR syndicated radio shows, Voice of American and satellite radio heard by millions worldwide. His recordings have been praised by Rolling Stone, Billboard, other notable music industry publications, and major daily newspapers. His extensive discography dates back to vinyl 45's! Since his debut on a major rock label in 1991, he now has a total of seven full length CD's as well as dozens of compilations and guest appearances.

In 2005, Terrance became the first Zydeco artist to perform in Cuba for the US State Department. In 2006, Carnegie Hall sent him and his group to Mali, West Africa to present "Creole for Kidz & The History of Zydeco" as part of a unique distance learning program entitled *Global Encounters*. 2007 offered another global opportunity and a rare Creole cultural exchange and tour with the US State Department to Mauritius, Rodrigues, and Seychelles where he connected his own Creole culture with the indigenous Creole population of these countries. He and his band were the first American artists to perform in Rodrigues, a country of 40,000 people with a Creole culture still alive.

He has received countless awards, grants, and recognition for his artistry as well as his contributions to help raise the professional standards by mentoring his fellow and emerging artists about the music industry. He worked closely with HBO producers on and was seen in the HBO documentary film, *The Music in Me: Children's Recitals from Classical to Latin, Jazz to Zydeco*. In 2008, Simien became a spokesperson for the State of Louisiana Office of Tourism and is featured in national television commercials and print ads. In December of 2009, Disney released a new Pixar animated film, *The Princess & The Frog*, set in New Orleans, featuring their first black princess, scored by Randy Newman and features the music of Simien, Terence Blanchard, and Dr. John, to name a few. Terrance is currently working on a non fiction book for students about Creole culture and Zydeco music.

Simien, along with his business partner/wife, Cynthia, was successful in establishing a new Grammy voting category in 2007. In 2008 he opened the Grammy pre-telecast awards ceremony with a 10 minute performance. Later that day, he received his own Grammy for "Best Zydeco or Cajun Music Album" at the 50th annual awards!

PRACTICE MANAGEMENT

Ten email management tips for busy lawyers

By Allison C. Shields

Email is one of the biggest sources of overwhelm for lawyers, and it can be one of the worst enemies of productivity. But email isn't going away any time soon. Use these tips to prevent email from taking over your practice.

Delete liberally – and quickly

The faster you get rid of the junk that's clogging up your inbox, the better off you'll be. Ben Schorr, Microsoft expert and author of several books, including the *Lawyers Guide to Microsoft Outlook* 2010 advises:

Temporarily sort your inbox by "From" rather than by date. You will likely be able to batch-delete a number of messages or move several at once to a client file or other archive or storage method.

Next, sort by "subject." This will group related messages together and again, you may be able to delete several at once, such as emails scheduling appointments that already took place, duplicate messages or emails that are part of a string.

Finally, sort your inbox in reverse date order – the older the message, the less likely it is that it will be important and the easier it will be to delete.

Separate tasks from emails

If an email represents a task that you need to complete, move it to tasks (to do this in Outlook, just drag and drop the message onto tasks; the body of the email will remain intact as part of the task). Alternatively, you can create to do lists and/or action folders for those emails. Just get them out of your inbox.

Move appointments to your calendar

If you are keeping an email simply as an appointment reminder, get the information into your calendar right away and toss the email. (Again, if you use Outlook, just drag and drop the message to your calendar and all of the information in the email will stay with the appointment).

Delegate

If the email requires action by someone else, forward it to that person right away with a note. Then eliminate the original email from your inbox by deleting or moving to an alternate folder for follow up, or convert it into a task for follow up.

Allison C. Shields

Keep only business email in your business email account

Don't clutter your regular email box with newsletters, subscriptions, etc. Create a separate email account for those so they're not in the way of your main personal or business messages. Make a separate shopping email account so promotional emails, etc. only go to that account, along with shipping confirmations, etc. There are many free email services you can use for this purpose, including Google's Gmail.

Respond immediately

Don't make the mistake of 'reviewing' your emails and planning to go back and respond to them later. It just creates extra work, and may result in important client messages getting lost. If you're going to review your emails, respond when you first read the message if at all possible.

Don't review email first thing in the morning

Doing so is the best way to ensure that your day will get out of control. For most lawyers, urgent messages don't arrive via email overnight or first thing in the morning. If that's the case for you, schedule a specific time to blast through email after you've already tackled your most important task of the day. If your clients *do* tend to send urgent emails before you arrive at the office, limit yourself to a quick skim of your inbox to ensure no such urgent messages have arrived, and then move on to another task.

Save emails directly to the client's file

They're really client correspondence and should be with the rest of your client correspondence, rather than in your email inbox. Remove or delete from your inbox.

Keep your emails short and request a specific action or response

If you're brief, those who respond to you are likely to be brief as well. When you give others good instructions and tell them what you expect, your email becomes much more efficient.

Know when email is not the appropriate medium for your communication

Email is fast and easy, but it isn't always appropriate. Sometimes picking up the phone to speak with a client or walking down the hall to see a colleague is a much more efficient way to accomplish a task or to get the answer you need than ending up in an endless back and forth exchange of email messages.

Don't forget that once you have your email inbox under control, you'll have to maintain it by keeping up good email management habits.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers productivity, client service, management, 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, where a version of this article originally appeared.

Suffolk County Courts celebrate Black History month

Photos courtesy Suffolk County Courts

VEHICLE AND TRAFFIC LAW

SUFFOLK TVB 1977-2013 AN APPRECIATION

By David A. Mansfield

The closure of the Suffolk County Traffic Violations Bureau (TVB) effective April, 2013, administered by the Department of Motor Vehicles under Vehicle and Traffic Law §225 et seq and 15 NYCRR Parts §121-§126 is a landmark for defense attorneys.

I was admitted in September 1978 and the very first cases I tried were at Suffolk TVB. As a young lawyer, I won a few cases and became my office's "new expert." I look back with nostalgia and warm feelings. I must also be candid and confess that I will not miss everything about the system.

The Defense Bar is looking forward to the new traffic court. But they may not realize that there are some features of administrative adjudication that might be missed. Trace Adkins' popular song, *You're Gonna Miss This* might be an overstatement, but not completely.

The TVB Ticket Management for attorneys was a very effective way of entering pleas of not guilty and printing out substitute summonses. This keeps attorneys off service counter lines and saves time.

The Department of Motor Vehicles notifies by email registered defense counsel of administrative adjournments. This feature saves countless unnecessary trips to the TVB. You no longer had to rely upon the notification to your client at their last known address on file. Your client would frequently assume your office was notified and not contact you.

David A. Mansfield

The defense lawyer is entitled to request one re-schedule as of right online provided there were no previous motorist adjournments. You can choose from an array of trial dates to fit your schedule. And the attorney can check on the disposed cases to confirm that your clients paid their fines.

The TVB Ticket Management for Attorneys was a lifeline during the closures as a result of Hurricane Sandy. The Department of Motor Vehicles notified the attorneys of record by email each day of their client's new trial dates.

And the DMV website clearly posts the weather related closings on a daily basis.

The Department of Motor Vehicles provides a system where the fines could be paid online which eliminated the need for defense counsel to remit the fine payments sent in by their clients. This eliminated time, effort, correspondence and the possibility of errors in the calculation of the payment.

The Defense Bar may find that more cases, in fact, on a percentage basis were dismissed at the Suffolk Traffic Violations Bureau based upon non-appearance of the police officers.

The trial of a case will an alleged extremely high rate of speed at TVB will subject your client only to sanctions which included a fine, points, a mandatory Driver Responsibility Assessment fee and a discretionary license suspension. The new system will provide for the judicial hearing officers to dispose of the case in any manner provided by law under Vehicle and Traffic Law§1690(1) (e).

The Department of Motor Vehicles administrative law judges have no power to impose a sentence of imprisonment under 15 NYCRR Part§124.7.

Should your client have been found guilty of a high speed or accumulated 11or more points allowed by Vehicle and Traffic Law §510(3)(i) 15 NYCRR Part 131.4 and the Administrative Law Judge imposed a warning or discretionary license suspension, that administrative action concluded the case.

Should your client be found guilty at the new Suffolk traffic court, of a speed more than 41 mph or more over the limit, they will be subject to a separate administrative hearing to investigate the incident to determine whether to suspend the driver's license or privilege. This contingency should be covered by your written retainer agreement.

When your client accumulates eleven points or more as a result of a conviction at the new traffic court, in an 18 month period at the New Suffolk Traffic Court, they will be subject to a §510 hearing or sign a waiver of hearing to accept a 31 day suspension as a persistent violator.

The administrative appeals process was relatively straightforward and inexpensive under §228. The appeals will now be sent to the Appellate Term.

A recent reported appeals decision the Appellate Term, Second Judicial Department upheld a stop sign conviction had at the District Court of Nassau County Traffic and Parking Violations Agency. *People v. Bonni Anne Franz,* 2011-1907 New York Law Journal 2/5/13.

The administrative adjudication of traffic infractions remains in operation in New York City, Rochester and Buffalo.

The new system will mean fewer traffic trials conducted by defense counsel. This will be a lost opportunity to sharpen essential trial skills such listening and cross-examination. Some clients would rather lose at trial than plead to a lesser offense.

On a personal note, I will miss all the hardworking administrative law judges and support staff that has earned my appreciation and respect for the difficult tasks they carried out each day.

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

Academy of Law happenings well attended

The Mondays in March program at the Academy of Law included a visit from Speakers William Burns, the President of Lexington Pension Consultants, left, and Thomas Campagna, Esq. on March 11. They spoke about wording for stipulations concerning Retirement QDROs and other retirement plans.

Photo by Arthur Shulman

Over 100 people attended the Academy's new electronic filing program.

The Academy of Law presented a program on Cloud Computing on March 13 that included the following speakers: Barry Smolowitz, Esq. at podium, Guido Gabriele, III, Esq., left, Glenn P. Warmuth Esq., and Allison Shields, Esq.

Those days, those nights as a Bronx assistant

Arraignments - learning restraint

By William E. McSweeney

The arraignment of the defendant occurred—by law, and mostly adhered to—within 24 hours of his arrest. It was at the arraignment that he was formally charged with the crime or offense to which he had to answer. The complaint against him was filed with the presiding judge and served upon defense counsel. Notice was given as to what statements the defendant had made at the time of his arrest, and the sum and substance of these statements were recited by the arraignment assistant. This ADA gave further notice, when applicable, as to what drugs, or weapons, or other contraband had been recovered from the defendant, as well as notice regarding the manner of his identification.

The assistant brings the file to life in the arraignment, put it "on its feet" in open court; it was where I became an effective adversary, one who argued to the court, and not with opposing counsel; one who, for the most part, kept his voice even, only now and again selectively raising it in outrage (for the most part feigned); one who chose from the abundance of material in front of me that which I deemed most compelling, most likely to persuade the court to keep the defendant "in;" one who, finally, argued that chosen material with conviction, intermixing with my direct argument the occasional word of indirection, of implication, something from which, with respect to the defendant, a judge could draw a negative inference.

"Your honor," I said one night all those years ago, "I won't exhaust the court by enunciating the facts as given on the complaint; nor will I read from the DA's folder, which would be redundant, in that I've already given notice as to what the defendant stated. I would simply draw the attention of the court to the defendant's rap sheet, not to his many former arrests listed thereon. I'll stand or fall on the strength of this arrest, but instead to the number of times that the defendant has warranted. He has a long record of not answering his cases."

"The instant matter," I continued, "sees a victim who was treated at Jacobi; hospital records will be forthcoming. I've handed up and served on counsel her supporting deposition. She intends to proceed on this matter. Ours is a strong case, the defendant has no roots in the community—as seen by the CJA sheet—and thus has every reason to again take flight. I would ask that a Temporary Order of Protection issue in favor of the complainant, and that the defendant be held on $10,000 bail to assure his presence at trial."

"Counsel," the judge asked the defense attorney, cueing him to advance his argument.

"I would ask the District Attorney if the complainant was hospitalized or treated and released?"

"The complainant was treated and released—after being sutured."

"I would ask how many—withdrawn. Your Honor, the People speak of my client's warrants; they fell many years ago. I'm not here to defend Mr. Smith's rap sheet, or his warrants, but he's answered all of his cases in the past five years. He has a recent history of answering his cases. I should add that I don't understand the Assistant's remarks that Mr. Smith has no roots in the community. While he's had to move from homeless shelter to homeless shelter, he's been a resident of Bronx County all his life. Are we to punish him because he's poor? His mother and brother are here in attendance at court. I'm advised that his mother will take him in to her home during the pendency of this matter. He has a credible defense of justification in this case; he's brought actions in family court against the complainant; there's a custody proceeding pending in that court as I speak. This is truly a family-court matter—"

Bill McSweeney

The judge at this point interrupted, asking counsel, "Doesn't an alleged assault, possibly a felony assault, depending on the seriousness of injury, belong in the criminal sphere, counsel?"

"Your honor," counsel answered, "the top count on this complaint is a misdemeanor assault—I haven't heard the People speak of possibly elevating the charge. It's now a facial misdemeanor, and, I submit, will remain so. The People's request for $10,000 bail is a request for felony bail, altogether diminishing in my mind the People's credibility. I would ask the court not to look at my client's history, not to look cumulatively, but to look proportionately, to look at the four corners of the instant complaint, which sets forth a misdemeanor, and to act accordingly. My client will answer this case; he'll stay clear of the complainant. He'll be at his mother's home; he'll honor the letter and the spirit of the order of protection. If we were at trial now, all presumptions would be in my client's favor, especially the presumption of innocence. Should this arraignment have any less-stringent standards? I submit not. He'll be back, your honor. We have no reason to think he won't. I would urge the court to release my client in his own recognizance, so that he and I can more effectively mount his defense. Thank you."

At this point, the court looked at counsel, pensively. "I have to balance your client's penal interests," he said, "against the interests of the complainant, who has an interest in remaining secure, safe in her home—"

"Your honor," the counsel interjected, "with all respect, as Justice Douglas wrote, the balancing was done 200 years ago, and the framers came down on the side of the defendant. That is properly the side all of us should protect."

The judge tersely concluded the matter: "Temporary Order of Protection to issue, to run co-extensively with any family court order in force. Bail set at $1500, cash or bond; case put over to 170.70 day, which would be May 20, in AP3. Next."

This, then, was a representative arraignment. Our system of jurisprudence is an adversarial one, grounded in self-interest. One party, feeling aggrieved, brings the action; the other party, feeling maligned, defends. In the contest between counsel, it is hoped that ultimately, and optimally, the truth will be reached. The judge, especially if he's secure in himself and the law, sits, listens, and only minimally intrudes; in our Bronx office many styled this type of judge—in displaying a near-comatose passivity—as a "mushroom." But I thought this analogy inaccurate and unfair; the mushroom, as I understand it, thrives in darkness. Quite often, the "passive" judge, in granting both counsel latitude in presenting their cases, thereby allowed light—knowledge—to enter his courtroom, gave full scope to the competing versions before him, allowed juries to see a rounded, variegated, multi-faceted depiction of the events that underlay the cases.

The arraignment judge whose actions I've depicted in the previous paragraph was, to my mind, and for the reasons I've set forth, indicative of the good judge. He allowed both counsel to step—and misstep—into areas they saw as holding promise for their positions; and only after hearing their arguments fully, did he decide the issue of bail.

The defense counsel was also as effective as could have been expected, catching himself before he committed what could have been an egregious error. The near-error: "I would ask how many—withdrawn." He had, at the last instant, decided against asking how many sutures were involved. That is to say, he had almost disregarded Trial Tactic #l: Don't ask a question whose answer you don't already know. Had he completed the question, he would thereby have risked the answer, "1000 sutures." In the event, I don't remember how many sutures the woman suffered—it was at least two, justifying my use of the plural word "sutures," and it could have been a greater number. The point is, from

the defense's position, the question as to the number of stitches woven, if completed, would have been a hazardous one; coming out of a blind curve, one could likely be hit by an oncoming truck.

The defense attorney, moreover, was doubly wise in at once keeping on point and expanding the point. He initially remained with the complaint. He reminded the court that the defendant's history wasn't to face imminent trial; it was the defendant who was to face trial, for allegedly committing those acts confined by the instant complaint.

Counsel then sprang from the complaint, enlarged the issue (in law school, it was called fractionating the issue) by mentioning Justice Douglas and the balancing of interests. By means of this enlargement, the defense counsel diverted the attention of the court (or so he hoped) from the flesh-and-blood assailant—he who had been, ironically, the very one to cut the flesh and shed the blood of the complainant—to the abstraction of the constitutional underpinnings of our very system. That is, Defendant John Smith wasn't facing charges, our entire system was; the mechanism which had caught the hapless John Smith within its gears was itself under scrutiny.

Though I might have referred to the foregoing as a representative arraignment, I have actually presented one that in some ways was non-representative. Defense attorneys didn't typically quote Supreme Court justices; arraignment judges, being for the most part recently appointed—judges in Criminal Court were often as not recently appointed judges, with those in arraignments being the newest of the new—weren't typically secure enough to sit in Solomonic silence.

Actually, newly appointed or veteran, many of the criminal court judges didn't have to be weighed against Solomon to be found wanting; more often than not I was surprised at the lack of erudition on the part of the bench. (Giving truth to the aphorism that "The Law sharpens the mind by narrowing it.")

"Hell hath no fury, Your Honor, like a woman scorned," was said at an arraignment during that time by a defense attorney, implying that the brute he represented was being prosecuted by a complainant whom he had wronged romantically.

"Well, counsel," the judge answered, "we're not here to discuss Shakespeare, we're here to discuss your client's assault of the 'woman scorned.'"

While the judge correctly didn't allow the counsel to fractionate the issue, he incorrectly attributed the quotation to Shakespeare, when it correctly was, and remains, attributable to William Congreve, as found in his *The Mourning Bride*. ("Heaven has no rage like love to hatred turned, Nor hell a fury like a woman scorned.")

Though at the time I was alert to this misattribution, and to various missed points, coming from the bench, I corrected none of them, especially when they were irrelevant to the legal issue at hand. I was, after all, in arraignments to learn, not to teach. And I began learning; in future I wouldn't have to be asked about the complainant's condition; I would do as I should have done in the previously mentioned arraignment: I would volunteer the information: "The complainant was treated and released at Jacobi, having sustained four sutures about the right cheek."

In short, I would soon become open, not cagey, and I would learn that therein lay the means to secure a degree of credibility in the eyes of a court, opposing counsel, and a sitting jury. And a larger engrafting would take hold: I would learn that, just as openness is likely the best way to altogether practice law, it is likely the best way to approach life.

With regard to the law, "Never be defensive about your father's occupation," I said to my daughters, not long after I had cleared the New York State Bar. "Don't bother to argue—it's a no-winner; people simply don't like lawyers, though most of them like their own lawyers. If you must debate, however, let them know that law is the only pursuit which forces candor upon the practitioner; where everything you say is taken down—if you're a courtroom lawyer, that is—by a reporter.

The in-court behavior, the care with words, soon enough permeates all behavior of the lawyer, in-court and out-of-court. "But again," I told them, "I wouldn't bother to argue."

The candidness, and the holding oneself back from making the clever riposte, these qualities I developed during those days and nights of arraignments. And though, when trial should come, I wouldn't be shy about casting to a jury a number of (God help me!) erudite remarks—trotting them out, so many brightly caparisoned ponies, into the center ring—I would save them against that day. For the time being, I was content to display, in the well of the courtroom, openness and restraint, not the worst qualities for a lawyer to manifest.

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

LEGAL RESEARCH AND WRITING

Motion practice in Suffolk County - avoiding the pitfalls

By Diane K. Farrell and Gerald Lebovits

This article is a brief overview of some of the most common motions encountered in civil practice in State Supreme Court, Suffolk County, with tips on how to avoid some oft-repeated pitfalls.

To draft effective motion papers, practitioners must be familiar with Uniform Rules for the New York State Trial Courts and CPLR 2211 through 2222. Practitioners must also consult the individual rules that many IAS judges have enacted.

Movants who bring an order to show cause need shorter notice than the minimum eight days provided under CPLR 2214(b) for bringing a motion on notice. In Supreme Court, Suffolk County, an order to show cause movant should call the assigned IAS judge's part before attempting to have the order signed. Under 22 NYCRR 202.7(f), the nonmoving party must be given notice of the movant's intention to present the order to show cause if the prayer for relief includes a request for temporary injunctive relief, such as a stay. Notice is not necessary if the movant can demonstrate that there will be significant prejudice to the party seeking the restraining order by giving notice.

Some types of motions do not require notice to be given when they are made. Among these are ex parte motions, which are made to a judge without notice to the adversary. The CPLR authorizes ex parte motions only in limited situations, such as attachment (CPLR 6211), temporary restraining orders (CPLR 6313), and orders specifying the manner of effecting service of process (CPLR 308(5)).

Other motions must be made on notice. These include a CPLR 3211 motion to dismiss a complaint, a defense, or a counterclaim; a motion to compel discovery or to strike a pleading for failure to provide discovery or appear for an examination before trial under CPLR 3126; a motion for summary judgment under CPLR 3212; and a motion to renew or reargue under CPLR 2221. These common motions are discussed below.

Defendants may move to dismiss a complaint before they interpose an answer or, in limited circumstances, after they interpose an answer. For defendants to be able to move after they have answered, they must preserve the right to move to dismiss by raising the ground as a defense in the answer.[1] Because of this requirement, the issue of the plaintiff's standing to commence the action is forfeited altogether in many foreclosure actions by the defendant-borrower's failure to interpose the defense of lack of standing in an answer or in a timely motion to dismiss the complaint.[2] It is too late to raise the defense of lack of standing for the first time in a motion to vacate the borrower's default under CPLR 5015(a).[3]

Under CPLR 3211(e), you may make only one motion to dismiss for the grounds specified in CPLR 3211(a) against any one pleading. Movants waive any potential ground for dismissal under CPLR 3211(a) if that ground is not asserted in the dismissal motion. Some grounds to dismiss under CPLR 3211 can be raised at any time, such as a failure to state a cause of action (CPLR 3211(a)(7)), absence of a necessary party (CPLR 3211(a)(10)), and lack of subject matter jurisdiction (CPLR 3211(a)(2)).

A plaintiff who faces a motion to dismiss should consider cross-moving to replead or to amend the deficient complaint. A proposed amended complaint should always accompany such a cross-motion. CPLR 3025(b) was amended effective January 1, 2012, to require that any motion to amend or supplement pleadings be accompanied by the amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

A cross-motion to amend under CPLR 3025 requires a showing that the other side will not be unduly prejudiced if the court grants leave to amend. On January 1, 2006, the legislature amended CPLR 3211(e) to allow a party to replead without having to seek leave to replead in writing. Before the amendment, the nonmoving party had to submit evidence in admissible form to support the cause of action or defense. The new legislation does not include any time limit on a motion for leave to replead.[4]

A motion to strike a pleading for a party's failure to comply with disclosure demands or appear for an examination before trial, or both, is one of the most common motions. When making such a motion, the moving party is required to demonstrate a good-faith attempt to resolve the disclosure issues before seeking the court's help.[5] Failure to make that showing, or evidence that the movant's attempt was perfunctory, will invite a denial of the motion without consideration on the merits.[6] Some Suffolk County judges will order a compliance conference when faced with a discovery motion as an alternative means to resolve discovery disputes.

Striking a pleading is a last resort. Practitioners in the Second Department should read *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, [7] to get a sense of the high threshold of willful and contumacious conduct required before a court may strike a pleading.

All too often motions to strike a pleading are filled with ad hominem attacks on the adversary. Gratuitous attacks that permeate motion papers distract courts trying to assist the parties in resolving their disclosure differences. Rather than persuading the court that the other party has been unreasonable, frivolous, or contemptuous, these attacks call into question the credibility of the attorney making them and obscure the merits of the attorney's argument. The New York State Standards of Civility for the legal profession require counsel for the parties to be courteous and civil in all professional dealings.[8] In accordance with those standards, counsel should refrain from personal attacks on opposing counsel in all submissions and proceedings. Counsel should also be aware that they are vulnerable to sanctions for frivolous conduct, which can including making a frivolous motion for costs or sanctions.[9]

Gerald Lebovits

Diane K. Farrell

Motions for summary judgment are one of the most dangerous weapons in a civil litigator's arsenal. Any party may move for summary judgment in any type of action after issue has been joined.[10] The one exception is found in CPLR 3212(e), which prohibits summary judgment in matrimonial actions. Practitioners should be careful when moving for summary judgment to provide all supporting proof. Many judges will deny a summary-judgment motion outright if the movant fails to attach a copy of the pleadings.[11]

A significant amount of case law has developed in the Second Department and in Suffolk County about the effect of relying on unexecuted deposition transcripts in support of summary judgment. Although the issue may be waived if not raised by the court or a party,[12] the movant should strive to attach executed copies of all deposition transcripts or, alternatively, demonstrate that the party seeking to rely on the transcript has complied with CPLR 3116.[13]

In addition, the moving affirmation should always contain a list of exhibits to which the court can refer. The exhibits should be divided into volumes no larger than a single ream of paper if unwieldy exhibits make the motion awkward or difficult to handle. Each volume should have a cover page listing the exhibits within that volume. If the papers are difficult to navigate for the lawyer who prepared them, they are going to be unwieldy, and annoying, for the court. Supporting affidavits should be placed in the motion package, not hidden in the documentary exhibits.

Legal arguments should be contained in a memorandum of law rather than in an attorney affirmation. The Uniform Rules of the New York State Trial Courts do not contain page limitations. But page limitations would be a beneficial addition to the rules. Limits force the writer to organize and prioritize the facts and arguments succinctly and prevent repetition and digression from important issues. When crafting reply papers, the movant should avoid rehashing arguments and points made in the original moving papers. If the reply simply restates the initial moving papers rather than offering a focused response to the opposition papers, the movant is inviting the court to give the reply short shrift or, worse, skip reading the reply altogether.

Affidavits in support of and in opposition to summary judgment must be made by a person with knowledge. Attorney affirmations not based on personal knowledge lack probative value and are insufficient to support or preclude summary judgment.[14] This is true even if the motion is for a default judgment.[15] An affidavit setting forth the facts on which the relief is sought must be made by a person with knowledge. A verified complaint may do the job unless the complaint is verified by the attorney who lacks personal knowledge.[16]

Motions to renew and motions to reargue are separate and distinct requests for relief with significant differences.[17] Most important, the denial of a motion to reargue is not appealable.[18] Litigants dissatisfied with an order should file both a motion to reargue and a notice of appeal. The time to take both actions is the same: within thirty days of service of the order with written notice of its entry, plus five days for mailing under CPLR 2103(b)(2).[19]

Whether or not the court adheres to its original decision, if the motion to reargue is granted an appeal lies from the order that grants reargument, not from the original order. If the court denies the reargument, the appeal lies from the original order.[20]

There is no time limitation on a motion to renew. Both the granting and the denial of a motion to renew are appealable orders.[21] The motion to renew must be based on new information rather than simply a reargument of fact and law submitted on the original motion.[22]

Litigants almost always describe their motion as one to renew and reargue. The court is required to differentiate between

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PRO BONO

Pro Bono attorney of the month - Regina Brandow

By Edie Reinhardt

Nassau Suffolk Law Services is pleased to recognize Regina Brandow as Pro Bono Attorney of the Month for her long-standing commitment to helping families in guardianship, disability, special needs and education matters. Ms. Brandow has consistently dedicated her time and expertise to these cases for over 12 years.

Brandow came to the practice of law after a successful career in finance. After earning a B.S. in economics from Dowling College in 1980, she joined J.P. Morgan & Co., Inc., over time becoming an officer in the firm and serving in various departments, including the legal department as the compliance officer for the SEC, NYSE, AMSE, and NASD. In that period she attended Touro Law Center, graduating in 1995.

Her first position as an attorney was in an insurance fraud and consumer reporting agency. She then began a private practice, concentrating in elder law and corporate law and was of counsel to several corporate firms. In 2001 she joined the Long Island Advocacy Center, where she represented students with disabilities in impartial hearings, appeals to both the State Education Department, and the Commissioner of Education, and other education law issues

Brandow's first experience with pro bono was in law school where she participated in the Immigration Law Clinic at Touro School of Law. Working on an asylum case of a Bosnian refugee was a stark contrast to her suburban upbringing and career on Wall Street.

After law school, she volunteered with the Legal Aid Society in Bay Shore helping senior citizens. She later started volunteering with Nassau Suffolk Law Services where she has handled a wide array of cases, often involving families with developmentally disabled children. The cases can be complex and emotional.

One case that stands out for her concerned a developmentally disabled child who turned 18 and needed to have a guardian appointed. The mother sought to continue her guardianship, but her ex-husband did not want to consent and the residential facility where the child lived was also seeking guardianship. Mental Hygiene Legal Services also participated in the case and had its own concerns about the situation. Eventually an agreement was negotiated but it was very frightening and difficult for the family.

Whether working in private practice or for a nonprofit, Ms. Brandow has continued to set aside time for pro bono and she extols the tremendous value of doing this work – both personally and professionally. When she first started out as a solo practitioner, she felt anxious taking on cases. However, her pro bono work gave her the opportunity to learn quickly how to identify and handle a vast range of issues in a very supportive environment.

In her experience, the attorneys, judges, clerks and other court personnel that she has met through her pro bono work go out of their way to help a pro bono attorney. "They tell you what the judge is looking for, what to expect in the case, how to handle issues, and what paperwork is needed and how to prepare it," she said. "And they are supportive not only in the pro bono work, but also have helped in my private practice as well." She feels that especially when you are starting out, it is invaluable to have the opportunity to manage an entire case, to learn from experienced and helpful people, and to make connections and build your confidence and reputation.

Ms. Brandow feels strongly that everyone can find time to do pro bono work. She adds that Nassau Suffolk Law Services is very sensitive to the stresses of practicing law, especially for solo practitioners.

Regina Brandow

"As a solo practitioner and parent, I have to make a living, eat and support my family, but I can still find time," she said. "There is nothing special or extraordinary about doing that. Imagine if every lawyer in Suffolk handled just one case."

For her consistent and devoted service to Nassau Suffolk Law Services and the families she represents, we honor Regina Brandow.

Note: Edie Reinhardt is an attorney and content marketing consultant specializing in helping firms develop and leverage their content to achieve their business goals. She volunteers with Nassau Suffolk Law Services.

CONSUMER BANKRUPTCY

Do bankruptcy laws encourage debtors to smoke?

Some interesting butt budget and means test issues

By Craig D. Robins

Although staunchly opposed to smoking, I'm continually intrigued by the amount of money some of my consumer bankruptcy clients spend to maintain their unhealthy tobacco habit. In looking at this one particular expense, I've made the bizarre observation that some smokers, because of their cigarette expense, will actually find it easier to file Chapter 7 than non-smokers.

Let me explain. In order to seek Chapter 7 relief, which enables a consumer to eliminate almost all consumer debts, the consumer has to essentially pass two tests - the "means test," which is a series of calculations involving both real and artificial expenses, designed to weed out those debtors who appear to have sufficient disposable income to make some kind of payment to creditors over a period of time.

The other test, sometimes referred to as the "disposable income" test, involves the debtor's actual budget. If the debtor has a significant amount of disposable income after subtracting actual expenses from income, then it would be considered an abuse for the debtor to obtain a Chapter 7 discharge.

Let's suppose a consumer with a substantial income passes the means test. That, in and by itself, does not mean that they qualify for a Chapter 7 filing. They must also demonstrate that they spend all of their disposable income on reasonable expenses.

Disposable income is that income which remains after satisfying all reasonable and necessary living expenses, like rent or mortgage, food, utilities, car expense, clothing, insurance, etc.

It is primarily the role of the U.S. Trustee to review all bankruptcy petitions to ensure that they are filed in good faith and do not constitute an abuse of the bankruptcy laws. The U.S. Trustee always has one eye on the bottom line of a debtor's budget - Schedule "J" - to see if there is additional disposable income.

It is not uncommon for the U.S. Trustee to bring a motion to dismiss a bankruptcy case pursuant to Bankruptcy Code section 707(b), alleging that a consumer debtor has available disposable income to make a substantial repayment of their unsecured debt over the course of a Chapter 13 plan, and that the existing bankruptcy filing, if permitted to go forward, would result in a "substantial abuse" of the provisions of the bankruptcy code.

Craig Robins

If a consumer has several hundred dollars in disposable income each month, then it is virtually inevitable that the U.S. Trustee will seek to have the case dismissed or converted to one under Chapter 13. Inexperienced attorneys, and consumers who file without attorneys, often make this mistake - I've seen it happen many times.

Smoking has become an incredibly expensive habit. With cigarette packs now costing about 10 bucks each, a pack-a-day smoker is facing a monthly expense of $300. The two pack-a-day habit costs $600 a month. Imagine if both husband and wife smoked! Can these monthly expenses be considered excessive and therefore an unreasonable budget expense?

An interesting notion is that a non-smoker, who has $500 of actual disposable income each month, cannot file for Chapter 7. However, a smoker with identical expenses, except with the addition of a smoking habit that costs $500 a month, can demonstrate that they have no extra income to devote to creditors, and the U.S. Trustee, at least in this district, will not blink an eye at that person or their tobacco expense. In this case, the smoker will have no disposable income and would have no difficulty seeking Chapter 7 relief.

It almost doesn't seem fair in this instance that the smoker will be able to obtain Chapter 7 relief, but the non-smoker would be compelled to file a Chapter 13 payment plan bankruptcy and end up paying tens of thousands of dollars to his or her creditors over a period of three to five years.

It's wild, but if a non-smoker who had a disposable income of several hundred dollars a month, and was therefore unable to file for Chapter 7 relief, suddenly took up smoking, then they would then qualify. Even a heavy smoker will fare better than a light smoker, as far as reducing disposable income. As a zealous non-smoker, this doesn't seem right to me, yet that's how the law in this jurisdiction treats smoking in bankruptcy. Payments that would have gone to creditors have literally gone up in smoke.

This raises an interesting ethical, moral and legal question. Can a bankruptcy attorney advise a client that if they took up smoking, or went from a pack a day to two packs a day, the client could then qualify for a discharge whereas they would not have before?

Obviously, good faith is an implicit and significant aspect of any bankruptcy case and there is a presumption that the debtor will set forth his expenses accurately, without deliberately inflating them or artificially including expenses for the sole purpose of manipulating the bankruptcy to avoid paying creditors.

Although I addressed an interesting scenario about how some smokers would find it easier to file for Chapter 7, I must note that most smokers would probably find it more difficult. This is because cigarette expense is not a valid means test deduction.

Smokers who do not have any disposable income may actually find it more difficult to qualify under the means test because the means test will artificially show that the debtor has extra money, when in fact the money is actually being spent for tobacco. In such situations, the smoker could be compelled to file for Chapter 13 relief even though the funds would not be available, putting an incredible strain on the debtor because there would be insufficient money in the budget to pay creditors even though the means test would mandate such payment.

Not all jurisdictions are as lenient with smokers as ours appears to be here in the Eastern District of New York. In other jurisdictions, there have been a few instances where the U.S. Trustee took a much different position.

In a Virginia case from 2005, the U.S. Trustee brought a 707(b) motion to dismiss, arguing that a debtor's budget was excessive, and highlighting a number of expenses including $186 per month for cigarettes. Although there was a full trial on the motion, the judge commented on how the U.S. Trustee failed to present any evidence to support its position that the cigarette expense was unreasonable.

The judge stated: "While the Court is reluctant to endorse even by implication the proposition that it is appropriate for a bankruptcy debtor to spend $186 a month on cigarettes to the prejudice of his creditors... the Court has found few published decisions explicitly discussing the issue of a debtor's budgeted expense for cigarettes in the context of a section 707(b) substantial abuse motion. Based on those published decisions, it appears that the weight of the authority is favorable to the debtor." *In re: Gromada* (No. 05-75683, W.D.V. 2005).

It appears that most reported cases that refer to cigarette spending lump this expense with other "discretionary" expenditures that the U.S. Trustee challenged in the proceeding. The reasonable conclusion is that the U.S. Trustee will probably be unlikely to object to cigarette expenses as long as all other expenses appear to be reasonable and necessary. So if your client needs to claim a smoking expense, make sure all other budget items are within reason.

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 twenty years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: www.Bankruptcy-CanHelp.com and his Bankruptcy Blog: www.LongIslandBankrupt-cyBlog.com.

ALTERNATIVE DISPUTE RESOLUTION

Why wait until the courthouse steps to settle

By Lisa Renee Pomerantz

Most lawsuits are never tried, but typically are settled on the eve of trial, after the parties have spent time, money and energy on discovery and motion practice. Often, by this time, the parties' relationship has been irreparably damaged, options for salvaging the relationship or transaction have been foreclosed, and there may have been collateral damage to relationships with third parties such as customers or vendors. However, neither party wants to take the chance of losing at trial, so a settlement is brokered to avoid that risk.

The conventional wisdom is that the discovery and motion practice which serve to clarify the facts and the law are necessary prerequisites to meaningful settlement discussions. However, especially in business disputes where the contract spells out the parties' obligations and their interactions have been recorded in emails and other business records, the operative facts and the applicable law may be discerned at the beginning of the dispute with some degree of certainty. Sometimes, extensive discovery and motion practice is intended primarily to impose costs on the other party and make it more willing to settle.

Lisa Renee Pomerantz

The litigation process may delay or impede settlement discussions by:

- Focusing on the parties' rights and obligations, and not on their interests, even though effective settlement negotiations require those interests to be identified and accommodated; and
- Intensifying adversarial relationships among the parties and counsel, which inhibits the effective communication and collaboration necessary to negotiate a settlement.

In fact, settlement negotiations often can be conducted successfully prior to or at the onset of litigation, and even while discovery and motion practice are conducted.

To do so, the parties might consider the following:

- Agreeing to a "standstill agreement" to toll the statute of limitations while negotiations are conducted so that neither party is prejudiced by any delay in filing suit;
- Discussing the merits in a calm, reasonable, forthcoming and respectful fashion;
- Reframing the situation from an adversarial "win-lose" proposition to a common problem faced by the parties susceptible of not only "win-lose" but also "win-win" and "lose-lose" outcomes;
- Proposing solutions for restructuring the business transaction or relationship that address the parties' respective interests and may be preferable to the potential or likely outcomes in litigation; and
- Recognizing and confirming that settlement discussions are not admissible in litigation; and

If direct negotiations are not successful, alternative methods such as the use of settlement counsel, early neutral evaluation or mediation can be helpful. As most attorneys know, mediation is the use of a third party neutral to facilitate negotiations. Settlement counsel is an attorney retained by one party to pursue settlement discussions with the other party while litigation is conducted by litigation counsel. It addresses the dilemma that some attorneys feel in pursuing adversarial and collaborative approaches simultaneously. Finally, early neutral evaluation is the retention by one or both parties of an attorney or retired judge to provide an advisory opinion on the merits. This can be useful in promoting settlement where the parties have significantly different views of the merits.

Note: Lisa Rene Pomerantz is an attorney with more than 25 years experience. She works with innovative and creative enterprises to structure and foster successful business relationships and to resolve disputes amicably and cost-effectively. Her dispute resolution activities include membership on the American Arbitration Associations Roster of Neutrals as a Commercial Mediator and Arbitrator.

HEALTH AND HOSPITAL LAW

A hospital patient pitfall in a "no fault" technicality

By James G. Fouassier

Some 10 or 11 years ago, when the State Insurance Department enacted sweeping changes in the claims submission provisions of the no fault regulations (11 NYCRR Part 65) the rationale was there was a need to curb fraudulent health care claims. Provider claims submission periods were dramatically cut back from 180 days to 45 days. At the same time, almost like a *quid pro quo*, the time periods within which no fault insurers and payers were required to pay, deny or seek verification of a claim also were reduced.

For the purpose of this article, two time periods are relevant. A no fault insurer is entitled to notice of an accident within 30 days of the accident itself. 11 NYCRR 65-1.1(d). [1] Usually it is the party or parties to the accident that notify the respective insurance carriers (the regulation says "injured person") but it need not be just those physically involved. What is important is that the carrier gets *actual notice* from someone within the 30 day period. The other time period is the provider's notice of claim. As I said, this is the one shortened to 45 days from the date of service (or, for hospital care, the discharge date).

Recently the Court of Appeals ruled that despite the language of 11 NYCRR 65-3.3 (d), a hospital's notice of claim (the so-called "NF-5" form), does not serve the same purpose as the insured's notice of the accident, and that even though the hospital timely served its claim (*i.e*. within 45 days of discharge), the failure of the injured person to notify the insurance carrier of the accident within 30 days resulted in the failure of a condition precedent to coverage, and the carrier need not honor the claim. *New York & Presbyterian Hospital v. Countrywide Insurance Company*, 17 N.Y.3d 586; 934 N.Y.S.2d 54; 2011 N.Y. LEXIS 3028 (2011).

Both the trial court and the Second Department sustained the hospital's argument that complying with the 45 day claim notice also satisfied the shorter accident notification requirement, pointing out that the regulation expressly states that the NF-5 claim form *may* serve as notice of the accident. But the high court disagreed, finding that the 30 day accident notification requirement is meaningless if it can be satisfied by a timely claim submission months or years after the accident date. This, the court held, would fly in the face of the purposes of the anti-fraud revisions to the regulations. In addition:

James G. Fouassier

> The "notice of accident" and "proof of claim" under 11 NYCRR 65-1.1 are independent conditions precedent to a no-fault insurer's liability . . . .By ruling that the notice of accident condition was satisfied based on the plain language of 11 NYCRR 65-3.3 (d), the Appellate Division disregarded the separate and distinct nature and purpose of these requirements. Even more troubling, such a construction effectively reads the 30-day written notice of accident requirement out of the no-fault regulations. But nothing in 11 NYCRR 65-3.3 (d) explicitly dispenses with the 30-day notice of accident requirement. Rather, 11 NYCRR 65-3.3 (d) merely provides that a NF-5 form may constitute the written notice required under the notice of accident provision. (17 NY3d at 590*; citations omitted*)

This is not to say that the NF-5 can never serve as notice of the accident:

> [A]n NF-5 form (or other form that can serve as proof of claim) may constitute timely notice of an accident, as permitted by 11 NYCRR 65-3.3 (d), only if such proof of claim is given within the 30-day period prescribed by 11 NYCRR 65-1.1. Any other construction is unwarranted and would undermine the importance of the 30-day time period to the no-fault system. (*Id*. at 592)

The court also observed that the law clearly holds that an assignee "stands in the shoes of the assignor" and that the provider, as assignee of the patient's insurance benefits, gets no greater rights than the insured patient has. If the patient fails to meet a condition of coverage (here, the timely notice of the accident), the hospital cannot get a greater right (here, the right effectively to cure the defect), simply by taking an assignment:

> Here, because no written notice of accident was given, there was a failure to fully comply with the terms of the no-fault policy, which is a condition precedent to insurer liability. As a result, the assignment effectively became worthless (i.e., [claimant] assigned nothing to Presbyterian) - you cannot assign your right to benefits if your right to those benefits has not been triggered, or if you had no right to those benefits in the first place. (*Id* at 592; 593)

The consequence to the patient-claimant (who may be your client), is severe: personal responsibility for what may be a six or seven figure hospital bill. Your first response may be, "So just submit the hospital bill to the health plan or Medicare." Many general health insurers, however, are taking the position that they will not pay claims that should have been covered by no fault if no fault coverage is disclaimed due to the failure or neglect of the insured to meet a condition precedent to coverage, like the situation here at bar or the common situation of failing to attend an examination under oath. It also is questionable whether a hospital is constrained to offer financial assistance in this situation. [2]

Hospitals and other medical providers are well advised, especially in a serious motor vehicle accident situation, to act "on behalf of" the patient by notifying the no fault insurer directly. It may be worth the investment in changes to admission and registration processes to have a staffer fax or even email notification of the accident to the patient's (or driver's) no fault carrier when it accesses that information from the patient or a family member or even a friend. Providers do not want to pursue patients directly, and dunning a patient $50 a month for a $45,000 hospital bill is in no one's best interest.

Of course, if a hospital submits the no fault claim to the carrier within 30 days of the accident date the NF-5 or equivalent will qualify as a valid notice of the accident, but will that always happen? Not if the patient is seriously injured and stays in-house longer than 30 days, because inpatient hospital claims cannot be billed until discharge. I also appreciate that when a patient is in-house for that long a period then the claims of the physician providers often will exhaust the $50,000 no fault first party benefits with nothing left for the hospital bill anyway. At the end of the day it is the usual "cost-benefit analysis" that must be confronted when any revenue "fix" is contemplated.

Note: James Fouassier is the Associate Administrator of Managed Care at Stony Brook University Hospital, SUNY at Stony Brook, New York. His opinions are his own and may not necessarily reflect those of the State University of New York or the State of New York. He may be reached at james.fouassier@stonybrookmedicine.edu.

1. 11 NYCRR 65-1.1(d): "Notice. In the event of an accident, written notice setting forth details sufficient to identify the eligible injured person, along with reasonably obtainable information regarding the time, place and circumstances of the accident, shall be given by, *or on behalf of*, each eligible injured person, to the Company, or any of the Company's authorized agents, as soon as reasonably practicable, but in no event more than 30 days after the date of the accident, unless the eligible injured person submits written proof providing clear and reasonable justification for the failure to comply with such time limitation."

2. Hospital financial assistance policies are now mandated by New York State law but the eligibility requirements generally limit applicability to the uninsured. Public Health Law section 2807-k(9-a). It currently is unsettled whether co-payments, deductibles and other patient responsible shares are eligible for reduction, and the equities do not favor the patient in this situation. (The eligibility provision reads, ". . . low-income individuals without health insurance, or who have exhausted their health insurance benefits, and who can demonstrate an inability to pay full charges, . . ." NB- many hospitals voluntarily offer assistance to a much greater extent and under many more circumstances than expressly required by law; inquiries always should be made when assisting a client with a large hospital bill.

LAND TITLE

Choose your helpers wisely

By Lance R. Pomerantz

A recent case out of the Third Department[1] hints at a hidden risk for buyers who use engineers, expediters, architects or other "helpers" to assist with their real estate matters.

The facts of *Gibeault*

In 2007, the County of Saratoga hired an engineering firm, Malcolm Pirnie, Inc., ("Pirnie") for the purpose of "assisting the County in acquiring easements … from real property owners to install [a] water … line." Once the easements were purchased from the record title-holders, the county assigned the easements to the Saratoga County Water Authority. Construction and installation of the water line commenced in 2008. Before and during construction, Gibeault, an adjacent property owner, asserted ownership to a portion of the property over which the authority claimed that it had valid easements. After installation was complete, Gibeault "filed"[ii] a correction deed purporting to change his description. The changed description would result in certain of the authority's easements traversing the Gibeault property.[3]

The claims of the parties

The authority brought an RPAPL Article 15 action seeking a declaration that it had unfettered access to the easements, as well as an injunction and damages. Gibeault counterclaimed, asserting ownership of the disputed property, along with other causes of action. The authority then asserted a third-party action against Pirnie, claiming it was negligent in the manner in which it obtained the easements. Pirnie sought dismissal and the Supreme Court denied the motion. The Third Department panel affirmed.

In support of its motion, Pirnie pointed out that Supreme Court had expressly found that a search of the public records and an examination of the chains of title to the subject property would not have revealed the Gibeault title claims. In response, the authority asserted

Lance R. Pomerantz

> "that the Gibeaults put Malcolm Pirnie on notice of their claims of ownership of the subject property and Malcolm Pirnie did not do enough *outside the search of the public documents* to ascertain the proper boundary lines" (emphasis supplied).

The panel held that the assertion was sufficient to support a *prima facie* claim of negligence. In addition, Pirnie submitted an affidavit from a surveyor that outlined the steps that should be taken-in addition to searching the public records-when easements are acquired from landowners. The surveyor concluded that those steps were completed in this instance. Nevertheless, the Third Department found that Gibeault had proffered sufficient facts to support the inference that "Malcolm Pirnie did not do enough to ascertain the appropriate boundary lines as a result of the Gibeaults' claims."

Why is this worrisome?

Clearly, Pirnie thought it had taken all reasonable steps to determine the location of the easements and the identities of the owners from whom easements would need to be obtained.

The opinion is silent as to whether the county had obtained title insurance on the easements. For the sake of discussion, let's assume that it had. If it is ultimately found that Pirnie "did not do enough *outside the search of the public documents*" to ascertain the proper boundary lines or ownership interests, could the insured have a viable claim under the policy?

The answer to that question hinges, in large part, on the applicability of Exclusion From Coverage 3(b) in the 2006 ALTA Owners Policy. That provision excludes from coverage

> Defects, liens, encumbrances, adverse claims, or other matters … not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant….

Since Pirnie was engaged for the express purpose of "assisting the county in acquiring easements," its knowledge of adverse claims might well be imputed to the county.[iv] As such, Gibeault's off-record assertions could plausibly be construed to be "adverse claims, or other matters … not recorded … but known to the Insured…" and, hence, excluded from policy coverage. In addition, if Pirnie has an affirmative duty to do more than a public records search and comply with local surveying practices, might that duty also be imputed to the buyer, with the same exclusionary effect?

Better safe than sorry

Proposed buyers frequently engage the services of various "helpers" in connection with the acquisition of real estate. The engagement should spell out the helper's obligation to promptly and accurately report all matters it discovers that might impair title. Early and complete disclosure will permit counsel to work with the title insurer in crafting a policy that delivers the coverage the buyer expects to receive.

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

1 *Saratoga County Water Authority v. Gibeault*, 2013 NY Slip Op 1120 (3rd Dept., February 21, 2013).
2 The opinion uses the word "filed." More likely, the deed was recorded, rather than filed.
3 It is unclear whether the "correction deed" was a true correction deed from the original grantor, or a unilateral one, from Gibeault to Gibeault, which would actually be ineffective to change the description. For purposes of the lawsuit, however, it was sufficient to create a cloud on the Authority's title.
4 The opinion does not characterize the parties' precise legal relationship.

REAL ESTATE

Dear Governor Cuomo - strengthen our IDAs

By Andrew M. Lieb

An Industrial Development Agency (IDA) is a public benefit corporation whose purpose is to facilitate economic development in specific localities. An IDA attempts to attract, retain and expand businesses within their jurisdiction through the provision of financial incentives to private entities. The incentive categories available to an IDA that may be utilized to attract businesses include property tax abatements, mortgage recording tax exclusions, and state / local sales tax exemptions. Additionally, an IDA can offer financing through tax exempt bonds. These financial categories are coupled with an IDA's ability to help a business navigate the nuances of local government from Planning Boards to the County's Health Department when getting a project underway.

Interestingly, IDAs do not just attract new businesses with these great incentives, but they also support projects to expand and / or renovate a business's current operations or to purchase / build a new or additional location within the IDA's jurisdiction. Moreover, these incentives are not restricted to businesses that own their own buildings and they are instead, also available to businesses that lease their spaces.

Don't IDAs sound like the type of thing that your clients would really like you to leverage for them?

Also, in the macro, Suffolk County needs to attract more businesses to our county so that there are more jobs and resources for our local citizens. While our economy is thankfully rebounding, a drive through many of our downtowns and community centers will reveal a plethora of vacant commercial buildings that need to be filled with businesses and jobs. Further, the best tool that our county has to attract businesses is our network of local IDAs. In Suffolk County, we not only have a County IDA, but also local IDAs for many of our towns such as Brookhaven, Riverhead, Babylon and Islip. While this may sound redundant, the Suffolk County IDA generally respects the jurisdiction of established Town IDAs and does not interfere with the Town IDAs when working with businesses in their jurisdiction and instead, fills a necessary void for the many towns in our county that do not operate their own IDA. This was one of the many great facts that your author learned when the leadership of the Brookhaven IDA was kind enough to serve as a guest speaker at a recent Real Property Committee meeting to the Suffolk Bar.

Andrew M. Lieb

Additionally, the Brookhaven IDA explained how the sales tax exemption, discussed above, could be applied even when a business does not seek to move, expand or modify its operations. You see, while a sales tax exception is important to avoid a great deal of costs for construction materials, it is also applicable for the purchase of new equipment, particularly for the research and development that is needed for a business in the technology sector.

Therefore, it is quite troubling that in Governor Cuomo's 2013-2014 State Budget, he proposed to limit the categories of business to which IDAs can offer State Sales Tax benefits. Currently, there are certain restrictions for retail projects, but those restrictions and others are generally dealt with by giving a lot of discretion to the local IDA. Furthermore, the Governor's Budget also limited the businesses that could receive State Sales Tax abatements to those that are eligible to receive New York's Excelsior Jobs Tax Credits. Additionally, IDA projects involving State Sales Tax abatements would require the approval of the Regional Economic Development Council and Empire State Development. Even then, the abatement would be received in the form of a tax refund at a later date, instead of as a tax abatement at the time of the purchase. This is a great curtailment of both the localized model for IDAs in strengthening their own communities and to the tools that these local IDAs can use to accomplish this difficult task.

Currently, IDAs are effective because they not only understand the matrix of their communities, but they also can create realistic requirements that are tailored thereto without the stringent requirements that are proposed by the governor, such as the minimum new jobs requirements that the Excelsior Program requires. To illustrate, in the category of "Back Office Operations" a company would need, under the Excelsior Program, to create one hundred and 150 net new jobs to qualify. Where in Suffolk County are businesses regularly creating 150 net new jobs? There are very few places that can even sustain such a project.

These restrictions on an IDA's tools to create economic development are troubling in a climate where we need the IDAs to be the most effective. Instead of reducing the tools available to an IDA, perhaps the governor should propose to offer IDAs additional tools to consolidate the local development process in streamlining growth in our communities or perhaps the governor should provide IDAs with grants for start-up businesses or perhaps the governor should provide IDAs greater influence over our State University system to match talent with business needs. While these suggestions are just provided as illustrations, the point is that we need our IDAs and we need them to be the strongest when our local economies are the weakest.

If you believe that the tools available to IDAs should be strengthened in a time where our communities need to draw businesses to create jobs, contact your local State Senator and Assemblyperson to voice your opinion.

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

HEALTH AND HOSPITAL

Essential health coverage benefits – the ACA final rule

By Christopher J. Kutner

Note: Reprinted with permission from www.nyhealthlawblog.com

The U.S. Department of Health and Human Services (HHS) has issued a final rule stating the future health insurance exchange ("Exchange") and insurance issuer standards related to coverage of essential health benefits (EHB) and actuarial value. The final rule further establishes a timeline for when qualified health plans (QHPs) should be accredited in federally facilitated Exchanges.

Beginning January 1, 2014, non-grandfathered insurance plans in the individual and small group market and those in the Exchanges will be required to provide coverage of benefits or services in 10 separate categories that reflect the extent of benefits covered by a typical employer plan. A QHP is one that provides a benefits package that covers EHB, includes cost-sharing limits, and meets minimum value requirements.

Essential Benefits

Regarding scope of EHB, each state will be permitted to identify a single EHB-benchmark plan. This is defined as the standardized set of essential health benefits that must be met by a QHP from the following four choices:

1. Small group health plan, defined as the largest health plan by enrollment in any of the three largest small group insurance products by enrollment in the state's small group market;

2. State employee health plan, which is any of the largest three employee health benefit plan options by enrollment offered and generally available to state employees;

3. Any of the largest three national Federal Employees Health Benefits Program (FEHBP) plan options by aggregate enrollment that is offered to all health benefits eligible federal employees; or

4. A non-Medicaid coverage plan with the largest insured commercial enrollment offered by a health maintenance organization (HMO) operating in the state.

The default base-benchmark plan will be the first option discussed above in the event a state does not make an election. A benchmark plan must include coverage in each of the 10 categories (ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care).

Christopher J. Kutner

A multi-state plan must meet benchmark standards set by the U.S. Office of Personnel Management (OPM). Additional information on EHB benchmark plans can be found here.

The Affordable Care Act creates four tiers of health plans available for purchase through the Exchanges. Each tier is defined by its actuarial value (AV). The HHS has created an AV calculator to assist in determining a plan's metal level.

- a bronze health plan is a health plan that has an AV of 60 percent;
- a silver health plan has an AV of 70 percent;
- a gold health plan has an AV of 80 percent; and
- a platinum health plan has as an AV of 90 percent.

The value may vary by plus or minus 2 percent. The purpose of establishing these "metal" levels is to help participants and potential enrollees compare various health plans.

Minimum value

An employer-sponsored plan is deemed to provide minimum value (MV) if the percentage of the total allowed costs of benefits provided under the plan is no less than 60 percent. In order to determine whether a plan provides minimum value, an employer-sponsored plan may use the MV calculator provided by the HHS and the Internal Revenue Service, or avail itself of "an array of design-based safe-harbors published by HHS and the Internal Revenue Service in the form of checklists to determine whether the plan provides MV."

The MV Calculator will have similar functionality to the AV Calculator but will be based on claims data that better reflects typical employer-sponsored plans. Alternatively, a group health plan may seek certification by an actuary to determine MV if the plan contains non-standard features that do not lend themselves to either of these determination methods.

Annual limits

HHS explains that it interprets the health care law as requiring all group health plans to comply with the annual limitation on cost-sharing, while only plans and issuers in the small group market are subject to the Act's deductible limits.

Deductible limitations and cost-sharing

For 2014, the deductible limit for self-only coverage is set at $2,000; and at $4,000 for coverage other than self-only. Guidance issued by the Department of Labor's Employee Benefits Security Administration (EBSA) explains that small group market health insurance coverage may exceed the annual deductible limit if it cannot reasonably reach a given level of coverage (metal tier) without exceeding the deductible limit.

With respect to self-insured and large group health plans, the agencies responsible for implementing the ACA plan to issue a rule to implement §2707(b) of the Public Health Service (PHS) Act, which was added by the ACA, providing that a group health plan must ensure that any annual cost-sharing does not exceed the ACA's limits on out-of-pocket maximums and deductibles for employer-sponsored plans.

Only plans and issuers in the small group market are required to comply with the deductible limit described in section 1302(c)(2) [of the ACA]. A self-insured or large group health plan will be permitted to rely on the agencies' stated intent to apply the deductible limits only on plans and issuers in the small group market until such regulations are issued.

As for the annual limit on out-of-pocket maximums, all non-grandfathered group health plans (including large group insured plans and self-insured plans) must comply with the annual limitation on out-of-pocket maximums set forth in §1302(c)(1) of the ACA, which ties the annual limitation on cost sharing for plan years beginning in 2014 to the enrollee out-of-pocket limit for high deductible health plans (HDHP).

A plan's annual limitation on out-of-pocket maximums will be considered satisfied if the plan complies with the requirements with respect to its major medical coverage (excluding certain coverage such as prescription drug and pediatric dental services) and whether the plan or any health insurance coverage includes an out-of-pocket maximum on coverage that does not consist solely of major medical coverage.

Pursuant to the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), however, plans and issuers "are prohibited from imposing an annual out-of-pocket maximum on all medical/surgical benefits and a separate annual out-of-pocket maximum on all mental health and substance use disorder benefits."

Accreditation

With respect to a timeframe, the rule states that the future Exchanges will be required to establish a uniform period within which a QHP issuer that is not already accredited must become accredited. The OPM will establish the accreditation period for multi-state plans. The rule outlines a multi-year accreditation timeline applicable for federally-facilitated Exchanges.

These regulations took effect 60 days after publication in the *Federal Register*, which was Monday, February 25, 2013.

Note: Christopher J. Kutner is a partner at the law firm of Farrell Fritz, P.C. and leads the firm's Health Law practice group. He can be reached at ckutner@farrellfritz.com or at (516) 227-0609.

LANDLORD TENANT

Nonpayment proceedings against month-to-month tenants

By Patrick McCormick

In *1400 Broadway Associates v. Henry Lee and Co. of NY, Inc.,*[1] the parties' commercial lease expired January 31, 1990 and the tenant, who did not realize the lease had expired, continued to make monthly rent payments, in the amount set forth in the expired lease, for six months. The tenant learned that the lease had expired during negotiations for a new lease and during the negotiations continued to pay rent through October 1992. Tenant then stopped making monthly rent payments and landlord commenced a nonpayment proceeding. Tenant moved for summary judgment to dismiss the complaint for failure to state a cause of action. The court granted the motion holding that a nonpayment proceeding could not be maintained against a month-to-month tenant because, "absent a meeting of the minds, no agreement exists regarding the monthly rental rate." The court held:

> A month-to-month tenancy, by its nature, is renewable by the parties' conduct, i.e., by continued payment and acceptance of agreed-upon amounts each month. When the parties no longer agree to continue the relationship, either party can terminate it. However, if the tenant does not voluntarily surrender, the owner must serve a statutory notice of termination at least 30 days before expiration of the monthly term, as a condition to bringing a holdover proceeding.

Patrick McCormick

Thus, the court held that "Petitioner's acceptance of respondent's monthly payments created a month-to-month tenancy, by operation of law, which could be terminated only by service of a 30-day notice." A 30-day termination notice, the predicate to commencing a holdover proceeding against a month-to-month tenant, was not served and therefore a holdover proceeding was not possible.

The court concluded that:

> [t]o permit petitioner to maintain a nonpayment proceeding under these circumstances, seeking payment at the lease rate, would permit a landlord unilaterally to bind a tenant to payment at a rate predicated on a continuing agreement, even though there no longer was a meeting of the minds. Such a result would vitiate the intent of RPL section 232-c.

RPL 232-c provides:

> Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.

The court's analysis has been generally accepted.[2] But, in *Tricarichi v. Moran*[3] the Appellate Term reversed an oral order dismissing a nonpayment proceeding brought against month-to-month tenants and in its decision explicitly rejected the analysis set forth in *1400 Broadway Associates v. Henry Lee and Co. of NY, Inc.*

In *Tricarichi,* the Appellate Term specifically held:

> Real Property Law §232-c is inapplicable to month-to-month tenants, since the term of a month-to-month tenancy is not 'longer than one month.'

The court explained that:

> Real Property Law §232-c did not abolish a landlord's right to elect to hold a month-to-month tenant for a new term solely by virtue of his holding over. Indeed, the requirement of Real Property Law §232-b—that both a landlord and a tenant wishing to terminate a month-to-month tenancy must give a month's notice—remains unaffected by the subsequent enact-

(Continued on page 20)

ACADEMY OF LAW NEWS

Academy completes elections

Academy Officers elected a new dean for the 2013-2014 fiscal year and four new officers to fill vacancies that will occur on the Academy board at the end of the current administration (May 31).

The *Honorable James P. Flanagan*, an Acting County Court Judge since 2011 and long time participant in Academy activities, was elected Dean. He will take over for Judge John Kelly, the Academy's current dean, on June 1, 2013. Judge Flanagan currently sits as a member on the Board of Directors, with a term expiring 2015. Judge Kelly, pursuant to the Academy Bylaws limited service, has served for two one-year terms.

Newly elected Academy Officers are *Joan McNichol, Charles Wallshein, Peter Tamsen and the Hon. John Leo* (a justice of the Supreme Court). The new Officers (elected to one year terms after successful completion of which eligibility is acquired for three-year terms) fill openings that will occur as outgoing officers have completed four years of service, the limit set by Academy Bylaws.

The service provided by all of the Academy officers and volunteers are extraordinary. They all supply the necessary inspiration and enthusiasm to carry the Academy's objectives into fruition, and that is what makes the Academy of Law enjoy its success and great reputation which has endured for many many years.

~LaCova

SCBA Bylaws ratified by the Board of Directors

Proposed Suffolk County Bar Association Bylaw Amendment to ARTICLE VI NOMINATIONS AND ELECTIONS, § 2 (5) Procedures of Nominating Committee, (language to be added appears in italics and language to be stricken contains strike-through):

Disqualification-no member of the Nominating Committee may be nominated for office. No person who is related by blood or marriage *to a member of the Nominating Committee*, or who is a partner or an associate of a member *of the Nominating Committee*, or *who* regularly serves as counsel to a member of the Nominating Committee, may be nominated for office unless such member of the Nominating Committee resigns *prior to such time as that Nominating Committee begins to interview candidates for office.*

This proposed Bylaws change will be voted upon at the May 6, 2013 Annual Meeting. The meeting will be held at the SCBA Center , commencing at 6:00 p.m

WHO'S YOUR EXPERT

Effects of untimely CPLR 3101[d] disclosures on motion for summary judgment

By Hillary Frommer

In a recent decision in *Rivers v Birnbaum*,[1] the Appellate Division, Second Department, clarified whether a trial court may consider an affidavit submitted by an expert on a motion for summary judgment where the party propounding the submission did not timely provide notice of the expert pursuant to CPLR § 3101[d][1]. In that medical malpractice action, the plaintiff served the defendants with a CPLR § 3101[d][1][i] demand, but then filed the note of issue and certificate of readiness before the defendants responded thereto. Thereafter, the defendants each moved for summary judgment dismissing the complaint, and submitted affidavits from physicians-experts who had not previously been disclosed during discovery. The plaintiff opposed summary judgment arguing, in part, that the expert affidavits should be precluded because the defendants failed to timely provide notice of the expert under CPLR § 3101[d][1][i].

The trial court rejected the plaintiff's preclusion argument and the Appellate Division affirmed. It held that the fact that a party did not disclose its expert pursuant to CPLR § 3101[d][1][i] prior to the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely and divest a trial court of its discretion to review an affidavit by such expert on a motion for summary judgment.

In reaching this decision, the court first looked at the plain language of the statute and noted that it does not contain any time frame for expert disclosures. It then considered the legislative intent in drafting that provision, which, the court noted, was originally "conceived as part of a major overhaul of medical malpractice litigation procedures." The court compared sections 3101[d][1][i] and [d][1][ii], and specifically noted that section [d][1][ii] requires a party to a medical, dental or podiatric malpractice action to accept or reject an offer to disclose the name of, and to make available for deposition, the person the party making the offer intends to call as an expert witness at trial, *within twenty days of service.* The court determined that the legislature deliberately omitted a timing requirement for the section [d][1][i] disclosure, and instead, vested the trial court with the discretion to allow the testimony of an expert who was not disclosed during pretrial discovery. The court reasoned that based on the express intent to allow expert testimony at trial where notice was not given during discovery, there was no basis to conclude that an expert's submission on summary judgment should be rejected based solely on the lateness of the submission. Moreover, the court recognized the broad

Hillary Frommer

discretion of the trial court to supervise discovery. For instance, the court opined that the trial court may set the timing for expert disclosures and impose sanctions-such as precluding the testimony of the expert at trial and/or the submission of an affidavit on summary judgment-against a party for failing to adhere to its deadlines.

The Appellate Division then considered the court's role on summary judgment. It is well-settled in New York that a court's function on a motion for summary judgment is to determine whether there are any issues of fact for trial. Its job is not to resolve them or assess credibility.[2] The court concluded that precluding an expert's affidavit submitted on a motion for summary judgment based solely on a party's failure to timely disclose the expert pursuant to CPLR §[d][1][i] "does not necessarily advance the court's role of determining the existence of a triable issue of fact" and "is not consistent with the purpose and procedural poster of a motion for summary judgment."[3] The court further noted the particular importance of an expert's submission in the medical malpractice context: a party must submit an affidavit or affirmation from an expert in order to satisfy its burden of proof or raise an issue of fact.

Although the court stated that it was clarifying the standard, did it really? It noted that several recent decisions could reasonably be interpreted to hold that the untimeliness of an expert disclosure is a basis to preclude the expert's affidavit on a motion for summary judgment, yet the court did not go so far as to expressly overturn those decisions. For example, in *Pellechia v Partner Aviation Enterprises, Inc.*,[4] the Appellate Division affirmed the trial court's decision granting the defendant's motion for summary judgment and dismissing the complaint, and stated that the trial court properly rejected the plaintiff's expert affidavit because "the plaintiff never complied with any of the disclosure requirements of CPLR 3101[d][1][i], and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness."[v] Although the court also found that the expert failed to demonstrate that (i) he was qualified to render an opinion and, (ii) his opinions were based on accepted industry standards, its determination as to the untimeliness of the disclosure as a basis for rejecting the affidavit is quite clear. Similarly, in *Vailes v Nassau County Police Activity League, Inc., Roosevelt Unit*,[vi] the Appellate Division held that the trial court "providently exercised its discretion in declining to consider the affidavit of the plaintiffs' purported expert, since that expert was not identified by the plaintiffs until after the note of issue and certificate of readiness had been filed attesting to the completion of discovery."[7]

Furthermore, *Rivers* does not discuss whether the trial court may or should consider why a party did not timely disclose the expert.[8] Under CPLR § 3101[d][1][i], a party is not precluded from presenting the testimony of an expert at trial where it establishes "good cause" for failing to timely serve the expert disclosure. Thus, while the court held that the failure to timely disclose an expert prior to the filing of the note of issue and certificate of readiness alone, is not a basis to preclude the trial court from considering that expert's affidavit on a motion for summary judgment, the court seems to have left open the question of whether the trial court may reject the expert's submission on the motion where the party propounding the submission failed to establish good cause for its untimely expert disclosure.

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

1 2012 NY Slip Op 06935 [2d Dept 2012].
2 See Kriz v Schum, 75 NY2d 25 [1989]; Capelin Assoc., Inc. v Globe Manufacturing Corp., 34 NY2d 338 [1974];
3 Rivers supra.
4 80 AD3d 740, 741 [2d Dept 2011].
5 Id.
6 72 AD3d 804, 805 [2d Dept 2010]; see also Ehrenberg v Starbucks Coffee Company, 82 AD3d 829 [2d Dept 2011].
7 Id.
8 Although the court implied that Pellechia and Vailes address the failure to provide good cause, in fact, neither decision addresses that question.

Month-to-month tenants *(Continued from page 19)*

ment of Real Property Law §232-c. Here, both the making of a rent demand by landlord and the commencement of a nonpayment proceeding constitute an election by landlord to treat the holdover tenants as tenants for a new term and not as trespassers (see Friedman on Leases §18:4). Their month-to-month tenancy continues on the same terms as were in the expired lease, if, in fact, the lease has expired.

This statutory analysis by the Appellate Term, at least in the 9th and 10th Judicial Districts and until a higher court weighs in, permits a landlord to commence a nonpayment proceeding against a holdover month-to-month tenant. The obvious benefit to a landlord is time. Rather than being compelled to serve a 30-day termination notice to terminate a month-to-month tenancy under RPL § 232-b before commencing a holdover proceeding, the landlord may now commence a nonpayment proceeding against a month-to-month tenant upon making an oral demand for rent or serving a 3 day written demand under RPAPL § 711(2).

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.

1 161 Misc.2d 497, 614 N.Y.S.2d 704 (NYC Civ. Ct., NY Co. 1994)
2 See, Krantz & Phillips, LLP v. Sedaghati, 2003 N.Y. Slip Op. 50032(U) (App. Term 1st Dep't 2003)
3 2012 N.Y. Slip Op. 22395 (App. Term, 9th & 10th Judicial Districts 2012)

Motion practice in Suffolk County *Continued from page 15)*

the two.[23] Whether the motion is one to reargue or renew, or both, the original moving papers, the opposition, and any reply, in addition to the order being reargued or renewed, should be included as exhibits. The reader is invited to join Judge Lebovits at the Suffolk Academy of Law on May 15 for an in-depth discussion on persuasive and effective legal writing and oral argument techniques and tips.

Note: Diane K. Farrell is the Principal Law Clerk to the Honorable John J.J. Jones, Jr.

Note: Gerald Lebovits is a New York City Civil Court judge and an adjunct professor of law at Columbia, Fordham, and NYU.

The authors thank Elizabeth Sandercock, a student at City University of New York Law School, for her research help. On May 15, at 6 p.m., the Suffolk Academy of Law will welcome Judge Gerald Lebovits back for a CLE-Persuasive Writing for Litigators.

1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon Gerstman, *New York Civil Practice Before Trial* § 36:61, at 36-15 (2006; Dec. 2009 Supp.).
2 *Wells Fargo Bank Minn. N.A. v. Mastropaolo*, 42 A.D.3d 239, 241, 837 N.Y.S.2d 247, 249 (2d Dep't 2007).
3 *Deutsche Bank Nat. Ass'n v. Hussain*, 78 A.D.3d 989, 990, 912 N.Y.S.2d 595, 596 (2d Dep't 2010).
4 *Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15, 28, 869 N.Y.S.2d 572, 582 (2d Dep't 2008).
5 N.Y. Comp. Codes R. & Regs. Tit. 22, § 202.7(a) (2013).
6 *Hernandez v. City of New York*, 100 A.D. 3d 433, 434, 953 N.Y.S.2d 199, 201 (2d Dep't 2012), (citing *Molyneaux v. City of New York*, 64 A.D. 3d 406, 882 N.Y.S.2d 109 (1st Dep't 2009)).
7 102 A.D.3d 201, 959 N.Y.S.2d 74, 79 (2d Dep't 2012).
8 22 NYCRR Part 1200, App. A.
9 Rules of the Chief Admin. 130-1.1(c)(3).
10 CPLR 3212(a).
11 CPLR 3212(b); *Mieles v. Tarar*, 100 A.D.3d 719, 720, 955 N.Y.S.2d 86, 87 (2d Dep't 2012).
12 *Ross v. Gidwani*, 47 A.D.3d 912, 913, 850 N.Y.S.2d 567, 568 (2d Dep't 2008).
13 *See generally*, *Rodriguez v. Ryder Truck Rental, Inc.*, 91 A.D.3d 935, 936, 937 N.Y.S.2d 602, 603 (2d Dep't 2012).
14 *Currie v. Wilhouski*, 93 A.D.3d 816, 817, 941 N.Y.S.2d 218, 219 (2d Dep't 2012).
15 *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 733 (2003).
16 *See Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 789 N.Y.S.2d 314, 315 (2d Dep't 2005).
17 *See* CPLR 2221.
18 *Poulard v. Judkins*, 102 A.D.3d 665, 666, 965 N.Y.S.2d 916, 917 (2d Dep't 2013).
19 CPLR 2221(d)(3); *Dinallo v. DAL Elec.*, 60 A.D.3d 620, 874 N.Y.S.2d 246 (2d Dep't 2009).
20 David D. Siegel, *New York Practice* § 254, at 434 (4th ed. 2005).
21 *Id.*
22 CPLR 2221(e).
23 CPLR 2221(d)(1), (e)(1); *In re Will of Nigro*, 14 Misc. 3d 1239(A), 836 N.Y.S.2d 501 (N.Y. Sur. 2007).

Estate planning *(Continued from page 5)*

(sperm or embryo) could instruct in his or her will or non-testamentary documents for an estate to be distributed to future children. The *Kolacy* court formulated a three-pronged test similar to the one discussed above to ensure fairness in determining inheritance rights in the context of federal benefits: proof of a genetic relationship between the children and the decedent; decedent's consent or intent to be a parent; and no interference with a legitimate state interest by granting such benefits.

The U.S. Supreme Court addressed the issue of posthumous children in the context of Social Security benefits. In *Astrue v. Capato*, 566 U.S. ___ (2012), the U.S. Supreme Court held that children conceived after a parent's death are not entitled to Social Security Survivor benefits if the laws in the state that the parent's will was signed in forbid it. In 1999, Karen Capato's husband was diagnosed with cancer. Out of fear that chemotherapy would render him sterile, he deposited sperm in a sperm bank. He and Karen conceived a son born before he died in 2002. Eighteen months after her husband's death, in 2003, Capato gave birth to twins conceived through in vitro fertilization using her husband's sperm from the sperm bank. Her claim for Social Security Survivor's Benefits was rejected by SSA because Florida law dictated that children conceived after a parent's death cannot inherit.

Although the Third Circuit Court of Appeals reversed the SSA's decision, the U.S. Supreme Court reversed the Third Circuit because under the laws of Florida, the children would not be eligible.

New York's laws on posthumously born children have not been updated to consider the application of those laws to children conceived and born as a result of assisted-reproductive technologies. This presents a minefield of potential disputes that can arise. In the meantime, it appears that courts will look to strike a balance between the children, parents, donors, and other beneficiaries of the estate, as well as placing an emphasis on the decedent's intent so as to prevent abusive use of genetic material to improperly gain access to an estate's assets. It is also a balance of the genetic relationship between the parent and child, public policy, the intent of the parties involved, state laws regarding donors and inheritance rights, and the efficiency in estate administration. Until such time as the legislation catches up to the advancements of science, mere donors of genetic material should take caution to state in his or her will that they do not intend to include children born from that donated material. Those who knowingly store their genetic material should also take care to make a specific bequest of that material to ensure that it is not used improperly solely for pecuniary benefit.

Note: Alison Arden Besunder is the principal of the Law Offices of Alison Arden Besunder P.C. in Manhattan and Brooklyn, where she focuses her practice on trusts and estate planning for individuals and married couples, as well as trust and estate-related litigation such as contested probate and contested accountings in Suffolk, Nassau, Kings, Queens and New York counties. She also handles intellectual property matters including trademark and copyright prosecution and infringement.

CORRECTION

The first line of the March 2013 Education Law article, *New gun control law impacts schools*, by Candace J. Gomez was edited incorrectly. The line from the original article written by Ms. Gomez was as follows: "On January 15, 2013, Governor Andrew Cuomo signed into law the nation's first gun control legislation since Newtown, called the New York Secure Ammunition and Firearms Enforcement Act of 2013 (New York SAFE Act)." *The Suffolk Lawyer* regrets the error.

WORKER'S COMPENSATION

Don't get burned by holding of burns

By Joseph F. Sensale

Joseph F. Sensale

While in general the New York Workers' Compensation statute may be an enigma wrapped in riddle wrapped in a mystery to those practitioners who do not ferry across its roiling waters routinely, the occasional excursion required when same must be considered in the settlement of third-party actions at law arising out of a work-related injury is no less fraught with potential trouble and attorney liability.

To help navigate the impact of settlement of such a third-party action, knowledge of the definition of relevant terms is necessary: a "lien" in this instance is defined as "*total of payments of compensation to claimant prior to settlement of third-party action at law,"* while a "credit" is defined as "*total value of payments of compensation to claimant subsequent to settlement of third-party action equal to the net proceeds 'actually collected' by claimant as a result of said action.* The foregoing terms are not interchangeable, as each refers to a distinct monetary amount arising from specific, chronological circumstances, with the nature of each revealed below.

Of paramount importance, and, from where the title of this piece is engendered, is the New York State Supreme Court, Appellate Division, Third Department holding in *Burns v. Varriale*, 34 A.D.3d 59, 820 N.Y.S.2d 655 (3rd Dep't 2006), affirmed by the New York State Court of Appeals at 9 N.Y.3d 207, 879 N.E.2d 140 (2007), wherein it was recognized:

> [i]n the absence of a reliable method by which the present value of plaintiff's future benefits can be estimated, counsel fees cannot be apportioned on those benefits at this time. Accordingly, [the instant workers' compensation insurance carrier] may recover the amount of its lien, [amount omitted] reduced by its equitable share of the costs incurred in recovering the lien amount, i.e., the percentage of the total recovery that it cost plaintiffs in counsel fees and disbursements to bring the action, [percentage omitted] (*see Kelly v State Ins. Fund*, [citation omitted]). We note that if, upon plaintiff's application, the Workers' Compensation Board determines-in the same manner that it would after the carrier's offset is exhausted-that he is entitled to continued compensation benefits, the Board shall direct further reimbursement of counsel fees by [the instant workers' compensation insurance carrier] based on the amount of those benefits and the…rate that we have determined to be the carrier's equitable share of the cost incurred in obtaining the benefits to the carrier (citation omitted). In other words, if plaintiff would have received further compensation benefits-but for the settlement-between the time of settlement and exhaustion of the carrier's holiday, the carrier will be required at that point to pay its equitable share of the cost of obtaining those benefits, which can no longer be deemed hypothetical or speculative, as those benefits accrue.

The following analysis must be performed to determine if the subject workers' compensation benefits are even *ascertainable*: These are, if: (a) the benefit paid is a death benefit (calculation of benefits is predicated upon life expectancy of spouse with accounting for provision to remarry – such calculation will produce a finite monetary amount sans speculation); (b) did plaintiff-claimant reserve its rights provided same pursuant to the holding in *Burns* at the time of settlement of related third-party action at law? (i.e., did workers' compensation insurance carrier agree to continue workers' compensation payments to plaintiff-claimant upon settlement of third-party action?)

Indeed, in the Court of Appeals affirmation of *Burns,* same recommended

> [t]he trial court, in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue and monitoring (e.g., by court order or stipulation of the parties) how the carrier's payments to the claimant are made. Thereby, the court can ensure that the payment of attorney's fees by the carrier is based on an actual, non-speculative benefit.

Proper application of the holding in *Burns* requires responses to the these additional queries: (i) inasmuch as the facts in *Burns* involve a *court-ordered compromise* of the workers' compensation insurance carrier's lien and credit rights; unless such court-ordered compromise exists in the case at bar, is holding of *Burns* even applicable? (ii) did plaintiff-claimant reserve its rights provided same pursuant to the holding in *Burns* at the time of settlement of related third-party action at law? (i.e., did workers' compensation insurance carrier agree to continue workers' compensation payments to plaintiff-claimant upon settlement of third-party action?) (iii) is a finding the claimant has *not* voluntarily withdrawn from the labor market a predicate to implementation of the Burns analysis? That is, without such finding, is the workers' compensation insurance carrier's credit nonetheless reduced to "speculative" as continued permanent partial disability benefits are subject denial/cessation at an arbitrary time? And (iv) even if a plaintiff-claimant returns to some employment which produced earnings affecting the permanent partial disability rate, upon production of proof of such earnings before the WCB, is the permanent partial disability rate subject to recalculation in accordance with the percentage of the workers' compensation insurance carrier's equitable share of the cost incurred in obtaining such benefits previously established?

Answers to these queries will directly assist in complying with the Court of Appeals recommendation to derive an "actual, non-speculative benefit" by the always-preferable stipulation, and, accordingly avoid adverse judicial findings.

Note: Joseph F. Sensale is a partner of The Chase Sensale Law Group, L.L.P. Chase Sensale serves the needs of the injured and disabled in the practice areas of workers' compensation, social security disability, long term disability, short term disability, disability retirement, accidental death and dismemberment, and unemployment insurance benefits, with offices located in Nassau, Suffolk and the greater NYC metro area, and, available on the web at www.ChaseSensale.com.

ABA 2013 Midyear Meeting (Continued from page 1)

Delaware earlier that morning. He reported that the Conference of Chief Justices has worked closely with the ABA and state and local bar associations to help obtain adequate resources to fund state courts. He also called on lawyers to bring their clients to the table to talk to legislators and help focus the conversation on the inadequate funding and resources of state courts.

In her remarks to the House, ABA President Laurel Bellows of Illinois thanked the House for the privilege of serving the profession and representing the Association. She reaffirmed that when the House acts and the ABA speaks, that voice carries internationally as an advocate for the rule of law.

President Bellows supported the earlier remarks by Chief Justice Steele regarding the underfunding of the state courts. She noted that less than two percent of state budgets are directed toward our justice system. Legislatures are starving justice and, when courtroom doors close, democracy fails. Increased funding of courts must be a priority if we want our justice system to survive.

President Bellows lauded the work of the ABA Cyber Security Taskforce, which is drafting guidelines and best practices on how information is shared to better protect law firms and clients from a cyber attack.

President Bellows spoke at length about the problem of human trafficking, which she likened to modern day slavery and characterized as the most profitable and fastest growing crime in the world, other than sale of drugs. The horror exists here in the U.S. where 100,000 U.S. citizens are held in slavery and forced into sex and labor for the profit of their captors. President Bellows discussed how the ABA is attacking this problem by promulgating a Uniform State Law to be presented to the House at the Annual Meeting in August, as well as business conduct standards to assist businesses in eliminating slavery-related products from their supply chains.

The ABA Nominating Committee reported on the following nominations for the terms indicated: William C. Hubbard of South Carolina as President-Elect for 2013-2014; Mary T. Torres of New Mexico as Secretary for 2014-2017; and G. Nicholas Casey, Jr. of West Virginia as Treasurer for 2014-2017.

Linda A. Klein of Georgia, Chair of ABA Day in Washington, gave a brief report on ABA Day 2013 which will be held April 16-18, 2013, in Washington, D.C. She referenced the 90 new members in Congress who need to be educated as to the issues important to the ABA. She reaffirmed that ABA Day serves as an opportunity for the voice of the profession to be heard. She encouraged all members to register to attend.

Among the many resolutions considered and voted on by the House:

The House approved Revised Resolution 109, sponsored by the Section of Business Law, supporting the position that United States Bankruptcy Judges have the authority, upon the consent of all the parties to the proceeding, to hear, determine, and enter final orders and judgments in those proceedings designated as "core" within the meaning of 28 U.S.C. § 157(b) but that may not otherwise be heard and determined by a non-Article III tribunal absent the parties' consent, as being consistent with and not violative of Article III of the United States Constitution.

In the area of criminal justice, the House approved a resolution urging Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile and civil commitment proceedings. The House also approved a resolution urging governments to enact legislation prohibiting the retaliatory discharge of a Chief Public Defender or other head of an indigent defense services provider because of his or her good faith effort to control acceptance of more clients than the office can competently and diligently represent, in accordance with their ethical obligations. The House also approved a resolution urging the federal government to restore, maintain, and, where appropriate, increase funding to organizations which provide training to state and local prosecutors, to better promote justice, increase public safety, and prevent wrongful convictions.

With respect to human trafficking, the House approved a resolution urging governments to enact laws and regulations and to develop policies that assure that once an individual has been identified as an adult or minor victim of human trafficking, that individual should not be subjected to arrest, prosecution or punishment for crimes related to their prostitution or other non-violent crimes that are a direct result of their status as an adult or minor victim of human trafficking. The House also approved a related resolution urging governments to enact legislation allowing adult or minor human trafficking victims charged with prostitution related offenses or other non-violent offenses that are a direct result of their being trafficked to assert an affirmative defense of being a human trafficking victim. In addition, the House approved a resolution urging governments to aid victims of human trafficking by enacting and enforcing laws and policies that permit adult or minor victims of human trafficking to seek to vacate their criminal convictions for offenses related to their prostitution or other non-violent offenses that are a direct result of their trafficking victimization.

Regarding ethics, the House approved a resolution amending Rule 5.5(d) of the *ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law)* to permit foreign lawyers to serve as in-house counsel in the U.S., but with the added requirement that foreign lawyers not advise on U.S. law except in consultation with a U.S.-licensed lawyer. The House also approved a resolution amending the *ABA Model Rule for Registration of In-House Counsel* to permit foreign lawyers to serve as in-house counsel in the U.S. but with added requirements. The House also approved a resolution amending the *ABA Model Rule on Pro Hac Vice Admission* to provide judges with guidance about whether to grant limited and temporary practice authority to foreign lawyers to appear in U.S. courts. The House also adopted a resolution amending Model Rule 8.5 of the *ABA Model Rules of Professional Conduct* to address an increasingly common choice of law problem arising in the context of conflicts of interest.

On behalf of the New York State Bar Association, NYSBA President Seymour W. James, Jr. moved Resolution 10A urging federal elected officials to adequately fund the federal courts and the Legal Services Corporation as they negotiate deficit reduction with the imminent threat of the implementation of sequestration if they fail. The resolution was approved.

The House approved two resolutions sponsored by the Section of Intellectual Property Law. The first supports the principle that laws of nature, physical phenomena, and abstract ideas are not eligible for patenting as a process under 35 U.S.C. §101, even if they had been previously unknown or unrecognized. The second supports clarification of the standards for finding direct infringement under 35 U.S.C. § 271(a) for a patent directed to a multiple-step process in the fact situation where separate entities collectively, but not individually, perform the required steps of the patented process.

Regarding Medicare reimbursement, the House approved a resolution supporting timely and efficient resolution of requests from a claimant or applicable plan for conditional payment reimbursement amounts where Medicare has a right to reimbursement from a recovery by way of settlement, judgment or award for payments made for items and services, and urging Congress and the Department of Health and Human Services to establish reasonable time limits and procedures for responding to such requests.

Finally, the House approved three resolutions sponsored by the National Conference of Commissioners on Uniform State Laws: approving the *Uniform Asset Freezing Orders Act;* the *Uniform Deployed Parents Custody and Visitation Act;* and the *Uniform Premarital and Marital Agreements Act.* In each instance, the House found the act to be appropriate for those states desiring to adopt the specific substantive law suggested therein.

Following tradition, at the conclusion of the meeting, the California delegation was recognized to make a presentation to the House inviting delegates to attend the 2013 ABA Annual Meeting in San Francisco.

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)

pursuant to CPLR §6514(a) for an order cancelling the Notice of Pendency filed by plaintiff against the premises located at 64 Pulaski Street, South Huntington, New York. The court noted that the plaintiff filed a notice of pendency against the subject premises with the Suffolk County Clerk on September 5, 2012, which filing was processed on September 6, 2012.

It was undisputed that the plaintiff had not served a Summons and Complaint in this matter as of November 9, 2012. In granting the application, the court noted that CPLR §6512 provides in relevant part that "a notice of pendency is effective only, if within 30 days after filing, a summons is served upon the defendant…" CPLR §6514(a) states that "the court, upon motion of any party aggrieved and upon such notice as it may require shall direct any county clerk to cancel a notice of pendency is service of a summons has not been completed within the time limited by Section 6512. Accordingly, the court issued an order canceling the notice of pendency.

Honorable William B. Rebolini

Default vacated; reasonable excuse and meritorious defense established; actions taken to enforce the default judgment in violation of two court orders prejudiced the rights of the defendants; hearing on sanctions scheduled.

In *State Tax Consulting Inc. v. S &A Plumbing & Heating Inc., Albert Eith, individually and Sheila Eith, individually,* Index No.: 33322/10, decided on February 14, 2013, the court granted defendants' motion for an order vacating the judgment of default entered against them.

The court recited the facts as follows: According to the affirmation of defense counsel, plaintiff's prior counsel agreed to accept an answer to the complaint by October 26, 2010 provided, however, that service and jurisdictional challenges were waived. Defense counsel served the defendants' answer to the complaint within the time frame. On or about November 2, 2010, the defendants' verified answer was mailed, but typographical error in plaintiff's counsel's address prevented delivery. On or about November 8, 2010, the verified answer was mailed to plaintiff's counsel. As a defense, defendants proffered that plaintiff failed to credit cash payments made on account, that plaintiff did not send defendants regular invoices, and that plaintiff's services were ineffective. On November 16, 2010, plaintiff entered a judgment upon defendants' default with the county clerk. On November 23, 2010, plaintiff filed a notice of petition and verified petition for an order directing the sale of defendants' home to satisfy the judgment.

The petition was denied, and in that order, the court stated that "…the plaintiff, its attorneys, agents, servants and employees are hereby enjoined from enforcing that judgment pending further order of this court. Thereafter, by amended order to show cause, dated September 28, 2012, it was ordered that "all enforcement actions of the Judgment entered on November 16, 2010…are hereby stayed pending….further order of this court." With regard to the branch of the motion which sought an order vacating the default, the court found that the defendants demonstrated both a reasonable excuse for their default in failing to timely serve an answer as well as the existence of a meritorious defense. The court noted that the undisputed evidence before the court demonstrated that the actions taken to enforce the default judgment in violation of two court orders prejudiced the rights of the defendants. Consequently, the court found that under the circumstances of the case, it was constrained to conduct a hearing to determine whether the plaintiff and/or its counsel willfully violated the orders of the court and whether the imposition of sanctions is appropriate.

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

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

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Technology *(Continued from page 9)*

problems that occur when pig organs enter human bodies, from immune system rejection to blood clots. Vacanti, now at Massachusetts General Hospital, has instead been developing technology to create genetically tailored organs out of a patient's own cells, abolishing compatibility issues. "I said to myself: why can't we just make an organ?" he recalls.

In the race to solve the organ shortage, xenotransplantation is like the slow and steady tortoise, still taking small steps after a long run-up, while organ engineering is more like a sprinting hare, racing towards a still-distant finish line. Most of those betting on the race are backing the hare. Industry support has dried up for xenotransplantation after years of slow progress, leaving public funders to pick up the expensive tab. Stem cells, meanwhile, continue to draw attention and investment. Both fields have made important advances in recent years, and the likely winners of their race—or whether it will result in a draw—is far from clear.

Pigs could provide all the organs that we need. They are the right size, and we already have the infrastructure to breed them in large numbers. For decades, people have been fitted with heart valves from pigs, and diabetics injected themselves with pig insulin before we learned how to synthesize the human version of the hormone. Whole-organ transplants, however, are another matter. The human immune system does not take kindly to the presence of a pig organ. A ready-made armada of antibodies recognizes a sugar molecule called alpha-1,3-galactose (a-gal), which coats the surface of pig blood vessels but is absent from human tissues. The antibodies activate a squad of proteins that make up the complement system, which punches holes in the membranes of the foreign cells on contact. "When I started in the field around 15 years ago, if you put a pig organ into a primate, it was lost in a matter of minutes," says David Sachs, an immunologist at Massachusetts General Hospital. Simple structures like bladders are already being grown over biodegradable polymer scaffolds. Though the printer-produced resolution is sufficient for many applications, printing a slightly oversized version of the desired object in standard resolution, and then removing material with a higher-resolution subtractive process can achieve greater precision.

Some additive manufacturing techniques are capable of using multiple materials in the course of constructing parts. Some also utilize supports when building. Supports are removable or dissolvable upon completion of the print, and are used to support overhanging features during construction. Several different 3-D printing processes have been invented since the late 1970s. The printers were originally large, expensive, and highly limited in what they could produce. A number of additive processes are now available. They differ in the way layers are deposited to create parts and in the materials that can be used. Some methods melt or soften material to produce the layers, e.g. selective laser sintering (SLS) and fused deposition modeling (FDM), while others cure liquid materials using different sophisticated technologies, e.g. stereo lithography (SLA). With laminated object manufacturing (LOM), thin layers are cut to shape and joined together (e.g. paper, polymer, metal). Each method has its own advantages and drawbacks, and some companies consequently offer a choice between powder and polymer for the material from which the object is built. The main considerations in choosing a machine are generally speed, cost of the 3-D printer, cost of the printed prototype, and cost and choice of materials and color capabilities.

3-D food printing

So, what about 3-D printing food? Would you like an instantaneous hamburger? Octopus shaped vegetables for the kids? At a push of a button you say? This is already being achieved by scientists and could be as normal to have in your kitchen as it is a microwave for your instant heated meals. The focus of food printing right now is producing tasty, simple food and leaving more complex meals for later. Early tests of mushrooms or cheese were a bit of a disaster as far as delicious goes... but still, they've already achieving a lot. Recently this was done with bacon (among many other things), so this is by no means technology out of reach. In fact, I know the first stem cell ever 3-D printed was as long as 6 years ago! So, for more complex meals (say a hamburger) you'd just need more stem cells, and the understanding of how these construct different parts of that particular meal.

As well as perhaps a future reality for us earthbound citizens, 3-D printed food would be a fantastic resource for astronauts' rations. Currently space voyagers pack rotating packets of different meal types, but with a 3-D printer, all that would need to be packed are base materials (stem cells) for the food you wish to 'print'. It's important to remember the idea of 3-D printing food would not be an unhealthy way of doing things. It works by taking a stem cell from the food in question, and just rebuilding it over and over again, like scientists currently do for medical purposes.

Using a 3-D bioprinter

So there's no reason why the taste would be any different if the science was correct. Imagine the benefits this could offer the third world in the future as 3-D printers become more and more available. We're not at *Star Trek's* level quite yet; much more science would be involved... but we are on the right track! When you buy beef at the butcher's, you know it comes from cattle that once mooed and chewed. But, imagine if this cut of meat, just perfect for your Sunday dinner, had been made from scratch - without slaughtering any animal. U.S. start-up Modern Meadow believes it can do just that - by making artificial raw meat using a 3-D bioprinter.

Paypal co-founder Peter Thiel has just backed the company with $350,000. The start-up wants to take 3-D printing to a whole new level. For three-dimensional printing, solid objects are made from a digital model. Some researchers have also managed to print food like chocolate. But Prof Gabor Forgacs, of the University of Missouri, says bioprinting something that is part of a living creature is much more challenging than making an earring or a chocolate bar. "We are printing live material - [the] cells are alive when we are printing them," he says. When you want to engineer an organ you have a zillion conditions and requirements to fulfill." "Three-dimensional printing has taken off big time, and printing things such as whipped cream is just another application of it - but it's no big deal. "Printing biomaterial is an entirely different ball game."

Prof Forgacs says he and his team have already managed to produce a prototype, but it is not yet suitable for consumption. To bioengineer meat, the scientists first obtain stem cells or other specialized cells from an animal via a common procedure known as biopsy. Stem cells are cells able to replicate themselves many times, and also can turn into other specialized cells. Once the cells multiply to sufficient numbers, they are put into a bio-cartridge. So instead of traditional ink or a material like plastic, the 3-D printer cartridge contains something called bioink made of hundreds of thousands of live cells. Once printed in the desired shape, the bioink particles naturally fuse to form living tissue.

Hod Lipson, director of the Computational Synthesis Laboratory at Cornell University, demonstrates how to bioprint an ear using silicone gels. This process of bioprinting biomaterials is similar to attempts to print artificial organs for transplants - but the result could well end up in your frying pan. So far there have been trials using bioprinted tissue and body parts have only been done on animals. "In some sense, Modern Meadow is taking the technology beyond regenerative medicine," says Prof Forgacs. "It eventually will be killed - not killed in the sense of killing an animal but killing cellular construct." Before Modern Meadow, he co-founded Organovo - one of the firms pioneering the use of printed live structures for medical purposes. In 2010, Organovo successfully bioprinted functional blood vessels made from the cells of an individual person.

The evolution of 3-D printing shall have a major impact on the legal field of patents and intellectual property . . . can we simply reproduce, for private consumption, that which already exists? We do this every single day when we photocopy ideas off the printed page. This area of law must develop if patent holders wish to prevent copy of their original ideas.

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