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INSIDE...
MAY 2012
FOCUS ON FEDERAL COURTS

Supreme Court Expands Defendant's Right to Counsel

Effective assistance of counsel required in plea bargaining stage

By Cornell V. Bouse

Longstanding has been a defendant's right to effective assistance of counsel in most stages of a criminal proceeding. This scope was expanded by the U.S. Supreme Court's ruling in two recent cases surrounding a defendant's right to counsel to now include the plea bargaining stage of a client's representation in a criminal case. In particular, the right to a reasonable interpretation by a defendant's lawyer of the risk of going to trial when considering a plea offer as well as the right that a plea bargain offer at the very least be communicated to a defendant by his attorney.

Cornell V. Bouse

Legal scholars are comparing the significance of the Supreme Court's recent encompassing of the plea bargaining stage of a criminal proceeding as included in the stages requiring effective assistance of counsel to that of the significance of *Gideon v. Wainwrite* which gave indigents the right to counsel in 1963.

In *Missouri v. Frye,* 10-444, a defendant in Missouri was apparently a habitual operator of a motor vehicle with a revoked license. While facing a three year prison term if convicted of the felony after trial, the prosecutor sent a letter to the defense lawyer with a plea offer of 90 days incarceration. The letter containing the plea offer included a date upon which the offer would expire if not accepted. Apparently it is undisputed that the offer was never conveyed to the defendant by his attorney. The offer expired with the defendant ultimately pleading guilty without a plea agreement in place and the court sentencing the defendant to a three-year prison term. The Supreme Court held that the attorney's failure to convey the offer to his client constituted ineffective assistance.

Clearly, it is an error of counsel when an attorney fails to inform his client of a plea offer within the time prescribed in writing from an assigned prosecutor and this action results in an extensively longer prison sentence. This can certainly be equated to a personal injury attorney missing a discovery filing date or a statute of limitations date which, if this adversely affects the client's case, is tantamount to legal malpractice. The significance of Frye is that an erroneous action or inaction, in this case during the plea-bargaining phase of a criminal case, is now

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Photo by Ode Jean-Claude

Catherine, Louis and Donna England with their family at the Women in the Courts celebration when Justice Catherine England was honored along with Justice Mary M. Werner and Valerie S. Manzo, Esq.

A Celebration For Women's History Month

By Jane LaCova

District Administrative Judge C. Randall Hinrichs and the Suffolk County Judicial Committee on Women in the Courts hosted a celebration of three extraordinary women who have left an indelible mark upon the Suffolk County legal profession on March 23. The honored women included: the Honorable Catherine T. England, Supreme Court Justice & Family Court Judge, retired and former SCBA President (1983-84); the Honorable Mary M. Werner, former District Administrative Judge and Supreme Court Justice, retired and Valerie S. Manzo, whose career has been dedicated to making a difference in the lives of others and who joined with like-minded attorneys to establish the Suffolk County Women's Bar Association (SCWBA) in 1984.

The program began with a welcome by Acting County Court Judge Chris Ann Kelley, committee co-chair and a prelude by the "Hamptones" a musical group of fourth and fifth grade students from Our Lady of the Hamptons Regional Catholic School in Southampton. They were accompanied by Music Director Joseph Basar and Sr. Kathryn Schlueter, Principal and their musical renditions added to the esprit de corps of those in attendance. The Bridge Builder written by Will Allen Dromgoole was beautifully recited by Acting County Court Judge Gae Lozito.

Justice Catherine T. England is a living legend for all women

(Continued on page 25)

BAR EVENTS

Annual Meeting
Monday, May 7, 6 p.m.
Bar Center
Recognition and Golden Anniversary Awards

Meet and Greet with the Board of Directors
Thursday, May 10, 6 to 8 p.m.
Bar Center
New Members and Membership Services and Activities Committees are hosting a special reception with the Board of Directors
Wine and cheese reception. All are invited.

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

FOCUS ON
FEDERAL COURTS
SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2011-2012

SCBA Calendar

All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.

OF ASSOCIATION MEETINGS AND EVENTS

APRIL 2012

23 Monday	Joint Nassau/Suffolk Board of Directors Meeting, 5:30 p.m., Great Hall.
24 Tuesday	Solo & Small Firm Practitioners Committee, 4:30 p.m. Board Room.
25 Wednesday	Professional Ethics & Civility Committee, 5:30 p.m., Board Room. Annual Peter Sweisgood Dinner Honoring former SCBA President Eugene J. O'Brien, Watermill Restaurant, 6:00 p.m., $70 per person. Call Bar Center or register on line at scba.org.
26 Thursday	Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

MAY 2012

1 Tuesday	Joint Matrimonial & Family Court Committees meeting - Justice Bivona's Courtroom, 3rd Fl. - Supreme Court, Central Islip. Appellate Practice Committee, 5:30 p.m., Board Room. Commercial & Corporate Law, 6:00 p.m., E.B.T. Room.
3 Thursday	Law Day - (mezzanine) Cohalan Court Complex, 12:00 p.m. to 2:00 pm.
7 Monday	SCBA's Annual Meeting, 6:00 p.m., Bar Center, Election of Officers, Directors & members of the Nominating Committee plus Awards of Recognition, Golden Anniversary Awards & Annual SCBA High School Scholarship Award, $35 per person. Call Bar Center or register on line at scba.org.
8 Tuesday	Labor & Employment Law , 8:00 a.m., Board Room.
9 Wednesday	Education Law Committee, 12:30 p.m., Board Room.
10 Thursday	New Members/Membership Services & Activities Committees Special Reception with SCBA Board of Directors, 6:00-8:00 p.m., Great Hall, Bar Center.
14 Monday	Executive Committee, 5:30 p.m., Board Room. Insurance & Negligence - Defense Counsel Committee, 5:30 E.B.T. Room.
16 Wednesday	Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall. Surrogate's Court Committee, 5:30 p.m., Board Room. Real Property Committee, 6:30 p.m., E.B.T. Room.
21 Monday	Board of Directors , 5:30 p.m., Board Room.
23 Wednesday	Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
29 Tuesday	Solo & Small Firm Practitioner Committee, 4:30 p.m., Board Room.

JUNE

1 Friday	Annual Installation Dinner Dance, Hyatt Regency Wind Watch Hotel, Hauppauge. Cocktails 6:00 p.m., Program & Dinner 7:15 p.m., music by Victor Lesser - Manhattan City Music. $125 per person. Call the Bar Center for reservation or register on line at scba.org.
5 Tuesday	Joint Matrimonial & Family Law/Family Court Committees, 1:00 p.m., Justice Bivona's Courtroom, 3rd Fl., Supreme Court, Central Islip.Commercial & Corporate Law, 6:00 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."

Video Court Appearances in Courtroom D-11

Courtroom D-11 now has the capability to conduct court appearances by video, as authorized by Article 182 of the Criminal Procedure Law and Part 106 of the Rules of the Chief Administrative Judge. These provisions allow inmates to appear in court via video from the jail without having to be physically produced in court. Most video court appearances in Courtroom D-11 will be conducted at 2:15 p.m. as the D-11 calendar permits. Designated inmates will be available for video court appearance in the attorney visiting area of the jail as of 2:15 p.m. on the court date. In order to arrange for a court appearance by video in Courtroom D-11, counsel must fax **either a "waiver of appearance" form with additional notation "VIDEO,"** or similar letter request on counsel's letterhead, to Court Officer Captain Denise Zeitler at FAX (631) 853-7599 by 3:30 p.m. the date before the scheduled court date.

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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Pro Bono Foundation Honors Extraordinary Efforts of Its Volunteers

By Jane LaCova

Members of the bench and bar, family and friends turned out at Captain Bill's Restaurant in Bay Shore on March 22, to praise the attorneys who were being honored at this annual event which celebrates the long tradition of commitment of *Pro Bono Publicio.*

Managing Director William T. Ferris conferred awards of recognition upon 23 individuals who have rendered distinguished service by providing legal services either through the SCBA's Pro Bono Foreclosure Settlement Project, or through the Foundation's Pro Bono Project in collaboration with Nassau Suffolk Law Services.

Nassau Suffolk Law Services is responsible for the administration of the Pro Bono Project which aims to bridge the gap in services by recruiting private attorneys to provide pro bono assistance to low income Long Islanders. The Pro Bono Foreclosure Settlement Conference Project, coordinated by Barry M. Smolowitz, one of the award recipients, was born out of necessity due to the economic crisis of late 2008. Unlike many other pro bono matters, statutory foreclosure settlement matters presented a new and immediate undertaking for the courts and the practicing bar.

The following SCBA members received honors:

Photo by Kim Smolowitz

Bill Ferris, SCBA Second Vice President and Managing Director of the Pro Bono Foundation, and Executive Director Jane LaCova with the plaque to be presented to honoree Lewis Silverman at Pro Bono Recognition Night.

Rory Alacron – he is steadfastly committed to alleviating the concerns of Suffolk residents facing foreclosure. Rory has been a strong ambassador for the Project and always encourages his colleagues to participate in the Project which helps to lessen the concerns of Suffolk residents facing foreclosure.

Susan Beckett – she is a semi-retired attorney who has participated in the SCBA's Pro Bono Foreclosure Settlement Project continuously since March 2010. Susan has counseled approximately 90 families to date and devotes a good deal of her time to advancing the outstanding service provided by the Project to clients so desperately in need of legal assistance.

Joshua P. Blumberg - he has devoted hundred of hours to the Pro Bono Project representing clients in matrimonial cases. The Pro Bono Project had honored Joshua as Attorney of Month in February 2011 and he continued his admirable commitment representing indigent citizens of Suffolk County in the true spirit of *pro bono*.

Linda M. Boswell - she was actively practicing in the field of bank foreclosures and mortgage modifications and with her background and expertise was able to provide effective guidance and counsel to many new clients in the Foreclosure Settlement Project.

Carol Burns - retired from private practice in 2004, her new pro bono career went into full swing. Since then she has been working for the Pro Bono Project, interviewing and screening clients, and providing pro bono representation in appropriate cases.

James M. Corcoran – he has an active tax grievance practice and has long been aware of the residential foreclosure crisis. When he attended a seminar hosted by the Bar Association, he quickly responded to the call for volunteers.

James P. Curren – he joined the Pro Bono Project 1994 and has been selected as Pro Bono Attorney several times volunteering hundreds of hours in matrimonial and other family law matters. Jim is a member of the Matrimonial Law, Family Law and Grievance Committees and was recent a guest commentator on both WALK 97.5 Radio and News 12 Long Island, explaining No Fault Divorce in New York State. He is a most dedicated volunteer doing valuable pro bono work.

Tracy J. Harkins – her involvement in the Pro Bono Foreclosure Settlement Project started in 2011. She has actively participated ever since, advising over 60 clients through the Project. Tracy is committed to being a dedicated ambassador for the Project as she continues to work as a part time attorney and a full time mother. With her demanding schedule, the SCBA is especially grateful that Tracy has made it a priority to dedicate a portion of her valuable time and energy to doing *pro bono* for the citizens of Suffolk County.

Jeffrey S. Horn – he has shown his dedication and commitment to pro bono representation, especially in matrimonial matters for many years. He was honored as Pro Bono Attorney of the Month in January 2011, May 2003, and December 1994 and has completed hundreds of hours of pro bono service to the unrepresented in Suffolk County

Cathy Kash – she was recruited to the Pro Bono Project by her friend Donna England who serves

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Meet Your SCBA Colleague

Glenn P. Warmuth, **a commercial litigator, has many interests. An attorney at Stim & Warmuth, P.C. for over 25 years, he is known for his expertise in technology, but he's also passionate about competitive running and bicycle racing. He finds time for many endeavors; included is his commitment to the Suffolk County Bar Association.**

By Laura Lane

What are some of your earliest memories of the profession of law? My mother, Paula, was an attorney and when I was a kid I went to the firm. I remember coloring when I was there and photocopying my pictures. I thought it was the greatest thing.

You and your mother practice at the same firm now. Did your mother encourage you to become an attorney? No she let me find my own way. In fact she didn't know that I decided to pursue law until I got accepted into St. John's University School of Law.

You were very involved in theater in college and to some extent still are at Dowling College. Has this knowledge assisted you as an attorney? I learned a lot about public speaking as a theater and performance minor and I find that a lot of attorneys have had that same lead-in background. And I know that some trial lawyers take theater classes to get better at it. I always thought of theater as a hobby and I do enjoy teaching at Dowling.

Do you see any parallels between the two professions? Directing, which I also do at Dowling, is all about being organized like law. You need some vision of course. And lighting is very technical and there's a lot of science to it as well as being artistic. It takes a certain mindset and disposition to do it - my mind thinks that way. Doing the shows is a great way for me to do something completely different and it's important to do something else. Then when you come back to your work your mind will come up with solutions for your legal work.

Technology is something that is tiresome for some as it races forward. You seem to embrace it. I had the very first home computer you could buy. I remember I worked all summer to buy it and worked another summer to get a tape drive. I've always been very interested in computers and technology.

Do you believe that an understanding or willingness to learn about technology has become essential in today's legal profession? At first it didn't mean anything but now with the changes in the courts it is very important. The courts now require attorneys to use technology. There is so much data out there and the courts now expect you to make sure that data is preserved and we as attorneys need to understand our client's data systems as well. You can get an expert to help you, but ultimately you're expected to understand it. The courts are ahead of the practitioners. Technology is something I'm always trying to keep up with because I believe you have to or you are doomed.

You are quite an athlete competing as an Ironman Triathlete, several times as a marathon runner, and a frequent bicycle racer. How do you juggle all of that? It's all very important and keeping in shape is crucial. People always ask me how I do it all. I get up at 5 a.m. and workout. Some years I do a marathon and other times it is maintaining a certain level of fitness. I love bicycle racing the most. I race out in Riverhead every Friday night in the summer and look forward to the first race all year. Bike racing is difficult both physically and mentally and the races are extremely competitive. We often average over 23 mph. I think that being active helps stress.

When did you join the SCBA? I joined right away. My mother was a member and she was always satisfied with being a member. But I didn't take advantage of the membership benefits right away. As time went on I realized how much the bar had to offer. My turning point was when I was working with the Appellate Practice Committee and they asked me if I'd be a co-chair. That led me to the Academy of Law which then led me to being an officer of the Academy. Now I'm being nominated for a position on the Board of Directors.

Why would you recommend other attorneys join? I know everyone says it but one of the main reasons is the camaraderie you will gain with other attorneys. When you've met someone at the bar and then you have to litigate with them it is a totally different experience than if you'd never met. Another major reason to join is the fact that you learn all the time at the SCBA. Membership keeps you current. It's another way to get information on the legal profession and to get suggestions on how to improve your own practice. I find that even when the topics aren't relevant to me I still learn.

Glenn Warmuth

New attorneys may not be sure if membership will benefit them. How will SCBA membership be the right decision for a new attorney? For younger attorneys membership will provide them with resources as it does for me. When you are first starting out you don't have a lot of resources. In front of the Membership Directory there is an Assistance for Lawyers page. On that page there is a list of people that will help and of course you could just call them. But meeting them face to face you realize that they really don't mind.

New Column Beginning in June

Hon. Stephen L. Ukeiley

Beginning with next month's issue, there will be a new column in *The Suffolk Lawyer* called "Views from the Bench" by Hon. Stephen Ukeiley. Judge Ukeiley will discuss and analyze a recent decision from an appellate court that impacts the practice of law and our community. The topics will be diverse, timely and relevant; whether a case of first impression or the revisiting of a longstanding legal principle, Judge Ukeiley will provide the details. "Views from the Bench" will appear every other month in *The Suffolk Lawyer.*

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge and author of The Bench Guide to Landlord & Tenant Disputes in New York©. He is also an adjunct faculty member at the New York Institute of Technology and an Officer of the Bar Association's Academy of Law. Judge Ukeiley is a frequent lecturer and author of numerous legal articles.

BENCH BRIEFS

Decisions from Three Judges

By Elaine M. Colavito

Elaine M. Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul H. Mayer

Motion to dismiss denied; a plaintiff may pursue an action against a bankrupt defendant, solely for the purpose of obtaining a judgment so as to be able to proceed directly against the bankrupt's insurer.

In *James Andrus v. Home Depot, U.S.A., Inc., Home Depot, U.S.A., Inc. v. March Associates, Inc.,* Index No.: 44938/08, decided on February 6, 2012, the court denied the motion to dismiss the third-party complaint. In denying the motion, the court noted that the third-party defendant sought dismissal of the third-party complaint pursuant to CPLR §3211 (a)(5) on the ground that the causes of action alleged therein were discharged in bankruptcy. In that regard, the third-party defendant asserted that it filed bankruptcy on October 30, 2008, and pursuant to the Chapter 11 Bankruptcy Order, all of its debts were discharged on November 12, 2010. Defendant contended that since the third-party plaintiff commenced the third-party action against it in March of 2011, it must be dismissed since the causes of action were discharged in the bankruptcy. The court found that the third-party complaint should not be dismissed for the sole reason that the third-party defendant was discharged in bankruptcy. The court reasoned that a plaintiff may pursue an action against a bankrupt defendant, as here, solely for the purpose of obtaining a judgment so as to be able to proceed directly against the bankrupt's insurer.

Motion to dismiss based upon lack of personal jurisdiction denied; non-domiciliary is subject to the jurisdiction of a New York court if it has purposefully transacted business within the state, and there is a "substantial relationship" between this activity and the plaintiff' cause of action.

In *Kevin Grigg and Tara Grigg v. Splish Splash Adventureland, Inc., Palace Entertainment, Festival Fun Parks, LLC, Proslide Technology, Inc. and Express Construction Corp,* Index No.: 10458/08, decided on May 2, 2011, the court denied the defendant's motion to dismiss. In deciding the motion, the court noted that generally, a non-domiciliary is subject to the jurisdiction of a New York court if it has purposefully transacted business within the state, and there is a "substantial relationship" between this activity and the plaintiff's cause of action. While the ultimate burden of proof rests with the party asserting jurisdiction, a plaintiff, in opposition to a motion to dismiss pursuant to CPLR §3211(a)(8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court. In opposing a motion to dismiss pursuant to CPLR §3211 (a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth "a sufficient start and [show] their position not to be frivolous." CPLR §3211 (d) protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party. The moving party need only demonstrate that facts "may exist" to defeat the motion, it need not be demonstrated that they do exist. Here, the court found that plaintiffs established that facts "may exist" to exercise personal jurisdiction over Palace Entertainment and has made a "sufficient start" to warrant further discovery on the issue of personal jurisdiction over it.

Motion to renew denied; defendant in the instant matter failed to submit any admissible evidence connecting the plaintiff to the hearsay statement in the hospital entry.

In *Gail B. Rast v. G. Thomas Woodhull, Executor of the Estate of Jean T. Woodhull,* Index No.: 35311/10, decided on March 6, 2012, the court denied defendant's motion for renewal of the court's June 23, 2011 order. The court noted that in the prior order, the plaintiff had made a prima facie showing of entitlement to summary judgment as a matter of law and that the speculative and conclusory nature of defendant's opposition concerning plaintiff's alleged rate of speed was insufficient to defeat such showing of entitlement by the plaintiff. In support of his

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Illustrating the Added Risks of the Internet

The Ravi case

By Jonathan I. Ezor

Much of the discussion surrounding Mr. Ravi's case has focused on the issues of anti-gay bullying. What has gotten less attention, but may actually be more important for the legal profession, is how the situation was both made possible and substantially worsened by the Internet. Had Mr. Ravi and other students spied on Mr. Clementi only from within the dormitory, the potential scope of harm would have been sharply different. Certainly, Mr. Clementi could have felt bullied and humiliated, and could even have been led to commit suicide as a result of the emotional harm, but the only possible audience for the spying would have been a small, local one. Because Mr. Ravi instead chose to publicize and stream the hidden camera feed over the Internet, Mr. Clementi's intimate activities were literally broadcast and available throughout the entire world, and because they were captured via digital video, Mr. Clementi could have reasonably believed that the footage might be posted and available indefinitely, well beyond his ability to stop it, perhaps even showing up as a top result in a search (by an employer, future partner or other person) for his name. The case gained worldwide attention, including in the English-language *Hindustan Times* from Mr. Ravi's native India,[2] itself an indication of the power of the Internet to extend information far beyond local borders.

The broader message of the Ravi case for attorneys and their clients is that the pervasive nature of the Internet, and the wide range of technologies it offers (such as real-time worldwide broadcasting) that were once only available to the largest corporations, offer not only tremendous opportunities but new types of levels of risk. One risk is jurisdictional - clients may face potential liability in any country because of what they do online, even if the activity is legal in their home state and country.

Jonathan L. Ezor

In 2002, New Jersey-based Dow Jones was sued in Australia based on an allegedly defamatory article against an Australian businessperson that it had published online, and unsuccessfully argued against the jurisdiction of the court.[3]

Google's Chief Privacy Officer Peter Fleischer was convicted in Italy of local privacy violations committed via his employer's Google Video service in early 2010, even though Fleischer not only had nothing to do with the actions or Google's response, but was only in Italy for a speaking engagement when he was arrested.[4]

Nor is this exclusively a foreign matter. In February 2009, David Carruthers, then the CEO of BetOnSports (an online sports book site legal in its native UK), was arrested in Texas during a stopover on a flight to his company's operations center in Costa Rica and charged with illegally accepting bets from U.S. residents.[5]

Still another risk demonstrated by the Ravi case is that utilization of the Internet substantially expands the potential scope of harm for an improper action, and may increase the applicable penalties under the law. In the federal sentencing guidelines, for example, the sentence for a conviction under various child pornography offenses is increased by two levels "[i]f the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material…." (U.S.S.G. § 2G2.2(b)(6)). Copyright law has had to change substantially over the past 20 years, even to the point of redefining criminal infringement based upon retail value rather than profit and by adding an offense for posting a work on a public computer network, after the Internet removed most costs of wide scale duplication and distribution of copyrighted works, and even those who did not seek profit or even request payment might nevertheless affordably engage in large-scale piracy (See, e.g., 17 USC §506(a)(1)(B) and (C)).

Transactional attorneys must also consider how the Internet affects the risks faced by their clients, and address those changes with appropriate contract language and compliance procedure. Geographic restrictions on licenses or sales territories (as with franchises) must address the reality that online advertising or marketing will extend beyond the real-world borders or boundaries, and that neither party can prevent that with complete certainty. Parties to non-disclosure agreements must recognize the ease by which Internet users may reveal confidential information, either intentionally by accident (e.g. sending sensitive e-mail to the wrong recipient, who then publicizes the information). Even if a transaction or contractual relationship is not directly focused on the Internet, its universal adoption for business and personal use means that its additional risks must be considered by parties and their attorneys.

Whatever happens with Mr. Ravi's sentencing and potential appeal, the case serves to sharply highlight the added risks, as well as rewards, arising out of Internet use. Clients should remember and consider these risks in their personal and professional lives. So, too, must the attorneys who counsel them, whether in litigation or transactional contexts.

Note: Jonathan I. Ezor is the Director of the Touro Law Center Institute for Business, Law and Technology, and an Assistant Professor Law. He also serves as special counsel to The Lustigman Firm, a marketing and advertising law firm based in Manhattan. A technology attorney for 15 years, Professor Ezor has represented advertising agencies, software developers, banks, retailers and Internet service providers as well as traditional firms, and has been in-house counsel to an online retailer, an Internet-based document printing firm and a multinational Web and software development company. He was named one of Long Island Business News' "Top 40 Under 40" for 2005.

1. http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html
2. http://www.hindustantimes.com/world-news/NorthAmerica/Voices-rise-against-unfair-verdict-in-Dharun-Ravi-s-case/Article1-828041.aspx
3. http://www.5rb.com/case/Gutnick-v-Dow-Jones—Co-Inc)
4. http://googleblog.blogspot.com/2010/02/serious-threat-to-web-in-italy.html
5. http://www.cbsnews.com/2100-201_162-1812590.html

PRACTICE MANAGEMENT

Where Does the Time Go?

By Allison C. Shields

Somehow, it always seems like there's not enough time to get everything done. And the truth of the matter is that no matter how hard we work, there will always be more to do. If we don't have client work, there's networking, planning, social media, marketing, etc., not to mention spending time with family and friends and engaging in activities we enjoy. Lawyers are often seeking solutions to be more efficient. But in order to be successful, you need to focus on being both efficient *and* effective.

- Being efficient means doing things the *right way*.
- Being effective means doing the *right things*.

Time is wasted due to a combination of an inability to identify the right activities (inability to say no, lack of direction, interruptions, etc.) and an inability to perform those activities efficiently (procrastination, ineffective delegation, lack of organization, etc.).

There's no such thing as multitasking

You probably think that you're being productive or getting a lot done if you're multitasking. But the truth is that you can't accomplish two things which require you to expend mental energy at once. You can only do one at a time. In actuality, you're constantly switching between one activity and another. In his book *The Myth of Multitasking*, Dave Crenshaw calls this "switchtasking." Switchtasking is rapidly switching between two or more tasks. Switchtasking costs time and damages relationships.

Allison C. Shields

Think about it: have you ever walked into someone's office (or been called to their office) only to have them checking email or going through documents while they're talking to you? How did that make you feel? Do you think that person was really listening to you? Have you ever done that to someone else? How about checking emails while you're on the phone? Were they both being done to the best of your ability? Were you really listening to the person on the other end of the line? Did you have to return to the email after the call anyway?

Switchtasking will always cost you time – you will always be less effective if you are "multitasking" then if you focus on one thing at a time. On occasion, you can do more than one thing at a time, but only if only one of those things requires mental energy – such as folding laundry while watching TV, listening to music while on the treadmill, etc. Crenshaw calls this "background tasking;" one task is the main focus while the other occurs in the background and doesn't require your direct attention.

Before you decide to answer that phone or wave that associate or assistant into your office, ask: "What will the switching cost be of this interruption?"

Minimize unplanned activities

Do you have a plan for the day, or do you constantly just react? If you're just reacting, you aren't getting the most important things done. The alternative is planning – before every day begins, you should know what you plan to accomplish. Schedule specific time to get tasks accomplished – particularly tasks which don't have built-in deadlines.

Other techniques for minimizing unplanned activities include:

- Prioritizing your activities so that you can concentrate your efforts on those items that require your specific skills, knowledge, expertise or personal touch
- Developing 'office hours' or specific meeting times for staff with whom you must interact regularly or whom you must supervise
- Creating 'no-call zones' which will provide blocks of uninterrupted time for focused work
- Start every day with one activity in mind that you must accomplish. To be sure it's the right one, ask yourself, "If I accomplished just this item today, would I be satisfied with my day?"

Use the "Power of Three"

Decide which three items are the most important and focus on those items or initiatives. Let's face it – there's no way we can all do everything we'd like to do for our practice. If you've determined that your three priorities for the next six months include focusing on a new practice area, improving your client service and developing your website, it will be easier to reject other 'wish list' items as they come along. If they don't fall into your three areas of focus, put them on the back burner.

Eliminate distractions and unnecessary activities

Which activities can you get rid of? Get rid of anything that you don't have to do. Some tasks can be eliminated entirely. Others can be delegated. Knowing your strengths and weaknesses can help you to determine what you should delegate. Anything that you avoid doing, hate doing or just don't do well is a potential candidate for delegation. If someone else can do it better, faster, more consistently, delegate it. Delegate it if someone else will get it done well enough (as opposed to keeping it on your 'to do' list where it never gets done).

(Continued on page 26)

E-Night @ Federal Court

By Joseph W. Ryan, Jr.

Do you know how to retrieve an erroneously filed document on ECF relating to a pending motion? How do you retrieve your forgotten registration and password? Are there limitations on filing voluminous exhibits? What new developments can we expect for e-filing? Have you considered a "Litigation Hold?" Are there sanctions for a client - and the attorney- for not preserving electronically stored e-mail and e-documents" on notice of potential litigation?

FOCUS ON
FEDERAL
COURT
SPECIAL EDITION

Forty SCBA members sat in the jury box and the well of Courtroom 710 at the Central Islip Federal courthouse on the night of March 26, 2012 to address these questions, hosted by the Federal Court Committee. Newly appointed EDNY Chief Clerk, Douglas C. Palmer and Carol McMahon, Chief Deputy Clerk in charge of the Central Islip Courthouse, addressed these and other issues relating ECF as part of the court's effort to make ECF "lawyer-friendly."

James G. Ryan and Cynthia A. Augello of Cullen and Dykman LLP addressed "E-Discovery" issues, a topic on which Jim Ryan has become renowned as a leading lecturer for attorneys and judges throughout New York State.

After an overview and history of the ECF system during his 28 years of service, Chief Clerk Palmer revealed that the ECF is under constant technological development. Within the next eighteen months, for example, you can expect to use one registration and password for e-filings in multiple districts,

(Continued on page 21)

Photo courtesy of Joe Ryan

James G. Ryan addressing "E-Discovery" issues, a topic which due to his expertise he lectures on often for attorneys and judges throughout New York State.

IN MEMORIAM:

LEONARD LUSTIG

We are deeply saddened to announce the passing of our dear friend and partner, Lenny Lustig,on March 31, 2012. We all cherish the memories of this outstanding man. We celebrate his life and we will miss him immensely.

TSUNIS GASPARIS LUSTIG & RING, LLP

SIDNEY SIBEN'S AMONG US

On the Move…

Leigh Rate, joined the Brookhaven Town Attorney's Office in February.

Genser Dubow Genser & Cona (GDGC), has opened new headquarters at 225 Broadhollow Road, Suite 200 in Melville.

Congratulations…

To **Barry M. Smolowitz** (SCBA Past President 2007-08) who was one of the Touro Law Center's Public Interest Attorney of the Year. He was presented with this coveted honor at the Goods & Services Auction on March 28, 2012.

Past President **Louis C. England** (1998-99) was appointed a member of the Grievance Committee for the Tenth Judicial District, with a term ending 2016.

Larry J. McCord, Founding Partner, Larry McCord and Associates LLC, received the Community Service Award on March 26 at SCOPE's 11th Annual School District Awards Dinner at Villa Lombardi's in Holbrook. He was honored for his work as a parent, an educator and an advocate for students in the Wyandanch community in helping to provide them with more and better educational opportunities.

Announcements, Achievements, & Accolades…

The law firm of **Futterman, Lanza & Block, LLP** is offering a free two-hour seminar, "Medicaid Planning & Asset Protection," on May 2 at the law office, located at 222 East Main Street, Suite 314, in Smithtown. The morning seminar runs from 10 a.m. to noon, and the evening seminar is from 6 to 8 p.m.

Jacqueline A. Siben

The law office of **Larry McCord and Associates LLC** has announced that a mock trial competition will take place on April 25 at the Wyandanch High School auditorium. The competition begins at 3 p.m. and is being presented by Dr. Pless M. Dickerson, Superintendent of Schools, Wyandanch School District. The school is located at 54 W. 32nd Street in Wyandanch.

Brian Andrew Tully, JD, CELA, Founder, The Elder Law Office of Tully & Winkelman, P.C. co-hosted a program on how to detect and prevent elder financial abuse at an Elder Financial Abuse Seminar on April 18 at Oyster Bay Manor Assisted Living, 150 South Street in Oyster Bay.

Condolences….

To **Joy Jorgensen** and her family on the passing of her father Lawrence R. Jorgensen on April 6, 2012.

To **Nancy Ellis** and her family on the passing of her father Charles Urban on April 8, 2012.

Thomas W. Stanisci, former senior partner at Shayne, Dachs, Corker, Sauer & Dachs, LLP passed away on March 31.

To the family of longtime SCBA member **Leonard Lustig** who passed away

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Alison M. Berdnik, Gene Bolmarcich, Lisa M. Browne, Carolyn Cunniff Corcoran, Jean K. Delisle, Daniel Greenbaum, Al Hedayati, Akshara Kannan, Mark Keurian, Yusuf Malik, Michelle Murtha, William J. Pallas, Sarvajit Patil, Kera Murphy Reed, Marcus Salva, David Sobotkin, Wendy S. Van Dorn and Tamir Young.**

The SCBA also welcomes its newest student member and wishes her success in her progress towards a career in the law: **Catherine Chilemi**.

On the Move – Looking to Move

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

Firms Offering Employment

Suffolk county firm with areas of practice consisting of: commercial litigation; personal injury; land use; condemnation tax certiorari; contested estates; real estate; seeking associate with 3-5 years' experience in any of the above areas.
Reference Law #24

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

Members Seeking Employment

Newly admitted attorney with excellent background experience. Willing to work late nights and weekends, and eager to learn with strong research and writing skills; has interned at a state court, federal court, and is currently working in a small law firm.
Reference Att#43

Attorney admitted 12 years looking for part-time or contract work. Experienced in litigation, elder law and estate planning. Capable of working independently and learning new areas of the law quickly.
Reference Att. #16

Attorney, fully experienced in all phases of personal injury, no-fault and SUM litigation, seeks full-time position.
Reference Att #21

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

Nominating Committee Announces Slate of Officers For 2012-2013

Secretary John R. Calcagni announces the 2012-2013 Slate of Officers, Directors and members of the Nominating Committee:

President Elect	Dennis R. Chase
First Vice President	William T. Ferris III
Second Vice President	Donna England
Treasurer	John R. Calcagni
Secretary	Patricia M. Meisenheimer
Directors (with terms expiring 2015)	Hon. James P. Flanagan
	Allison C. Shields
	Harry Tilis
	Glenn P. Warmuth
Nominating Committee (three year terms expiring 2015)	John L. Buonora
	Annamarie Donovan
	Matthew E. Pachman

Election of Officers, Directors and members of the Nominating Committee, Awards of Recognition, Golden Anniversary Awards, Annual SCBA High School Scholarship Award as well as special recognition to Officers, Directors of the SCBA and Academy whose terms have expired will be held on **Monday, May 7, 2012, 6 p.m. at the Bar Center.**

Federal Practice Roundup

Four decisions from the Eastern District

By James M. Wicks

James M. Wicks

This month we review four decisions rendered by the Judges and Magistrate Judges of the Eastern District of New York, Alfonse D'Amato Courthouse. First, we consider a decision by the Hon. Joseph F. Bianco, granting defendant's motions to dismiss and dismissing the civil rights complaint against the N.Y.S. Department of Taxation and Finance. Next, we consider a decision by the Hon. Joanna Seybert, adopting in its entirety, the Report and Recommendation of the Hon. William D. Wall, granting judgment to plaintiffs based upon a default. We then review a decision by the Hon. Denis R. Hurley, also granting a motion for a default and striking defendant's counterclaims. Finally, we review a Report and Recommendation of the Hon. Gary R. Brown, recommending dismissal of the complaint, but offering plaintiff the opportunity to file an amended complaint.

FOCUS ON FEDERAL COURT SPECIAL EDITION

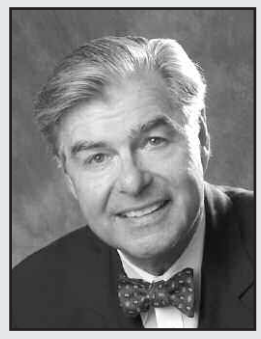
In *Temple v. N.Y.S. Dep't of Taxation & Finance*, 11-CV-0759 (JFB) (ETB) (E.D.N.Y. Feb. 15, 2012), the defendants moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff's claims under 42 U.S.C. § 1983 and for a declaratory judgment. Plaintiff sued the N.Y.S. Department of Taxation for withdrawing funds from his bank account to satisfy past due child support, claiming the levy was invalid. The defendants moved to dismiss, arguing, (1) Eleventh Amendment immunity, (2) plaintiff lacked standing, (3) *Rooker-Feldman* doctrine, (4) failure to state a claim, and (5) plaintiff had adequate post-deprivation remedies.

The court concluded that the Department of Taxation was entitled to immunity under the Eleventh Amendment, which bars federal claims against the states. Furthermore, since the complaint against the individual was in his official capacity, he too was entitled to immunity. The court also considered whether, applying the four prongs of the *Rooker-Feldman* doctrine, the suit was jurisdictionally barred. This doctrine – which holds that the U.S. District Courts lack subject matter jurisdiction to review final judgments of a state court in judicial proceedings – applied to this case, according to Judge Bianco. The court also granted the motion to dismiss for failure to state a claim, without granting leave to replead. Although ordinarily the court would be inclined to afford a party, particularly pro se, leave to replead, Judge Bianco concluded that under the circumstances presented, "it is abundantly clear that no amendments can cure these (and other) defects in this case."

In *Sheet Metal Workers' Nat'l Pension Fund v. Nifenecker*, 11-CV-1239(JS) (WDW) (E.D.N.Y. Feb. 17, 2012), plaintiff pension fund brought an action seek-

(Continued on page 27)

The Suffolk Lawyer wishes to thank Federal Courts Special Section Editor Joseph W. Ryan, Jr. for contributing his time, effort and expertise to our May issue.



Joseph W. Ryan, Jr.

Not Among Our Law School Goals

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

Sound familiar? You're not alone.

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

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

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

Interested?

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

The Lawyer's Voice in Merit Selection of U.S. Magistrate Judges

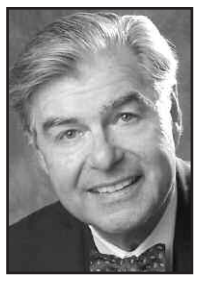
By Joseph W. Ryan, Jr.

At a time when President Obama referred to the U.S. Supreme Court Justices as an "unelected group of people," did you know that the practicing lawyer has more of a voice in the appointment of an "unelected" United States Magistrate Judge (USMJ), than he or she has in the election of a local judge? For a local judge, the lawyer's voice can be heard only through the SCBA's Judicial Screening Committee which is limited to rating the judicial candidate as "qualified" of "not qualified at this time" - but the candidate remains on the ballot. For the appointment of a USMJ, however, the practicing lawyer's voice is heard directly, and weighed heavily by the Merit Selection Panel (MSP) before he or she is appointed by the Board of Judges as an USMJ.

FOCUS ON FEDERAL COURT SPECIAL EDITION

The Merit Selection Panel was created by the Judicial Conference of the Unites States pursuant to the Federal Magistrates Act of 1968 which replaced the United States Commissioner system established in 1793.[1] A USMJ, appointed by the Board of Judges to serve a term of eight years, has jurisdiction to issue arrest and search warrants, trial and disposition of misdemeanor cases, conduct arraignment and bail proceedings and conduct pre-trial management of civil cases assigned to the "Article III" Judges of the Court who are appointed by the President with the advice and consent of the Senate. In practice, the USMJ plays a huge role in management of the courts' docket including the trial of civil cases with the consent of the parties.

The candidate must have at least five years experience in the practice of law (private or government). The USMJ openings are posted on the EDNY Clerks Office and website and published in *The New York Law Journal*. The measure for qualification includes scholarship, experience and area of law practice, intelligence, demeanor and temperament, ability to work with others, and professional reputation among bar members.



Joseph W. Ryan. Jr.

Of the 16 members of the MSP, 13 are practicing lawyers with a wide range of law and experience, including solo practitioners and managing partners of large law firms. Two lawyers are associated with law schools on a full time basis and another is a reporter for the New York State Bar Association's Committee on Standards for Attorney's Conduct project. Two members serve as the laypersons, a regulation requirement. Both are experienced businesspersons, one of whom is President of a 200 employee printing firm. Four members work on Long Island. Bob Beglieter, a Manhattan practitioner and former Chief of the Civil Division of the United States Attorneys Office, serves as chairperson. The Board of Judges appointed each MSP member. All serve without compensation. As a body, the MSP constitutes an ideal blend that will address all concerns in the selection process.

The lawyer's voice is heard when an MSP member conducts inquiry into the background of the candidate, including adversaries, colleagues and anyone associated with the candidate. This is no idle inquiry; it is intended to get an in-depth evaluation of the candidate's past performance. The lawyer's voice will be shared with the entire MSP panel on a confidential basis when the panel meets to interview the candidate.

The MSP deliberations are cordial but intense. It brings out the members varied backgrounds and perspectives of what qualities should be deemed more suitable to serve as a USMJ. Voting may be by secret or open ballot depending on the wishes of the chair and panel members. Voting can be contentious, but in the end the MSP endorses each one of the five candidates as suited to serve as USMJ. The field of candidates for USMJ, ranging from 125 to 36 over the past five years, is usually narrowed to approximately 18 for interviews by the MSP.

The Board of Judges will make the final determination as to which one of the five recommended candidates will be appointed USMJ after an interview by the judges.

During the eight-year term, the USMJs performance will be documented and subject to a further inquiry- and the lawyer voice - should the USMJ seek reappointment. Once again the regulations require the MSP to conduct an inquiry. A notice is published on the EDNY Clerks Office and website and *The New York Law Journal*. The notice invites comment from the practicing bar and public. The lawyer's voice will once again be heard when an assigned MSP member inquires about his or her experience before the USMJ. The inquiry will focus on judgment, legal ability and temperament. To encourage candor, the lawyer is assured that his or her identity will not be disclosed. The lawyer's comments are shared with the entire MSP when it meets to interview the USMJ. The lawyer's voice and candid comments are essential in this process.

In the end, the merit selection of U.S. Magistrates may well be considered an "election" given the competition of highly qualified candidates. But here the voting rests on an "electorate" consisting of the MSP and Board of Judges. Most importantly, the "electorate" rests in large measure on the lawyer's voice, a voice dependent on the caliber of judges in order to pursue justice for his or her client. The practicing lawyer should appreciate the wisdom of Congress when establishing the merit selection process, and be proud of the caliber of our "unelected" of Unites States Magistrate Judges.

Note: Joe Ryan is Chair of the SCBA Federal Court Committee and a member of the Merit Selection Panel.

1. See: http://www.wvsd.uscourts.gov/pdfs/Regulations%20%20Establishing%20Standards%20and %20Procedures.pdf

On the Way to CJA

By Marianne S. Rantala

Marianne S. Rantala

So how does a Suffolk County attorney - a transplant from Boca Raton, Florida – get herself admitted to the Criminal Justice Act (CJA) panel for the Eastern District of New York? In my case it took approximately one year and since my appointment I have been assigned to criminal cases at the rate of $125.00 per hour, and payment is expected within 60 days of voucher submission.

I feel fortunate because the Central Islip Federal Courthouse is a wonderful place to work. The judges, court personnel and even the prosecution staff are all pleasant, hardworking professionals. Perhaps my experience will encourage you to become a member of the CJA panel.

For 16 years, I had been a criminal practitioner in Palm Beach County, Florida. There I had tried numerous state court cases, including State RICO, murder, drug and robbery cases. After my admission to the United States District Court for the Southern District of Florida, the Administrative Judge of that Court's CJA panel solicited experienced state court practitioners, such as myself, to act as CJA counsel to handle the burgeoning caseload of indigent defendants (as a result of ever increasing drug conspiracy cases). Trained by the Federal Public Defenders Office, I handled a variety of Federal cases (including drug, white collar fraud and other conspiracy cases) where I gained invaluable experience—which undoubtedly influenced my admission to the CJA panel in the EDNY.

FOCUS ON FEDERAL COURT
SPECIAL EDITION

The CJA application can be obtained on the EDNY website.[1] You will find that it is very demanding, including questions concerning how many Federal cases have been tried in the past five years. The CJA panel is not intended to be a training ground for young attorneys. While most of my Federal experience did not fall within the five year period, the question did not deter me from pursuing the process. Federal experience can be acquired, for example, by working on a Federal case with an experienced practitioner. Perhaps the EDNY will adopt a mentoring program similar to the SDNY where experienced CJA attorneys assist practitioners on CJA cases.[2] With the large multi-defendant drug cases prosecuted in the Central Islip, there seems to be an increasing demand for CJA counsel.

Nine months after filing my CJA application, I received a gracious voicemail message from United States District Judge Sandra J. Feuerstein inquiring whether I was still interested in the CJA panel, to which I promptly replied: "Absolutely!" Three weeks later I was facing Judge Feuerstein and Magistrate Judge William D. Wall in an hour-long interview in which the judges thoroughly examined my experience in federal and state cases. The intensity of the judges' scrutiny only serves to highlight the caliber of the attorneys admitted to the CJA panel.

I am very grateful and proud to have been selected to serve with such distinguished CJA attorneys and trust that my experience will encourage you to do the same.

Note: Marianne S. Rantala, Esq., is a federal and state court practitioner in private practice, licensed in New York, District of Columbia and Florida. She is a member of the SCBA Federal Courts Committee.

1. http://www.nyed.uscourts.gov/pub/docs/court-forms/AppCJA.pdf
2. http://nysd.uscourts.gov/cases/show.php?db=notice_cja&id=18

Save the Date

Installation Dinner

Friday, June 1 at 6 p.m.

Hyatt Regency, Hauppauge

For further information call the Bar Association

CONSUMER BANKRUPTCY

Two Attorneys Get Into Serious Trouble Over E.C.F. Filings

Flouting E.C.F. filing rules has grave consequences

By Craig D. Robins

"The following is a cautionary tale of what occurs when the uninitiated attempt to practice before the bankruptcy court without a firm grasp of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure."

"Even the most well intentioned practitioners can inadvertently wreak havoc on unsuspecting clients by failing to appreciate the complexity of the bankruptcy process. It is also a prime example of how things can escalate when an attorney is less than candid with the Court about his or her mistakes."

The preceding words were taken verbatim from a recent Massachusetts decision that severely castigated an attorney for messing up a consumer debtor's bankruptcy filing and then lying about it to the court. This month I will discuss that case and another from one of our own courts here in the Eastern District of New York, both of which lambasted attorneys who utterly failed to abide by the rules.

Inexperienced attorney makes a mess of bankruptcy filing

In the Massachusetts case, Bankruptcy attorney Georgia S. Curtis was authorized to use E.C.F., but was grossly unfamiliar with how to do so. "E.C.F.," which stands for Electronic Case Filing System, is the computerized court website system through which attorneys file court documents such as bankruptcy petitions *In Re: Jackquelyn D. Stallworth, 2012 Bankr. LEXIS 740 (Bankr. D. Mass 2/8/12).*

Since 2003, every petition and other court document that I've filed with the court have been done through my office computer, while logged into the court's E.C.F. website.

When Curtis filed her client's petition, which was only the second petition that the attorney had ever filed, her inexperience got the best of her as she neglected to file the Creditor Matrix or the Statement of Social Security Number. These are mandatory requirements, and failure to abide by them, as Curtis soon learned, is fatal. Nine days later the court dismissed the petition. Curtis also failed to file the Credit Counseling Certificate and page 3 of the petition, which is one of the petition pages that contain the attorney's signature.

Craig D. Robins

Curtis then thought she could file a motion to vacate the dismissal by e-mail (which is not the appropriate procedure for filing a motion). However, she messed this up as well by attaching the wrong PDF document. The court ordered her to correct this mistake within two days.

Did Curtis do that? No. Instead of correcting the deficient filing, two weeks later she filed a second Chapter 7 case without her client's knowledge. The petition in the second case contained only the debtor's name, which was spelled incorrectly, the last four digits of her Social Security number, and the county of her residence, omitting her street and mailing addresses, as well as reference to her prior filings. Additionally, the schedules accompanying the Debtor's petition were blank or were otherwise incomplete, which, if taken literally as pointed out by the judge, reflected that she had neither assets nor any creditors.

The judge then issued a *sua sponte* order to show cause directing Curtis to show cause why the court should not sanction her and suspend her E.C.F. filing privileges. Because this petition was basically a blank, it also caught the attention of the United States Trustee who brought a motion against Curtis seeking to have her disgorge the legal fee.

Over several order to show cause hearings, Curtis testified that she did indeed file all necessary documents when that was not true. She also offered conflicting and contradictory explanations of what had happened.

The judge wasn't happy. He suspended Curtis's E.C.F. privileges, but indicated that Curtis could purge her "civil contempt" by becoming re-certified with E.C.F. (All attorneys are required to participate in an E.C.F. training course as a prerequisite to obtaining authority to file by E.C.F.). In addition, the judge stated that he had reasonable cause to believe that Curtis violated the Rules of Professional Conduct and referred the matter to the District Court for further disciplinary proceedings.

Curtis had a problem adhering to the court's E.C.F. rules: she violated them. That led to a suspension of her E.C.F. privileges. But her problems increased exponentially when she lied to the court. That led to a most serious referral that might result in her losing her license to practice. For a legal practitioner, not knowing what you're doing is bad enough; perjuring yourself in court is indefensible.

Suspended Attorney Files Petitions in Other Attorney's Name

On March 22, 2012, Judge Carla E. Craig, sitting in the Brooklyn Bankruptcy Court, issued another interesting decision involving attorney ineptitude and impropriety with the E.C.F. system. *In re: Clyde Flowers*, (01-12-40298-cec, Bankr. E.D.N.Y.)

Peter J. Mollo was a Brooklyn bankruptcy attorney who had just been suspended from practicing law in this state in January 2012 by the Appellate Division for several reasons such as endorsing a check without permission.

That left him with a bunch of bankruptcy clients whose petitions he had not filed. What he should have done was transferred the files to another attorney after first consulting with his clients. Instead, he called another local attorney, Brian K. Payne, and asked him if he would take over representation. However, no final agreement was reached.

Mollo, nevertheless quite eager to get these four cases filed, revised the petitions to indicate that the debtors' attorney was now Payne — even though Payne never agreed. Mollo then filed these four petitions under his own E.C.F. account and forged the electronic signature of Payne on each petition.

When the U.S. Trustee got wind of this after Payne sent a letter to the Chief Judge and others indicating that Mollo had filed petitions without his knowledge, consent, authority or signature, the UST immediately brought a motion to sanction Mollo, revoke his authorization to use the E.C.F. system, disgorge his fees, and compensate replacement counsel.

At the hearing, Mollo admitted that he "made terrible egregious, unbelievable errors." The judge determined that Mollo violated Bankruptcy Rule 9011 by filing a forged document, an act that warranted sanctions. Mollo agreed to disgorge all legal fees received, which was complicated by the fact that he kept such poor records that he was not sure how much he actually did receive. He also agreed to compensate each debtor's replacement counsel. He lost his E.C.F. privileges, not that he would have been legally able to use them in light of his suspension.

Finally, the judge thought additional sanctions were warranted given the egregious nature of Mollo's violations and their similarity to the conduct that got him suspended in the first place (forging signatures). Judge Craig sanctioned Mollo an additional $3,000, stating that Mollo's conduct compromised the integrity of the court system and the electronic filing process.

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

Copies of both decisions are available on Mr. Robins' blog.

IMMIGRATION

Could Your Client Already Qualify For Lawful Permanent Residence?

By Eric Horn

There are an estimated 11 million undocumented immigrants who live in the United States. This is because of the restrictive laws that have existed essentially unchanged for more than ten years. However, there is a small class of people who qualify for permanent residence who are probably unaware that they can presently apply without a change in the law.

The most common way people qualify for permanent residence is via adjustment of status. Most people qualify for adjustment of status under either Section 245(a) or Section 245(i) of the Immigration and Nationality Act. People qualify for Section 245(a) of the Immigration and Nationality Act if an immediate relative, who is a United States Citizen, files a petition for them after they've lawfully entered the United States, with limited exceptions, such as when a person who entered as a K1 did not marry their fiancé.

Persons qualify for Section 245(i) in one of two different scenarios. They are eligible for adjustment under this section if they were the beneficiary of an immigrant visa petition with the Immigration and Naturalization Service or an application for a labor certification filed on or before April 30, 2001. If the application was filed after January 14, 1998, the principal alien must have demonstrated that he or she was physically present in the United States on December 21, 2000.

Eric Horn

There are two types of beneficiaries who qualify for adjustment of status under Section 245(i). The first type is a principal beneficiary, the person for whom the application was filed. The second type is a derivative beneficiary, who is the spouse or minor child of the principal beneficiary. A derivative beneficiary under Section 245(i) qualifies for permanent residence regardless of when he or she entered. The only question is whether the principal beneficiary qualified for Section 245(i) of the Immigration and Nationality Act.

However, a derivative beneficiary can qualify for permanent residence now via his or her own independent petition. This is highlighted by a decision that was issued on March 8, 2012 by the Board of Immigration Appeals, *Matter of Ilic.* In that case, husband and wife were married in 1982. In 1999, the wife's sister filed an I-130 petition for alien relative principally on behalf of her sister. Because her spouse was listed as her husband on the petition, he qualifies as a derivative beneficiary.

The husband entered the United States in 2005 without inspection. He then had an employment based immigrant visa petition filed on his behalf. The Board of Immigration Appeals held that he qualified for adjustment of status under Section 245(i) of the Immigration and Nationality Act so long as his wife was in the United States on December 21, 2000. Even though he was the principal beneficiary on the employment based visa petition filed in 2005, he did not have to be in the United States on December 21, 2000 because he was the derivative beneficiary on the sibling petition filed prior to April 30, 2001.

Finally, please note that for a derivative beneficiary to qualify today for permanent residence, the person does not have to still be married to the principal beneficiary. So long as the parties were in a valid marriage when the petition was filed the derivative beneficiary can file for adjustment of status under Section 245(i) of the Immigration and Nationality Act even if they subsequently divorced.

Note: Eric Horn is an immigration attorney with his main office in Brentwood. Mr. Horn is immediate past chair of the Immigration Committee of the Suffolk County Bar Association. He is also an active member of the American Immigration Lawyers Association. He can be heard on Radio 1580AM Mondays from 12:30-1:30pm providing information and answering questions regarding immigration and nationality law. For further questions, please contact Mr. Horn at (631) 435-7900 or via email at EricHornLaw@gmail.com.

ESTATE PLANNING

Death-Styles of the Rich and Famous

By Alison Arden Besunder

Truth is sometimes stranger than fiction, even beyond anything Hollywood could make up in the movies.

Whitney Houston's death on February 11 prompted much discussion and questions surrounding her estate plan (or lack thereof) and the extent of her assets (or lack thereof). All of the drama surrounding her estate teaches valuable lessons for everyone in overseeing their own estate plan.

As it turns out, Whitney's only child will receive 100 percent of her estate, with the proceeds held in trust to be distributed to her outright in chunks at the ages of 21, 25 and 30. The will was signed in 1993 when Whitney was still married to Robert "Bobby" Brown. Although Whitney had executed a codicil in 2000 (when they were still married) naming her mother as executor, her mother has declined that appointment and Whitney's sister-in-law will serve.

Whitney never amended or re-did her will after she divorced Brown in 2007. He remains named as the guardian of the now-19-year old Bobbi Kristina although it is not clear who will serve as trustee of her trust. And, the will still leaves assets to Brown if her daughter had predeceased her (think of Anna Nicole Smith's will, whose son, Daniel, did in fact predecease her, and Anna had not updated her will to provide for her after-born daughter Danilynn). Moreover, she did the will in New Jersey but never changed it when she moved to Georgia, where her will is being probated.

The fact that all this is publicly known is due to the fact that Whitney – the biggest recording star in history – did not have a living trust, which would have privately administered her assets. Instead, she relied on a will-based plan which required that her will be publicly filed for all the world to see.

Alison Besunder

Ironically, Whitney had just emerged as the victor in an estate battle with her stepmother over her father's death in 2002. Her father had secured a $1 million life insurance policy naming Whitney as the beneficiary to secure payment of a loan she made to him. The stepmother claimed, unsuccessfully, that the balance of the proceeds in excess of the loan balance belonged to the stepmother.

Celebrities are notoriously difficult to deal with in general and most likely are psychologically unwilling to face the prospect of their own demise. A number of celebrities have died without completing a will, including: Sonny Bono, John Denver, Jimi Hendrix and Steve McNair. More importantly, celebrities continue to earn long past their death, some of them even more so than in life. Consider that the Forbes top 5 earners in 2011 include three deceased celebrities: the King of Pop Michael Jackson generated $170 million largely from posthumous sales of his music by his own publishing company; the King of Rock n' Roll Elvis Presley generated in $55 million with revenues from Graceland admissions and licensing and merchandising; and Candle in the Wind Marilyn Monroe generated $27 million, primarily from the use of her images in an ad for J'Adore fragrance (Authentic Brands Group recently bought the rights to Monroe's estate last year from residuary beneficiary Lee Strasberg's heirs). And, cartoonist Charles Schulz, who died of cancer at age 77 in 2000, made $25 million in 2011 due to the 1,200 licensing agreements for the Peanuts cartoon characters with Met-Life, Warner Home Video, ABC and Hallmark.

Many celebrities fail to specifically address their intellectual property. As a result, they wittingly or unwittingly pass it to their heirs as part of their residuary estate. Marilyn Monroe, for example, left for the most part the entire balance of her residuary estate to Lee Strasberg. Other important figures of note have left behind interesting legacies. George Washington wrote all 29-pages of his own will, in which he freed his slaves and provided for their children. By contrast, Warren Burger, Chief Justice of the U.S. Supreme Court from 1969 to 1986, wrote his will as he wrote his opinions: with brevity. Burger drafted his own simple one-page, three-paragraph will that (1) directed payment of claims: (2) appointed his executors; and (3) directed his estate distributed one-third to his daughter and two-thirds to his son. Benjamin Franklin, on the other hand, had a lengthy will that wins the prizes for both the most interesting bequest of personal property *and* the most interesting clause effectively disinheriting his son, who wound up on the wrong side of the war from Uncle Ben:

> The king of France's picture, set with four hundred and eight diamonds, I give to my daughter, Sarah Bache, requesting, however, that she would not form any of those diamonds into ornaments either for herself or daughters, and thereby introduce or countenance the expensive, vain, and useless fashion of wearing jewels in this country; and those immediately connected with the picture may be preserved with the same.
>
> […] To my son, William Franklin, late Governor of the Jerseys, I give and devise all the lands I hold or have a right to, in the province of Nova Scotia, to hold to him, his heirs, and assigns forever. I also give to him all my books and papers, which he has in his possession, and all debts standing against him on my account books, willing that no payment for, nor restitution of, the same be required of him,

(Continued on page21)

LANDLORD/TENANT

A Bright Line Rule is No Longer Bright

By Patrick McCormick

The long standing "one inch" rule in New York, in connection with actual partial evictions, as explained by Judge Cardozo[1] has been that an actual eviction by a landlord, even if partial, and no matter how trivial, will suspend the entire rent owed by the tenant. The reason for such rule, as explained by the Court of Appeals[2] is "that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed."

As a result of such rule, practitioners in Landlord/Tenant courts are (or were) well aware that a full 100 percent rent abatement would result, even if a tenant remained in possession of the premises,[3] if a landlord physically expelled or excluded a tenant from any part of the leased premises.

The Court of Appeals in *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*,[4] while claiming it was not overruling this longstanding rule, appears to have done just that.

The facts in *Eastside* are straightforward: Eastside, as tenant, entered into an 18 year lease with *210 86th Street Corp.*, as landlord, to operate a multiplex movie theater. The lease allowed landlord to make repairs and improvements without an abatement of rent during the period the work was in progress and also provided that the tenant would not receive an allowance for any diminution in value resulting from the repairs or improvements. Approximately 4 years after commencement of the term, without notice, landlord entered the premises and "installed cross-bracing between two existing steel support columns on both of plaintiff's leased floors causing a change in the flow of patron traffic on the first floor and a slight diminution of the second floor waiting area." Plaintiff ceased paying rent alleging an actual partial eviction.

Patrick McCormick

At trial, the parties stipulated that the total area of the demised premises was between 15,000 and 19,000 square feet and that the cross-bracing installed by landlord occupied approximately 12 square feet. The Supreme Court dismissed plaintiff's claim and entered judgment for defendant holding that "the taking of 12 square feet of non-essential space in plaintiff's lobby constituted a de minimis taking not justifying a full rent abatement." The Appellate Division, First Department modified, "holding that there is no de minimis exception to the rule that any unauthorized taking of the demised premises by the landlord constitutes an actual eviction" but held that the remedy was not a full rent abatement but compensation to plaintiff for its actual damages. During an inquest, the plaintiff's witnesses were not able to estimate actual damages testifying that given the variables in the motion picture industry, damages were impossible to determine. The Supreme Court made no damage award to plaintiff and the Appellate Division affirmed.

On these facts, and acknowledging the existence of the longstanding rule, the Court of Appeals held "Given the inherent inequity of a full rent abatement under the circumstances presented here and modern realities that a commercial lessee is free to negotiate appropriate lease terms, we see no need to apply a rule, derived from feudal concepts, that any intrusion—no matter how small—on the demised premises must result in a full rent abatement. Rather, we recognize that there can be an intrusion so minimal that it does not prescribe such a harsh remedy." The court then enunciated what appears to be a new rule: "For an intrusion to be considered an actual partial eviction it must interfere in some, more than trivial, manner with the tenant's use and enjoyment of the premises."

This new pronouncement now opens the door to an analysis, on a case by case basis, as to whether a particular intrusion or taking by a landlord, given the particular facts at issue, is severe enough to warrant any relief at all and, if so, the extent of such relief.

The dissent by Judge Read is well written and worth reading for its analysis as to why the "trivial" taking may not be so trivial on the facts presented and for its historical analysis of the law as it relates to actual partial evictions. The most compelling objection raised by Judge Read is succinctly stated as follows: "The majority has overruled an easy to understand, easy to apply bright-line rule in favor of a new de minimis rule that affords no predictability of outcome. Under *Kernochan* it was very risky for a landlord to intrude on leased space in disregard of the tenant's right to the whole of the property because the tenant might withhold rent. Now it is very risky for a tenant to withhold rent where the landlord wrongfully appropriates any portion of the leased premises because it is left up to the courts to determine whether the ouster is merely trifling in amount and trivial in effect. This determination will inevitably require expensive, protracted litigation with an uncertain resolution (citation omitted)."

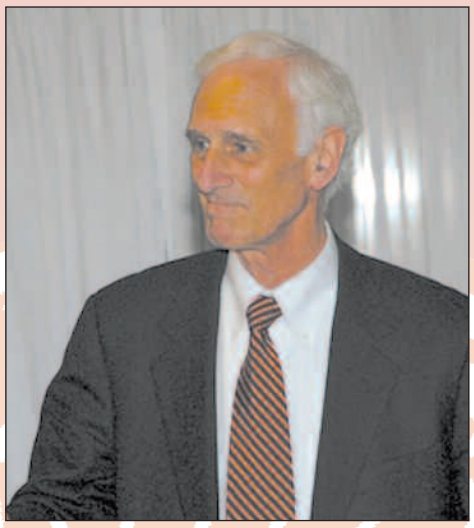
It was the predictability of outcome that previously guided both landlords and tenants and helped guide their decision making process. Now, without such predictability, will landlords be more willing to take space from tenants? Will tenants continue to pay rent even if landlords trespass and take back portions of the demised premises instead of availing themselves of the costly and often times lengthy, and now unpredictable, judicial process? Only time will tell what the fallout from this decision may be.

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. Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370 (1917)
2. Edgerton v. Page, 20 N.Y. 281 (1859)
3. Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77 (1970)
4. 2012 WL 538244, decided February 22, 2012

Pro Bono Foundation Awards Volunteers

Photos by Kim Smolowitz



COURT NOTES

Appellate Division-Second Department

By Ilene Sherwyn Cooper

Attorney Reinstatements Granted

The application by the following attorneys for reinstatement was granted:
Martin Eric Marks

Attorney Resignations Granted/ Disciplinary Proceeding Pending:

Howard Finkelstein: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee which has thus far revealed conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent acknowledged his inability to successfully defend himself on the merits against any charges predicated upon his misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Anthony Okechukwu Onua: By affidavit, respondent tendered his resignation, indicating that he pled guilty in the United States District Court for the Eastern District to one count of conspiracy to commit wire fraud and bank fraud, a class B felony. He was sentenced to five years of imprisonment, and five years of supervised release. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Ilene S. Cooper

Charlotte T. Watson: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee which has thus far revealed conduct involving dishonesty, fraud, deceit, misrepresentation, and conversion of escrow funds. Respondent acknowledged her inability to successfully defend herself on the merits against any charges predicated upon her misconduct under investigation. She stated that her resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that she make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and she was disbarred from the practice of law in the State of New York.

Attorneys Censured

Kevin J. Gilvary: By decision and order, dated November 8, 2010, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent, and the matter was referred to a special referee. After a hearing, the referee sustained all charges, which alleged, *inter alia,* that the respondent had signed the former guardian's name to checks issued from a guardianship account. The court granted the application by the Grievance Committee to confirm the referee's report. In determining the appropriate discipline to impose, the court noted the respondent's cooperation with the Grievance Committee and his good character. Accordingly, based upon the record, the respondent was publicly censured for his misconduct.

Paul E. Warburgh, Jr.: Application by the Grievance Committee to impose discipline on the respondent based upon his public reprimand by the United States Court of Appeals for the Second Circuit, which granted him leave to resign from the Bar of the Second Circuit. The Second Circuit had found that the respondent had failed to comply with its orders, had failed to reply to the court's inquiries, and failed to communicate with his clients. In addition, the Grievance Committee found that the respondent had failed to cooperate with it. The respondent failed to submit a verified statement asserting any defenses to the imposition of discipline. Accordingly, the application by the Grievance Committee was granted and the respondent was publicly censured.

Attorneys Suspended:

Christopher J. Maloney: The Grievance Committee served a petition upon the respondent requesting his suspension based upon his suspension from the practice of law in Connecticut based upon his failure to pay client security funds. A notice was served upon the respondent and he failed to submit a verified statement asserting any defenses to the reciprocal discipline. Accordingly, the application by the Grievance Committee was granted, and the respondent was suspended from the practice of law for a period of six months.

Attorneys Disbarred

Gerard E. Brogdon: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent based upon 14 charges of professional misconduct, including neglect of two legal matters entrusted to him, and failing to cooperate with the Grievance Committee in its investigation of three complaints alleging that he had charged excessive fees, and failed to provide a client with an accounting. The respondent did not answer the petition. Based upon the respondent's default, the charges against the respondent were deemed established, and the respondent was disbarred from the practice of law in the State of New York.

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

REAL ESTATE

Blinded by Love

Joint Tenancy and the Never-Married "Widow"

By Lance R. Pomerantz

Spring is in the air, and the attorney's thoughts drift invariably toward that staple of modern romance, the joint tenancy with right of survivorship. Fortunately, the Appellate Division has provided us with two stories of love gone wrong, and the real estate consequences that follow in its wake. Here, dear hearts are our cautionary tales:

Trotta v. Ollivier

For the first time in any New York appellate court, the Appellate Division, Second Department, recently decided that the executor of the deceased joint tenant cannot sue the surviving joint tenant to recover one-half of payments made by the decedent for the purchase and upkeep of the property. *Trotta v. Ollivier,* 2011 NY Slip Op 8349 [91 AD3d 8] (2nd Dept., November 15, 2011).

In 1992, Susan Leone and Charles Ollivier took title to the real estate as joint tenants with right of survivorship ("JTWROS"). Between 1992 and 2008 Susan expended $226,500 from her own funds for acquisition, closing and construction costs, insurance, repairs, utilities and the like. She and Charles lived together for some time as an unmarried couple, until Charles "moved to another address." Susan died unexpectedly in 2008 and Trotta was appointed executor of Susan's estate. Trotta's lawsuit alleged that Charles did not contribute to the purchase and carrying charges of the property or, if he ever did, his contributions were not equal to those of Susan. The lawsuit sought, *inter alia,* reimbursement from Charles for one-half of Susan's expenditures, pursuant to RPAPL §1201. That section provides that "[a] joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant who has *received* more than his own just proportion, or against his executor or administrator" (emphasis supplied).

The court pointed out that Susan, while alive, never sought to partition or otherwise sever the JTWROS, or to seek an equitable adjustment of the expenditures. When she died, Charles became the sole owner of the premises. While the statute makes no mention of money, the court held that the purpose of RPAPL §1201 is only to provide a right to recover *monies* (i.e. not intangible, in-kind or indirect benefits) "received" by the co-tenant that exceed his or her proportionate share.

Lance R. Pomerantz

> "The statutory focus upon monies 'received' by the co-tenant, rather than upon expenses 'paid' by the tenant, suggests that the right of recovery is limited to rents and income generated by jointly held property. The absence of language in RPAPL 1201 extending the right of recovery to expenses 'paid' by a tenant beyond his or her equitable share means, under the doctrine of *expressio unius est exclusio alterius,* that the legislature, by inference, intentionally omitted or excluded joint tenant expenditures from the scope of the statute."

While equitable apportionment of past expenditures is routine in the divorce context, an unmarried joint tenant should take steps to protect her investment following the dissolution of the relationship. At the very least, she should understand the consequences of her failure to do so.

Northern Trust, NA v. Delley

It's a familiar story: Boy meets Girl. Boy is in contract to buy a parcel of real estate. Boy tells Girl "Marry me and I'll add your name to the contract as a purchaser." Girl accepts proposal, closing occurs and the deed reads: "Boy and Girl, as joint tenants with right of survivorship." Sadly, the wedding never takes place. Eventually, Boy, his judgment no longer compromised by the beauty of his beloved, brings an action pursuant to Civil Rights Law §80-b. That section permits an action for "rescission of a deed to real property when the sole consideration ... was a contemplated marriage which has not occurred ..." In the alternative, the statute permits the court to award damages in lieu of rescission. Tragically, before judgment is rendered, Boy dies.

Girl, presumably devastated by the untimely demise of Boy, takes comfort in knowing that, as surviving JTWROS, she will always have a roof over her head. Unfortunately, the deities of love (in the form of the Appellate Division, Fourth Department) disagreed and awarded complete title to Boy's executor. *Northern Trust, NA, as administrator of the Estate of Richard Sarkis v. Delley,* 2011 NY Slip Op 09710 [90 AD3d 1644] (4th Dept., December 30, 2011).

The court concluded "that an action pursuant to Civil Rights Law §80-b raises issues regarding the title and ownership interest in real property that survive the death of a party." The court distinguished this situation from that of a pending partition action or pending divorce action. "[A] section 80-b action for the return of real property is not extinguished upon the death of the party who commenced the action, even where, as here, the subject property is held as joint tenants with right of survivorship."

Has the Fourth Department panel just extended the meaning of the word "rescission?" Typically, "rescission" restores the parties to their pre-deed positions. In this case, Boy didn't make a deed to Girl. All he did was amend his contract to add her as a purchaser, presumably with the assent of both Girl and the seller. So the panel is not actually "rescinding" the deed, but "reforming" the deed, *post facto*, to negate Girl's interest pursuant to the deed.

Unlike the "girl" in *Trotta,* Boy had the good sense to get a promise to marry from his intended before arranging that she receive a half-interest in the real estate. By doing so, Boy was not only able to negate the unambiguous grant in the deed, but to preserve his right to do so beyond his death.

It is particularly noteworthy that had Boy merely sought a partition of the property, that cause of action would have died with him, leaving Girl in title to the whole. In the right circumstances, could the rationale behind *Sarkis* be used to support a post-mortem §80-b action by the personal representative of the decedent?

Moral of the Stories

Many unmarried couples acquire real estate as joint tenants to avoid succession problems following the death of one of the "partners." They should understand all the ramifications of this approach ahead of time to insure that their intentions are realized.

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.SM Please visit www.LandTitleLaw.com.

FUTURE LAWYERS FORUM

Social Media and the Legal Industry

The benefits and burdens

By Scott Richman

Social media, a group of perpetually expanding diverse platforms including, but not limited to Facebook, Twitter, MySpace, YouTube, and Wikipedia have become successfully integrated into the majority of mainstream America's daily lives. Today, you may have already snuck away from the daily doldrums of your workday to check your Facebook page, Twitter feed, or the location of where the rest of your friends and acquaintances are when you are slaving away at work. According to social networking specialist Jeff Bullas's blog, Facebook users spend on average 15 hours and 33 minutes on Facebook per month.[1] Interestingly, if Facebook were a country it would be the third largest country in the world (behind China and Japan) and the country of Facebook would be twice the size of the current U.S. population.[2]

It is evident that there are both positives and negatives to an individual's use of social media both inside and outside of the workplace. The legal industry has begun to embrace social media for purposes of marketing individual attorneys and their organizations/firms, investigating information regarding current and future potential clients, and in a rather new application, for purposes of voir dire.[3] While there are multiple positives to the legal industry's use of social media, there are some potential negatives for which attorneys and practitioners must be aware.

Scott Richman

Recently, lawyers have begun using social media as evidence in both the jury selection process, in the fields of employment and/or disability law through helping discover individuals lying about sick days or having disabilities that they claim make them unable to work, and uncovering both true and false alibis to crimes. In the jury selection process, attorneys may use social media sites to help uncover information limited through interviews, background checks, etc.[4] Through websites such as Facebook and LinkedIn, attorneys may uncover vital information about a prospective juror which may be the difference between suggesting a prospective juror be added to the jury and dismissing a juror for cause or peremptorily challenging that potential juror's admittance. Uncoverable information may include a juror's party affiliation or group affiliations, potential biases or strong views on pertinent topics, and more information about their current employment situation. Lawyers who practice employment law may use pictures posted or updates to statuses on social media websites to track employee sick days. Individuals who are lying about being ill or needing to take off time from work for a family situation may "accidentally" post pictures of himself/herself at the golf course, partying with friends, or simply partaking in activities contradictory to their purported reason for taking off from work. Similar to lawyers who practice employment law lawyers who practice disability law can use websites to help determine if an individual is lying about a certain disability for which they are collecting disability wages. For example, an employee may claim that he has a back problem that renders him unable to move items throughout a factory. But, if the attorney or employer sees a picture on a social media site, and the employee is engaging in an activity requiring exertion of back muscles (ex: golf, moving furniture, etc.), they may have a cause for action against the employee to recover disability . Social media sites may also be useful in uncovering the truth behind alibis in criminal investigations. For example, a few years ago, a Brooklyn teenager was arrested in connection with a robbery

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NEW CONTRIBUTOR JOINS *THE SUFFOLK LAWYER*

The Suffolk Lawyer would like to welcome our new law school student contributor Scott Richman. We thank him for his efforts and encourage all SCBA members to commit to writing for *The Suffolk Lawyer*. If interested contact editor Laura Lane at scbanews@optonline.net.

MEMBER BENEFIT

Disability Income Insurance

What every attorney needs to know

By John J. Marcel

Would you ever show up in the courtroom—or at a client meeting—without properly preparing your case or researching your client's situation? Of course not – in fact, for most lawyers, the idea of being poorly prepared at a crucial moment is the stuff of nightmares.

But no matter how well you prepare your cases, there's an all-too-common scenario that you may not have anticipated fully: what would happen if you were to become disabled? Perhaps you believe that you're fully covered by a group policy your firm has purchased. However, the truth is that while group disability income insurance is often relatively inexpensive and easy to administer, it can also fall short just when you need it most—leaving you in for some unpleasant surprises when it's too late to correct the situation.

Furthermore, disability may be far more common than you imagine. Even if you're young and careful, it could happen to you—through an accident, injury, or a lengthy illness. And in fact it does happen probably more often than you might think.

In a recent survey only 1 percent of employees felt they had a chance of becoming disabled during their working years, [1] but in reality almost one-third of Americans entering the work force today (3 in 10) will become disabled before they retire.[2]

Want to be better prepared? Consider the following:

Learning to speak the lingo

The right disability income insurance (DI) policy can help you keep your household going, even if you suffer a long-term disability. But before you go shopping for a DI policy, you need to know what features to look for—and the language the insurance industry uses to describe them. The following terms are part of the language describing high-quality policies, and are what you should look for to get coverage you can count on:

- Non-cancellable. To avoid the possibility of losing your coverage just when you need it most, choose a policy that's non-cancellable and guaranteed renewable to age 65—with premiums also guaranteed until age 65. With group or association group coverage, you run the risk of being dropped and left unprotected at a time in your life when, due to your age or to a change in your health, it would be very difficult to qualify for coverage from another provider.

- Conditionally renewable for life. Although premiums may increase after age 65, your policy should be renewable for life, as long as you are at work full time.

- The core of any disability income policy is its definition of "Total Disability" which outlines what constitutes being "totally disabled" and therefore eligible for benefits. This definition is in every carrier's policy; however, it does not always mean the same thing. For example, some policies pay benefits if you are unable to perform the duties of your own occupation, even if you are able to work successfully in another occupation, while others pay only if you cannot work at all.

- Residual Disability coverage. Through a rider, a good individual DI policy can provide you with protection against the income loss you may suffer as a result of *partial* (residual) disability—*even if you have never suffered a period of total disability*. This kind of residual coverage is not available with most group plans.

- A choice of "riders." Riders offer optional additional coverage such as Future Increase Options and Cost of Living adjustments, or "COLA."

Protecting your business, as well as yourself

You must also protect the source of your income: the firm you've worked so hard to establish and grow. Special policies, available from the same DI providers who offer high-quality individual coverage, offer your office protection while you recover from a disability.

To help meet the expenses of running the office while you are disabled, consider a separate type of disability insurance coverage known as Overhead Expense or OE. Benefits reimburse your practice for expenses such as rent for your office, electricity, heat, telephone and utilities, as well as interest on business debts and lease payments on furniture and equipment.

Overhead expense insurance specifically designed for professionals pays some additional costs not included in most overhead expense policies—including the salaries of employees except those who are members of your profession. In an office such as yours, for example, salaries for the receptionist and staff would be covered, but not the salary of your law partners or any junior attorneys. However, high-quality professional overhead policies will cover at least part of the salary of a professional temporary replacement for you, such as a lawyer retained to fill in during your total disability.

In addition…

Lawyers who are partners in a group will want to consider a policy known as a Disability Buy-Out or DBO. In much the same way that life insurance benefits can be set aside to fund a buy-out by the remaining partner (or partners) if one partner dies, DBO is designed to fund the healthy partners' purchase of the disabled partner's share of the business. With the proper agreement in place before disability occurs, hard feelings and the conflicts of interest

(Continued on page 22)

MATRIMONIAL & FAMILY LAW

Litigating Private or Parochial High School Expenses

By John E. Raimondi

The issue of payment of expenses for private or parochial high school is an issue frequently litigated in the Matrimonial and Family Courts in New York State.

An interesting case regarding the payment of high school expenses was the matter of *Weinschneider v. Weinschneider*, 50 A.D.3d 1128, 857 N.Y.S.2d 613 (2008). In *Weinschneider*, the parties, parents of five children were divorced in 2005. The parties Stipulation of Settlement incorporated, but not merged into the Judgment of Divorce, provided that the father would be responsible for 100 percent of the children's tuition through high school. The parties Judgment of Divorce, however, provided that the father would be responsible to pay 100 percent of the educational expense of the parties children through each child's graduation from high school. The tuition bills from the private high school included fees for registration, building fund and annual dinner. The father paid the portion of the bill for tuition but refused to pay for any additional fees.

The Appellate Division Second Department held that where there is a conflict between a settlement agreement and the decretal provisions of a later divorce judgment from which no appeal was taken nor modification sought, the judgment will govern (see *Rainbow v. Swisher*, 72 N.Y.2d 106,109,110, 527 N.E.2d 258, 531 N.Y.S.2d 775 [1988]). The Appellate Division further stated "In light of the tuition bills from the relevant educational institutions which list various fees under the heading "Tuition Contract," the court erred in determining that the parties' intention was to limit the plaintiff's responsibility to only that fee under the sub-heading "tuition." Under the circumstances of this case, the term "education expenses" must be construed to include all fees necessary for enrollment (see Matter of *Dorcean v. Longueira*, 44 A.D.3d 770, 843 N.Y.S.2d 410 [2007]; *Attea v. Attea*, 30 A.D.3d 971, 972, 817 N.Y.S.2d 478 [2006], affd 7 N.Y.3d 879, 860 N.E.2d 58, 826 N.Y.S.2d 596 [2006]; cf. *Lee v. Lee*, 18 A.D.3d 513, 795 N.Y.S.2d 288 [2005]).

John E. Raimondi

The matter of *Wen v. Wen*, 304 A.D.2d 897, 757 N.Y.S.2d 355 (2003) was an appeal from Albany County Family Court. The parties' separation agreement stated that the father would pay 80 percent of the cost of private school for the parties' son should the father consent to such an education. The parties' son who was previously having difficulties in public school transferred to Albany Academy. The son excelled academically and socially for three years at Albany Academy. The father, however, refused to consent to his son's return to Albany Academy for his fourth year of high school. Petitioner mother brought suit to compel the father to pay for the fourth year of high school. The father's income was approximately $120,000.00 per year and the mother's income was approximately $40,000.00 per year. The cost of Albany Academy was approximately $15,000.00 per year. After the hearing, the Support Magistrate found special circumstances existed and directed the father to pay 75 percent of the tuition.

On objection, the Family Court affirmed the Support Magistrate's determination and the father appealed. The Appellate Division Third Department held "While the separation agreement sets the percentage that respondent must pay if he consents to his son attending Albany Academy, it does not purport to foreclose any financial obligation in the event he does not consent. Stated in another way, the agreement is silent regarding the extent of his financial obligation in the event either of his children attends any private school, with the one exception of specifically providing that he will pay 80 percent of his son's tuition to Albany Academy if he consents to his son attending such school. He did not consent to his son attending Albany Academy and, therefore, the petition was directed to an issue not expressly covered by the separation agreement. Under such circumstances, private secondary school expenses may be awarded as justice requires upon consideration of the best interests of the child and the circumstances of the case and the parties (see Family Court Act Section 413 [1][c][7]; *Allen L. v. Myrna L.*, 224 A.D.2d 495, 496, 638 N.Y.S.2d 168 [1996]; *Matter of Cohen v. Rosen*, 207 A.D.2d 155, 157, 621 N.Y.S.2d 411 [1995], lv denied 86 N.Y.2d 702, 655 N.E.2d 703, 631 N.Y.S.2d 606 [1995]).

Relevant factors in such regard include the parent's educational background, the child's academic acuity and the financial situation of the parents (*Fruchter v. Fruchter*, 288 A.D.2d 942, 943, 732 N.Y.S.2d 810 [2001]; *Matter of Cohen v. Rosen*, supra at 157 n; *Matter of Haessly v. Haessly*, 203 A.D.2d 700, 701, 611 N.Y.S.2d 928 [1994]). Here the record reflects that both parents attended private schools, the child has been at Albany Academy for three years and is doing better there than he was in public school, and respondent has the financial ability to contribute to his son's education at Albany Academy." The Appellate Division upheld the decision of the Support Magistrate and the Family Court.

The matter of *Massimi v. Massimi*, 35 A.D.3d 400, 825 N.Y.S.2d 262 (2006) was an appeal from the Orange County Supreme Court. The Appellate Division Second Department held that the father's claim that he objected to the child attending private school is contradicted by the father having toured prospective schools and by the father having paid one year's tuition. The father's finances also indicated an ability to afford the cost of the private school tuition.

The matter of *Stearns v. Stearns,* 11 A.D.3d 746, 783 N.Y.S.2d 686 (2004) was an appeal from Washington County Family Court. The parties were divorced in 2001. The parties, parents of four children, executed a Stipulation of Settlement which stated that the father would pay 50 percent of the children's private schooling "for so long as the parties agree upon the school the children attend." After hearing, the father was found to have unreasonably withheld to consent to reenroll the children in private school and that the current increase would only obligate the father to pay an additional $17.50 extra per month. The Appellate Division Third Department stated that there had been neither a significant change in the school since their separation agreement or evidence that the public schools were offering any new advantages that were not previously available.

The matter of *Pollack v. Pollack*, 3 A.D.3d 482, 770 N.Y.S.2d 435 (2004) was an appeal from Queens County Supreme Court. In *Pollack*, the Appellate Division Second Department held that the parties did not mutually confer and decide what summer camp or private school the children would attend. The husband's obliga-

(Continued on page 22)

TRUSTS & ESTATES

By Ilene Sherwyn Cooper

Commissions

In a contested accounting by the former administrator of the estate, the court opined on the issue of commissions to which a former fiduciary was entitled. The court held that a fiduciary who has resigned is not entitled to statutory commissions but instead may be awarded compensation, in the discretion of the court, on the basis of quantum meruit. Generally, however, commissions based upon quantum merit will be calculated in accordance with the statutory formula, but not exceeding statutory commissions, subject to the caveat that such an allowance will not include paying out commissions on the property that a resigned fiduciary has merely transferred to his successor.

Furthermore, the court opined that the compensation of a fiduciary in New York is not a function of the degree of ease or difficulty posed by his responsibilities, but rather, the value that his services have conferred on the estate. To this extent, the court held that a fiduciary will not be allowed commissions on property that he did not marshal or receive within the meaning of the statute.

***In re Korshunova,* NYLJ, 1/13/12, at 22 (Sur. Ct. New York County) (Sur. Anderson).**

Domicile

In a contested probate proceeding, the threshold question presented was the decedent's domicile at death. Although the proceeding had been instituted in Kings County, the objectant maintained that the decedent died domiciled in Suffolk County. The matter was determined on the papers submitted, without a hearing.

Ilene S. Cooper

The record revealed that at the time of her death, the decedent owned two parcels of real property, one in Brooklyn and one in Suffolk County. In support of his claim that the decedent died domiciled in Suffolk County, the objectant proffered (1) a copy of the Federal Estate Tax return of the decedent's predeceased spouse, which listed the decedent's address as Suffolk County; (2) a copy of the decedent's health card which listed his address as Suffolk County; and (3) a copy of a brokerage statement for an account in the names of the decedent and his spouse, and listing the decedent's address as Suffolk County.

In opposition to the objectant's contentions, the petitioner maintained that the request by the objectant for a change of venue was untimely, and, that in any event, her domicile was Brooklyn at death. In this latter regard, the petitioner submitted the following documentary proof listing her residence as Brooklyn: (1) a copy of the decedent's death certificate; (2) a copy of the decedent's New York State driver's license; (3) copies of two New York City health cards; (4) copies of correspondence from Medicare, health care providers and an automobile insurer; (5) a copy of a prescription medication label; (6) a copy of a Verizon statement and a National Grid statement; and (7) a copy of a petition filed by the decedent against the objectant in Family Court, Kings County.

In finding that the decedent died domiciled a resident of Kings County, the court opined that a determination of domicile is usually a mixed question of fact and law, and frequently depends upon a variety of circumstances. Although the court acknowledged that the decedent may have been domiciled in Suffolk County at the time of her spouse's death, it did not preclude a finding that she changed her domicile to Kings County at a subsequent time. To that extent, the burden of proof rested with the party asserting a change of domicile to demonstrate by clear and convincing evidence that the decedent intended to effect such a change.

In assessing the proof submitted by both parties, the court discredited much of the petitioner's proof, but for the Family Court petition filed by the decedent, and which resulted in a temporary order of protection which referred to the decedent's home in Brooklyn. As for the objectant's proof, the court found the dates set forth thereon too remote from the decedent's date of death to be considered relevant to the issue of her domicile at death.

***In re Estate of Halper,* NYLJ, Jan. 20, 2012, at 28 (Sur. Ct. Kings County) (Sur. Torres).**

Objections to Probate

In a probate proceeding, the respondent appealed from a decree of the Surrogate's Court, Chemung County (Hayden, S.), which among other things, dismissed his objections to probate of the decedent's Will.

In June, 2009, after the filing of a petition for probate of the decedent's will, the respondent, on behalf of himself and other non-resident potential distributees, sought to examine the attesting witnesses prior to filing objections to probate. Although granted a 30 day extension to do so, respondent did not conduct the examinations, but instead, in January 20101, served discovery demands upon the petitioners in advance thereof. Apparently in response to the respondent's prolonged delay in seeking the discovery and the broad nature of the demands, the Surrogate's Court directed respondent to post a $15,000 bond prior to any discovery taking place. Respondent failed to post the bond, but filed objections to probate. The petitioners argued that the objections were untimely and the Surrogate's Court agreed and admitted the will to probate.

The Appellate Division, Third Department, affirmed. In doing so, the court opined that if pre-objection examinations pursuant to SCPA 1404 take place, objections to probate "must be filed within ten days after the completion of the examinations or such other time as is fixed by stipulation of the parties or the court." (SCPA 1410). The court found that although respondent was given a substantial amount of time to complete the examinations, he failed to do so. As such, the court concluded that his March 2010 objections, filed more than 6 months after the examinations were to be completed, were untimely. Further, given the conclusory nature of the objections, the court held that the Surrogate's Court did not abuse its discretion in rejecting them.

***In re Scianni,* 2011 NY Slip Op 06174 (App. Div. 3rd Dept.)**

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

MUSIC REVIEW

Despite Rumors to the Contrary, Jane's NOT Done with Sergio

Jane's Addiction at The Paramount in Huntington

By Dennis R. Chase

Dennis R. Chase

Fifty-three year old lead vocalist, flamboyant, flexible, and ferocious Perry Farrell hasn't lost a single step since opening for Jane's Addiction in 1985. Farrell's energy was both electrifying and contagious in the packed, yet fairly new venue, The Paramount in Huntington. The proof of the evening's success, however, was in their music. Once again Jane's Addiction proved that they are still one of the greatest alternative bands performing live.

The stage, could best be described as a sexed-up Warhol carnival with live girls (coupled by cinematic ones), providing the perfect backdrop to evoke the crowd's delirium. While much of their set list consisted of scorching rips from their recently released CD, *The Great Escape Artist*, with Farrell, perennial lead guitarist and mayhem maker, Dave Navarro, teaming up with Velvet Revolver bassist Duff McKagan, and mainstay drummer Stephen Perkinson, the band peppered their performance with plenty of pleasing popular tunes.

The Paramount, reopening in October 2011 after extensive renovations, is just completely unlike any other Long Island concert venue, more closely resembling some of the hotter, chic, trendier venues found only across the river. The Paramount's combination of retro-industrial aesthetics and modern-day technology makes for interesting, yet intimate performances. Perhaps The Paramount's most impressive feature is the sound stage design seemingly obscured by exposed bricks and the large steel I-beams that make up the main bars, the extensive dance floor, and accompanying mini-bars offering seat side service to the fortunate few. The venue previously provided unlimited access to an outdoor multilevel balcony (nee fire escape) until local residents and business owners complained to the town regarding alleged zoning violations. The theater, unfortunately, has recently been plagued by arrests, parking issues, and other unwanted activities claim local officials.

Farrell, Navarro, and company, however, oblivious to local complaints, blew that room away. Opening with new single *Underground*, the band quickly segued in to more familiar territory driving the excited crowd in to unparalleled frenzy with fan faves like *Mountain Song*, *Been Caught Stealing*, and *Jane Says*. The highlight of the evening, however, was not to be predictably entwined within the obligatory encore set, moreover with a burning live version of *3 Days*, a 10 to 15 minute trilogy featured on Jane's Addiction's 1990 album, Ritual de lo Habitual. *3 Days* meditates on death and rebirth highlighted by a blistering guitar solo by Dave Navarro ranked in *Guitar World*'s "100 Best Guitar Solos." Not to be outdone, however, a surprised Paramount was captivated by a triumvirate of tympani drums articulating and punctuating Farrell piercing voice during *Chip Away*.

Perry Farrell, lead vocalist for Jane's Addiction.

Although security kept stage crashers to a minimum, quickly whisking habitual offenders offstage, Farrell, himself invited that lucky *Bieber wannabe* back on stage during a smoking version of *Ocean Size*. Move over Jagger, Farrell's lust for life, acrobatic stage antics, and never ending reservoir of high energy makes him a best bet for the "over 50" rock n' roller set.

Note: Dennis R. Chase is the current First Vice President of the Suffolk County Bar Association and 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.

PRO BONO

Pro Bono Attorney of the Month - H. Lee Blumberg,

By Nancy Zukowski

Nassau Suffolk Law Services is privileged to honor H. Lee Blumberg as Pro Bono Attorney of the Month for his service to the underprivileged of Long Island since the inception of the Suffolk Pro Bono Project in 1980. He was previously honored as Pro Bono Attorney of the Month in May of 1999 and his firm, Blumberg, Cherkoss, Fitz Gibbons & Blumberg located in Amityville, was also honored in 2006 for its pro bono work.

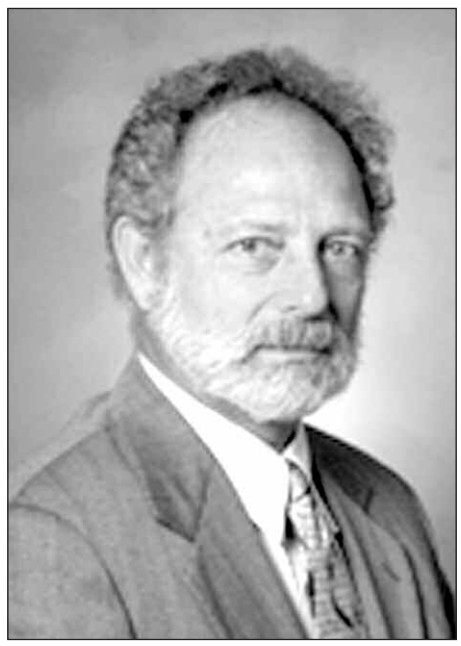
Mr. Blumberg usually devotes about five to six pro bono hours per week accepting matrimonial and other cases through the Pro Bono Project, and often does additional pro bono cases on his own. When asked what attracts him to this type of work he explained, "Not everyone likes to do matrimonial work, but there is satisfaction in alleviating spousal or child abuse, or preventing one party from getting the better of the other. You can tell it was a good settlement if nobody is either elated or upset when it is all over."

He believes that short of being a mental health professional, the most satisfying aspect of this work is the opportunity to educate clients and give them a realistic idea about what to expect. Mr. Blumberg acknowledges, "The world lawyers live in today proves that the law is a jealous mistress." He and his firm pay attention to all their cases because, "with each case there are always different nuances. A good attorney is able to pick out the one situation in 10 that has some unique twist and gives those matters the special attention required."

Lee's firm was founded by his father, Eugene, over 75 years ago. The youngest of his three sons, Joshua, joined him in the practice, and was also recently honored as Pro Bono Attorney of the Month, following in the family tradition. While the firm specializes in many areas of law, including Trusts and Estates, Landlord/Tenant, Criminal Law, Litigation and general practice, Mr. Blumberg felt that it was in the area of Matrimonial Law that there was the most need for pro bono assistance.

Maria Dosso, Esq. who oversees the Pro Bono Project at Nassau Suffolk Law Services agrees. "We can barely keep up with the applications for pro bono divorce representation on behalf of defendants," she said. "Our plaintiff waiting list is currently closed due to the long wait. Pro bono attorneys like Lee Blumberg are in great demand. His cooperation and consistent generosity is much appreciated, and a great value to the community."

Interestingly enough, the law was not necessarily Mr. Blumberg's first career choice. Originally he thought of becoming an accountant but found that it was too dry. Becoming a physician was not an option, since he soon learned he didn't like the sight of blood. So, following in his father's footsteps, he became a lawyer after graduating with his B.A and his J.D. from the University of Michigan, and was admitted in New York in 1964. He has been married almost 48 years to Jo Ann and has three sons, (David, Daniel and Joshua) and 7 grandchildren (Benjamin, Justin, Skyler, Brittany, Maceo, Noah and Ryder). His hobbies include boating, traveling, hiking, and snorkeling, and he loves to drive "Leegalee," his Corvette, his well known vehicle of choice since the 1970's.



H. Lee Blumberg

Lee says there are good reasons for accepting pro bono cases. "It is personally gratifying and it benefits the legal system. We all have the drive and ability that lead us to become good lawyers and to make a good living, and we should give back to those who are less fortunate."

For his many years of serving the indigent community of Suffolk County and exemplifying the ideal of community service, it is once again our privilege to name H. Lee Blumberg, Esq. Pro Bono Attorney of the Month.

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

MEMBER BENEFIT

Camp Bello - A Smart Choice For Members

SCBA Member and Academy of Law officer Harry Tilis along with Michael Perri co-direct Camp Bello which is a traditional summer day camp that combines outstanding programs, experienced leadership and dedicated staff to enable campers to learn new skills, make new friends, develop self-esteem and have fun. Camp Bello differentiates itself from other day camps, including those run by various municipalities, because Camp Bello focuses and attends to each individual camper's and each family's needs.

Camp Bello delivers a lot more than just a teenager in a fluorescent t-shirt handing out a basketball. Camp Bello creates a camp community of positive energy that will electrify your camper every day! In addition, because one of our SCBA members runs the program, calls from lawyer/parents saying, "I just got called into an emergency hearing and need to pick up late," will be met with understanding that will allow parents to do their job and meet all their obligations.

With sufficient interest, the camp will run a shuttle from and to the Central Islip courthouse and the 320 Carleton Avenue office building.

Camp Bello offers SCBA Members a 10 percent discount on all tuition expenses as a member benefit. In addition, Camp Bello will offer staff of SCBA members a special discount on tuition as well.

Our program, philosophy and policies combined with Harry Tilis and Mike Perri's vision make Camp Bello a first-rate camp that dazzles parents. You can ask Bar Association members who already have signed up their children! Former Harvard University President, Charles William Eliot, and Secretary of Education, Arne Duncan, support camping and its positive effect on children. "Camp made me what I am today," Co-director Harry Tilis says.

For more information contact us (either Harry or Mike) at (631) 244-1475 or email us at fun@campbello.org. Also, visit our website campbello.org for more information and enrollment forms.

REAL ESTATE

Stemming Home Foreclosures

Apologies to Jonathan Swift

By Charles Wallshein

The negotiations between mortgage servicers and federal and state officials concerning the nation's housing crisis have been described as a "sideshow."[1] Many agree that the best way to cure the crisis is to wipe the slate clean and purge the system of the defaulted loans as quickly as possible. I couldn't agree more; although, opinions regarding the methodology vary greatly.

So much discussion revolves around placing the blame for the crisis on one sector or another. As if the issue of blame could be spun such that the hypothetical responsible parties could be shamed into or forced into accepting culpability and making the situation right by performing financial penance. The issue no longer concerns who caused the crisis. That is almost irrelevant. The issue is also not about the fairness of the foreclosure process. Rather, the issue is about the hundreds of billions of dollars of lost equity in the underlying collateral for the RMBS (Residential Mortgage Backed Securities), GSE (Government Sponsored Entities *FannieMae, FreddieMac*) and portfolio residential mortgages and how to stabilize the real estate market.

I am an attorney who is in the trenches every day trying to help homeowners who are either in foreclosure, default or are about to become in default. There are very few options available to borrowers who want to save their homes. It is my observation that the current system is deeply flawed in that the asset recovery process is designed to be inherently adversarial and ultimately poses no real long-term benefit to either homeowners, the banks or to the nation's economy.

Defaulting or "in trouble" homeowners have the options of; litigating a foreclosure defense, mortgage modification, bankruptcy or simply walking away. However, each borrower's particular situation will govern the option that best suits their goal. There is no question that many Americans simply cannot afford to keep their homes due to severe economic hardship. Yet there are a rather large number of homeowners who *can* afford to pay their mortgages albeit at a lower monthly payment.[2]

It is sometimes hard for the mortgage servicers to tell who *can* pay and who cannot. Compounding the problem for servicers is determining who *will* pay and who will not[3] There is further complication with the moral dilemma of having to set an equitable policy that affords everyone the opportunity to lower their payment when there are clear disparities in the root causes of their respective "hardships." Let us put the issues of moral culpability and legal inequity aside for the moment and focus on the real issue of how to unwind the hundreds of billions of dollars of defaulted and imminently defaulting paper.[4]

The problem

The problem's root is that hundreds of billions of dollars of equity has been sucked out of the housing market as if it never existed. However, people need places to live and the underlying collateral, the homes, for the loan assets are still worth something, though the measurements and degree of negative equity, and *net present value* (NPV) vary geographically.

Ultimately, properties are going to have to get back into the hands of responsible, long term, sustainable borrowers. But how do we get from here to there? Given the state of the capital markets and the economy in general, a cure involving mass foreclosures defies logic. The foreclosure debacle is not the problem. It is the value of the underlying collateral and the problem of who will bear the burden of absorbing the losses from the hundreds of billions of dollars of lost equity.

Regulatory policy plays a huge role in determining who will bear the burden. Under the current policy, banks are facing tighter capital requirements. They are being forced to recapture as much capital

(Continued on page 23)

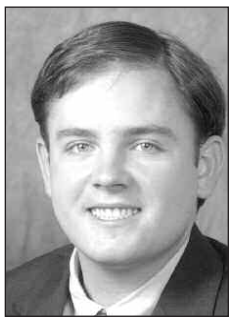
TRUSTS & ESTATES

Revoking Marriages in Article 81 Guardianship Proceedings

By Robert M. Harper

Elder abuse has become increasingly prevalent in recent years and so too has the need to protect elders who suffer abuse, whether physical, mental, or financial, at the hands of the individuals to whom they have entrusted their care and affairs.[1] Recent case law demonstrates that elderly individuals can fall prey to their much younger caregivers who secretly marry the elderly in the hopes of benefiting from their estates.[2] For family members who are aware of such abuse, one solution may be to commence an Article 81 guardianship proceeding and to seek to have the marriage revoked by a guardianship court.[3]

Under Mental Hygiene Law § 81.29, an Article 81 guardianship court "may modify, amend, or revoke... any contract [including one involving a marriage] made while the person was incapacitated." In this regard, the Second Department has held that a marriage may be revoked when the evidence shows that one of the parties to the marriage "was 'incapable of understanding the nature, effect, and consequences of the marriage'" at the time that it occurred.[4] The factors that the guardianship court should consider in determining whether to revoke a marriage include, among other things, the differences in the purported spouses' ages; whether the spouses cohabited; whether there was a change in residency; whether the spouses wore wedding rings; and whether there is any evidence of financial exploitation of the incapacitated spouse.[5] A marriage revoked under Mental Hygiene Law § 81.29 is void *ab initio*.



Robert M. Harper

Matter of Carmen R. is instructive.[6] There, the petitioner, the alleged incapacitated person's daughter and duly appointed Temporary Personal Needs Guardian, made an application for the annulment of her 89 year-old mother's marriage to her 57 year-old chauffeur.

At an evidentiary hearing, Westchester County Supreme Court Justice Peter J. Rosato heard testimony from, among others, the alleged incapacitated person's physician, which established that she suffered from severe dementia, among other ailments, and could not understand any marriage ceremony; from the alleged incapacitated person, which demonstrated that she knew her alleged spouse, but could not remember his last name or any marriage to him; and from the alleged incapacitated person's daughter, which suggested that the alleged spouse concealed the "marriage" from her, evidenced that the alleged spouse was her mother's chauffer, not her friend, and flatly contradicted the alleged spouse's claim that he had lived with the incapacitated person for more than a decade. Justice Rosato also heard testimony from the alleged spouse which demonstrated that the first time he publicly disclosed the marriage was on an immigration application to have his daughter admitted to the United States from Ecuador; that he had been collecting thousands of dollars in rent from the tenants of property owned by the alleged incapacitated person; and that he had previously been arrested for violating a temporary restraining order that prohibited him from having contact with the alleged incapacitated person.

Based upon the testimony and other evidence before the court, Justice Rosato granted the petitioner's application for an annulment of the marriage between her mother and the chauffer. In doing so, Justice Rosato explained that "[i]t [was] abundantly clear, on the evidence adduced upon the hearing held herein, that the [alleged incapacitated person] did not possess the requisite mental capacity to marry." Justice Rosato also found that the marriage was a product of fraud arising from the purported spouse's desire to gain entry into this country for his daughter who was living in Ecuador until after the marriage. Accordingly, Justice Rosato granted the petitioner's application to annul the marriage.

Of course, an annulment in the context of an Article 81 proceeding is only feasible where the relatives of an allegedly incapacitated person are aware of the marriage prior to the incapacitated person's death. Where the marriage is concealed until after the person dies, however, the allegedly incapacitated person's survivors may have to contest the validity of the marriage in the Surrogate's Court.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in estate and trust litigation. Mr. Harper serves as Co-Chair of the Bar Association's Member Benefits Committee and a Vice-Chair of the Governmental Relations and Legislation Committee of the New York State Bar Association's Trusts and Estates Law Section.

1. *Campbell v Thomas*, 73 A.D.3d 103 (2d Dep't 2010).
2. *Matter of Berk*, 71 A.D.3d 883 (2d Dep't 2010); *Matter of Kaminester*, 26 Misc.3d 227 (Sur. Ct., New York County 2009).
3. Mental Hygiene Law § 81.29.
4. *Matter of Joseph S.*, 25 A.D.3d 804 (2d Dep't 2006).
5. *Matter of I.I.R.*, 21 Misc.3d 1136(A) (Sup. Ct., Nassau County 2008).
6. *Matter of Carmen R.*, 15 Misc.3d 1116(A) (Sup. Ct., Westchester County 2007).

RESTAURANT REVIEW

Insignia Fails to Achieve Expectations

Smithtown steak & sushi experiencing growing pains

By Dennis R. Chase

Locals truly longed for another New York City quality steakhouse in Suffolk County. While Nassau maintains bragging rights with Peter Luger, Rothmann's, Bryant & Cooper, Burton & Doyle, etc., Pace's popularity makes a weekend reservation, at times, more than just a tad difficult. We all wanted a place in Smithtown to provide that New York City steakhouse experience, unfortunately, Insignia just isn't it . . . yet.

The *potential* exists, mind you, beautifully decorated interiors, slightly snobby hostess, even snobbier valets, but we come for the perfectly prepared food, presented poignantly, and served with air of distinction (visitors to their website may be surprised to learn, however, the restaurant is not waterside).

Here is where Insignia falls short. Each diner is introduced to the "team" that will be assisting the wait staff, each *team* consisting of at least three Insignia staff members. Three poorly trained staff members are no substitute for one knowledgeable, well seasoned member; *more is not always better*. The *team* struggled to understand the cocktail orders, fumbled with their knowledge of the availability of high end spirits, and more than once filled glasses containing sparkling water with iced tap water despite vehement and vocal objections with each absurd faux pas. The *team* was, you see, dazzled by the *pretty green bottle of Pellegrino* prominently displayed on our table. Perhaps, however, the *team* was far more confused by the *cacophonous monstrosity* which could only be described as the dueling music systems Insignia employs. While *Insignia proper* attempts to soothe and relax patrons in the dining room with classic Japanese music, the *adjacent* ultramodern, overcrowded, and incredibly noisy *Insignia bar* strives to bring in da' noise (yet omitting da' funk) with that signature UNCE UNCE UNCE made famous by only, well, every single piece of dance music ever written.

Once our *team* determined our beverage orders by consensus (apparently theirs, not ours), our *team* offered recommendations regarding appetizers (sorry, *starters and salads* . . . let's always try to be chic). The obligatory sliders (a.k.a. *Seven Spice Mini Kobe Burger Flights*) ran the slider spectrum from spicy to spicy with not much in between. The *Crispy Pork Belly* served with garlic sausage, braised red cabbage and red wine mustard was slightly better, just not crispy. The *Black Truffle Mac & Cheese* served in a small iron crock pot fared much better and was the clear winner among our guests. The *Colossal Crab Cocktail*, however, also delivered, as promised . . . cold, succulent, and yes, even crispy.

Bring on the *Prime Dry-Aged Steaks*; after all, that was our raison d'être for the evening. While Insignia surely sought to purchase their beef from only the finest purveyors of dry aged beef and Wagyu beef (for the *money is clearly no object* set), something critical was lost in translation, otherwise known as the cooking process. *Blackening* is a cooking technique commonly used in the preparation of fish, chicken, and even beef. While often associated with traditional Cajun cuisine, Insignia does not profess to offer Cajun fare. Moreover, nowhere on the menu does the chef describe the preparation of any of the steaks as *blackened*, however, this is the way in which all of our steaks were served. While each diner conceded their steaks were cooked to the correct temperature (with requests ranging from rare to medium), many of our guests struggled to slice away the charred blackened crust that simply but effectively detracted from what could have been an amazingly good steak. While the menu boasted that its *Skirt Steak* was char-grilled, one wonders if not all the steaks were char-grilled (defined as grilling over a charcoal fire) and there may be some *team* confusion in the kitchen over the definitions of *blackened*; *char-grilled*; or even *steak*, for that matter. Perhaps the kitchen is located a little too close to the bar and the real dancing was taking place amongst the pots and pans by *teams* of exuberant *hipster wannabes*.

Sides ranged from flabby, flat, tasteless *Sautéed Broccoli* to *how you say* . . . rotten *Baked Potatoes*. Our "team" seemed particularly perplexed that diners possessed absolutely no desire in having their left-over potatoes wrapped to go. Perhaps, just perhaps, our *team* placed speed over attentiveness to detail subsequently confusing the *team* into believing the potatoes were also to be served *char-grilled* or *blackened* and not simply potatoes riddled with rotten patches. The *Grilled Asparagus* was a hit with the entire table with diners casting aside their blackened bits of steak and potato to greedily enjoy what essentially became the main course.

Our *team* suggested we might consider skipping dessert when queried as to their particular suggestions. As tempted as we were to sample what could potentially have been *blackened Mixed Berries* served with whipped cream and fruit coulis, we all decided we'd return to Insignia, hopefully long after they overcame their quite understandable growing pains. We didn't have an opportunity to say good night to our entire *team*, however, we strongly believe they were already partying at the bar . . . after all, who can possibly resist that taunting melody . . . UNCE UNCE UNCE!

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Editor's Note: Dennis R. Chase is the current First Vice President of the Suffolk County Bar Association and 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.

Defendent's Right to Counsel (Continued from page 1)

held to the same standard as an attorney's error prejudicing his client or his client's rights at trial and rises to the level of ineffective assistance of counsel.

An interesting note is that following the expiration of the plea offer that was never conveyed in Frye, the defendant was arrested again for driving with a revoked license shortly before his preliminary hearing on the then pending felony. At a hearing on the issue on appeal, the defendant testified that he would have taken the 90-day offer had he been made aware of it before the offer's expiration. This raises the question, if we are engaging in hindsight, as to whether the court would have entertained the 90-day plea and whether the defendant would have ultimately taken an open plea with no commitment on sentence nor any bargained for recommendation from the District Attorney which resulted in the sentencing of the defendant to a three-year term if he had not once again been arrested.

In *Lafler v. Cooper,* No. 10-209, the second of the ground breaking Supreme Court decisions, the defendant was charged with four counts of assault with intent to murder following a chase of the victim by the defendant who fired four rounds with all shots hitting the victim below the waist. The defendant was offered a plea which included a prosecutor's recommendation of four to seven years incarceration. While this plea offer was communicated to the defendant by his attorney, the defendant later rejected the plea alleging his attorney made the claim that since all bullets hit the victim below the waist during the defendant's chase of the victim, the prosecution would be unable to secure a conviction since the charges required proof of intent to murder. That since all of the bullets hit the victim below the waist, that fact would vitiate the element of intent required within murder counts. The defendant relied on his attorney's claim, proceeded to a trial by jury, was convicted and was sentence to an extensive prison term.

The court in *Cooper* based its decision on the fact that the attorney made such a statement which apparently comforted the defendant to the extent that he felt secure in proceeding to trial. Clearly, any attorney should be standing as an unbiased viewer and interpreter of the evidence expected to be unveiled at trial as he discusses the issue of accepting a plea bargain with his client while reminding the client often throughout the attorney client conference that no one can predict what a judge's ruling may be on defense' motion for a trial ordered dismissal and, more importantly, no one can predict what a jury will do.

The unpredictable actions of a jury will continue with them compromising verdicts they shouldn't, their wondering why they haven't heard from the accused, and perhaps their giving that man in blue just a little more credibility just because he's wearing a badge. A large part of any criminal trial beyond the evidence is a defense attorney's attempt at equalizing this playing field, a job which continues through read-backs during deliberation. For any attorney to guarantee or to merely assure his client that a jury will not convict based on his interpretation of circumstantial evidence is clearly ineffective assistance if not couched together with all of the other conclusions 12 lay persons could spin the evidence into.

The significance of *Cooper,* as with *Frye*, is the Supreme Court's holding that defense attorneys are now held to the strict standard of effective assistance during the plea-bargaining stage of a criminal case. Considering that in most jurisdictions plea-bargains comprise over 90 percent of convictions, these Supreme Court cases will be far reaching and of course bring about appeals with defendant's claims that their attorney told them one thing or failed to tell them another. Similar to forms suggested for a client's signature when a defendant is electing not to testify before a Grand Jury on his or her own behalf, signed forms reflecting the substance of an attorney-client plea conference should be considered for use by defense attorneys or that statements be placed on the record reflecting the substance of the conference immediately preceding the plea.

Note: Cornell V. Bouse is a past president of the Nassau County Criminal Courts Bar Association, a current co-chair of the Criminal Law Committee of the Suffolk County Bar Association and currently serves on the Judicial Screening Committee of the Suffolk County Bar Association.

E-Night at Federal Court (Continued from page 1)

rather than separate ones for each district court. In the EDNY the capacity for PDF filings was recently increased from 5.0 MB to 20.0 MB to handle voluminous document filings. As an alternative, Mr. Palmer pointed out, the Individual Practice Rules of Judges allow voluminous non-text exhibits to be submitted to Chambers "the old fashion way" provided they are marked "ORIGINAL" and "COURTESY COPY."

Chief Deputy Clerk Carol McMahon signaled the "lawyer friendly" policy by handing out her calling card, and offering telephone numbers ((631) 712- 6010 or 6011) for lawyer assistance "the old fashion way." The EDNY website provides ready assistance under its "HELP DESK." One of the most common lawyer inquiries seeks the forgotten registration and password. As an alternate, you may communicate with the ECF by e-mail: support@ nyed.uscourts.gov. Finally, there are video tutorials that provide an excellent guide, especially when rushing to meet a midnight deadline.

While E-discovery expert Jim Ryan advised "there is nothing to be afraid of in e-discovery," he cited one case where five of the plaintiff's lawyers were held financially responsible for $8.5 MILLION in costs and attorney fees out of a patent infringement lawsuit. The district court judge also referred the matter for disciplinary action for failing to produce e-mail evidence. Although the judgment was later reversed on appeal, Mr. Ryan pointed out that it provided little solace to the lawyers and their reputation.

A "Litigation Hold" is a simple notice to preserve information stored on computers systems. Despite the lack of any authority in the Federal Rules of Civil Procedure, Mr. Ryan noted that it has proven to be an effective foundation for a contempt proceeding in the later stages of discovery upon the ground that deletion of e-evidence is tantamount to spoliation of evidence, giving rise to contempt proceedings and settlement discussions.

An impressive Cullen and Dykman LLP handbook entitled Electronic Discovery Avoiding Disaster included examples of the consequence that can flow from not preserving e-evidence. Morgan Stanley, Inc., for example, was hit with a jury verdict of $1.5 billion (adverse inference jury instruction), and in a separate case the firm received a $15 million SEC fine for failure to preserve e-evidence.

Cynthia Augello handed out a "quiz" on common computer terms to demonstrate how essential it is for the unsophisticated lawyer to consult "IT" (Information Technology) personnel when addressing the need to preserve or pursue e-evidence.

"E-Night" got excellent ratings from the lawyers as part of their effort to stay in step with the ever-escalating impact of technology on our profession.

The next Federal Courts Committee meeting, "Defending Tax Fraud Cases" is on May 5, 2012 at Courtroom No. 710. Hope to see you there.

Note: Joe Ryan is Chair of the SCBA Federal Court Committee, a federal practitioner, and member of the Merit Selection Panel with offices in Melville, NY. See: JoeRyanLaw.com.

Death Styles of the Rich and Famous (Continued from page 13)

by my executors. The part he acted against me in the late war, which is of public notoriety, will account for my leaving him no more of an estate he endeavored to deprive me of.

The deaths of famous individuals can yield significant questions and lessons about estate planning:

Heath Ledger: The passing of the *Dark Knight Rises* star showcases one of the most common estate planning mistakes. When he died his will had not been updated to include his partner, actress Michelle Williams and their daughter Matilda. Instead his estate was left to his parents and sister. Although the Ledgers indicated that they would "do the right thing" and provide for Matilda there are no assurances that family members will in fact do so and, in any event, there are tax consequences. These situations can lead to endless court battles and contestation of wills. Lesson learned: update your estate plan when major life changes such as births, marriages or divorces occur, and at least every three years.

Jerry Garcia: What a long strange trip it's been. Garcia appointed his third wife as the executor of his will, leading to a long legal battle with an ex-wife. In contrast, Michael Jackson appointed neutral, impartial estate planning experts who administer the estate impartially and are skilled in avoiding conflict and defending against legal challenges. Lesson: update your fiduciary selections to prevent unnecessary disputes, or choose unbiased professionals to be the executors of your estate.

Leona Helmsley: Famously leaving $12 million to her dog Trouble, the court struck the bequest to $2 million, rendering a $10 million windfall to the beneficiaries of her pet trust. She also provided for her dog's burial with her, overlooking the legal prohibition in New York of the burial of humans with animals.

Whether you're on the A-list or D-list, proper estate planning is critical for everyone. Clients should be encouraged to revisit their estate plan and beneficiary designations every few years or following a major life change event (birth, death, divorce) to ensure that their documents are in place and continue to meet their needs.

For more fun facts on celebrities and their wills, go to: http://www.will-sandtrustslawfirms.com/famous-wills

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

Pro Bono Foundation Honors Its Volunteers (Continued from page 3)

as Assistant Managing Director of the Pro Bono Foundation. Cathy, recently retired as Law Secretary to Judge Kitson and later to Judge Bivona, has been utilizing her years of expertise and experience. She meets with applicants for free legal services at the offices of Nassau Suffolk Law Services, to carefully evaluate their financial situation and the complexity of the matrimonial case. Based on her evaluations, the cases are referred to pro bono attorneys, the Modest Means panel, or to the SCBA Referral service in the event that the application has resources.

Raymond B. Lang – he was inspired to participate in the Pro Bono Foreclosure Settlement Project after attending a CLE foreclosure seminar sponsored by the SCBA. Ray, is considered an "expert" on the foreclosure crisis. He has written "white papers" advancing creative solutions to the crisis and has advised legislators regarding foreclosure legislation on both the state and national level. His practice is focused on protecting homeowners who are at risk of losing their homes through foreclosure and we are fortunate to have him on our team.

Barry Lites – he has donated hundreds of hours to the foreclosure project and was featured as the October 2011 Pro Bono Attorney of the Month. Barry's pro bono career started right out of law school serving as pro bono counsel to two non profit agencies. Barry gets great satisfaction from helping people and not only does he work for the Foreclosure Project, but he also handles pro bono matrimonial cases referred by Nassau Suffolk Law Services. Barry truly is an outstanding example of *Pro Bono Publicio*.

James F. Matthews – he is being recognized for his tireless and effective pro bono advocacy in tackling the tragic case of a deserving quadriplegic client. His zealous advocacy and perseverance yielded great result. Through his skill and expertise, Jim was able to get the insurance carrier to provide in-home skilled nursing care for the client. The SCBA is honored and proud to recognize Jim's magnificent contribution to the pro bono effort.

Karen C. Napoliano – she has been amazing in assisting clients in the Pro Bono Foreclosure Settlement Project for two years. Karen was motivated to become involved in the Project by her strong desire to help people overcome stress in their time of need. As she is a strong champion of pro bono work, she has recruited other attorneys to participate in the Project. Karen also devotes time to the Pro Bono Project's Bankruptcy Clinic. We are deeply appreciative her continued commitment to pro bono. She is indeed a role model for attorneys to do their part in providing pro bono service to the community.

Thomas Persichilli – he is an attorney who consistently volunteers his time to help the poor in Suffolk County. He has been honored as Pro Bono Attorney of the Month several times, going back to the mid-1990. He has been a reliable pro bono referral for bankruptcy cases which are screened at Law Services' bimonthly Bankruptcy Clinic. He helps people who have few assets and who really need help. The Pro Bono Project is grateful to have committed attorney like Tom who work tirelessly and has been dedicated for so many years to the cause.

Lewis A. Silverman – he is a Professor of the Family Law Clinic at Touro Law Center, he was selected as Pro Bono Attorney of the Month in April 2011 and received the same accolade in September 1999 and September 2005, primarily for his major role in planning with other local professional organization and overseeing the matrimonial clinics. Given the great number of applicants waiting for pro bono divorce services, the Family Law Clinic provides an important referral source and under Lewis' tutelage, the students handle divorces, custody proceedings, and child support proceedings. He does not take the credit, but wants to thank all of the students who have been enrolling in the Family Law Clinic and to the three people who have served as the Clinic's staff, Marjorie Zuckerman, Danielle Schwager, Louis Sternberg. Lew also expressed his gratitude to Toro Dean Lawrence Raful for his continued support of the project.

Steven Snair – he has devoted 20 hours weekly to the Nassau Suffolk Law Services' Civil Unit, providing legal representation to low income people in eviction proceedings, Section 8 hearings, and advocacy in public housing and landlord/tenant disputes. He was an attorney of the month in January 2012 and encourages other attorneys to volunteer their time in the pro bono effort.

Tarsha C. Smith – she juggles so many personal and professional responsibilities; raising six children, serving as Town Attorney for the Town of Babylon and Special Assistant District Attorney and doing pro bono work representing clients in bankruptcies and assisting in guardianship matters. Tarsha was selected Pro Bono Attorney of the Month in September 2011 and is an outstanding, motivated volunteer.

Barry M. Smolowitz – he is a well respect, highly skilled compassionate attorney who plays a vital role in the legal community helping the unrepresented citizens in Suffolk County. His unique design and implementation of the website portal that allows the SCBA Pro Bono Foreclosure Settlement Conference Project to operate is nothing short of phenomenal. Besides being a full time coordinator of the project, he also handles client consultation and appears at foreclosure conferences. Among his many kudos and honors, he is especially proud of being nominated the Attorney of the Pro Bono Attorney of the Month in March of 2012.

Aida Aguayo von Oiste – she has been honored several times as Pro Bono Attorney of the Month for her outstanding contributions of hundreds of hours on pro bono matrimonial cases. Fluent in Spanish and English, her language skills are especially important to the Pro Bono Project. She is also a frequent volunteer at the Bar Association where she serves on many committees including Fee Disputes. Her pro bono commitment and her unique skills are invaluable not only to her clients, but to the indigent in Suffolk County.

Glenn P. Warmuth – he became an active participate in the Foreclosure Project at the end of 2009. He had experience in representing a number of banks in title fraud cases and this type of litigation provided him with insights into the practices and policies of lenders which helped him negotiate mortgage modifications. He is also an officer of the Academy and an SCBA Director nominee. The Pro Bono Foundation was very pleased to recognize Glenn for his devotion and significant contributions to the success of the foreclosure project.

Margarett Williams – she serves the legal community as an advisor and mentor to junior attorneys, all while representing Suffolk County residents in pro bono matrimonial cases. She is the Assistant Dean of Career Services at Touro Law Center and finds the time to counsel her pro bono clients most of whom are women who have survived abusive relationships. She is a supporter of pro bono and advises her students to participate in pro bono work in order to gain experience while doing gratifying work. For her wisdom and inspiring dedication serving the underserved of our community, Margarett was honored as Pro Bono Attorney of the month in February 2012.

Edward Zinker – he has practiced bankruptcy law since 1966 when he was first admitted to practice in New York State. He has consistently participated in the Pro Bono Project's bi-monthly Bankruptcy Clinics since its inception. For this reason, Ed was honored as Pro Bono Attorney of the Month on more than one occasion and he spends hundreds of hours on pro bono bankruptcy cases in addition to service on the panel, interviewing and screening prospective clients for referral. He says it's a means of fulfilling a civic service to people who need assistance.

When Managing Director Ferris introduced Suffolk's District Administrative Judge C. Randall Hinrichs he spoke about how pro bono volunteers truly exemplify an attorney's professional commitment to provide justice for all. Justice Hinrichs told of his envisioned program for Law Day 2012 and to raising awareness of the vital important of our courts and the need to keep them open and accessible. The program will be held at the John P. Cohalan Court Complex, Central Islip, on Thursday, May 3 from 10:00 a.m. – 2:00 p.m. Bill Ferris also thanked Judge Fern Fisher, Deputy Chief Administrative Judge, also charged with state-wide responsibility for access to justice issues, for taking time from her busy schedule to join us in this wonderful celebration of recognizing the SCBA members who are motivated to do the public good.

Note: Sarah Jane LaCova is the Executive Director of the SCBA and the Pro Bono Foundation

Disability Income Insurance (Continued from page 17)

that result from a partner's disability can be avoided. Furthermore, in combination with the disabled partner's individual Disability Income coverage and OE, a DBO policy can allow the business to continue to generate an income for the healthy partner, while the disabled partner is supported by the benefits from his or her individual DI policy. Any continuing share of the business expenses is reimbursed by the disabled partner's OE policy.

Take the time to consider upgrading your DI coverage today. You know how valuable it is to be fully prepared—in all areas of life. Having the right DI coverage could be vitally important to your economic wellbeing in the future—and help protect one of your most valuable assets: the ability to earn an income by practicing law.

In the case of DI protection, as in your legal work, a little extra planning and research in advance could prove invaluable at a later date. The truth is, successful professionals often need far more complete DI coverage than is provided through their firm's group policy or through association coverage. How does your coverage stack up? To find out, ask a reputable DI agent for a free consultation—specifically to help you compare your present coverage to an individual own-occupation policy for professionals, tailored to suit your individual needs.

1 CDA 2010 Consumer Disability Awareness Survey.
2 Social Security Administration Fact Sheet, January 2009.

Litigating School Expenses (Continued from page 17)

tion to pay those expenses was therefore never triggered. The Appellate Division Second Department stated that the defendant's contention that the plaintiff should be directed to pay certain expenses for private school for the parties' older child and certain summer camp expenses is without merit. The judgment of divorce required the parties to mutually confer and decide upon all important issues related to the children's health, education and welfare, and because the parties did not mutually confer and decide on summer camp or private school, the father's obligation to pay said expense was not triggered.

The matter of *Susan A. v. Louis C.,* 32 A.D.3d 682, 821 N.Y.S.2d 687 (2006) was an appeal from Erie County Family Court. In *Louis C*, the parties, although never married, signed a custody and child support agreement which directed that the father would be responsible for all of the daughter's educational expenses through high school. The ability of respondent father to pay child support was not an issue during the hearing. After the hearing, testimony was that the father and daughter did not have a close relationship. Further testimony was that the respondent declined to become involved in the high school selection process even though invited by the mother. Respondent father also admitted that he did not do any independent investigation of the various area high schools prior to withholding his consent to the enrollment of his daughter at the high school his daughter wished to attend. The Appellate Division Second Department held that it was unreasonable for the respondent father to withhold consent for the parties' daughter to enroll in his daughters chosen high school and respondent was directed to pay 100 percent of the high school educational expenses as was set forth in the parties' custody and child support agreement.

In *Durso v. Durso*, 68 A.D.3d 1107, 893 N.Y.S.2d 81 (2009) the parties were divorced in 2007. The petitioner mother then filed a modification petition in Family Court seeking that the father pay a portion of their daughter's parochial high school. After hearing, the Support Magistrate directed the father to pay 50 percent of the daughter's tuition. On objection, the Family Court granted the father's application to vacate the Support Magistrates Order that the father pay towards his daughter's high school tuition. On appeal, the Appellate Division Second Department held that "the evidence presented at the hearing before the Support Magistrate established that the father had ample financial resources, far exceeding those of the mother, enabling him to contribute to the cost of Concetta's parochial high school tuition without impairing his ability to support himself or maintain his own household (see *Gavrin v. Heymann*, 27 A.D.3d 693, 812 N.Y.S.2d 139, *Frei v. Pearson*, 244 A.D.2d 454, 456, 664 N.Y.S.2d 349). Moreover, the fact that Concetta enrolled in the parochial high school as a freshman, with the father's approval and with initial financial support from him, and performed well at that school, warrants a finding that it was in her best interests to remain at that school, rather than having her academic and social life disrupted by a transfer to a different high school (see *Valente v. Valente*, 114 A.D.2d 951, 495 N.Y.S.2d 215)."

Note: John E. Raimondi has been employed as a Family Court Magistrate since 1999. He was previously employed with the Suffolk County Legal Aid Society and was also a partner in Raimondi & Raimondi, P.C. He is a former officer of the Suffolk Academy of law, a frequent lecturer at the Suffolk County Bar Association, an Advisory Committee Member, a program coordinator with the Suffolk Academy of Law and an adjunct professor at Briarcliffe College.

Stemming Home Foreclosures *(Continued from page 19)*

as possible from defaulted and delinquent loans to shore up their balance sheets. The Troubled Asset Relief Program (TARP) was a temporary measure. The fact is that on one hand government regulators are forcing the banks to raise capital through foreclosure while on the other they are trying to shore up the housing market through relief programs like the Making Homes Affordable Program (HAMP) and its cousins. These are competing and irreconcilably opposing strategies because the former encourages acceleration and the latter seeks to mitigate acceleration of the foreclosure process.

Besides these competing policies, the regulatory agencies, Federal Reserve, FDIC, OCC, OTS, SEC, the rating agencies, the FASB, the GSEs, and Congress's nonexistent oversight were contributing factors to the crisis as well.

The regulators want to eliminate all the risk from residential real estate the banks are carrying as quickly as possible. This is very admirable. However, moving quickly at this juncture would be imprudent and does nothing more than exacerbate the problem. Forcing the banks to foreclose and recapture capital will only accomplish shifting the risk and the long-term financial burden from the banks to another sector of the economy.

Any solution to the problem must create incentives for debtors to continue paying their mortgages and for creditors to temporarily restructure residential mortgage debt until the values of the underlying collateral improve. Current policy promotes neither.

The downward spiral

Let us assume that every borrower who defaults on their mortgage is foreclosed upon and/or vacates their home voluntarily. The displaced families do not disappear and neither does the real estate. They still need someplace to live and someone or some entity will own those properties at greatly reduced values. Will those displaced homeowners be able to go out and buy these cheap homes? How will they get financing? Where will they get the down-payment? The logical conclusion must be that under the current scenario America will turn into a nation of home-renters rather than home-owners.

Let us also assume that the banks become the new owners of the homes pursuant to the mass foreclosures. The banks will have to sell those homes or maintain them as rentals. I believe it is also fair to assume that the foreclosing banks have no interest in becoming giant real estate management companies for one to four family homes as one to four family homes are the least efficient business model for generating rental income from real estate. We can also assume that the net present value of the foreclosed homes will continue to drop due to lack of capital improvement.

The logical conclusion is that mass foreclosure will cause a downward spiral in the real estate market and that the current collapse will continue until equilibrium is reached among three main factors; sustainable ownership based on responsible loan underwriting, the supply of affordable real estate, and stability in housing prices.

Can the market correct itself? And if so, how long will it take?

One logical conclusion is that the longer the process takes the worse the housing market will become. For the downward spiral to stop, the inventory of homes-for-sale must stop increasing. Supply and demand must reach equilibrium for housing prices to stabilize.[V] Until prices stabilize the main incentive for people to purchase will not materialize. The incentive likewise diminishes for people to keep paying their mortgages on homes that continue to decrease in value, further increasing the likelihood of future defaults.

Irrespective of whether the banks end up owning all this property through foreclosure or whether we continue on the current course of short-term solutions whereby homeowners are allowed to stay in possession of their grossly underwater homes, the net-net result is the same; a dearth of homes that are underwater in value and a corresponding number of homeowners who cannot afford their mortgages or simply have no incentive to continue paying. The ultimate solution must incentivize both homeowners and banks to make and accept payments respectively until the housing market stabilizes.

A modest proposal

Sustainable long-term ownership depends upon stabilizing real estate values. To accomplish this, the first step must be to separate those who cannot now and will not likely be able to afford their homes (at any cost) in the near future. The method is to calculate the net present value of a person's home and then calculate whether they can afford to make a reasonable monthly payment based on a reasonable, 31 percent debt to income ratio on principal, interest, insurance and taxes (PITI) of the home's current adjusted value or NPV. There will be a gap in between the outstanding mortgage balance and the home's current net present value. Let's call this the *gap amount.*

The issue then is to create a test that separates those who can maintain reasonable PITI payments on their home's NPV and those who cannot. For those in the first group, who cannot, surrender of the home or foreclosure is the only option. Determining who is in each group is relatively easy. The more difficult issue is determining, among the second group, how the homeowner and the lender agree to repay the *gap amount* and who bears the financial burden of amortizing that cost.

If the *gap amount* is amortized over a short period the cost to both homeowners and to banks is unreasonable to the former and unabsorbable to the latter. Regulatory capital rules and the need for capital recovery from underperforming assets for lending institutions are paramount. Further erosion to the equity base for residential property will only cause more stress to the banking system.[VI] Likewise, falling real estate values will disincentivize people from participating in the real estate market as homeowners. It will simply become a bad long-term investment.

For those who will be able to make a payment based on a 31 percent DTI based on their home's NPV, I make the following modest proposal: Treat the *gap amount* like a grant to both the homeowner and the bank. Make the grant period 10 years. Divide the *gap amount* by 10 years and allow the bank to write down the asset over the 10 year period while still retaining a security interest in the *gap amount*. If the property's value recovers its value over the grant period the bank would be permitted to account for the collateral's increased value as an asset at its updated NPV.

The grant mechanism would make the *gap amount* a temporary principal reduction without forcing the bank to take permanent and immediate charges against regulatory capital as it would at a declaration of default/commencement of foreclosure. However, the bank is only allowed to treat the gap portion as an asset to the extent that it reflects the property's NPV. For accounting purposes, the gap portion may never be valued at an amount that exceeds the original amount. The bank may book the value of its security interest in the gap amount as an asset at equal 10 percent increases over the 10-year period. The homeowner would also be restricted from mining any equity from the home until the bank is made whole on the gap amount.

There are several incentives for homeowners to continue paying their mortgages in this scenario. First, they can stay in their homes. Second, the homeowner will view the 10 year grant period as an opportunity to recover some, if not all, of their lost equity. Third, the mortgage now reflects a payment at prevailing rates based on the adjusted NPV so the homeowner does not feel that they are continually sinking money into a wasting asset.

The last three and a half years has not shown signs of lasting economic recovery. Nor has there been any indication of a stabilizing trend in real estate values. The foreclosure crisis began as a symptom of both the industry's willingness to lend people more than they could afford to pay, and by borrowers taking loans they should have known they could not afford. The banking crisis is a symptom of lenders and homeowners being unable to recover their investments from a real estate market that has lost a large share of its value. The former are underwater on the asset value, the latter on the value of the underlying collateral. Both parties to these transactions are in the same boat.

It is unreasonable and irresponsible to believe that the real estate market and the capital markets will find equilibrium without both lenders and borrowers sharing both the responsibility and the burden of mitigating their respective losses. The solution to the foreclosure crisis depends on the stabilization of real estate values and a pool of homeowners who are financially capable of, and willing to own and maintain their homes. To accomplish this neither side should be favored or absolved.

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.

1 *Bite the Bullet: Waiting and Hoping Won't Cure What Ails Housing*, American Banker, Barbara Rehm, April 7, 2011.

2 Each course of action results in an impairment event for the mortgagee. Foreclosure and short sale result in an immediate recognition of loss at a sum certain. A modification that involves a concession to the borrower also results in an impairment event, however, the lender hopes to retain a long-term performing asset at a reduced cost basis.

3 Servicers are encouraged to use the authority that they have under the governing securitization documents to take appropriate steps when an increased risk of default is identified, including: proactively identifying borrowers at heightened risk of delinquency or default, such as those with impending interest rate resets; contacting borrowers to assess their ability to repay; assessing whether there is a reasonable basis to conclude that default is "reasonably foreseeable"; and exploring, where appropriate, a loss mitigation strategy that avoids foreclosure or other actions that result in a loss of homeownership. FDIC FIL S*tatement on Loss Mitigation Strategies for Servicers of Residential Mortgages*, April ,2008.

4 Residential Mortgage MIS that generate performance probabilities exist and are being used by servicers. The sophisticated systems are designed and developed internally by servicers that purchase *Agency, Sub-Prime* and *Alt-A* paper at a discount and make their money on the spread between the portfolio purchase price and recovery performance. The analytic algorithms that calculate expected recoveries from these databases do not just exist in some theoretical world. Nor are they designed to just to please regulators. These systems are designed to have highly accurate predictive modeling characteristics that are expected to produce real world profits. Once a loan's predicted recovery value is ascertained, it is up to the servicer to maximize the loan's recovery potential. Theses very same systems can be used to ascertain NPV's and other asset values.\

5 Prior to the crisis, and perhaps the root of the crisis, was the availability of credit to borrowers who could not, prior to the availability of high LTV loans and lax underwriting standards, qualify for home mortgages. The demand for housing did not really increase organically. The increased demand was synthetic in that credit became available to people who always wanted to own a home but could not meet responsible underwriting standards based on verifiable income, verifiable downpayments and adequate credit scores.

6 The institutional decision-making process is governed by careful consideration of short-term and long-term needs. Short-term needs could be described as the institution's desire to rid itself of non-performing assets and to raise capital. Long-term needs are described as the institution's desire to keep borrowers with stronger credit and repayment capabilities within their portfolio. The process then requires an assessment of the capital strength of the institution combined with the probability and amount of recovery in its portfolios.

CORRECTION

Judge Peter H. Mayer's name was listed incorrectly in the column Bench Briefs, in the March 2012 edition of *The Suffolk Lawyer.* We regret the error.

AMERICAN PERSPECTIVES

Out with the Old and in with the New

The United States Constitution

By Justin Giordano

The United States Constitution is the "oldest written constitution still in force in the world," to quote Justice Ruth Bader-Ginsberg in her interview with the Egyptian television network Al-Hayat TV, which aired on January 30, 2012.

Justice Bader-Ginsberg was very correct in that statement and on its face the statement taken in isolation would have been considered a factual declaration. Such a declaration should be expected from a learned member of the institution that since its inception has been charged with the interpretation of the United States Constitution, namely the Supreme Court of the United States of America.

What was wholly unexpected was what was stated by the totality of Justice Bader-Ginsberg's interview. In order to provide full context Justice Bader-Ginsberg's interview consisted of these three major components, which contained the following:

> "I can't speak about what the Egyptian experience should be, because I'm operating under a rather old constitution. The United States, in comparison to Egypt, is a very new nation, and yet we have the oldest written constitution still in force in the world.

Let me say first that a constitution, as important as it is, will mean nothing unless the people are yearning for liberty and freedom. If the people don't care, then the best constitution in the world won't make any difference. So the spirit of liberty has to be in the population, and then the constitution - first, it should safeguard basic fundamental human rights, like our First Amendment, the right to speak freely, and to publish freely, without the government as a censor.

Robert M. Harper

You should certainly be aided by all the constitution-writing that has gone on since the end of World War II. I would not look to the US constitution if I were drafting a constitution in the year 2012. I might look at the constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, and had an independent judiciary... It really is, I think, a great piece of work that was created. Much more recent than the US constitution is Canada's Charter of Rights and Freedoms. It dates from 1982. You would almost certainly look at the European Convention on Human Rights. Yes, why not take advantage of what there is elsewhere in the world?

The analysis and contradictions

Clearly Justice Bader-Ginsberg was right on point in underscoring that a constitution per se no matter how well written or constructed has little meaning if the "spirit of liberty" is not in the population. She was equally on target in stating that a sound constitution "should safeguard basic fundamental human rights, like our (the U.S. Constitution) First Amendment, the right to speak freely, and to publish freely, without the government as a censor."

However in making her next statement, she essentially obliterates the points that she previously makes in her interview, as quoted above. More specifically Justice Bader-Ginsberg recommends to the Egyptians that they rely on much more recent constitutions and other similar documents for guidance and inspiration. She cites the South African Constitution, the Canadian Charter of Rights and Freedoms, and the European Convention on Human Rights.

Justice Bader-Ginsberg's affirmation naturally beckons the following question - are the documents just cited an improvement on the U.S. Constitution? Even Justice Ginsberg's own words make amply apparent that these documents are inspired in great part by the First Amendment of the constitution. Furthermore a reading of these documents shows that either in part or in their entirety the documents in question were inspired by and founded on the essential principles encapsulated within the U.S. Constitution. For example, the Canadian Charter of Rights and Freedoms adopted in 1982 is that country's version of our constitution. It sought to substantially emulate the principles enshrined in its American counterpart. However, as is more than often the case, imitations of any great work seldom improves on the original, be it a great work of art or, as in the case at hand, a great document. In constructing The Canadian Charter of Rights and Freedoms the Canadian framers in their attempt to protect their society's most vulnerable members in essence enabled through the chart their courts to invade many aspects of free speech that are typically protected under the U.S. Constitution's First Amendment; .in other words opening the door to the "slippery slope" syndrome.

The other two documents that Justice Bader-Ginsberg cited also evidence serious shortcomings with regard to individual freedoms and freedom of expression, even more so than the Canadian Charter of Rights and Freedoms. For example, the South African Constitution contains a clause protecting free expression. Unlike the First Amendment's right of free speech, the South African constitution states that the right of free expression does not include "propaganda for war" or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm**."** On its face these declarations are lofty and well intentioned. However, in practicality these constitute vague exceptions, which go well beyond the limited "incitement of imminent violence" exception to the First Amendment that the U.S. Supreme Court has traditionally recognized and enforced. Instead, these exceptions by virtue of their vagueness intrude into the very areas of potentially controversial speech that the American Constitution vehemently protects and promotes as one of our most cherished fundamental rights.

The European Convention on Human Rights fares no better when compared to the U.S. Constitution. In fact said European Convention on Human Rights mirrors the South African constitution in that it also contains basic rights. However, it also features restrictions on the exercise of such rights and these are even more far-reaching and broad-based than the restrictions found in the South African Constitution. Evidence of this can be found in "Article 10" of said constitution. Article 10 states that "Everyone has the right to freedom of expression". However once again a caveat follows in that the aforementioned right can be restricted for reasons such as "the protection of health or morals" and "the protection of the reputation or rights of others." This language does not simply imply that one can sue for defamation of character but rather this constitutes a comprehensive loophole that can enable the bureaucracy to impose unpredictable and potentially highly restrictive limitations on individual rights.

It certainly isn't a secret that every Supreme Court justice is required, under Article VI of the United States Constitution, to take and an oath or affirm that he or she will "support this Constitution." This includes all of the privileged few who have ever served as United States Supreme Court Justices since the Supreme Court came into existence. Justice Bader-Ginsberg and her eight colleagues currently sitting on the high court were not exempt from taking this oath. Consequently, an argument could be made that Justice Ruth Bader Ginsburg broke, or at the very least, tarnished her commitment by making the comments she did in front of a foreign audience, denigrating the very document she is sworn to support. However, whether a violation of the oath has occurred is not germane for the purposes of this analysis but nonetheless it's worth noting in passing.

What is most puzzling is that a sitting United States Supreme Court Justice could not or would not engage an analysis equivalent to the one undertaken here prior to reaching the conclusion that Justice Ginsberg expressed in her Al-Hayat TV interview, namely advising a foreign entity drafting its new constitution to look elsewhere rather than the American Constitution for guidance and direction. Just as importantly and lest one forgets the U.S. Constitution is a document that has stood the test of time and that in itself is no small feat. In addition, through its incorporated amendment process the Constitution has been able to adjust and reflect the changing needs of the people it serves while at the same time safeguarding its fundamental principles, most prominent among them being individual rights. Perhaps the learned justice might re-consider her advice to the Egyptian people.

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

LETTER TO THE EDITOR

Dear Editor,

I read with great interest the article submitted by Allison C. Shields entitled the "Do's and Don'ts of Email Marketing" and found the article to be informative and very instructional, with this caveat: When preparing an Email newsletter attorneys must be mindful of 7.1(f) of the Rules of Professional Conduct, which require that the subject line of the Email **must** contain the phrase "ATTORNEY ADVERTISING" in caps. Failure to do so will run an attorney afoul of the Rules and could present a grievable offense.

Barry M. Smolowitz, Esq.

The writer is a member of the Grievance Committee for the 10th Judicial District.

VEHICLE AND TRAFFIC LAW

Interstate Compact Regarding Driver Licenses

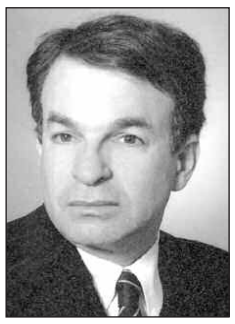
By David A. Mansfield

The Driver License Compact, found at New York State Vehicle and Traffic Law §516, provides for reciprocal actions between states regarding certain convictions for driving related offenses.

A "state" is §516(2)(a) defined as a possession of the United States, District of Columbia, Puerto Rico or a province of Canada. This is especially important in New York State because a conviction for any traffic offense by any New State licensed driver in the provinces of Ontario or Quebec will be reported to New York State appearing in your client's abstract with the points and other sanctions to be applied. Thus, any points accumulated in Ontario and Quebec will count toward a mandatory revocation for three speeding violations committed within an 18 month period under §510 (2) (IV) persistent violation of the Vehicle & Traffic Law §510(3) (d). It will result in a suspension or revocation of a New York State driver's license. The points will be used to calculate the mandatory Driver Responsibility Assessment fee under §1199 and §503(4).

The requirements to report certain convictions are found in Article III. It requires that the jurisdiction or the state where the conviction was had to report to the home state of licensing.

Article IV provides that New York State will honor an out of state revocation of driving privileges in certain instances if the violation was committed in a state belonging to the Compact. The listed offenses under Article IV (a) (1) are manslaughter, and negligent homicide resulting from the operation of a motor vehicle. Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug on the influence of any drug to a degree when driving a motor vehicle and any felony which involved the use of a motor vehicle, failure to stop and render aid in the event of a motor vehicle accident resulting in the death or personal injury of another which would be the same as leaving the scene of a personal injury accident without reporting § 600(2).



David A. Mansfield

Article IV (b) gives the states leeway to decide how to treat the conviction if the offense is not exactly the same as the statutory language in the home jurisdiction.

Article V governs the applications for a new license providing that a member of the compact will not issue a new driver license any jurisdiction as a signatory to the compact and not issue a license unless the privileges have been restored in the home state of licensing. Complimentary legislation exists in approximately 21 jurisdictions including the District of Columbia and numerous states.

The National Driver Registry 23 CFR Part §1327 will prevent any jurisdiction from issuing a license if it reports that the applicant's privileges have been withdrawn in any state or other jurisdiction. The National Driver Registry is a federal law and is not part of the Compact.

As a general rule, your client can be sure that if their privilege or license is suspended and they make application in a new jurisdiction, the National Driver Registry (NDR) will ensure that they will not be approved until the underlying issue has been resolved. These reciprocity issues arise most frequently in representing clients dealing with §1192 offenses for alcohol and drug related driving offenses. The safest advice that you can give to any client is that if convicted of a DWI offense in New York State on an out of state license it is very likely that the home licensing jurisdiction will eventually impose a suspension or revocation of their home state driver's license. Your client may be able be to satisfy in the home state of licensing or normally after all requirements are met in the State of New York the home state of licensing may accept proof of rehabilitation.

When representing out of state licensed clients for non- DWI offenses, you will want to consult the website of home state licensing agency to determine the consequences.

§516-a authorizes a driver license compact agreement with the provinces of Canada.

§ 516-b specifies offenses, in addition to more serious convictions, such as; speeding offenses, disobeying traffic control device, failing to yield right of way involving direction of traffic overtaking or passing any offense of failure to safety or child restraint device, reckless driving and passing a stopped school bus.

Only certain out of state offenses committed while operating a commercial motor vehicle such as speeding more than 15 miles per hour over the speed limit. Serious traffic violations while operating a commercial motor vehicle as defined in §510(4) and DWI will appear on New York State Driving Abstracts.

§517 is the interstate contact guaranteeing appearance.

This simply put means that failure to answer or pay fines assessed in another jurisdiction will result in the home jurisdiction being notified and to a suspension will be imposed as well as a suspension in the jurisdiction where the violation occurred and in the home jurisdiction of licensing as well until resolved.

I stand corrected on the issue of the discretionary exception of "compelling circumstances for Penal Law Article §220-§221 driver license suspensions under Vehicle & Traffic Law §510 which was made permanent, but not repealed ,based upon my recent telephone conversation with Ida Traschen, Esq. of DMV Counsel's Office. DMV counsel stated that there is no departmental memo because the law did not change. A press release was misunderstood. The law was made permanent but no other changes were made as it was renumbered as§510(2) (b) (vi).

Defense counsel should request that the court grant the discretionary compelling circumstances exception at time of sentencing for any misdemeanor or felony drug conviction under these two articles.

Your client should be informed that if the court grants the relief, it is up to the Department of Motor Vehicles to honor the court's decision not to suspend. Should this interpretation be incorrect, DMV in Albany will impose the suspension notwithstanding judicial intervention to grant an exception.

Should the request for relief be denied, your client may be eligible for a restricted-use license VTL§530 and 15 NYCRR Part §135.7.

I'd like to acknowledge Daniel Maksym, Senior Court Clerk, for bringing this subject matter to my attention for further research.

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

Women's History Month *(Continued from page 1)*

who want to make a difference. She is the oldest of nine children and was raised in a traditional family where only male children were expected to receive an advanced education and pursue careers outside of the home. But, Justice England was blessed with a sharp intellect and indomitable determination and knew that education would open doors to an interesting and fulfilling career. An interesting career she did have; she was the first woman elected president of the Suffolk County Bar Association, and the first woman to sit on the Family Court and the Supreme Court Bench. In response to a prohibition by a neighboring bar association, Catherine England, along with the Hon. Beatrice S. Burstein, Hon. Ruth C. Balkan, and Hon. Marilyn Friedenberg, among others, formed the Nassau/Suffolk Women's Bar Association. Justice England was certainly one of the early trailblazers, actively involved in numerous committees and professional associations, her accomplishments are well documented and it is most fitting that we wish her well in her retiring years.

Justice Mary M. Werner's life and career has been an amazing journey. The mother of seven, she returned to college at 40, graduating Dowling College and St. John's University School of Law, she began her legal career as an Assistant District Attorney in Suffolk County. Justice Werner was appointed to the NYS Supreme Court and subsequently elected to that bench in 1991. In 1994, she was appointed District Administrative Judge of Suffolk County, the first woman to hold that position, where she served for five years. She implemented the first Drug Treatment Courts in both the District and Family Court, with the mission of providing treatment and rehabilitation. With the support of SC Women in the Courts Committee, Justice Werner was the driving force behind the establishment of the Children's Center at the Cohalan Court Complex.

Justice Werner is a founding member and past president of the Suffolk County Women's Bar Association, a member of the New York State Bar Association, a past director of the Suffolk County Bar Association, a lecturer of the Academy of Law, a former member of NYS Family Violence Task Force, has served as member of the Boards of the Cleary School for the Deaf and St. John's University School of Law Alumni Association and an active participant in the Osher Lifelong Learning Institute at Stony Brook University. Justice Werner, the recipient of numerous awards and accolades during her career and her professional contributions to the legal system, has had a tremendous impact on the lives of attorneys, court personnel, litigants and children in Suffolk County. Her professionalism and humanitarian achievements stand as an inspiration for future generations of women.

Valerie S. Manzo, Esq. As case worker for the Suffolk County Child Protective Services, she attended the evening division of St. John's University School of Law and following her graduation in 1979, was appointed Suffolk County Assistant District Attorney. In 1983 she became an

Honoree Justice Catherine T. England, left, and her daughter SCBA Treasurer Donna England at the ceremony.

Honorees Justice Mary M. Werner and Valerie S. Manzo at the Suffolk County Judicial Committee on Women in the Courts celebration.

Assistant Town Attorney for Smithtown and government relations director of lobbying and franchising activities for Cablevision from 1984-1991. A solo practitioner since 1983, she concentrates her practice in elder law, estate planning/probate, guardianship, real estate and zoning. She has twice served as co-chair of our Bar Association's Elder Law Committee and is active in state and local elder law bar associations. She has chaired many Women's Bar committees, including Real Property, Women in Law and Solo and Small Firm Practitioner. In 1999, she was appointed Counsel to the Board of Zoning Appeals of the Town of Smithtown.

In 1984, Valerie was elected president of the Suffolk County Women's Bar Association where she is still very active. She is also active in the New York State Women's Bar Association (WBASNY). She is admitted to practice in New York State and Federal Courts as well as the U.S. Supreme Court.

In addition to her legal work, Valerie is Vice-President and Trustee for the Middle Country Public Library Foundation, a national model which has implemented the first Family Place Library, the Miller Business Resource Center, the National Explorium and the Women's Expo, an annual event featuring women vendors. She also serves as Treasurer of the Board of Director of the Ocean Beach Resort, Ltd. In Montauk and is a long-standing member of the Smithtown School District Industry Advisory Board. In 2011 she joined with dozens of other women to create "Ready, Set, Lead!" an event featuring leaders of all political parties. This led to (PAWL), an organization dedicated to promoting women leaders in law, politics, government, private industry, medicine and all walks of life.

Note: Jane LaCova is the Executive Director of SCBA. The biographical information above was excerpted from the program as prepared by the Committee on Women in the Courts.

Bench Briefs (Continued from page 4)

motion to renew, the defendant submitted hospital records, which were obtained by counsel after the issuance of the June 23, 2011 order. Those records contained a typewritten entry in relevant part as follows: "victim of MVA driver, traveling appros (sic) 60 mph, struck passenger side front." The defendant attempted to have the court consider this statement in deciding the motion based upon the premise that "a hearsay entry in a hospital record as to the happening of an injury is admissible at trial, even if not germane to diagnosis or treatment, if the entry is inconsistent with a position taken by a par at trial." Here, the court found that the hospital record was precluded from admission as evidence because it was unclear whether the plaintiff was the source of the information proffered. Consequently, the court would not consider the statement, and the motion to renew was denied.

Honorable Joseph C. Pastoressa

Motion to change venue granted; convenience of material witnesses better served by the change; convenience of local government officials such as police officers is of paramount importance because they should not be kept from their duties unnecessarily.

In *Joanna Barbagallo, as Administrix of the Estate of Linda Murphy, deceased, Joanna Barbagallo, as Administrix of the Estate of Sean T. Murphy, deceased, Hannah Murphy, an Infant under the age of 14 years, by her Guardian of the person, Joanna Barbagallo, and Andrew Murphy, an Infant under the age of 14 years, by his guardian of the person, Joanna Barbagallo v. William Grant Lemaster, D.O., Irene Hollander Margolis, LSCW, John T. Mather Memorial Hospital of Port Jefferson, New York, Inc., and Outpatient Behavioral Health Services, Irene Hollander Margolis v. County of Suffolk, Suffolk Police Department,* Index No.: 45138/10, decided on April 26, 2011, the court granted the third-party defendant's motion for an order pursuant to CPLR §§504 and 510(3) changing the place of trial from the County of Richmond to the County of Suffolk. Initially, the court noted that although CPLR §504(1) requires an action brought against a county to be commenced in said county, such does not apply to a third party action commenced against a county as in the case at bar. Rather, the municipality's sole recourse is to seek a discretionary change of venue under CPLR §510(2) or (3). Here, the court found that the third-party defendant demonstrated that the convenience of material witnesses would be better served by the change. Further, here, the convenience of local government officials such as police officers was of paramount importance because the court noted that they should not be kept from their duties unnecessarily.

Motion to dismiss granted; any action commenced by or against an estate without a duly appointed executor or administrator must be dismissed as a matter of law.

In *Diane Jakubowski, as the proposed executrix of the Estate of Jan Jakubowski, and Diane Jakubowski, individually v. Huntington Hospital, Nick Fitterman, M.D., Cristina Pruzan, M.D., Hilaire Farm Skilled Living and Rehabilitation Center and Huntington Village Rehabilitation and Nursing,* Index No.: 43970/10, decided on January 31, 2012, the court granted the motion to dismiss the action pursuant to CPLR §3211(a)(3) on the basis that the plaintiff did not have capacity to sue when the action was commenced. In granting the motion, the court noted that capacity to sue may depend on a litigant's status or authority to sue. A litigant's lack of capacity to sue was an affirmative defense and provided a basis for dismissal of the action. In granting the motion to dismiss, the court reasoned that a proposed administrator lacks the capacity to bring a wrongful death action since the appointment of a qualified administrator is an essential element of the right to bring a suit for wrongful death. Here, when the action was commenced on December 3, 2010, Diane Jakubowski had not yet been appointed executrix of her husband's estate. Any action commenced by or against an estate without a duly appointed executor or administrator must be dismissed as a matter of law. As such the motion to dismiss was granted.

Honorable Thomas J. Whelan

Cross-motion for an order dismissing the claims against the deceased plaintiff granted; there was a failure to substitute a duly appointed representative of his estate within a reasonable time.

In *Salvatore Buffa, Salvatore Buffa, Jr. and Jack Buffa v. Busch Bros. Cesspool, Sewer & Drain Corp., Eric J. Witthohn and Does 1-10,* Index No.: 19230/09 decided on October 6, 2011, the court granted the cross-motion by the defendants for an order dismissing the claims of plaintiff, Jack Buffa, deceased, pursuant to CPLR §1021 by reason of a failure to substitute a duly appointed personal representative of his estate. The court noted that in May of 2009, the plaintiffs commenced this action to recover damages for the personal injuries that they allegedly sustained in a motor vehicle accident that occurred on December 17, 2008. In June of 2010, plaintiff Jack Buffa died. As of the date of the court's decision, no personal representation of his estate had been substituted for the late plaintiff. In granting the motion, the court pointed out that CPLR §1021 provides relief to a party whose adversary has died but no substitution of a personal representative of the state of said deceased party has been made within reasonable time.

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

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

Where Does the Time Go? (Continued from page 16)

The "Don't Do" list

One of the reasons many lawyers get discouraged and feel overwhelmed is that they keep one long, unrealistic 'to do' list. The list is so long and cumbersome that there is simply no way that they can accomplish all of the tasks on that list in a whole month, let alone a week or a single day. They continue to carry the same things on their 'to do' list day after day (and keep adding more tasks, so the list grows, rather than shrinking). There's no sense of accomplishment, because they see the same tasks carried from one day to the next, over and over.

Create a 'Don't Do' list in which you eliminate unnecessary items or activities that don't serve you or that can be done by someone else. You may decide that you will no longer answer your own phone so that you won't be distracted constantly. Even if you're a solo, there are outsourced alternatives.

Staff interruptions

Crenshaw points out that often staff will take up additional time because they aren't sure when they will have your attention again. If you're always too busy to talk to them or you're out of the office a lot, it may appear that your staff is making things up or trying to remember what to talk to you about. They may seem unprepared. That is because they're not sure when they might have another chance to talk to you. Once they have your attention, they are afraid to let it go, because it is so difficult to get your attention in the first place.

You must give staff a clear "when" that they can count on:

- Recurring meetings with those who are accountable to you or have regular questions
- Clear expectations of availability/ office hours

In other words, it isn't unavailability that causes the interruptions, it is uncertainty.

In the same way that you have to train your clients and set expectations with them, you need to train your employees and set expectations, not only for their level of performance, but also for your availability. When they know that they will have access to you at a specific time, they are more likely to hold questions. And they may actually learn how to resolve some issues on their own.

Technology interruptions

Take control of your technology – very few of the following interruptions: telephone calls, the cell phone, email alerts, direct messages – are actual emergencies. Schedule times for technology. Just because you have a cell phone doesn't mean you should always be available. It doesn't serve you or your clients (with very limited exceptions).

Remember: switching damages relationships. If you take a client's call when you're distracted, you may be worse off than you would have been just allowing the client to leave a message or get help from someone else in your office.

Don't let time get away from you - make sure you take control of what you focus on during the day, rather than letting it take control of you. And stop fooling yourself thinking that you're multitasking and that you're getting a lot done. Studies have proven that it just isn't true.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers management, productivity, business development and marketing consulting services to law firms. She is also the co-author of the recently released book, LinkedIn in One Hour for Lawyers, published by the American Bar Association's Law Practice Management Section. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com.

Social Media and the Legal Industry (Continued from page 16)

in Brooklyn.[5] The teenager updated his Facebook proof from a computer at his father's house in Harlem, which exonerated him from a potential conviction.

Attorneys also use social media sites to establish online relationships with the intention of potentially creating offline relationships for purposes of networking, generating and broadening their client bases, and learning more about either relevant practice areas to their current practice(s) or new practice areas for which they may want to begin practicing. This gives attorneys the ability to connect with individuals for whom they may never have met before nor gotten the chance to meet in the future without the use of online networking social media site.

While it seems that the positive reasons for attorneys to use social media websites outweigh the negatives, there is one problem that may arise when attorneys or any individuals use these sites. At the instant that an individual signs up for an online networking site, their visibility increases dramatically. While the use of social media sites for the purpose of advertising the individual attorney or law firm may lead to a positive increase in visibility, it could detrimentally affect the individual attorney or firm's reputation if postings are made by outside individuals with a negative connotation. Attorneys and firms must be careful in the access that they give outside individuals to their sites in terms of their ability to post information, pictures, and augment the message that the attorney's are attempting to convey through the specific website.

It is clear that the social media revolution that is presently taking place will only continue into the future and adapt with new websites and ideas that are yet to have been put in place. It will be important for attorneys to continue to use social media sites to their advantage and adapt with these changes.

Note: Scott Richman is a 2L at Touro Law Center in Central Islip, N.Y. He would like to give special thanks to his family, his roommate, and everyone who has supported him throughout his law school experience.

1 Jeff Bullas, *20 Stunning Social Media Statistics Plus Infographic*, JeffBullas Blog (Mar. 24, 2012, 3:00PM), http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics/.
2 *Id.*
3 Zachary Sniderman, *How Lawyers May Use Social Media in the Future*, Mashable Business, http://mashable.com/2010/10/25/lawyers-future-social-media/.
4 Sara Yin, *Facebook Complicates Jury Screening*, PCMag, http://www.pcmag.com/article2/0,2817,2380747,00.asp.
5 Barb Dybwad, *ALIBI: Facebook Status Update Saves Teen from Jail,* http://mashable.com/-2009/11/11/facebook-alibi/.

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LEGAL MEDIA PUBLISHING

Federal Practice Roundup *(Continued from page 6)*

ing delinquent contributions allegedly owed under a collective bargaining agreement. Plaintiffs moved for a default judgment and, on the Report and Recommendation of Magistrate Judge William D. Wall, Judge Joanna Seybert adopted the Report in its entirety, concluding that it was "thorough, well-reasoned, and free of clear error."

In his Report, Magistrate Judge Wall easily disposed with entry of default on liability, since no answer was ever filed. Turning to the damages, the court was guided by the rule that a default constitutes an admission of everything in the complaint, except as to damages. The movant for a default must nevertheless prove that the damages naturally flowed from the injuries pleaded. The court determined that an evidentiary hearing was not required, since defendant did not contest the evidence of damages submitted by plaintiff.

After reviewing the submissions, Magistrate Judge Wall found first that the individual defendant was an "ERISA fiduciary" individually liable under ERISA. Next, the court considered the proof submitted on the delinquent amounts, liquidated damages, interest and attorneys' fees, and awarded the full amounts sought.

In *Next Proteins, Inc. v. Distinct Beverages, Inc.*, 09-CV-4534 (DRH) (ETB) (E.D.N.Y. Feb. 1, 2012), District Judge Hurley was faced with an unusual motion for a default and to strike the counterclaims asserted by the corporate defendants. The action arose out of defendants' alleged patent infringement through defendants' manufacture and sale of a protein drink known as "Protegy." Early on, all four defendants, then represented by counsel, filed a timely answer and asserted counterclaims for tortious interference and declaratory judgment. Since then, counsel for defendants has withdrawn from representation on application as granted by the court. After counsel withdrew, the court had afforded the corporate defendants numerous deadlines and extensions to obtain new counsel. They never did secure new counsel.

Plaintiff thereafter moved for a default judgment against the corporations under Fed. R. Civ. P. 55 for failure to appear by counsel. Finding that over seven months elapsed without counsel for defendants appearing, the court granted plaintiff's motion for a default against the corporate defendants. Since the court granted the default, the motion to strike the answer and counterclaims of the corporate defendants was also granted.

In the last case we review, *Parrino v. SunGard Availability Servs. LP*, 11-CV-3315 (JFB) (GRB) (E.D.N.Y. Feb. 16, 1012), Magistrate Judge Gary R. Brown considered defendant's motion to dismiss a defamation action on referral from District Judge Bianco. Specifically, plaintiff, appearing pro se, alleged that his former employer, SunGard Availability Services LP ("SunGard"), defamed and damaged his reputation by providing plaintiff's personnel file to third parties in response to a trial subpoena served on SunGard. The trial subpoena was served by a defendant in an unrelated action brought by plaintiff. The personnel file contained, among other items, an allegedly negative performance report.

In reviewing the complaint, Magistrate Judge Brown concluded that since plaintiff failed to allege specifically the defamatory words, the defamation claim was defective. In addition, since SunGard acted in compliance with a lawfully issued subpoena, there is an absolute privilege conferred upon the publication of the personnel file. The court also found that the "common interest privilege" applies, namely, that communications between a supervisor and co-workers mad in connection with performance reviews, are subject to a qualified privilege. The only issue that remained unanswered by SunGard, however, was plaintiff's claim that the performance review report was "falsely created." As such, Magistrate Judge Brown recommended dismissal of the complaint, with leave to replead.

Note: James M. Wicks is a partner at Farrell Fritz, P.C. concentrating in business and commercial litigation. He is a frequent contributor to the firm's New York Commercial Division Case Compendium blog. Mr. Wicks has an AV Preeminent Martindale-Hubbell Peer Review Rating.

ACADEMY OF LAW NEWS

Dealing with Divorce Dollars

Four New CLEs for Matrimonial Lawyers this Spring Focus on Financial Issues

By Dorothy Paine Ceparano

Virtually any issue can trigger conflict when a marriage breaks up. But one of the biggest areas of contention, as any divorce lawyer knows all too well, is anything having to do with money: salaries; support; bank accounts; pensions; property; business valuations; the estate, etc., etc.

This spring, the Academy presents four new CLE programs that deal with various facets of divorce dollars. Both experienced and novice matrimonial lawyers will want to take advantage of these opportunities to learn new and better ways to advocate for their clients.

Issues that make even veteran matrimonial lawyers uneasy will be covered, on the evening of Wednesday, May 2, in **"A Practitioner's Guide to the Interplay of Matrimonial and Bankruptcy Law."** Organized by Immediate Past Academy Dean Rick Stern, an experienced bankruptcy attorney, the program will delve into an assortment of potentially troublesome questions: the effects of an "automatic" stay on divorce proceedings; dischargeable and non-dischargeable debt; the effects of bankruptcy on support; the effects on property; the differences, in the context of a divorce, between Chapter 7 (liquidation) and Chapter 13 (reorganization); the role of the bankruptcy trustee in a divorce proceeding; and other similar matters. Attendees are urged to send questions in with their registration forms so that the panel – a distinguished and highly qualified group, indeed – may address them during the program. That faculty, in addition to Mr. Stern, includes the Honorable Alan S. Trust, U.S. Bankruptcy Judge for the Eastern District of New York, who teaches a course on " Bankruptcy and Divorce" in an LL.M program; the Honorable John C. Bivona, New York State Supreme Court Justice (Suffolk County), who serves in the Matrimonial Part and has seen – often – what happens when a divorcing party declares bankruptcy; Robin S. Abramowitz (Lazer Aptheker Rosela and Yedid), who handles both matrimonial and bankruptcy matters; and Marc A. Pergament (Weinberg, Gross and Pergament, LLP), an experienced bankruptcy lawyer and Chapter 7 Trustee.

Matrimonial lawyers often call in accountants to examine tax returns and financial statements. But lawyers who can readily decipher these documents and ascertain the significance of the numbers are a step ahead. An opportunity to improve these deciphering skills is available on Wednesday, May 23, through a succinct lunch 'n learn program entitled **"Understanding Tax Returns and Financial Statements for Matrimonial Attorneys."** With SCBA President Elect Arthur Shulman, a veteran matrimonial lawyer, as moderator, CPAs from Brisbane Consulting Group will go through individual tax returns (1040) and tax returns for S-corporations, partnerships, and corporations. They will also examine sample financial statements, i.e., balance sheets, income statements, cash flow statements, plus the all-important "notes." Through the process, they will provide guidance on valuations, built-in gains, pass-through entities, the importance of identifying the spouse's industry; valuation adjustments; frequently "abused" expense areas; identifying changes in cash that may indicate "divorce planning," and other issues of significance in divorce advocacy.

Dealing with **"Business Valuations"** in a divorce proceeding will be given a thorough treatment in a lunch 'n learn seminar scheduled for Tuesday, June 5. Experienced matrimonial lawyer Tom Campagna will share tips and formulae for analyzing business valuations and using the information for the benefit of the client. He promises to make the process easy and accessible even for those who find the process of business valuation formidable or off-putting. Wende Doniger, the Academy's Curriculum Co-Chair, is the program coordinator and moderator.

Clashes related to estate assets often arise as a marriage ends, and potential conflict may accelerate if one of the parties dies during or after the divorce proceedings. On the evening of June 14, a skilled faculty of estate and matrimonial lawyers will look at **the consequences of marital agreements on estate planing, estate administration and estate litigation** in a program entitled **"Till Death or Divorce Do Us Part."** Numerous issues and potential problems will be explored, including prenuptial agreements and provisions for pension rights and elective share (including challenges); waivers of retirement benefits or estate rights; mutual releases; revocations of bequests and appointments in the absence of a pre- or post-nuptial agreement; life insurance and estate tax deductibility; divorce settlements and obligations to former spouses and children from that marriage; payments to the former spouse; application of the Dead Person's Statute; claiming rights under a settlement agreement after the former spouse dies, and many other matters that are sometimes overlooked in both divorce proceedings and estate planning. Matrimonial lawyers will gain important pointers and sample language to include in the documents they draft, and estate lawyers will garner new insights into planning for a possible break-up of the union and administering the estate or handling an estate contest if one of the ex-spouses dies. Presenters include Frank Santoro and Patricia Marcin, estate attorneys with Farrell Fritz; Deborah Barcham, estate planning and taxation lawyer with L'Abbate Balkan Colavita and Contini; and matrimonial lawyers Mary Ann Aiello and Nancy Gianakos.

In addition to the programs focused on matrimonial money, the Academy offers two other spring programs attorneys in the family law field will want to note: On the evening of Tuesday, May 8, a meeting of the SCBA Matrimonial and Family Law Committee will include a video replay of Tim Tippins' recent, well received presentation on **"Preparation and Trial Examination of a Custody Expert."** Those who wish MCLE credit for the replay may pay a tuition fee of $75 to the Academy; others may attend at no cost. Then, on June 14, an East End presentation on **"Emergency Applications"** will delve into orders of protection and other key matters for family court practitioners. The faculty includes the Honorable Joan Genchi, JeanMarie Costello, and James Barnett, ACA, with Wende Doniger as moderator. The program will be presented at Seasons of Southampton and runs from 5:00 to 8:00 p.m.

To enroll in any of the upcoming Academy programs, attorneys may call the Academy at 631-234-5588 or register online through the interactive calendar on the SCBA website (

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

SECOND SESSION OF IPAD FOR LAWYERS SCHEDULED

Because registration for the April 20 session of "iPad for Lawyers" exceeded the capacity of the SCBA great hall, Michael Glasser, the presenter and program sponsor, has graciously agreed to a second session on **Wednesday, May 30,** 12:30–2:10, with lunch from noon.

The program is free, but pre-registration is required. Be sure to sign up early for this second chance to learn how to get the most out of your iPad and use it to boost your productivity. Enroll by calling the Academy at 631-234-5588.

ACADEMY Calendar of Meetings & Seminars

Note: Programs, meetings, and events at the Suffolk County Bar Center (560 Wheeler Road, Hauppauge) unless otherwise indicated. Dates, times, and topics may be changed because of conditions beyond our control CLE programs involve tuition fees. For information, call 631-234-5588.

MAY

1 Tuesday	**Trial Skills: Trial of a Medical Malpractice Case.** Session One: Jury Selection & Opening Statements. 6–9 p.m. Sign-in and light supper from 5:30.
2 Wednesday	**Bankruptcy & Matrimonial Law.** 6–9 p.m. Sign-in and light supper from 5:30
8 Tuesday	**Trial Skills: Trial of a Medical Malpractice Case.** Session Two: Direct and Cross-Examination of Plaintiff's Expert and the Defendant. 6–9 p.m. Sign-in and light supper from 5:30.
8 Tuesday	**CLE at Meeting of SCBA Matrimonial Committee: Video Replay of Tim Tippins' "Preparation and Trial Examination of a Custody Expert."** 5:30 p.m.
9 Tuesday	**IRA Trusts & Retirement Trusts** (Sy Goldberg). Breakfast Seminar. 9:00 a.m.–noon. Sign-in from 8:30 a.m.
11 Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. – ***Note re-scheduled date.***
11 Friday	**Life of a Case: Using Research & Litigation Platforms – Presentation from *Lexis-Nexis.*** 12:30–2:00 p.m. Lunch from noon.
16 Wednesday	**Trial Skills: Trial of a Medical Malpractice Case.** Session Three: Jury Charge Conference; Closing Arguments; Deliberations. 6–9 p.m. Sign-in and light supper from 5:30.
22 Tuesday	**Bankruptcy Basics.** 6–9 p.m. Sign-in and light supper from 5:30
23 Wednesday	**Understanding Financial Statements & Tax Returns for Matrimonial Lawyers.** 12:30–2:10 p.m. Lunch from noon.
24 Thursday	*East End:* **SCPA 2211 Examinations.** 6:00–8:00 p.m. Bridgehampton National Bank; Montauk Highway, Bridgehampton.
30 Wednesday	**iPad for Lawyers** (added second session**)** 12:30–2:10 p.m. Lunch from noon.

JUNE

5 Tuesday	**Business Valuations.** 12:30–2:10 p.m. Lunch from noon.
6 Wednesday	**Real Estate Master Class: Surveys and C.O.s.** 12:30–2:10 p.m. Lunch from noon.
8 Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. ***Note: First meeting of new administrative year.***
12 Tuesday	**Meet the New Judges.** 6–9 p.m. Sign-in and light supper from 5:30
14`Thursday	*East End;* **Emergency Applications.** 5:00–8:00 p.m. Seasons of Southampton.
14 Thursday	**Till Death or Divorce Do Us Part: Consequences of Marital Agreements on Estate Planning, Estate Administration, and Estate Litigation.** 6–9 p.m. Sign-in and light supper from 5:30
19 Tuesday	**Choosing a Trustee.** 6–9 p.m. Sign-in and light supper from 5:30

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