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INSIDE...

JUNE 2012
FOCUS ON WORKERS COMPENSATION & SOCIAL SECURITY DISABILITY

Celebrating a New Beginning for the SCBA

Arthur Shulman becomes the new SCBA President

By Laura Lane

Dignity, class and an overabundance of good humor were ever present at this year's Suffolk County Bar Association Installation Dinner Dance. Dubbed "The Noble Profession of Law," the festive evening included the installation of Arthur E. Shulman President; Dennis R. Chase, President Elect; William T. Ferris, III, First Vice President; Donna England, Second Vice President; John R. Calcagni, Treasurer; and Patricia M. Meisenheimer, Secretary.

Mr. Shulman is the SCBA's 104th president. He said that he looked forward to working with the Executive Committee and was planning to make the upcoming year productive and rewarding.

One of the highlights of the evening, and there were many, was the slideshow of memorable SCBA moments that dated back many years. They served as yet another example of the love and commitment felt by Mr. Shulman for the SCBA. He spent hours searching for the appropriate photos looking through over a thousand photos for his slideshow which was on view at the cocktail

(Continued on page 16)

The SCBA's 104th President Arthur Shulman receiving the Oath of Office from NYS Chief Administrative Judge Hon. A. Gail Prudenti.

PRESIDENT'S MESSAGE

Plans to Inspire Others to Get Involved

Arthur Shulman

By Arthur E. Shulman

In anticipation of my being sworn in as your President at the Suffolk County Bar Association's 104th Installation and Dinner Dance on June 1, I started inputting my thoughts into my computer which have evolved into this, my first President's Column for *The Suffolk Lawyer*. I am looking forward to working with each of my fellow officers, members of the Board of Directors and bar members to make this a productive and rewarding year for the SCBA and its members. All of the officers and directors have shown their dedication to the SCBA and I know I can count on them all to continue to work for the good of the SCBA. I also want to specifically acknowledge the Suffolk Academy of Law, its Director, Dorothy Ceparano, its Officers, Advisory Committee and all of its volunteers, who constantly amaze me with their energy and dedication in promulgating, coordinating and implementing a rugged schedule of programs and activities that make our Academy the envy of most bar associations.

A debt of gratitude is owed to our Executive Director, Sarah Jane LaCova, without whom our Installation Dinner and all of our SCBA activities could not take place. Jane often starts her day at the SCBA at 7:00 am and on many evening doesn't leave until after 7:00 pm. I find her on many weekends at the SCBA working on the many things she does for our organization, including seeing that the structural integrity of our beautiful building is maintained. I am thankful that I have Jane - and her wonderful husband, Joey - this year to assist me and I know that every incoming president has the same thought, "Jane, please do not even think of retirement until at least after my year as president."

I was greatly honored and humbled to have the Honorable A. Gail Prudenti, Chief Administrative Judge of the State of New York, administer the oath of office to me. I am grateful for her kind words on my behalf and her support of the SCBA. My fellow officers and I are also appreciative of the attendance at the Installation Dinner by the Honorable Sandra L. Sgroi, Associate Justice of the Appellate Division, Second Judicial Department, who swore in President Elect Dennis R. Chase, First Vice President William T. Ferris III, Second Vice President Donna England, Treasurer John R. Calcagni and Secretary Patricia M. Meisenheimer. The newly elected directors and I are equally thankful to the Honorable C. Randall Hinrichs, J.S.C., Suffolk County District Administrative Judge, who swore in our newly elected members of the Board of Directors, the Honorable James L. Flanagan, Allison C. Shields, Harry Tilis and Glenn L. Warmuth.

It was my good fortune to have served as President Elect during the term of

(Continued on page 25)

BAR EVENTS

42nd Street at the John W. Engeman Theatre
Thursday, June 14, 6 p.m. reception
Curtain at 8 p.m.
John W. Engeman Northport Theatre
See insert for details.

Tri-County Elder Law Guardianship Dinner
Thursday, June 21, 6 p.m.
Westbury Manor, Westbury
http://www.scba.org/post/tri.pdf

Annual Outing
Monday, August 13
Golf Outing at Rock Hill, Manorville
Fishing to be announced
For further information call the Bar Association.

Dog Day Afternoon Agility Expo & Pet Fair
Saturday, Sept. 8, 10 a.m. to 4 p.m.
SCBA Animal Law Committee presenting event.
St. Joseph's College, 155 West Roe Blvd., Patchogue
Agility demos, magicians, vendors, face painting etc. Bring your dog for fun and a run through the agility course.
$10 per car.

FOCUS ON
WORKERS COMPENSATION & SOCIAL SECURITY DISABILITY
SPECIAL EDITION

Suffolk County Bar Association

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Sarah Jane LaCova	Executive Director

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."

Commissioning of the USS Michael Murphy

The Commissioning Committee of the USS Michael Murphy is pleased to announce that the web site at **www.ussmichaelmurphy.org** is now open. There is a registration tab for the commissioning on the web site. Please note registration is required and seating is extremely limited due to pier restrictions and force protection issues involving the safety of the ship. Please register as soon as possible for the commissioning on Saturday October 6, 2012 at 10 a.m. in New York City Pier 88 if you intend to be present. The invitations will go out in August and admittance to the commissioning is by invitation only. Thank you to James White, Chairman, Commissioning Committee.

(The late Michael Murphy was the son of SCBA member Daniel J. Murphy, the Principal Law Clerk for Justice Peter Fox Cohalan.)

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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New President Commits to Increasing Membership Activity

Arthur E. Shulman

J.D. Brooklyn Law School – 1973

Solo Practitioner – mainly matrimonial and family law, real estate, wills & estates
NYC Police Dept. 1968 – 1988, retired lieutenant

Dean of Academy of Law 2001 - 2003
SCBA Board of Directors 2001 – 2004; 2007 – Present

NYSBA Mandatory Continuing Education Committee 2005 – 2010, Alternate Delegate and Delegate to NYSBA House of Delegates 2003 – 2007; Delegate 2010 to Present.

By Laura Lane

The 104th Suffolk County Bar Association President, Arthur Shulman, has been keeping the peace for many years. Affable, keenly focused, highly intelligent and kind, he plans to lead the SCBA by recruiting others to step forward and join him.

"I've always marched to my own drummer," he said. "But for over 17 years I've never missed an Academy of Law, Board of Directors or Executive Board meeting. I believe in inspiring others by doing the job myself. I'm not afraid of the work and if I say I'm going to do something I do it."

A proud Brooklyn native, Mr. Shulman worked for many years simultaneously as a police officer and attorney. Maintaining a law practice by day he worked for the New York City Police Department evenings or the graveyard shift. He started Brooklyn Law School during his second year in the police department.

"I thought law was an interesting career," he explained. "There are actually a lot of police officers that become attorneys, more than you think. Of course as an attorney I couldn't work certain areas like criminal, but for 14 years I did both careers. I get along with very little sleep and did back then too."

Mr. Shulman is not hesitant about jumping right in and getting any job done, a characteristic he will bring to the SCBA. When Martin Luther King was killed in 1968 he had only two months in the police department. Yet for around six months he, like other rookies was put out on the street to control the violence and rioting.

"In November they put us back in the Police Academy to finish up," he said smiling. "In 1973 I was promoted to detective, then to sergeant and in 1979 to lieutenant working East New York, Brownsville, and South Jamaica. I always asked for transfers to busy police precincts because I didn't want to get bored."

Mr. Shulman will be anything but bored leading the SCBA this year. He has many plans. Committed to improving the public's perception of attorneys, he'll publicize the many attorney led charitable and noble activities that benefit colleagues and the community. At his installation, "The Noble Profession of the Law," Mr. Shulman began this commitment by highlighting the accomplishments of attorneys throughout the past year.

The new SCBA President will act as spokesman and advocate on behalf of attorneys with legislation, regulations and court rules affecting the practice of law. He hopes to lead efforts to help attorneys run their offices more efficiently and will give his support to the many members experiencing economic problems and stressful conditions when facing clients, other attorneys and the court system.

Mr. Shulman is committed to networking. He will provide networking opportunities to help members enhance their business opportunities and to socialize.

"I'm already looking into three or four activities that will be geared toward children and grandchildren of members so they can come and socialize together like maybe an outdoor Olympics," he said. "I want to give the membership more for their buck and want them to call the SCBA their home."

A former SCBA Academy Dean, Mr. Shulman has already been a leader at the SCBA. His goal then was somewhat similar to what it is now. His plan then as the dean was to get other attorneys to volunteer their time to work on programs, and he had success.

"I was a fixture at the Academy there almost every night," he recalled. "I encouraged attorneys to attend the programs too and we ended up having meetings that had an overflow of people. It takes more time to be Dean of the Academy than anything else in the bar association. The position assisted me into molding myself to be an SCBA president."

A realist, Mr. Shulman admits there will be some challenges this year. No president will be able to make everyone happy and the new president is content to do what is good for the common goal of all members. He realizes he needs to work within the confines of the budget to accomplish his goals. And then there is the man himself, someone with a great sense of humor that is unafraid to always be himself.

"I'm sometimes a little controversial and not afraid to speak my mind," he said. "But I do have the ability to stop myself from speaking it if it is not beneficial to the general membership. My main goal this year will always be to get others to join me in becoming active in this bar association and I will do whatever it takes to make that happen."

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer and an award winning journalist.

Meet Your SCBA Colleague

Richard L. Stern, **a bankruptcy attorney, has been awarded the New York State Bar Association Pro Bono Service Award twice and recognized twice by the SCBA too with a Special Recognition Award from the Pro Bono Foundation for his work in the Pro Bono Project Bankruptcy Clinic. Mr. Stern believes in doing the right thing and he's one of the most dedicated Ohio State University Buckeye fans you'll ever meet.**

By Laura Lane

You volunteer your time on a regular basis handling pro bono cases in the Bankruptcy Court. When did this all begin? I don't remember. I do remember that a friend who was an attorney asked me to become involved in the Pro Bono Foundation. I found those people to be so well intended and committed.

You are very involved in the Bankruptcy Clinic as well. I honestly wish every one of our children would go and attend a pro bono bankruptcy clinic. They'd see that there is a very fine line between being someone who is successful and someone down on their luck. You really get an understanding what it is to be in need and it keeps you well grounded. There is no question that I experience a great deal of gratification being on the Pro Bono Foundation.

As a student at Ohio State did you envision yourself as someone who would seek to help those who couldn't help themselves? Actually I was a history major as an undergraduate and studied in England in my junior year. I graduated early and planned to either get a doctorate and teach, or go to law school. I didn't have a direction but decided that a law degree wouldn't hurt.

Was it in law school that you decided to become a bankruptcy attorney? I knew once I was in law school that I wanted to become an attorney but I still didn't know what type of law. My first job was at a firm that did a lot of collection work and I learned the basics there. Then I ended up working at a bankruptcy firm in Mineola and after a few years joined Holland & Vinker becoming a partner. Shortly after Marvin Holland became a United States Bankruptcy Judge. I went on to join Macco & Hackeling. Several years later Stephen Hackeling became a New York State District Court Judge. Today the firm is Macco & Stern.

What have you enjoyed about practicing law? One thing about law is whether you like it or dislike it it's always challenging, always changing. In every business move that I made it enabled me to grow, become more productive. They were good long-term business moves. Our firm has a good reputation as a solid bankruptcy firm that's respected. Being a lawyer is not a career that you can perform leisurely and succeed. It's very competitive. Reputation is everything in this business.

Mr. Holland gave you some advice that led you to the SCBA, right? Marvin told me it was important to get involved, to meet people, that networking was very important - based on that I got involved in the SCBA.

You were the Dean of the Academy of Law and just completed six years as a member of the Board of Directors for the SCBA. What led you to become so involved? I started getting involved at the Academy because I was interested in helping to coordinate and put together bankruptcy programs. The Academy puts on over 100 CLE programs a year. It's unlikely there is another bar association in the state that puts on that number or offers the quality as we do. Later I was approached to become the Dean but at first I hesitated.

Why? That hesitation was due to all of my predecessors each of whom I thought to be more extraordinary than the one before. They still encouraged me to become the Dean. I accepted and ended up experiencing an absolutely wonderful two years. The Academy really runs on its own with Dorothy Ceparano's expertise. What was difficult were the fiscal issues, like making decisions on what types of programs would attract the greatest number of people.

Why would you recommend SCBA membership? The SCBA has afforded me an opportunity not only to meet colleagues but for these colleagues to become friends. I believe it is important to meet colleagues from a friendship and business perspective. People do not realize how terrific other people are until they get to know them. You see a name in the directory but it's very hard to personalize that name. At the SCBA people are committed to the wellbeing of the association and they leave their egos at the door. There's camaraderie at the SCBA that's hard to match. All you have to do is reach out and you will be welcomed.

Richard L. Stern

VIEWS FROM THE BENCH

Rental Permits and the Fourth Amendment

Property Owner Not Denied Rental Permit for Refusing Consent to Search

By Hon. Stephen L. Ukeiley

Stephen L. Ukeiley

The unreasonable search and seizure provision of the Fourth Amendment is not commonly associated with rental properties. Perhaps this is because the landlord and tenant typically agree to possession and the conduct of the parties is not criminal in nature. Moreover, if a dispute arises, the landlord's remedy is to commence a summary proceeding for the return of possession and unpaid rent or use and occupancy.

Where illegal activity is alleged to have occurred, law enforcement will generally have to either obtain consent or show probable cause for the issuance of a search warrant before entering the rental property. Interestingly, where the search is of a leased property, only the occupants, not the absentee landlord, may consent to the search.[1] Where the search is of a communal area, however, the court must determine if the absentee landlord had a legitimate expectation of privacy in the "place or object" searched.[2]

This month's column addresses local legislation requiring property owners consent to a search of their residential property as a condition for obtaining a rental permit. The issue is of significant concern and consequence to both landlords and tenants.[3] Landlords are generally operating a business and prefer to avoid unnecessary expenses and distractions. Tenants, on the other hand, may find the living conditions ideal and wish not to relocate. Thus, in many cases, the governing municipality only learns of the "illegal" rental property when there is a crack in the parties' relationship.

The primary reason cited for the mandatory search requirement is the health and well-being of the occupants. Presumably, a majority of property owners do not object to an inspection because their properties are safe and built to code. Further, in the litigious society we currently live, it is reassuring to have a municipal-issued permit stating the satisfactory condition of the property prior to the tenants taking possession.

Property owners' Fourth Amendment rights

Others, nonetheless, may not be as accommodating when it comes to the government entering one's property without probable cause. This was the case in *ATM One, LLC v. Incorporated Village of Hempstead*. In January 2009, the Incorporated Village of Hempstead ("Village") amended its Village Code by enacting Chapter 106 which required a rental permit for each rental dwelling.

A condition for obtaining the permit was the owner's consent to an inspection by the Village's Building Department.[4] A search could not be undertaken without the consent of the owner, but where an inspection was not completed, a permit would not be issued. A first offense for noncompliance constituted a violation punishable by a mandatory fine between $2,500 and $5,000 and/or imprisonment not to exceed 15 days.[5]

The Supreme Court action

Shortly following enactment of the ordinance, several owners filed suit in Nassau County Supreme Court seeking an order declaring Chapter 106 of the Village Code, with its amendments, unconstitutional. Following unsuccessful negotiations, the village moved to dis-

(Continued on page 30)

BENCH BRIEFS

Decisions from Three Judges

By Elaine M. Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Peter H. Mayer

Motion for summary judgment denied; here, delivery of summons and complaint to defendant's 12-year-old daughter constituted a person of suitable age and discretion.

Elaine M. Colavito

In *Harold P. Keil, Janice Keil and Dorothy Keil v. Wade Hults, Kimberly R. Magnani and Michael Magnani,* Index No.: 20957/10 decided on June 14, 2011, the court denied the motion for summary judgment by defendant Hults. Hults' motion for summary judgment alleged that the court lacked personal jurisdiction over him by reason of improper service. In support of his motion, he submitted the affidavit of Heather Hults, his daughter, in which she stated that she was the person to whom the summons was delivered at the family residence, that she was only 12 at that time, and that she did not match the description of "Mrs. Hults" appearing in the plaintiffs' affidavit of service.

Hults claimed that service was defective because the plaintiffs failed to deliver the summons and complaint to a "person of suitable age and discretion" as required by CPLR §308(2). Plaintiffs, in opposition, submitted the affidavit of their process server, Kevin Hyland, in which he states that the "Ms. Hults" to whom he delivered the summons and complaint met the description set forth in the affidavit of service. He further stated that when he was advised by "Ms. Hults" that her father was not home, he asked whether she would be able to give him the summons and complaint. She told him that she would deliver it to her father and proceeded to take the papers from him. In denying the motion, the court noted that even assuming, as Hults claimed, that Heather was the person who received delivery of the summons and that she was only 12 at that time, it could not be said on the record that she lacked the requisite age or knowledge. The court further pointed out that while the phrase "suitable age" did not imply that, at some point a court must deem a person too young to accept such delivery, neither CPLR §308(2) nor the case law interpreting it prescribes a minimum age as "suitable." Here, given the family relationship, and absent any proof that Heather failed to deliver the summons to her father, it could be reasonably inferred that Heather was the type of person contemplated by the statute who could be expected to advise her father of the service.

(Continued on page 30)

Barry M. Smolowitz *Pro Bono* Extraordinaire

Tenth Judicial District Winner for Pro Bono Foreclosure Settlement Project

Barry M. Smolowitz, center, was one of the award recipients of the New York State Bar Association's 2012 President's Pro Bono Service Awards. He was presented with an honorary plaque by from left, New York State Bar Association President Elect Seymour W. James, Jr. and New York State Bar Association President Vincent E. Doyle III.

By Jane LaCova

Barry and Kim Smolowitz, Jeff Seigel, who is the Executive Director of Nassau Suffolk Law Services and I traveled up to Albany on a rainy, cold morning, to attend the Pro Bono Service Awards luncheon program on May 1. Barry was one of the award recipients of the New York State Bar Association's 2012 President's Pro Bono Service Awards, a proud day for him, his wife Kim, and our Pro Bono Foundation.

The award which acknowledged the extraordinary pro bono service of 22 attorneys and firms helps to raise professional awareness of the vital role pro bono has in ensuring equal access to justice for low-income individuals and families said NYSBA President Vincent E. Doyle III. NYSBA President Elect Seymour W. James, Jr. was also on hand to co-present the awards. Chief Judge Jonathan Lippman announced a new initiative requiring the bar exam to add a pro bono requirement. He said that New York will become the first state in the nation to require pro bono service as part of admission to the bar.

Barry received many kudos from other award recipients in attendance, who told him that the forms he developed were extremely helpful to them when they developed foreclosure programs in their own counties. Barry is truly Mr. Pro Bono, having provided decades of service to the unrepresented citizens of Suffolk County, and has motivated and mentored attorneys and law students giving them general advice in the practice aspects of the profession.

The SCBA Pro Bono Foreclosure Settlement Conference Project was born out of the necessity due to the economic crisis of late 2008. The project was made possible thanks to Barry. He designed and developed a special website portal program that invites the homeowner subject to a residential foreclosure filing to contact us and receive a free one-on-one legal consultation.

To quote Jeff Seigel, "…in the true spirit of volunteerism, Barry expanded our pro bono services, and went out on a limb to launch the Suffolk County Foreclosure Settlement Project at just the right time to make a huge difference in the lives of many Suffolk County homeowners…"

We congratulate and thank Barry Smolowitz.

Note: Jane LaCova is the Executive Director of the Suffolk County Bar Association.

Sweisgood Dinner Honors the Late Eugene O'Brien

By Laura Lane

The SCBA Lawyers' Helping Lawyers Committee is committed to helping members suffering from alcoholism and/or drug addiction by providing direction, encouragement, and the resources available to help attorneys kick their habit and once again lead productive and healthy lives.

Every year the Lawyers' Helping Lawyers Committee sponsors the Peter Sweisgood Dinner named after the late Father Peter Sweisgood, a recovered and rehabilitated alcoholic who was the executive director of the Long Island Council on Alcoholism and also worked closely with the Lawyers' Committee on Alcoholism and Drug Abuse at the state and local levels.

This year everyone paid tribute to the late Gene O'Brien, the first recipient of the Peter Sweisgood award, someone who was described as making a difference in so many lives as he helped others come to terms with their own alcoholism. Mr. O'Brien, a SCBA Past President (2000-01), was described as someone who was always available to help others. He believed strongly in the philosophy that you do something nice for others and make sure you don't get caught. Mr. O'Brien was known for his commitment to reaching out to help so many who struggled with alcoholism including lawyers and judges. Mr. O'Brien enriched the lives of everyone around him. He will be missed.

Photo by Arthur Shulman

Eugene O'Brien's widow, Nancy, spoke about her late husband's commitment to helping others suffering from alcoholism.

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer.

We wish to Acknowledge those who contributed to the Lawyer Assistance Foundation

Donors	In Memory of
Penny B. Kassel	Alex Weinblatt
Barry L. Warren	Leonard Lustig

SCBA's Annual Meeting

Photos by Barry Smolowitz

President Matthew Pachman praised SCBA Executive Director Jane LaCova for all of her efforts and her dedication to the bar.

By Laura Lane

The Great Hall at the Suffolk County Bar Association headquarters was quite full on May 7 when members gathered for the Annual Meeting. The purpose of this meeting is to elect the officers, directors and members of the Nominating Committee and to recognize special award recipients.

The evening began with a welcome by President Matthew Pachman. After thanking the many dignitaries and honorees and recognizing SCBA Past Presidents and SCBA Officers and Directors he paused.

"We all know how much Jane LaCova does for this bar association but you don't truly know a fraction of what Jane does until you are the president of this association," he said. "We don't really know the long hours she puts in, the love and dedication she has for this job. Thank you so much for everything Jane."

Secretary John Calcagni announced all of the nominated officers for the next term casting one ballot for each nominee. The nominees were then declared duly elected to the positions for which they were nominated. They include: Dennis R. Chase, President Elect; William T. Ferris, III, First Vice President; Donna England, Second Vice President; John R. Calcagni, Treasurer; Patricia M. Meisenheimer, Secretary; Directors Hon. James P. Flanagan, Allison C. Shields, Harry Tilis, Glenn P. Warmuth, John L. Buonora, Annamarie Donovan and Matthew E. Pachman.

The evening also included awards for the High School Scholarship Winner, Golden Anniversary Awards, Awards of Recognition, Awards for Directors going off the Board, Academy Awards, and Academy Officers going off the board.

Academy Officers going off the board were honored as well including: Marilyn Lord-James, George L. Tilschner, Herbert "Skip" Kellner and Lynn Poster-Zimmerman.

The Golden Anniversary award-winners were: Robert H. Tucker, Hon. Anthony Tafuri, Harold A. Shapiro, Murray B. Schneps, Fredric Scheinfeld, Hon. Louis J. Ohlig, J. Stewart McLaughlin, Kenneth A. Deegan, Anthony V. Curto and Eugene L. DeNicola.

Academy of Law Awards were presented by President Pachman and Academy Dean Hon. John Kelly to: Joseph M. Rosenthal, Hon. James F. Flanagan, Hon. Isabel E. Buse; Hon. John E. Raimondi, Hon. Thomas F. Whelan and Peter J. Walsh.

The Awards of Recognition went to: Glenn P. Warmuth – Appellate Practice Committee; Eliott M. Portman – Creditors' Rights Law Committee; Harry Tilis – District Court Committee; Robert E. Schleier, Jr. – Insurance & Negligence Defense Counsel; William J. McDonald – Health & Hospital Law Committee; Brian S. Conneely – Labor & Employment Law Committee; Rosemarie Bruno- Lawyers Helping Lawyers Committee; Hon. Peter H. Mayer – Military & Veterans Affairs Committee; Ted Rosenberg – Military & Veterans Affairs Committee; Suzanne Q. Burke – New Members Committee; Hon. Caren L. Loguercio – Professional Ethics & Civility Committee; Patricia M. Meisenheimer – Professional Ethics & Civility Committee; Brette A. Haefeli – Surrogate's Court Committee; John J. Roe, III – Surrogate's Court Committee; and Joanne S. Agruso – Workers Compensation & Social Security Disability.

Those leaving the SCBA Board received an honorary plaque. They included: James Winkler, Richard L. Stern and Lynn Poster-Zimmerman.

SIDNEY SIBEN'S AMONG US

On the Move…

Michelle Aulivola has become a partner at Long, Tuminello, Besso, Seligman, Werner & Sullivan, LLP located in Bay Shore. The firm will now be called, Long, Tuminello, Besso, Seligman, Werner, Sullivan & Aulivola LLP.

Bracken Margolin Besunder LLP is pleased to announce that **Mark Keurian** and **David Sobotkin** have joined the firm as associates. **Mr. Keurian** was formerly with the Office of Legal Counsel, Fordham University, and will concentrate in the general practice of law**. Mr. Sobotkin,** a former Assistant District Attorney in the New York County District Attorney's Office, will practice in the areas of Civil Litigation and Criminal Law.

Ingerman Smith LLP, has hired three new attorneys who will contribute to the Firm's long-established areas of expertise in Education Law, Labor Law, Commercial Law, and Litigation. **Alessandro A. Bianchi** is an associate in the firm's Westchester office in Harrison, and **Kerrin A. Bowers** and **Julie L. Yodice** have joined the Hauppauge office.

Congratulations…

The firm of **Bracken Margolin Besunder LLP** has been named one of the New York areas top ranked law firms based on AV® Preeminent Martindale-Hubbell™ Lawyer Ratings.

To **Annamarie Donovan** whose firm, The Donovan Law Firm, LLC was named to the Long Island's 2012 List of Top Legal Eagles The Top Rated Attorneys in Nassau and Suffolk Counties, for ESTATE PLANNING. The list of attorneys was published in *Long Island Pulse*, March 2012 edition.

Jacqueline Siben

To SCBA member **Karen Tanenbaum** who is the recipient of the Long Island Center for Business and Professional Women's 33rd Annual Achievers Award.

To SCBA member **Patricia Galteri**, Partner, Meyer, Suozzi, English & Klein PC and President Elect of the Nassau County Bar Association Marian Rice, who were named among the Top 50 Most Influential Women in Business.

To former *Suffolk Lawyer* "Future Lawyer's Forum" contributor **Andrew VanSingel** who was appointed as the Assistant Editor of the *Young Lawyer* published by the ABA Young Lawyers Division.

To **A. Thomas Levin** who received the 2012 Diversity Vanguard Award from the Metropolitan Black Bar Association for "exemplary work" as a bar leader and attorney and for his efforts to promote diversity within the legal profession. Tom, a past president of the New York State Bar Association and the Nassau Bar Association and a longstanding member of our association is well known for his commitment and dedication to serving the unrepresented. He has been a member of the Law Services' Advisory Council for many years and was recognized by Nassau/Suffolk Law Services in 2002 with their Commitment to Justice Award.

Kudos go to **Barry M. Smolowitz**, Past President of the SCBA and Director of Technology who received the New York State Bar Association's President's Pro Bono Service Award for 2012. Barry's pro bono contributions to pro bono are unparalleled. He developed the SCBA Pro Bono Foreclosure Settlement Conference Project.

To Kathryn Mary Shulman, 7 ½, SCBA President **Art Shulman's** granddaughter who received her First Holy Communion at Christ the King R.C. Church in Commack on Saturday, May 12.

John P. Bracken, a Partner in Bracken Margolin Besunder LLP, has been appointed a member of the Chief Judge's Task Force on Commercial Litigation in the 21st Century. **John Bracken** has also been certified an advocate by the National Board of Civil Pretrial Practice Advocacy, the newest division of the National Board of Legal Specialty Certification, National Board of Trial Advocacy. And **Mr. Bracken** was also named again in the 2011-2012 *Super Lawyers Business Edition* as one of the top attorneys practicing in the area of Business Litigation in New York State.

LI Pulse Magazine handed out its Second Annual Legal Eagles award. Partner **John V. Terrana** of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP's was honored with the 'Most Unbeatable' Award for his recent milestones and accomplishments. The firm's Tax Certiorari department recently reached a milestone by opening its 5,000th file. Mr. Terrana is co-chair of the SCBA's Tax Certiorari Committee.

Announcements, Achievements, & Accolades…

Patricia E. Salkin has been appointed the new Dean of the Touro College Jacob D. Fuchsberg Law Center. Salkin is a nationally known scholar and expert in land use planning and government ethics. She is currently the Associate Dean and Director of the Government Law Center of Albany Law School where she is also the Raymond & Ella Smith Distinguished Professor of Law. Ms. Salkin becomes Touro's fifth dean and will be the first woman to hold the position when she begins her tenure on August 1.

On April 25, **Larry J. McCord**, Partner, Larry McCord and Associates LLC, joined Dr. Pless M. Dickerson, Superintendent of Schools, Wyandanch School District, in presenting a mock trial competition at Wyandanch High School.

James F. Gesualdi, a sole practitioner in Islip, whose practice is concentrated on

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High School Student Amanda Ambruster Essay Winner

Over 100 applications from high school students were considered this year by the SCBA Scholarship Committee. President Matthew Pachman thanked both the SCBA staff member Marion Baumer who redacted and copied all of the applications and the members of the committee that include, Lynne Adair Kramer, Sheryl L. Randazzo, Rosemarie Tully and Ilene Cooper who chose this year's winning essay written by Amanda R. Ambruster. Amanda attended the SCBA Annual Meeting with her parents, Lori and Richard Armbruster, where she was honored by the members of the SCBA. Below is her essay.

President Matthew Pachman presented the SCBA High School Scholarship Award to Amanda R. Ambruster who accepted a check and honorary plaque with her parents Lori and Richard at her side.

SCBA Scholarship winner Amanda R. Ambruster received an enthusiastic standing ovation from members of the SCBA.

Photos by Barry Smolowitz

High School Essay Scholarship Winner
By Amanda R. Armbruster

I could tell by the look on her face when she answered her cell phone that something was very wrong. She averted her eyes from mine and her hands trembled as she paid the cashier. My mother blurted out the horrific news. Tears rolled down her face as she told me that my twenty year old cousin Kyle had been killed by a drunk driver in Arizona. The driver of the other vehicle was a nineteen-year old illegal immigrant who had made an irresponsible decision to get behind the wheel. He had been going eighty miles per hour when he crossed over the double yellow line. I was totally shaken, crushed and, ultimately, outraged.

Kyle's accident brings to light three major social problems. Alcohol consumption by underage minors is rampant in high schools and colleges all over our country. Despite early education, most students drink alcohol. It has become socially acceptable for high school age young people to attend parties where alcohol is being served. I made a personal decision not to drink in high school. I have had a tremendous high school experience, filled with good friends and healthy activities. My decision has not hindered me socially in the least.

Secondly, it boggles my mind how any person can get behind the wheel of a car while under the influence of alcohol. If a person wants to drink, so be it. Don't drive!

Putting other people's lives at risk is a travesty. Again, we are taught at a young age about the dangers of drinking and driving, but every time I open a newspaper someone is killed by a person who used poor judgment. Driving is a privilege and our highways need to remain safe. The easy alternatives are to walk, call a cab or assign a designated driver.

Lastly, Kyle's death by an illegal immigrant has motivated me to educate myself on this issue. I have no problem with people coming to America from foreign countries. However, this has to be done legally, with respect for our country's laws. The person who killed my cousin had been in this country illegally for five years. He had no license and he had no car insurance. He chose to drink and to get behind the wheel. Police at the scene said he ran away from the accident and had to be pursued. There is something terribly wrong with this picture. If he wanted to live in America he should have had the decency to respect our country's laws.

In retrospect, Kyle's accident highlights some severe problems in our society. As an individual, I try to hold myself to a high standard. I am a rule follower. It troubles me when people use bad judgment. Kyle went out that night to return a DVD so he didn't have to pay a late charge, and in the blink of an eye his future was taken away from him.

This horrendous waste of a life agonizes me. It was a senseless accident that has caused my family much grief, all because of a series of bad decisions.

INTELLECTUAL PROPERTY

LegalZoom Mocks USPTO Legal Rep Rules

By Gene Bolmarcich

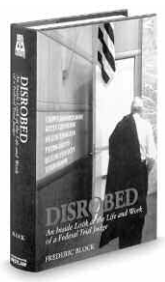
Gene Bolmarcich

LegalZoom.com, the giant of the "legal forms" industry, has been under attack on many fronts since 2008 for engaging in the unauthorized practice of law (UPL) stemming from the vast multitude of services it provides to its customers, such as will preparation, preparing divorce papers, incorporating businesses, and "personalizing" real estate leases. These attacks have come in the form of class action lawsuits brought in Missouri[1] and California[2] (both of which have settled on terms effectively allowing LegalZoom to continue doing business in exchange for certain payments made to the class members comprising LegalZoom's customers in those states), a lawsuit filed by the North Carolina State Bar on Sept. 30, 2011, Connecticut Bar Association Informal Opinion 2008-01, Pennsylvania Bar Association Formal Opinion 2010-01, the Supreme Court of Ohio Advisory Opinion UPL 2008-03, and other informal opinions expressed by attorneys on various blogs and websites.

The focus of this article is on only one aspect of LegalZoom's business - its activities associated with trademarks and patents. By virtue of what can only be called "mutual buck passing" on the part of the United States Patent and Trademark Office (USPTO) and state Attorneys General offices, LegalZoom has remained immune to attack in connection with what is considered to be, without a scintilla of doubt, the unauthorized practice of law in connection with its preparation of patent and trademark applications, and the filing thereof with the USPTO. While the law concerning UPL in general can at least be argued to be less than crystal clear[3], that is not the case with respect to trademark and patent matters. On September 15, 2008, the USPTO issued new rules that should have stopped those who are not attorneys or patent agents from preparing and filing both patent applications and trademark applications[4]. Pursuant to the USPTO rules and in particular, Section 11.5(b) thereof, the only way a non-practitioner, including LegalZoom, can provide any services relating to patent and trademark applications is through an attorney or patent agent authorized by the USPTO.

Notwithstanding its own rules, the USPTO has taken the position that they do not have the authority to regulate the activities of those who are not attorneys or patent agents, and unfortunately the USPTO is probably right given current rules and laws. Even when the USPTO knows that the person filing a trademark or patent application is not an attorney admitted to the bar of any state, or a patent attorney or agent registered

(Continued on page 23)



Save the date!!

Author's Night
Thursday, September 20, 2012
SCBA Center

***Disrobed* -** An inside look at the Life and Work of a Federal Trial Judge by the Hon. Frederic Block.

Get a unique and comprehensive look at the life and trials of Federal District Court Judge Frederic Block, whose bench sits in the heart of New York City.

Mutli-faceted, the book gives the reader

- The perspective behind some of the most newsworthy and sensational cases of the last 20 years;
- It discusses the death penalty, racketeering, gun laws, drug laws, discrimination laws, race riots, terrorism and foreign affairs;
- A revealing story of how the law works in America, and much more.

Judge Block, prior to his tenure on the bench, practiced in the areas of civil and criminal trial and appellate litigation on both the state and federal levels. He had the time and inclination to lead our bar association in various capacities and ultimately to become president in 1979-1980. Judge Block was appointed United States District Judge for the Eastern District of New York by President Bill Clinton in September 1994. He assumed senior status on September 1, 2005.

Program Coordinator: Scott M. Karson - Watch for further details of this "must read" well crafted book.

- LaCova

The Suffolk Lawyer wishes to thank Workers Compensation & Social Security Disability Special Section Editor Craig Tortora for contributing his time, effort and expertise to our June issue.

Craig Tortora

Permanent Impairment and Loss of Wage Earning Capacity Guidelines

By Lisa Tortora

The NYS Workers' Compensation Board has made sweeping changes regarding the adjudication of work related injuries in terms of medical impairment rating and the payment of workers' compensation benefits since calendar year 2007. Prior to March 13, 2007 if an injured worker were deemed to have a permanent partial disability he or she would be entitled to weekly benefits without durational limits subject to certain criteria.

The 2007 workers' compensation reform imposed duration caps for permanent partial disability payments under Workers' Compensation Law WCL Section 15(3)(w) on claims with dates of accident or disability after March 13, 2007. The "caps" are based on an individual's loss of wage earning capacity. In order to address calculation of loss of wage earning capacity the NYS Workers' Compensation Board promulgated and implemented the 2012 Guidelines effective January 2012. The 2012 Guidelines (the "Guidelines") replace the existing 1996 Medical Guidelines and took effect January 1, 2012.

The 2012 Guidelines address evaluation of both schedule loss of use awards and non-schedule permanent disability awards. With regard to schedule loss of use awards essentially the Guidelines remain unchanged from June 1996. The non-schedule permanent disability sections include guidance for medical professionals to follow on how to evaluate medical impairment and physical function and guidance for the board on how to determine loss of wage earning capacity. Specifically, the starting point for determining both schedule loss and non-schedule permanent disabilities with relationship to a workers' compensation claim require a finding of maximum medical improvement. Maximum medical improvement is based on a medical judgment that (a) the claimant has recovered from the work related injury to the greatest extent that is expected and (b) no further improvements in his or her condition is reasonably expected. The need for palliative care or symptomatic treatment does not preclude a finding of maximum medical improvement.

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Medical impairment is a purely medical determination made by a medical professional and is defined by any anatomical or functional abnormality or loss. Medical evaluation of a claimant requires a medical examination and accurate objective assessment of function. In order for a doctor to report on permanent impairment he or she must review the 2012 Guidelines, review the medical records, perform a thorough medical history, identify each affected body part, report on prior test results, and follow the recommendations to establish a level of impairment.

The 2012 Guidelines now adopt and recommend a three part analysis for determining loss of wage earning capacity when a claimant has a non-schedule permanent impairment. This three step analysis relies upon a medical professional to evaluate (1) medical impairment and (2) functional loss/abilities. The third factor addresses vocational issues and is assessed by the Administrative Law Judge.

In terms of medical impairment the 2012 Guidelines address evaluation of the spine, pelvis, respiratory system, cardiovascular system, skin, brain and extraordinary pain. The impairment guidelines include severity rankings by body part that use letter grades (A – Z) and a chart that places those letter grades on a scale from 0 – 6. An evaluation to determine functional loss/abilities should include and document whether or not the injured worker is capable of performing work activities of the at-the-job injury. Moreover the physician is required to measure the injured worker's performance and restrictions across a range of functional abilities including but not limited to lifting, carrying, pushing, pulling, and grasping. He or she must also assess the injured workers' ability to walk, sit, stand, climb, bend, stoop, kneel and reach. Finally in assessing functional ability or lack thereof a doctor must determine an individual's exertion capacity relative to those activities that require lifting and/or pushing and/or pulling objects. A doctor rates an injured worker potentially capable of sedentary, light, medium, heavy or very heavy work activity.

Generally speaking a, permanent medical impairment reduces earning capacity by restricting the worker's ability to perform certain work-related activities. If the medical impairment does not prevent the worker from performing the essential job functions of his pre-injury work activity, then injured worker may be deemed to have no loss of wage earning capacity.

Finally a judge must assess vocational issues including but not limited to education, age, literacy and English proficiency of the injured worker when determining loss of wage earning capacity. All these factors play a role in the workers' ability to qualify for different occupations and level of income. Thus when a judge addresses such vocational issues in determining loss of wage earning capacity, he or she must also look at a person's prior work skills and whether or not they are transferrable to alternative employment.

In the coming years the implementation of the January 2012 Guidelines and the assessment of permanency and loss of wage earning capacity will not be a simple task. We potentially expect revision of statute and case law to carve out and further refine how the concept of loss of wage earning capacity will be implemented by the Workers Compensation Board accordingly.

Note: Lisa M. Tortora is a partner at the law firm of Foley Smit O'Boyle & Weisman one of New York's oldest Workers' Compensation Law defense firms. She actively lectures throughout NYS state to various employers and insurance carriers as well as before the Suffolk County Bar Association.

Court Defers to Judgment of Workers' Compensation Board

Matter of Zamora

By Joanne Agruso

Matter of Zamora, recently decided by the Court of Appeals, is a rare instance where a case involving only workers' compensation issues has been heard by the highest state court. The 4-3 decision reversed the Appellate Division determination, reinstating the decision of the Workers' Compensation Board. Unfortunately, it appears the decision may have resulted from political exigencies, and not necessarily the compensation law itself.

Matter of Zamora dealt with the issue of voluntary removal from the labor market and its twin sister, attachment to the labor market. These issues arise in cases where a claimant is alleging a loss of income due to an inability to return to work based on the compensable injury pursuant to Section 15-3 (w).

Withdrawal from the labor market is a determination made by the board as to whether or not disability from a work-related injury causes a claimant to be removed from the work force. If the disability caused the cessation of work activity, then the board can find the withdrawal to be involuntary, or due to the disability. This finding permits a claimant who has retired to continue to receive compensation benefits. A finding of voluntary withdrawal means that the board has determined something other than the disability is the basis for the claimant's retirement, such as age or general economic conditions. Meisner v. UPS, 243 A.D.2d 888 (1998) *app dismd* 93 NY2d 848 (1999) and *app den* 94 NY2d 757 (1999).

Attachment to the labor market is a determination whether or not a workers' compensation claimant has made a reasonable search for work consistent with his or her physical limitations and is part of the process used to determine entitlement to wage replacement (indemnity) benefits.

In Zamora, the claimant was injured while working, sustaining damage to the left shoulder and two herniated cervical discs. Eventually, spinal surgery was performed in late 2005, with the claimant returning to full time employment. Thereafter, she was declared to have a permanent partial disability. This did not result in indemnity payments, since there was no loss of income. About six months later various health issues forced her to quit. It was at this point that the issues of voluntary withdrawal and attachment to the labor market became paramount.

Testimony was taken of the claimant in August of 2008. The testimony dealt with claimant's health, including problems not related to her compensable injury, as well as her attempts to obtain other employment. The judge found the claimant to be entitled to benefits, but the decision was reversed by the board. The board found the claimant had not conducted a reasonable job search after December 2007, and although her original withdrawal from the job market was involuntary, she had not established attachment to the labor market and therefore entitlement to continuing benefits.

The Appellate Division reversed the board, finding the subsequent loss of wages were due to her disability. The Court of Appeals, however, reversed this finding, in a 4-3 decision.

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The majority opinion of the court finds that the board may, but need not infer that the claimant cannot find suitable employment because of the work-related disability. The Court felt the Appellate Division made this "inference" into a "presumption. As part of its opinion, the court cites *Burns v. Varriale*, 9 NY3d 207 (2007) as supporting that viewpoint. However, as the dissent notes, Burns dealt with a different section of the compensation law, Section 29, and did not squarely address the issues presented in Zamora.

The court noted that the determination of a reasonable work search is a factual one which must be upheld if there is substantial evidence to support it. In Zamora, the court felt the evidence did support the board's conclusion.

The dissenting opinion, written by Chief Judge Lippman, notes the remedial nature of the Workers' Compensation Law and the fact that attachment to the labor market is not found in the law itself. Judge Lippman felt the issue to be whether or not a worker who has involuntarily withdrawn from employment due to a compensable disability must demonstrate "attachment to the labor market" in order to receive benefits, finding the statute makes no such prerequisite to obtain benefits. Thus, the imposition of barriers to compensation benefits contravenes the law itself.

Based upon the majority opinion, Zamora stands for the principle that the board may infer that a work related disability can cause a claimant to be unable to return to employment or find substitute employment within their restrictions, but is not required to make such an inference. It is left to the board's discretion to decide, on a case-by-case basis, whether or not there is a voluntary or involuntary withdrawal from the labor market, and whether or not there have been sufficient attempts to obtain employment within a particular claimant's work-related limitations.

Note: Joanne S. Agruso has been a practicing attorney in the workers' compensation field since 1981, first as a sole practitioner and later as the founding partner of Agruso & Trovato. She is presently a sole practitioner with offices in Hauppauge.

Challenges of the Medical Treatment Guidelines

By Craig Tortora

In an attempt to streamline the treatment approval process, the Workers' Compensation Board enacted Medical Treatment Guidelines (MTGs), for causally related injuries to the neck, back, shoulders and knees.

The Workers' Compensation Board maintains that the MTGs were created to help claimants obtain required treatment in an expedited fashion, although it is readily apparent that traditional forms of conservative management such as physical therapy and chiropractic treatment have been significantly limited. Irrespective of the board's motivations for these limitations, there are unintended consequences that the practitioner must face that have made this system more challenging, and quite frankly, more frustrating, especially for those of us who represent injured workers. The following is a brief discussion of the difficulties facing claimants and their representatives attempting to navigate the MTG process.

In order to reach its goal of expediting the treatment process, regulations were promulgated that place strict requirements on treating physicians who wish to deviate from the MTGs. Called "variances," these requests must be made upon a specific form (MG-2). The forms must be accompanied by treatment notes which are submitted to support the attending physician's assertion that a variance from the guidelines are medically necessary and that he/she believes that this departure from the guidelines will bring about functional improvements. Physicians are encouraged to include additional medical authority in support of their opinions. Carriers are provided with five days to respond if requesting independent exams, 15 days for a final response if not (variance requests must still be reviewed by a medical professional), and 30 days for a final response if not requesting an IME. If denied, a claimant is provided with 21 days to request a review. Depositions of medical witnesses are often required.

Craig Tortora

FOCUS ON WORKERS COMPENSATION & SOCIAL SECURITY DISABILITY SPECIAL EDITION

The MTGs at first blush, appear to place a heavy burden upon insurance carriers, in terms of the strict time requirements. However, defenses to variance requests have been increasingly successful for a number of reasons. "Medical professionals" are usually in-house and rejections are often boilerplate. Attending physicians frequently fail to properly complete the variance request forms or commit other ministerial errors resulting in technical denials by the board. Finally, a spate of recent Board Panel decisions have rejected variances previously granted by law judges, based upon the fact that the law judges did not strictly adhere to the requirements of the variance process.

Although it had become readily apparent that the timely delivery of appropriate treatment was a glaring deficiency within the Workers' Compensation system, these new regulations are fraught with, what we can assume are unintended consequences. The Workers' Compensation Board is presently swamped by the volume of requests that must be addressed within the strict time requirements, to the point where other non-treatment related issues have been supplanted on calendar by variance–related matters, not to mention the inordinate amount of time spent by board examiners processing the avalanche of supporting documentation. Quite frankly, many practitioners have commented that cases will appear on calendar for the consideration of a variance issue before they will be scheduled for the suspension of a claimant's indemnity benefits.

A second deficiency is that treatment for chronic injuries is notably absent from the MTGs. Although other states have included such considerations in their regulations, New York has failed to do so. Therefore the question arises where claimants are denied treatment for therapeutic benefit where all other treatment modalities have been exhausted. Many individuals who were receiving such therapeutic intervention prior to the enactment of the MTGs are now being denied palliative care.

It should also be noted that although the board has been successful in expediting conservative treatment immediately following an accident, issues arise when surgery becomes a consideration. Although the MTGs explicitly permit certain surgical procedures without authorization, physicians are reluctant to proceed without explicit authorization from a carrier. Claimants are left waiting for authorization that is not required and which will

(Continued on page 26)

Consistency & Making the Record Work for You

By Jason Weissman

The most important part of representing someone in a Social Security case is developing the record properly and making it work for your client. When I worked as a decision writer for the Social Security Administration, two of my biggest challenges were drafting a favorable decision with a dearth of evidence and drafting an unfavorable decision with a strong, consistent record. While a poor record can make it difficult for a judge to justify paying a claimant, a strong record can make it difficult to deny them. So, what should a social security attorney be looking for when developing the record? Consistency

Consistency in the record is important for two reasons. First, inconsistent statements can make your client look like they are exaggerating their symptoms or worse, that they are a malingerer. Inconsistent statements give the administrative law judge license to find that your client is not credible. Credibility reflects on everything they say, including the extent of their limitations - in other words, if they're exaggerating about one thing, then why not another? Once a judge determines that your client isn't credible, it is easy to find that their alleged inability to work is an exaggeration.

Second, given two options of what a claimant can do, a judge can always choose the one that helps their case. For example, your client may have noted that he is able to drive on one form but noted that he is unable to on another. When taken in combination with several factors, the ability to drive can be used to support an unfavorable decision. Because the record is so well-developed, even the tiniest detail can be recalled years after it was made.

A responsible and diligent attorney will create consistency by developing the record. This means finding and submitting medical evidence that supports their client's statements regarding treatment and symptoms. Treatment notes can support the case by telling a story, whether that story consists of ineffective treatment, personal challenges, decompensations, or midnight emergency room visits. It is much harder for a judge to find that your client is exaggerating when his or her statements are reflected repeatedly in treating notes.

Developing the record also means providing opinion evidence from treating medical sources that support your case. The more familiar a treating source is with your client, the greater value his or her opinion provides. A treating medical source acts as a reputable third party, whose advanced understanding of an impairment allows them to accurately assess a condition and convey its effects to the judge.

A well developed record can also create challenges for an attorney. If a client was ever noncompliant with medications or treatment, the judge will find out. If a client ever claimed that he or she could travel on public transportation or liked to cook at home, even if it wasn't true the judge will find out. Developing the record can create a new set of challenges.

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The problem of inconsistencies can be overcome by explaining them on the record. A necessary pre-hearing step is reviewing the record and consistency-spotting. By reviewing the record, an attorney can note any issues, discuss them with the client, and explain them away so that they cannot be used against him or her. For example, treating notes that reflect noncompliance with medication can create challenges. If a client's impairments were severe, then why wouldn't they take their medications? A quick conversation with a client can clarify that their noncompliance was the result of difficulty obtaining medications. Many claimants seeking benefits have financial difficulties, which affect their ability to afford treatment. Explanations like these can prevent inconsistencies from being held against your client.

Any inconsistencies should be explained either as part of questioning during the hearing, or preferably, as part of a narrative statement submitted before the hearing. An experienced attorney will be mindful of inconsistencies in the record and make effort to identify them, explain them, and in some cases, even use them to their client's advantage. Given the proper focus on consistency, even an inexperienced attorney can give their client an excellent opportunity to obtain social security benefits.

Note: Jason Weissman is an associate at Goldsmith & Tortora, where he specializes in Workers' Compensation, Social Security, and Disability Benefits Law. He previously worked at the Social Security Administration as an attorney advisor. He is a member of the Suffolk County Bar Association.

Posthumous Child's Survivors Benefits

When a "child" is not a "child"

By Sharmine Persaud

Can a child conceived after the death of a biological parent be eligible to receive survivor benefits under Title II of the Social Security Act, 42 U.S.C. 401 et seq. regardless of state intestacy laws?

Sharmine Persaud

As a sole practitioner, I am fortunate in that I can take on the most interesting and intellectually rewarding cases even though there may not be a pot of gold at the end. In the spring of 2011, the most interesting case of my legal career was referred to me by a colleague. The case involved a young widowed mother of quadruplets who had filed an application with the Social Security Administration (SSA) for child survivors' benefits for her quadruplets. As it turned out the application for child survivors' benefits was denied and the young widow was seeking an attorney to assist her in the appeal. Simple enough, right? Not quite. We need more facts.

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My interest in learning more about the case and meeting the client was piqued. When the client arrived at my office with a briefcase of legal information, newspaper articles and case law my first thought was either she was nuts or knew more and was far more prepared that an attorney to litigate her case. The latter was true.

My client, who I will name Mrs. Jane Doe, mother of the claimants in this matter, married Mr. John Doe, on July 15, 2003. Shortly after their marriage Jane sought medical assistance from an OBGYN, as the couple was trying to conceive their first child. Although Jane was able to conceive, she miscarried in October 2003. Unfortunately two years and three months after their marriage, John was killed in a motor vehicle accident on October 4, 2005. John sustained severe head trauma and was pronounced dead at the scene about 45 minutes after he was struck. Months prior to John's death, Jane had returned to her OBGYN and was under their continued care for fertility treatment. Jane was still undergoing fertility treatment and was tak-

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IMMIGRATION

Decision by BIA Will Impact LI Immigrants

By Mitchell C. Zwaik

While most of the nation's immigration advocates were focused on the US Supreme Court as it heard oral arguments on Arizona's controversial immigration statute, a little noticed decision by the Board of Immigration Appeals (BIA)[1] promised to have a greater impact on the lives of Long Island's immigrant community. The BIA, the agency's highest appellate court, overturned years of policy by the U.S. Citizenship and Immigration Services (USCIS) and held that individuals with pending applications for permanent residency (a "green card") could legally travel outside the U.S. without facing administrative sanctions upon their return.

The new ruling, coming on the heels of recent changes in administrative policy, has given some glimmer of hope to many thousands of undocumented immigrants trying to legalize their status and signals a new willingness by the Obama administration to ameliorate some of the laws harshest provisions without requiring Congressional approval.

At the heart of the controversy is Section 212(a)(9)(B) of the Immigration and Nationality Act[2] (INA) which provides that a noncitizen who leaves the U.S. after having lived illegally in this country for more than one year cannot re-enter the U.S. for 10 years. Enacted in 1996, the provision's supporters claimed this draconian measure was necessary to stem the tide of illegal immigration. Instead, the provision has had exactly the opposite effect as the numbers of undocumented individuals has swelled from under 5 million to more than 10 million since the provision went into effect.[3]

To understand the issues, one must understand that a basic principle of U.S. immigration law provides that noncitizens who are currently "out of status" (illegal[4]) in the U.S. usually need to return home and obtain new, proper documentation from the U.S. Consulate to become legal in the U.S. Combine this principle with the "10 year bar" and the results can be severe.

Mitchell C. Zwaik

A few examples may help:

Assume that Maria is a native of El Salvador, brought illegally into the U.S. at the age of 5. She remains with relatives after her parents are deported, graduates high school, marries a U.S. citizen and has two citizen children. She wants to become "legal" but cannot obtain her permanent residency without returning home and Section 212(a)(9)(B) of the INA means that Maria cannot return to the U.S. for up to 10 years. The law does provide for a waiver (or pardon) of that 10 year bar for extreme hardship to a "qualifying relative" who include her husband but not her children. The granting of that waiver is entirely discretionary and often takes years to adjudicate. Thus to "get legal" Maria must leave her husband and children for years and hope to return to them. The administration recently announced it was amending the regulations to allow Maria and other Immediate Relatives[5] to complete processing of the paperwork, including the waiver, in the U.S. If the paperwork is approved, Maria will return to El Salvador to complete processing that should take only a few weeks.

If we change the facts only slightly and have Maria enter the U.S. legally, the results are very different. Although Maria has lived illegally in the U.S. for many years, her legal entry combined with her marriage to a U.S. citizen will allow her to obtain her permanent residency in the U.S. without returning to El Salvador and without facing the 10 year bar. No waiver is necessary and current processing times on her green card application are about four months. But what if Maria travels outside the U.S. while her green card application is pending? She becomes subject to the 10 year bar upon her return. Why would she be so foolish as to travel while her application is pending? Because the USCIS invites her to do so! Bundled together as part of her filing fees, is a fee for issuance of travel permission known as "advance parole." If she uses the advance parole to return to El Salvador, she will ordinarily be permitted to re-enter without a problem. When she appears at USCIS for final processing of her green card, her application will be denied unless she can have the waiver approved.

The new ruling by the Board of Immigration Appeals has overruled that policy. Now Maria's travel back to El Salvador on advance parole will not raise the 10 year bar on her return.

Simple enough? Not really.

Let's change the facts just a little. Suppose Maria is being sponsored by her sister, a U.S. citizen and suppose further that Maria is unmarried with two U.S. citizen children. If she entered the U.S. illegally, she will have to return to El Salvador. She will not qualify for stateside processing of her waiver under the new rules because she is not an Immediate Relative. Worse yet, she will not be able to file the waiver application because she does not have a "qualifying relative." As a result, despite her two U.S. children, she will never be able to get "legal" in the U.S. unless she marries a U.S .citizen or returns to El Salvador for 10 years.

One final example.

Same fact pattern as above, but assume Maria was sponsored by her sister who filed the application on April 1, 2001. Because these sibling applications come under a preference classification that is backlogged by 11 years, Maria's green card application is only now current. She can adjust status in the U.S. under a special provision in the law that permits stateside processing of green card applications filed on or before April 30, 2001. Maria now learns that her father is dying in El Salvador and she returns home on advance parole. Upon her return Maria is subject to the 10 year bar, but because she does not have a qualifying relative, she cannot even file the waiver application. Her trip home to visit her dying father has effectively cost her her green card.

Again, the BIA decision provides Maria with some relief. The real relief, however will only come when the 10 year bar is eliminated.

Note: Mitchell Zwaik is the founder and director of Mitchell Zwaik and Associates, a Bohemia based law firm that limits its practice to immigration law. Mitchell Zwaik & Associates is well versed in almost every facet of immigration law, including business related visas, employment and family based

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Judge Czygier Chosen to Serve on Esteemed Panel

Suffolk County Surrogate's Court Judge, John M. Czygier, Jr., who was recently re-elected to a ten year term beginning January 1, 2012, will be a member of an esteemed panel of trusts and estates experts who will address this years New York State Bar Association's Trusts and Estates section spring meeting. The meeting will be held from May 3 to May 5 in Washington D.C. and will be attended by trusts and estate attorneys from around New York State. In addition, Judge Czygier will be addressing the members of the Surrogate's Association of the State of New York on the topic of attorney malpractice. The Surrogate's Association is a unique judicial association whose membership consists solely of past and present Surrogate's Court judges. Judge Czygier currently serves as the Association's Vice President.

Hon. John M. Czygier, Jr

Judge Czygier is a frequent lecturer on the topic of wills and estates and he continues to make numerous presentations at seminars sponsored by professional and civic associations across the State of New York. On May 15, he will be lecturing on professional ethics for the Practicing Law Institute.

Judge Czygier has served as a member of the Surrogate's Court Advisory Committee to the Chief Administrative Judge of the Courts of the State of New York since his appointment in 1999 by the Hon. Jonathan Lippman. He has also been a member of the EPTL-SCPA Legislative Advisory Committee since 2007. The mission of both committees is to review existing statutes and to draft legislation. In 2009, he was appointed to The Administrative Board for the Offices of the Public Administrator where he now serves as Chair. Judge Czygier is a former director of the Suffolk County Bar Association, and was elected to the esteemed American College of Trust and Estate Counsel, a national organization of respected trusts and estates attorneys.

Judge Czygier resides with his wife, Rose Marie, in Remsenburg, New York.

REAL ESTATE

Deal Killers, Part 2

By Andrew M. Lieb and Louis B. Imbroto

In January, 2012, the Long Island Education Board™ (LIEB) authored an article for The Suffolk Lawyer entitled "Deal Killers," which provided primary source data on the name that real estate agents utilize to refer to the document that they initially fax to attorneys containing all of the pertinent deal terms for a real estate transaction after they have procured a ready, willing and able purchaser. This is a follow-up to that article with primary source data gathered from the perspective of attorneys.

The prior article, "Deal Killers," found that 32.8 percent of real estate agents refer to the document as the "Sales Agreement" with even less utilizing the remaining questioned terms, including Binder, Deal Sheet, Purchase Agreement, Agreement of Sale, Memorandum of Sale, Purchase Contract, or Other. It was previously postulated that the data represented a reason that real estate deals do not close and are "killed" and argued that "the lack of standardization creates false expectations between real estate agents and attorneys because it creates miscommunications of key deal terms and expected turnaround time." Yet, the prior article put the blame for this problem on real estate agents. Now it's time for attorneys to look at themselves in the mirror.

Andrew M. Lieb

Louis B. Imbroto

Therefore, LIEB conducted a comparable study of attorneys at a Mandatory Con-tinuing Education Course (MCLE) licensed by the CLE Board, which it conducted. Results were obtained through administering an instrument to a total of 90 attorneys at three separate MCLE courses, with two having been conducted in Long Island and the other in Manhattan. The study finds that the legal industry lacks standardization concerning the identification of this document, but nonetheless, the term "Deal Sheet" is used the most prevalently. Of note, the term "Sales Agreement," which was used most prevalently by real estate agents was tied with the terms "Binder" and "Memorandum of Sale" as being utilized the second most often, but in a distant second place from "Deal Sheet." It is theorized that many deals fail as a result of the great disparities in the practice of professionals in this industry and it is further theorized that the divergence of terminology utilized by the different professionals in the industry results in the public's distrust of the industry as a whole. These issues must be addressed to facilitate the real estate market's correction.

Methodology

In January, February and March of 2012, LIEB conducted the MCLE course, *Property Wars: Real Estate Issues Incident to Divorce* in Bridgehampton, Manhattan and Melville respectively. Therein, 90 licensed attorneys were surveyed and 70 responded with a completed survey. The survey instrument was created as a result of in-person qualitative elicitation interviews at varying real estate brokerage offices.

The instrument utilized the following inquiry, among others:

In a real estate transaction, what is the name of the document provided to you by a real estate agent that contains the details of the transaction?

a. Sales Agreement; b. Deal Sheet; c. Purchase Agreement; d. Agreement of Sale; e. Memorandum of Sale; f. Purchase Contract; d. Binder; h. Other.

Results

Although 73 percent of the attorneys surveyed refer to the document by one name only, the term by which they refer to it varies significantly. "Deal Sheet," "Sales Agreement," "Memorandum of Sale" and "Binder" were the most commonly utilized terms with 44 percent, 9 percent, 9 percent and 9 percent of attorneys responding that they utilize each term respectively. Yet strikingly the terms utilized also varied significantly by the location where the survey was conducted. In Bridgehampton, the term "Sales Agreement" was utilized most prevalently at 33 percent; in Melville, the term "Binder" was utilized most prevalently at 53 percent and in Manhattan, the term "Deal Sheet" was utilized most prevalently at 82 percent. Therefore, in three different regions of New York three different terms were utilized. Notably, the previous study of real estate agents was also conducted at the very same Melville location, but results were not consistent with the attorneys surveyed at that location, but instead with the attorneys studied in Bridgehampton. Consequently, it appears that results are neither location specific nor profession specific, but instead vary widely unexplainably.

The results of this study have created more questions than understandings. This study has determined that there is no consistency in the real estate industry concerning the term for the most important document to convey information between

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PROFESSIONAL ETHICS & CIVILITY

Ethical Issues Facing Attorneys for Children

By Evie Zarkadis

During a recent custody trial in Family Court, the attorney for the child was accused by the petitioner mother as being biased, unfair and closed-minded. The petitioner asked that the attorney for the child be replaced. Her application was denied. At no time did the petitioner accuse the attorney for the child of improper representation of her client, of misrepresenting her client's wishes, or of replacing the child's wishes with the attorney's judgment.

Evie Zarkadis

In the example above, it is obvious that there is a misunderstanding and a misconception of the role of the attorney for the child. Often and in error, the attorney for the child is perceived as a guardian and not as an advocate. Family Court Act Section 241 imposes a dual role on the attorney for the children: (1) he/she must protect their interests and (2) help the child express his wishes to the court. Section 7.2 of the Rules of the Chief Judge provides, in part that:

1.) The attorney for the child is subject to the ethical requirements applicable to all lawyers;

2.) In JD and PINS proceedings where the child is a respondent, the attorney for the child must zealously advocate the child's position;

3.) In other proceedings where the child is the subject, the attorney for the child must zealously advocate the child's position:

a.) Must consult with and advise the child to the extent and in a manner consistent with the child's capacities.

b.) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

c.) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child'[s wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

The attorney for the child is bound by the same ethical obligations and considerations that govern the behavior of attorneys representing adults. Attorneys representing adult litigants have been accused of being biased on the side of their clients, of being unfair to the other side and of being closed-minded so they only see their client's position. In other words, they were accused of doing their job. The attorney for the child is charged with the same responsibility and is subject to the same ethical requirements applicable to all lawyers. The child's attorney is an advocate for the child and not a guardian. As an advocate, the attorney for the child must exercise due diligence, protect his client's confidential information, represent his client's wishes, avoid conflicts of interest and avoid becoming a witness in the litigation.

The rules of ethics that govern attorney behavior do not require that clients be of a certain age, intellect of gender. They simply impose a course of conduct on all attorneys for the ethical representation of clients. The attorney for the child practices law under the same rules which impose the same obligations. A child's infancy does provide an exclusionary escape from ethical practice of law; instead, it imposes a higher obligation because of the disability of infancy.

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

From Suffolk County District Administrative Judge C. Randall Hinrichs

In response to a statewide effort to develop specific plans to move cases before the courts in a fair and timely manner, a number of measures tailored specifically to the needs of Suffolk County have been fashioned including rules which impact procedures to be followed in the Suffolk County Supreme Court Calendar Control Part. These rules, which have been codified in an Administrative Order issued on May 9, 2012, by Suffolk County District Administrative Judge C. Randall Hinrichs, in consultation with the Honorable Paul J. Baisley, Jr., J.S.C., Presiding Justice of the Calendar Control Part, take effect on May 14, 2012. The rules follow:

(1) The first appearance on the trial calendar of the in the Calendar Control Part, previously referred to as the "Reserve Calendar" is herewith replaced by a Pre-Trial Calendar.

(2) There will be no adjournments of Pre-Trial Calendar appearances without prior order of the court except as required by 22 NYCRR § 202.32 and part 125.

(3) All counsel must appear at the Pre-Trial Calendar. Failure to appear may result in the imposition of sanctions pursuant to 22 NYCRR § 202.27.

(4) Only attorneys fully familiar with the action and authorized to make binding stipulations on behalf of their clients, or accompanied by a person empowered to act on behalf of his or her client, shall appear at the Pre-Trial Calendar (22 NYCRR § 202.26(e)).

(5) Prior to the conference, counsel and parties shall complete a Pre-Trial Conference form.

(6) Thereafter, a mandatory settlement conference will be held before the Court or a Court-Attorney Referee. At that time, plaintiff's counsel must provide copies of marked pleadings and bills of particulars. If the matter is not settled at the conference, the CCP Justice will take appropriate measures to set the matter down for trial in an expeditious manner.

PERSONAL INJURY

Threshold Motions after Court of Appeals' Decision in *Perl v. Meher*

By Seth M. Weinberg

The Court of Appeals issued its most recent opinion on the "serious injury" threshold under Insurance Law § 5012(d) in *Perl v. Meher,* 18 N.Y.3d 208 (2011) in November, 2011. In *Perl,* the Court of Appeals removed a hurdle from plaintiff's path to trial. The court held that the Appellate Divisions were incorrectly requiring plaintiffs to provide medical reports listing the numerical ranges of plaintiff's motion that were "contemporaneous" with the accident. *Perl,* 18 N.Y.3d at 218.

The Court of Appeals also reduced the burden for plaintiffs to raise an issue of fact as to causation. One of the plaintiffs in *Perl* was 82 years old. As expected, defendant's expert radiologist found evidence of a pre-existing degenerative condition. Plaintiff's radiologist made similar findings, but also opined that a clinical finding was required to determine if the soft tissue injuries were a result of trauma. Plaintiff's treating physician opined that the injuries must be causally related because plaintiff did not report any similar symptoms prior to the accident. This evidence was sufficient to raise a triable issue of fact. *Perl,* at 219.Thus, it appears that plaintiffs can raise an issue of fact by submitting a physician's affidavit stating that the plaintiff did not make these complaints before the accident.

Seth M. Weinberg

The Appellate Division, Second Department has handed down 59 decisions on "serious injury" threshold motions since the Court of Appeals' decision in *Perl* through April 2012. From a statistical perspective alone, the defendant's chances of leaving the Appellate Division with a dismissal are relatively low. Only 12 of 59 (20 percent) defendants were successful in obtaining a complete dismissal of the action. 3 of the 59 (5 percent) defendants were able to dismiss one plaintiff's case in cases with multiple plaintiffs. The remaining 44 out of 59 defendants (75 percent) were unsuccessful in convincing the Appellate Division to dismiss plaintiffs' complaints.

35 of the 59 defendants won summary judgment from the Supreme Court. Only 6 of those defendants (17 percent) were able to avoid a reversal or modification at the Appellate Division. 24 defendants attempted to have the Appellate Division reverse the Supreme Court's denials of their summary judgment motions. Only 6 of them (25 percent) were successful in obtaining a reversal.

Although *Perl v. Meher, supra,* is the most recent treatment of this issue from the Court of Appeals, defendants must still be wary of issues that were not raised in *Perl.* For example, defendants must affirmatively address plaintiff's claim that he or she was unable to perform all of the material acts which constituted plaintiff's usual and customary activities for 90 of the first 180 days after the accident as well as all injuries to plaintiff's body. *See Cohn v. Khan,* 89 A.D.3d 1052 (2d Dep't 2011). *See also, Caracciola v. Elmont Fire Dist.,* 2012 N.Y. Slip Op 1194418 (2d Dep't 2012). The failure to do so may result in a court finding that the defendant did not meet their prima facie burden. *Id.* This is critical as the Appellate Division, Second Department does not seem to allow the grant of partial summary judgment on threshold motions. The Appellate Division, First Department, however, does dismiss portions of plaintiffs' "serious injury" claims. For example, in *McCarthur v. Act Limo, Inc.,* 93 A.D.3d 567 (1st Dep't 2012), the Appellate Division, First Department held that defendant was entitled to summary judgment as to plaintiff's

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LANDLORD/TENANT

Equity Does Not Relieve Tenant's Failure to Timely Exercise Renewal

By Patrick McCormick

A recent article discussed the decision by the Appellate Division First Dept. in *135 East 57*th *Street LLC v. Daffy's Inc.*[1] in which the Appellate Division excused a tenant's failure to timely give notice of its election to exercise its option to renew its commercial lease because the tenant had "garnered substantial good will in its approximately 15 years at the location, which good will was a valuable asset that would be damaged by its ouster from the premises." The court in *Daffy's Inc.* referenced the Court of Appeals decision in *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*[2], which held that "the loss of an option does not ordinarily result in the forfeiture of any vested rights…"

By decision dated May 3, 2012, the Court of Appeals in *Baygold Associates, Inc. v. Congregation Yetev Lev of Monsey, Inc.*[3], citing *J.N.A. Realty Corp.,* held that the tenant was not entitled to equitable relief to excuse its failure to timely exercise its option to renew under the circumstances presented, despite the fact that the premises had been continually operated as a nursing home for more than 30 years and more than one million dollars in improvements had been made to the premises.

In *Baygold Associates, Inc.*, Baygold operated a nursing home in Monsey, New York from 1972 through 1975. In 1976, Baygold, as tenant, entered into a lease with Monsey Park Hotel, the owner of the premises, for a 10 year term. The lease granted Baygold the option to extend the term of the lease for four 10 year periods by giving notice by certified mail, return receipt requested, no later than 270 days before the expiration of each term or extended term. With the owner's consent, Baygold sublet the premises to its affiliate Monsey Park Home for Adults which operated a nursing home from 1976 through 1985 and made approximately one million dollars in improvements to the premises. In 1985, Monsey Park Home for Adults sub-sublet the premises to Israel Orzel who continued to operate a nursing home at the premises. In August 1985, Baygold renewed the lease for two additional ten year periods. During Orzel's tenancy, Orzel also made improvements to the premises.

In July, 2005, Baygold directed its attorney to renew the lease for two additional 10 year terms. It was disputed whether Baygold's attorney actually prepared and sent the renewal notice as required by the lease.

Patrick McCormick

In July 2007, the Rubenfeld family, as successor to the owner, entered into a contract to sell the property to defendant Congregation Yetez Lev of Monsey Inc. Rubenfeld's attorney notified Baygold that its tenancy would expire September 30, 2007 and that Baygold would be a month-to-month tenant. Baygold claimed it had exercised the renewal option and Baygold's attorney produced a copy of a November 1, 2005, renewal letter but did not produce either a certified mail receipt or a return receipt green card.

Baygold sued seeking a declaration of the rights of the parties in connection with the renewal term. After a bench trial, Supreme Court held that the lease was not properly renewed because Baygold did not comply with the specific lease renewal provisions and denied equitable relief. The Appellate Division affirmed holding that Baygold "failed to demonstrate 'that it made improvements of a substantial character' in anticipation of renewing the lease."

The Court of Appeals granted leave to appeal and on appeal framed the issue as "whether non-renewal would result in a forfeiture by Baygold." The court, in citing *J.N.A. Realty,* noted that "a forfeiture results where the tenant has in good faith made improvements of a substantial character, intending to renew the lease and the tenant would sustain a substantial loss in case the lease were not renewed." Also, in citing *Sy Jack Realty Co. v. Pergament Syosset Corp.*[4] the Court of Appeals noted that "we have concluded that the 'long standing location for a retail business is an important part of the good will of that enterprise' and that a tenant may be entitled to equitable relief through the loss of such 'a substantial and valuable asset.'"

However, the Court of Appeals held that "the forfeiture rule was crafted to protect tenants in possession who make improvements of a 'substantial character' with an eye toward renewing lease, not to protect the revenue stream of an out-of-possession tenant like Baygold."

The court noted that Baygold had not made any improvements to the premises since 1985, and that neither Baygold nor any of its affiliates was a tenant in possession of the premises at the time of the fail-

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SCBA 2012 Installation Dinner

Photos by Bruce Infantino, Infantino Images

New Beginning *(Continued from page 1)*

hour as well as during the ceremony. And during the President's Address, Mr. Shulman utilized them to bring a little humor to the evening as well.

There really were so many enjoyable moments. Of note were Mr. Shulman's adorable grandchildren leading members in the Pledge of Allegiance, SCBA member George Roach welcoming everyone, the address by New York State Bar President Seymour James, Jr., the presentation of various awards to well-deserving members, and the installation of this year's officers and directors.

After receiving the "famous cufflinks," a tradition that is given to outgoing male presidents, Matthew Pachman summed up what so many were thinking when he said, "The members of the Executive Committee are talented and committed. Dedicated and hardworking, nobody loves this bar association more than our new President Arthur Shulman."

FREEZE FRAME

Members of the Board of Directors joined the New Members and Membership Services Committee on May 10, holding a "Meet and Greet" event. Some of those attending included Suzanne Q. Burke, Co-Chair, New Members Committee; Elizabeth Reilly, a new SCBA member; SCBA Executive Director Jane LaCova; John J. Burke and Supreme Court Justice William B. Rebolini.

President Elect Art Shulman and Executive Director Jane LaCova joined over 300 other bar associations from across the county at the American Bar Association's Bar Leadership Institute (BLI) on March 14 to 16. They were joined by ABA President William T. (Bill) Robinson III of Florence, KY and ABA President Elect Laurel G. Bellows of Chicago, Il in session on bar leadership, governance and communications.

SCBA President Art Shulman's granddaughter Kathryn recently made her Communion and her sister, Allison, father, Len and mother, Michele were there for the big day.

SCBA member, Annamarie Donovan, attended the Oxford Round Table at Oxford University in England in March, 2012. She attended the session on Women's Issues and presented a legal perspective on U.S. gender equality and employment.

SCBA member Amy Chaitoff welcomed her new baby Tegan Kathleen Chaitoff who was born on February 17, weighing six pounds, two ozs. Mother and daughter are doing well.

District Administrative Judge C. Randall Hinrichs (center) celebrated Suffolk County Courts Community Law Day 2012 in collaboration with the Honorable Fern Fisher, Deputy Chief Administrative Judge for New York City, and the Suffolk County Bar Association, Empire Justice Center, Nassau/Suffolk Law Services, Touro Law School and Suffolk County Legal Aid Society. A mobile legal help van was available on site for Foreclosure issues and consumer debt consultations.

Honoring Retired Supreme Court Justices Doyle and Underwood

Prior to the calendar call on March 16 in the Suffolk Supreme County Supreme Court Calendar Control Part, and coinciding with the celebration of St. Patrick's Day, a portrait unveiling ceremony was conducted honoring retired Supreme Court Justices Robert Doyle and William Underwood. Among those instrumental in making the event possible were attorneys Michael Clancy and John J. Breen.

The esteemed justices joined the ranks of other Suffolk judges whose images grace the walls of the courthouse. Indeed, the first judge to be so honored was the Honorable Selah Brewster Strong in 1847. Before a standing room only crowd, the event, presided over by the Honorable Paul J. Baisley Jr., was called to order with the playing of the pipes by Martin K. Rowe and Christian Leddy. Justice Baisley began by announcing the passing of a long time member of the bar, William F. Andes, and asked for a moment of silence. District Administrative Judge C. Randall Hinrichs then addressed the audience with his remarks noting the storied careers of the justices and the extraordinary efforts undertaken to ensure that their tenures on the bench were recognized in such memorable fashion. After Justice Hinrichs' comments, Justice Thomas F. Whelan regaled the assembled with memories of Justice Doyle's time on the bench, particularly his stint in what was then known as TAP. At turns humorous, respectful and insightful, Justice Whelan paid touching tribute to his friend. In response, Justice Doyle left all with a smile and a tear as he expressed his heartfelt appreciation for the honor bestowed upon him noting that his likeness was joining "Murderer's Row" together with Justices Marquette Floyd and William Underwood. Judge James Hudson, the Supervising Judge of the Criminal Courts, followed providing an eloquent reflection on the career of his friend and mentor, Justice Underwood. Justice Underwood, Judge Hudson observed, worked tirelessly throughout his career to make better the lives of his fellow citizens. Justice Underwood too expressed his deep gratitude for the recognition by his colleagues and the presence of so many members of the Suffolk County Court family, past and present. Justice Baisley concluded by inviting all present to join the honorees at a reception following the program.

Justice Robert Doyle looks on at his photograph at the unveiling.

Justice William Underwood looks on at his photograph at the unveiling.

COMMERCIAL LITIGATION

Amendments to FRCP 56(c) Concerning the Authentication of Documents

By Leo K. Barnes Jr.

New York courts mandate that the movant on a summary judgment motion authenticate exhibits or be subject to denial. Thus, it is prudent that counsel devote sufficient time and energy during the discovery process addressing admissibility issues as a prelude to motion practice and trial. Historically, federal courts likewise required that all documents submitted in support or in opposition to a summary judgment motion be authenticated. *See, Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008). *See also*, *Young v. Daughters of Jacob Nursing Home*, 2011 WL 2714208, at *1, fn. 1 (S.D.N.Y. 2011) ("It is also settled that exhibits submitted in connection with a summary judgment motion must be authenticated and non-hearsay in order to be considered."). In sophisticated commercial practice, where document exchanges are often measured in gigabytes, not pages, the dedication of highly coveted pages of moving papers to authenticate mainstream moving documents seems, at times, to be a waste of valuable resources.

In federal court (home of the seven hour limit on depositions [FRCP 30(d)], mandatory initial disclosure [FRCP 26(a)(1)] and discovery completion deadlines which subtly encourage counsel to sprint between depositions), the Federal Rules of Civil Procedure have been amended concerning the submission of unauthenticated documents concerning summary judgment motions. In typical fashion, the Federal Rules of Civil Procedure elevate substance over form.

Leo K. Barnes Jr.

In *ForeWord Magazine, Inc., v. OverDrive, Inc.*, 2011 U.S. Dist. Lexis 125373, Case No. 1:10-cv-1144 (W.D. Michigan 2011), the court specifically addressed the impact of the changes to the procedure governing the submission of unauthenticated evidence in support of a motion for summary judgment. There, plaintiff ForeWord Magazine, Inc. ("ForeWord") brought a trademark action against defendant OverDrive, Inc. ("OverDrive"), asserting, *inter alia*, a claim for cybersquatting under 15 U.S.C. § 1125(d), to which ForeWord thereafter moved for summary judgment on its cybersquatting claim. In response, defendant OverDrive filed a motion to strike certain exhibits relied upon by plaintiff in its motion for *inter alia*, not being authenticated.

In addressing the changes to Rule 56, the court noted that "In some respects, the 2010 amendment to Rule 56 works a sea of change in summary judgment procedures and introduces flexibility (and consequent uncertainty) in place of the bright-line rules…" The court explained, however, that with the enactment of amendments to Rule 56, the "unequivocal requirement" that documents submitted in support of a summary judgment motion must be authenticated was removed, and now "allows a party…to cite to materials in the record including, among other things, 'depositions, documents, electronically stored information, affidavits or declarations' and the like." *ForeWord Magazine, Inc.*, at *4-5, quoting FRCP 56(c)(1)(A).

Furthermore, subdivision (c)(2) of Rule 56 allows a party to make objections to unauthenticated documents contained in summary judgment papers, which does not have to be made by a separate motion to strike. After an objection is made, the party proffering the documents would then be given an opportunity to show that the material is admissible or to explain the admissible form.

The court in *ForeWord* found that the amended rule distinguished between material that "has not" been submitted in admissible form, rather than material that "cannot" be submitted in admissible form. Specifically, the court stated that "the objection contemplated by the amended Rule is not that the material 'has not' been submitted in admissible form, but that it 'cannot' be." From a practical point of view the difference is significant, as the rule seems to preclude objections by an attorney as to unauthenticated evidence to which he or she knows *could be* submitted in admissible form.

In *ForeWord*, the court addressed the objections made by the defendant that certain exhibits were unauthenticated with the recent changes to Rule 56. In analyzing the amended Rule 56, the court held that the "submission of unauthenticated exhibits is not a violation of any express obligation imposed by the rules. Rather, it is grounds for objection, in which case the proponent has the burden to show that the material is admissible as presented or to explain the admissible form that is anticipated." According to the court, the exhibits that the defendant objected to were indeed unauthenticated, and "would have been condemnable as sloppy lawyering as late as November 30, 2010." However, under the new amended Rule 56 the court allowed plaintiff to come forward with supplemental affidavits authenticating the documents to which were the target of defendant's objections. After discussing whether the supplemental affidavits authenticated the exhibits objected to, the court concluded that the supplemental affidavits were sufficient to authenticate the exhibits under the Federal Rules of Evidence and applicable case law.

Assuming time and space permits, it is good practice to submit documents in admissible form in the first instance to safeguard against additional costly motion practice, notwithstanding that an attorney may be able to supplement his or her papers later due to the recent changes to the FRCP Rule 56.

Note: Leo K. Barnes Jr. is a member of Barnes & Barnes, P.C. in Melville and can be reached at lkb@barnespc.com.

CONSUMER BANKRUPTCY

Debtor's Attorney Tries to be Creative – Unsuccessfully

By Craig D. Robins

After I wrote about some bankruptcy court decisions last month which involved some quirky and unusual facts, some of my colleagues requested that I continue to discuss similarly odd and interesting cases. Fortunately, we have one that is fresh off the docket.

On April 24, 2012, Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, happened to issue a decision in just such a case, so we now have appropriate fodder for this month's column. The decision, which is just as interesting for what is says, as for what it does not, involves protecting a debtor's entitlement to receive funds, being creative with exemptions, and seeing how a client might suffer from attorney ineptitude for being unfamiliar with bankruptcy practice and procedure. It also leaves one thinking about how far a judge can go to assist counsel who is clueless. *In re Cho,* no. 11-75595-ast, (Bankr. E.D. New York 2012).

Craig Robins

In August 2011, Mr. and Mrs. Cho filed a typical Chapter 7 consumer bankruptcy petition here on Long Island. About a month before filing, the debtors' car lender repossessed their Honda. Unbeknownst to the debtors at the time, a week before the filing date, the lender sold the vehicle at auction, and the sale resulted in a surplus of $5,000.

The debtor's bankruptcy attorney, a lawyer from Queens who shall remain nameless, advised Chapter 7 Trustee Robert Pryor at the meeting of creditors that the debtors' vehicle had been repossessed pre-petition, resulting in a surplus, and that the debtors had received and deposited a check for the surplus post-petition.

The trustee soon demanded that the debtors turn over the entire surplus amount. Instead of doing that, the debtors amended their Schedule of Assets to include an ownership interest in the vehicle (which they no longer owned). They also amended their Schedule of Exemptions (which opted for New York State exemptions as opposed to the more liberal federal exemptions) to exempt the vehicle in the sum of $4,000 pursuant to C.P.L.R. § 5205(a)(8), and to also increase their cash exemption by $1,000 to cover the additional value of the surplus pursuant to C.P.L.R. § 5205(a)(9).

The trustee believed that he was nevertheless entitled to the full surplus amount, so he brought a motion to compel the debtors to turn it over. The debtors responded, acknowledging that they no longer owned the vehicle, but argued that they were entitled to exempt the surplus as cash. The trustee responded and pointed out that the amended schedules were improperly done and therefore fatally defective.

The trustee's observation was correct. Eastern District of New York Local Bankruptcy Rule 1009-1(iv) provides that in order for an amendment of exemptions to become effective, the debtor must first file and serve the amended exemptions on the U.S. Trustee, all creditors, and all other parties in interest, and then file proof of service with the court. Here, the debtors' attorney both neglected to file, and neglected to serve.

One would think that the debtors' attorney, after reading the trustee's papers alleging this neglect, would take immediate corrective action. However, he did not. At the hearing, which was held in December 2011, Judge

(Continued on page 23)

FUTURE LAWYER'S FORUM

Law and Imagination

By Maria Veronica Barducci

At the Harvard University commencement speech of 2008, renowned author J.K. Rowling told the graduating class that her biggest fear upon her graduation was not poverty, but failure. And she did fail, so she admits, but she learned that[1]:

> *The knowledge that you have emerged wiser and stronger from setbacks means that you are, ever after, secure in your ability to survive. You will never truly know yourself, or the strength of your relationship, until both have been tested by adversity. Such knowledge is a true gift, for all that it is painfully won, has been worth more than any qualification I ever earned.*

She continued her speech by outlining how important imagination is in life. Imagination is the power that allows people to empathize with humans whose experience we have never shared. Through imagination, humans can learn and understand without having experienced. They can think themselves into other people's places.

Maria Veronica Barducci

Both these points are important in a law school student's career, especially now as the class of 2012 is getting ready to graduate. This is because, as law school students, we always have that little bit of fear of failure inside of us: of not making the grade, of not getting a job, of not making enough money and even the fear of failing the expectations of the people who sacrificed everything for us so we could be here.

But for some, that fear is a stepping stone towards success. It is the push they need to keep them going or even to get them started just as for others the idea of success drives them to reaching their goals. All of us have experienced failure to a certain extent, but it never stopped us, it was the breeze of reality that hit us in the face and made us realize that not everything we want is meant to be. Nonetheless, we keep going on our journey and when we get the job we want, pass the class we struggled with, or sit at graduation with the caps and gowns we know that we "painfully won" and that victory becomes that much sweeter.

I believe that imagination is important because as student and lawyers we try to help and work with others whose life we have not lived but yet we have to understand. It is important when it comes down to using our law school education, which is a power beyond itself, a power not many people have the possibility to use, a power that can change the world. So in the words of J.K. Rowling, "if we retain the ability to imagine ourselves into the lives of those who do not have our advantages, then it will not only be our proud families who celebrate our existence, but thousands and millions of people whose reality we have helped change. We do not need magic to change the world because we carry all the power we need inside ourselves already: we have the power to imagine better.

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

1. *Harry Potter Author J.K. Rowling's 2008 Harvard Commencement Address*. 5 June 2008. Web. http://harvardmagazine.com/2008/06/the-fringe-benefits-failure-the-importance-imagination.

Under the Boardwalk, Down By the Sea

By Lance R. Pomerantz

The approaching summer combined with the good fortune of living on Long Island induces us to consider a nice, relaxing visit to our local waterfront. Land title lawyers, however, should be aware that the Court of Appeals, Appellate Division and Supreme Court have already been spending a lot of time there. Here are three recent cases (including two from Suffolk County).

Under the boardwalk

Our first case literally concerns ownership of the property under the boardwalk.

In *Estate of Becker v. Murtagh,* 2012 NY Slip Op 02417 (Court of Appeals, April 3, 2012) a long-term lessee was awarded title by adverse possession to a portion of his neighbor's premises. The neighboring parcel was also leased *from the same landlord*.

The two adjoining beachfront parcels are located in Oak Beach in the Town of Babylon. The town is the owner of both parcels and separately leased them to two different tenants (the parties to this action). In the early 1960's the town required the tenants to erect a wooden jetty on the leased lots to inhibit beach erosion. The jetty, as constructed, appeared to be built on the lot boundary. Soon thereafter, the plaintiff erected a small dock, using the jetty for support. He later extended a pre-existing boardwalk to reach the dock. The opinion does not give the location of the boardwalk extension in relation to the jetty.

More than 20 years later, both lessees learned that the dock and boardwalk extension were actually built inside the lot line of the defendant's lot. *The dispute focused only on the claims of the two lessees* to the areas occupied by the dock and boardwalk extension. After analyzing the "hostility" and "exclusivity" elements of adverse possession, the court concluded that both elements were present (along with the other necessary elements) and were "sufficient to establish title by adverse possession" in the plaintiff.

The town was not a party to the proceedings. Hence, the court only adjudicated the competing rights of the lessees. In a footnote, the court states that the "resolution of [the plaintiff's] adverse possession claim has no bearing on [the town's] interest." But the whole idea of "adverse possession" is that it divests the *record owner* of title, not merely possession. When the lease terms expire, does the plaintiff still own the dock and boardwalk parcels in fee? Even if the plaintiff's acquisition of title ultimately inures to the benefit of the town, how can the town acquire adverse possession against itself? The court also does not discuss the undisputed fact that the original jetty (which "supported" the dock, if not part of the boardwalk as well) was built at the common landlord's behest and was clearly "permissive."

Lance R. Pomerantz

Our next "boardwalk" case involves a residential subdivision on the shore of Brant Lake in upstate Warren County. *Ford v Rifenburg,* 2012 NY Slip Op 02746 (3rd Dept., April 12, 2012).

The common grantor imposed a number of restrictive covenants on the lots for the benefit of all grantees. Plaintiff commenced this action pursuant to RPAPL §2001 seeking to enjoin construction of defendants' proposed boathouse in the waters of Brant Lake. The restrictive covenant at issue provides that

> "[a]ny dock, pier or land projection constructed in or over the lake shall be no closer than [15] feet from the adjoining property line and no such structure shall be built with sides."

The defendants did not dispute that they had notice of the restrictive covenant or that plaintiff has standing to enforce it. Instead, the defendants contended that it is unenforceable because the common grantor did not own the underwater land and thus had no right to impose any restrictions on it. They also contended that since *they* do not own the underwater land, RPAPL §2001 does not apply because the boathouse will not be on their "premises." Both the Supreme Court and the Appellate Division disagreed, stating that, regardless of the ownership status of the underwater land, defendants' littoral right to access the water adjoining their lot "is part and parcel of their use of their land and is therefore subject to the restrictions to which they agreed when they purchased the property."

Finally, the defendants argued that the restrictive covenant should not be construed to include boathouses in the absence of a covenant explicitly precluding them. The proposed structure consisted of a dock on which a boathouse composed of four sides and a roof was to be built. The court explained "it is the addition of sides to be built on the dock that runs afoul of the plain language of the restrictive covenant, regardless of the lack of any explicit mention of boathouses."

Down by the sea

Our last case comes out of Supreme Court, Suffolk County, and illustrates how far "down by the sea" this particular land description runs.

In 1900, the Town of East Hampton was embroiled in ongoing disputes with upland property owners about the northerly boundary of the Atlantic Ocean beach. In an attempt to resolve those disputes, the Trustees of the Freeholders & Commonality of the Town of East Hampton offered a quitclaim deed to each upland owner delineating an agreed-upon boundary. That boundary was fixed as the "general line of grass growing along the ... Banks or Dunes." Fast-forward 112 years and the validity of that monumentation has been upheld. *Macklowe v Trustees of the Freeholders & Commonality of the Town of East Hampton*, 2012 NY Slip Op 50452(U) (Sup. Ct., Suffolk Cty., March 2, 2012).

The plaintiffs' 1992 deed contained an ambiguity. The easterly line supposedly ran 264' from the point of beginning "to ... the southerly line of beach grass." The description continued westerly "along said ... southerly line of beach grass." Unfortunately, the beach grass line was not even close to 264' south. It actually lay more than 400' south of the point of beginning. The plaintiffs claimed ownership down to the beach grass line. The Town Trustees challenged the plaintiffs' claim by focusing on the single issue of whether a natural object set forth in a deed description must be fixed and permanent or whether it can be "ambulatory" (changing naturally over time). Their argument was that "reference to ambulatory natural objects cannot be enforced with certitude" and, therefore, the distance and area recited in the deed should control.

The court (Whelan, J.) disagreed, finding that the beach grass line is a "natural object." Pointing out that the rules of deed construction give the greatest weight to natural objects, the court went on to analogize this case to other cases involving ambulatory water-course boundaries. Finding that a natural object need not be "fixed," the court determined that it need only be "a tangible landmark in order to indicate a boundary, having visibility, a pronounced level of permanence and stability, and a definite location." Based on the expert testimony of a coastal geologist, as well as a formal viewing of the site by the court, all of these criteria were found to be established.

Beach grass viability is greatly influenced by soil chemistry, porosity, water retention capacity, etc., which are in turn influenced by natural forces like wind, rain, tides, erosion and accretion. In addition, man-made structures such as jetties can be a factor. While plaintiffs won the day, the decision makes clear that these various forces can also cause the lot size to "shrink" in the future

Part of a larger trend

High-profile appellate decisions have recently been handed down concerning beaches in Florida and Texas. In another ongoing Florida dispute, the local sheriff refused to eject trespassers from a private beach. Wherever there is water, there are title disputes. Suffolk County clearly has its share.

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. Please visit www.LandTitleLaw.com.

EDUCATION LAW

School Safety vs. Students' First Amendment Rights

By Candace J. Gomez

This article explores some of the many questions raised by the Second Circuit's recent opinion in *Cuff v. Valley Central School District*, 2012 WL 954063 (2d Cir. 2012), regarding the First Amendment rights of students and the scope of school officials' authority to impose discipline on students based on potentially disruptive or threatening student messages.

At first blush, the court's opinion in *Cuff* seems clear. The Second Circuit upheld a six day suspension imposed by school officials against an elementary school student who wrote a message expressing a desire to "blow up the school with the teachers in it" on a crayon drawing of an astronaut. Accordingly, the court affirmed the dismissal of the parents' complaint against the school district and principal, which alleged that the student's First Amendment right to freedom of expression had been violated and that an excessive punishment had been imposed in disciplining the student.

In light of the recent wave of school shootings that have tragically affected our nation, school administrators have become much more attuned to potential threats of violence. Thus, it is not surprising that the court would reinforce the school administrators' judgment. Since the Second Circuit has jurisdiction over all school districts in New York State, this ruling may set an important precedent. However, the precedential value of the *Cuff* opinion may be limited because the Second Circuit's ultimate conclusion was partially based on the student's troubling disciplinary history. The court's use of the student's disciplinary history as a factor begs the question of whether a school district needs to establish that a student has previously made threats to school safety before a suspension based on a threat will be upheld. Also, the court's finding that the student's sharing of the threatening message with classmates was a pertinent factor, begs the question of whether the record must show that a student shared his or her threatening message with classmates before the Second Circuit will determine that it is reasonably foreseeable that the student could create a substantial disruption at school.

Candace J. Gomez

These questions are raised in light of this case's interesting procedural history. The late Judge Conner of the United States District Court for the Southern District of New York, to whom this case was first assigned, granted the school district's motion to dismiss the parents' claims on the grounds that the student's speech was not constitutionally protected and that his punishment was not unconstitutionally severe. When the parents appealed, the Second Circuit could have chosen to affirm the District Court's decision and that could have been the end of the matter. However, the Second Circuit chose to vacate and remand the District Court's dismissal. Based upon the pleaded facts - which stated that the student had no other disciplinary history that would suggest a violent tendency and that the student did not show the drawing to any classmates but, instead, handed it directly to his teacher - the Second Circuit was not convinced that the student's speech was unprotected by the First Amendment and that the parents' complaint should have been dismissed, at least at the initial pleading stage.

On remand, the parties completed discovery and it was revealed that the student had previously drawn a picture depicting a person firing a gun with a message that mentioned killing people; previously written a story about adults and kids running for their lives and dying; and previously had been involved in numerous physical altercations with other students at school. Furthermore, the student had shown the astronaut picture with his "wish" to blow up the school to classmates. The school district and principal moved for summary judgment and Judge Rakoff of the Southern District, to whom the case was assigned following the untimely death of Judge Connor, granted the school district's and principal's motion for summary judgment dismissing the parents' complaint. As Judge Rakoff stated, "[I]t is now uncontested that…[the student] had a substantial disciplinary history, all of it tied to suggestions of violent tendencies..[and] not only did [the student] show his assignment to other students, but also it was only after his drawing prompted a classroom commotion that another student learned of the drawing and informed the teacher of what had occurred." Upon consideration of these additional details, adduced from evidence that went beyond the mere pleadings, the Second Circuit affirmed the dismissal of the complaint.

When the extensive factual analysis and the case's procedural history is fully considered, one wonders if the Second Circuit's opinion in *Cuff* is really a total victory for school districts. As an attorney who represents school districts, I would certainly like to think so, but it is not clear that a school district would prevail in a circumstance where an elementary age student makes an immature but threatening statement (in crayon or otherwise) against classmates or teachers, but the student does not have a disciplinary record. What is a school administrator to do in a "first offense" situation that potentially poses a risk to the lives of students and faculty? Likewise, what is a school administrator to do in a situation where a student hands a threatening message directly to a teacher without showing it to classmates or disrupting the classroom? What will the courts do where there is conflicting evidence as to those factual issues? Will an expensive and lengthy federal trial be necessary?

Until the *Cuff* ruling is tested by such a case, it is likely that school officials will continue to err on the side of caution by reacting quickly and decisively to address threats of physical violence against their students and staff. It is hoped that *Cuff* will be read to grant school officials broad discretion in making such judgment calls.

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

New Dean Soon to Take the Helm at Touro

Patricia E. Salkin has been appointed the new Dean of the Touro College Jacob D. Fuchsberg Law Center. Ms. Salkin is a nationally known scholar and expert in land use planning and government ethics. She is currently the Associate Dean and Director of the Government Law Center of Albany Law School where she is also the Raymond & Ella Smith Distinguished Professor of Law. Ms. Salkin will become Touro's fifth dean and the first woman to hold the position when she begins her tenure on August 1.

Dean Salkin succeeds Lawrence Raful, who announced last July that he was stepping down after eight years as dean to return to Touro Law's faculty. Dean Raful has earned the gratitude of our bar association as a great leader and supporter of our programs and activities. He has a record of accomplishments under his leadership at Touro Law and as he passes the gavel to his distinguished successor, Dean Salkin, a woman of wide experience and great ability, the SCBA expresses our best wishes.

COMMITTEE ROUNDUP

SCBA Solo and Small Firm Practitioners Committee End of Year Report

By Co-Chairs Allison Shields and Peter Walsh

The Solo and Small Firm Practitioners' Committee was very active during the 2011 - 2012 term and enjoyed the increased attendance and participation of committee members.

During the September meeting the committee talked about challenges common to solo and small firm practitioners in Suffolk. Suggestions were made and plans discussed for topics and speakers for the remainder of the committee year. In an effort to increase the value of attending committee meetings to our members, we incorporated a 1/2 hour networking period prior to every presentation. This provided a lively start to each meeting and a great opportunity for lawyers to interact and get to know one another. In addition, we created a specific agenda designating topics and guest speakers for each particular meeting. In retrospect, we can say participants found this format both informative and enjoyable.

In October, the Solo and Small Firm Practitioners Committee was visited by Hon. Andrew Crecca, co-chair of the Bench-Bar Committee. We brainstormed about ways to improve the courts and the relationships of the bench with solo and small firms. Judge Crecca took many of our suggestions back to his committee, including ideas about: (i) completing and submitting Preliminary Conference forms rather than appearing for PCs; (ii) service via e-mail; (iii)working to better schedule conferences to avoid delays; and (iv)replacing time-consuming chambers conferences with scheduled conference calls.

Our November speaker, Paul Strohmenger of Nettle Bay Partners (an outsourced CFO who works with small professional services businesses, including law firms), discussed what solos and small firms should be looking at in terms of their daily, weekly and, monthly finances to determine whether they are meeting their financial goals.

The committee began its new year with our January meeting. Committee members Neil Katz, Esq. and Ed Karan, along with Rob Breuchert, Esq. presented a program on practice continuity.

In order to assist committee members to better prepare for the April tax deadline, our February meeting featured a presentation about how to use the tax code to benefit the solo and small firm practitioner and, the different tax advantages available depending upon your business structure. The presentation was given by Bruce Rothenberg, Esq., and Saranto Calamas, CPA, MBA.

Gary Victor from Websites for Lawyers spoke to the committee in March about: (i) the key elements of a well-designed legal website; (ii) how search engines work; (iii) how to help search engines "see" your site; and, (iv) analytics to look at in order to determine whether your site is working.

At our April meeting, Aniella Russo, Esq., co-chair of the Fee Disputes Resolution Committee and the SCBA's primary fee arbitrator, spoke about fee disputes and how lawyers can best prepare for them.

In May, we intend to conduct a roundtable discussion to sum up the year and, once again, address common challenges for solo and small firm practitioners. We also hope to discuss collections strategies at this meeting. As always, all SCBA members are welcome.

Job Opportunity - Small Claim Arbitrators

There are a limited number of positions open for small claim arbitrators in Suffolk County. If you are interested in sitting as an arbitrator please send a letter, together with a short resume to Edward Brozinsky, Co-Chair, District Court Sitting Arbitrators Committee, PO Box 114, Kings Park, NY 11754

In order to qualify for this program all interested candidates must meet the following criteria:

- Membership in good standing with the Suffolk County Bar Association.
- An attorney in good standing admitted to practice for a minimum of eight years.

The candidates that are selected will then complete a Small Claims Arbitrators training program. Upon completion of the program their names will be added to the approved list.

The current compensation for the position is a per diem fee of $250.

LIHBA visits Havana Cuba for a Legal-Cultural Exchange

By Raymond Negron

When my term as President of the Long Island Hispanic Bar Association approached in the spring of 2011, I pondered about whether or not I would have a legacy and if so, what would it be. My predecessor had built our reputation as respected organization worthy of inquiry and participation in all kinds of civic and political events. I wanted to accomplish something different, something more my style. I wanted to create an adventure.

Few people knew my ambition to take our fraternity to Cuba when I began my research. It started at the U.S. Treasury, wondered over to Touro Law School in search of an "educational" partner and ended with a few foreign tour companies who suggested illegal travel through Canada was the only sure thing. Well, after seven months of applications, planning and hoping, nine members of the LIHBA landed in Havana Cuba on April 9, 2012 for a cultural, People-to-People experience of a lifetime.

Our five-day adventure started as we were greeted at the airport by our guide, Viviana and our private bus and driver Jorge. Our first stop was a Palador, a private home with a license to operate a private restaurant business. It was one of the very first in Cuba. The food was fantastic and the elderly man who lived there invited us to explore the first floor of the huge home. One of the rooms had some articles and letters prominently displayed. To the point, this man was part of Cuba's delegation to North Vietnam during the conflict where he interviewed a US POW named John McCain (the picture of the 2 was in one of the articles).

The Hotel Nacional was an experience in itself. Built by the mafia and visited by everyone who was anyone, the location and rich history made for a wonderful week. Several rooms have badges with the names and dates famous people stayed there. We toured the Mafia room where some scenes from the Godfather were shot and saw the accompanying room where Frank Sinatra insisted to stay each time he visited, despite having "no ties" to the mafia (said the tour guide).

Our legal exploration took us to a meeting with the Cuban Bar Association (equivalent) and the Law School. The barristers were a distinguished bunch fully prepared to turn every question into blame of the "blockade" on the poor conditions in the country. They were obviously used to answering questions of educated visitors on behalf of the current regime. To the contrary, the young students were 2 generations past the Revolution, curious and willing to speak. Amazingly, they all began voting at 16, have a 90 percent turn-out and could not understand why the U.S. has about a 20 percent voter turn-out. They explained how competitive their educational system is and how hard they have to study if they wish to attend college, graduate school and beyond.

We toured the cigar factory, rum museum, Revolutionary Square, the home of artist Fuster and Hemmingway's house. But the most fun was had in Old Havana. This was our destination after dinner every night. The streets had wonderful night life, music and friendly people. There is no crime in Cuba and the choice of old taxis was an event in itself.

Enjoying their trip in Cuba were, Ari Aranda, Esq., Dr. Roy Aranda (Secretary), Kyle Wood, Esq., Elizabeth Bloom, JHO, David Sperling, Esq., Raymond Negron, Esq. (President), Eliot Bloom, Esq. and Juanita Perez, a law student of the University.

The country is ripe for investment. The government does not allow any private businesses that are "chains." So, should the embargo end, there is still hope that the charm will not get destroyed by Starbucks and McDonalds. In any event, the feeling that the end of the Embargo is near exists throughout the country. We were constantly asked if we were Canadian or British, as every country in the world sends tourists there except the U.S. Licenses have been granted much more liberally under President Obama than ever before, and this has given the people there hope that relations may be restored soon.

As for me, I'm glad I saw the Cuba frozen in time. The experience was unlike anything I have ever done, and I've visited perhaps 20 Caribbean Islands over 25 years. Everyone had a great time. I just wish more people could have accompanied us on this fantastic trip. The LIHBA conquered Cuba in 2012!

Note: Raymond Negron is a member of the SCBA, the President of LIHBA, Of Counsel to Glynn, Mercep & Purcell, Stony Brook, and CPT, US Army Reserve, Judge Advocate.

REAL ESTATE

Legal Malpractice Issues in Mortgage Foreclosure Defense and Modifications

By Charles Wallshein

I remember waking up in the middle of the night last October with the realization that I may be committing systemic legal malpractice. My subconscious had apparently been working overtime such that I came to the realization that I was actively engaged in negotiations with "lenders" on my clients' behalf, where they had no legal authority to negotiate

Foreclosure defense/modification comprises more than three quarters of my practice and a quickly growing percentage of the firm's cases. I am specifically referring to the issue of settling cases with foreclosing lenders pursuant to CPLR §3408 and to a lesser degree entering into mortgage modification agreements prior to foreclosure.

There are approximately 75,000 active foreclosure cases on Long Island. As a growing area of practice, the body of law for foreclosure defense is rapidly expanding. Courts are deciding issues as matters of first impression on a regular basis. For example, there are a line of cases in New York where lenders' *standing* in foreclosure cases have been successfully challenged.[1] These cases turn on whether the lender is a "real party in interest" such that they can be a plaintiff in a foreclosure action. Litigating a foreclosure defense case does not generally pose the risk of legal malpractice. However, it is important to consider the malpractice risk to the borrower's attorney when a settlement is actually reached between the borrower and the lender.

The risk is that the practitioner who is settling the case has no way of knowing whether the party with whom they are negotiating has legal authority to settle the case. A settlement of the foreclosure action (or a modification of the mortgage prior to litigation) necessarily entails the formal reformation of the loan contract between the parties. It entails agreement to a new promissory note and a modification of mortgage that is recorded. When borrowers enter into these new contracts they are in effect waiving their defenses to the foreclosure or default.

To understand the risk, it is necessary to understand the roles of the participants in the foreclosure and modification process. First, there is the borrower. The borrower was loaned money from a lender. Evidencing the transaction is a promissory note and a security instrument (mortgage) on the borrower's real property. Identifying the lender is more difficult. In nearly 100 percent of the mortgages written since the late 1990's the party alleging to have a possessory interest in the note and mortgage is different from the "lender" identified on the promissory note and/or mortgage.[2] The note and mortgage have often traveled tortuous paths since the loan's origination date. The securitization process where mortgages are "pooled" into securities has obscured identity of the "owners" of the interests in the loans and made those with authority to act on same completely opaque.

More recently it has come to light that there are potentially fatal irregularities in the mortgage origination and pooling process. The impact of these irregularities could be far broader, affecting a vast number of investors in the residential mortgage-backed securities (RMBS) market.[3] These irregularities would affect already completed foreclosures, properties currently in foreclosure, delinquent borrowers and current homeowners that are in the modification process.

The lawful and enforceable transfer of interests in real estate depends on parties to the transaction being able to answer three simple questions: who owns the property, how did they come to own it, and, is there another party that can make a competing claim of ownership to it? The documentary irregularities in securitized mortgage transactions and perhaps the securitized mortgage business model itself have the potential to make these three seemingly simple questions extremely complex.

The malpractice

Consider what would happen if the attorney counsels his client to enter into a formal agreement with their "lender" to modify their loan or settle the foreclosure and it is later revealed, perhaps years later, that the lender had no authority to take any action on that loan due to a break in the chain of title of the mortgage or a breach in the contractual rights of the servicer that allegedly acted with authority on behalf of the possessors of the rights under the note and mortgage. Consider what would happen if the "real party in interest" appeared and asserted a competing claim under the mortgage.

Also consider all the modified monthly payments paid by the borrower to the wrong party. These dollar amounts would be in the tens of thousands of dollars per year and in the hundreds of thousands of dollars over the life of the modified contract. An aggrieved borrower would have a *prima facie* case of legal malpractice against his attorney for not conducting reasonable due diligence to uncover the real party in interest property authorized to lawfully accept payment pursuant to a mortgage modification or settlement.

Attorney Due Diligence

The fact is that by the time a loan is being foreclosed or modified it is nearly impossible to determine what entity has the legal authority to settle the matter from a search of the title record at the county clerk's office. In the "old days" an attorney's due diligence would consist of conducting a search of the title for the last mortgagee of record. However, securitized loans do not exist as "whole" loans.

A whole loan is what, for generations, we recognized. A bank held all the interests to collect the interest from the note, and the security instrument gave the holder of the mortgage the rights to enforce the note. If the mortgage was assigned to another lender, the transfer was necessarily reflected by a mortgage assignment and an endorsement of the note. In order for the transferee to protect its race-notice position, the transferee had to diligently record its interest (assignment of mortgage) with the county clerk.

However now, RMBS loans and the rights to service them often are bought and sold. In many cases, the company that you send your payment to is not the company that owns your loan. The flow of funds from mortgage payments goes from borrower to servicer to trust to investor. The servicer is responsible for making sure the real estate taxes are paid, the hazard insurance policy is paid and that the certificate holders are paid. Servicing rights and the duties of the servicer, trustee, document

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HEALTH AND HOSPITAL LAW

More on Health Plan Recoveries Against Tort Settlements

Keeping up with Plan Fiduciaries

By James G. Fouassier

I routinely advise personal injury practitioners to stay current on the latest case law respecting the efforts of health plans (both insurers and self funded ERISA varieties) to recover from third party tort settlements the value of the benefits applied by the plan for the medical expenses of the victim-beneficiary. Some time perusing the recent Fifth Circuit case of *ACS Recovery Services v. Griffin* (Case 11-40446; 4-2-12) would be time well spent.

Several years ago Larry Griffin was seriously injured in a car accident and his "employee welfare benefit plan" (i.e. an ERISA plan pursuant to 29 USC 1002(1)) paid $50,000 toward his medical bills. His counsel astutely discerned that the plan benefit design required the plan administrator to seek the recovery of benefits from any tort settlement and to do so the administrator might assert an equitable lien. Consequently the settlement of the later personal injury action in Texas state court was purposefully structured with this in mind, and the form of the settlement was approved by the state court. The judge approved attorneys' fees, future medicals, and a $40,000 payout to the former wife for loss of consortium (the cause of action evidently arising before the filing of the divorce action). The balance of some $148,000 was assigned directly to an investment company which, in turn, purchased an annuity which then paid monthly benefits to the trustees of the special needs trust established pursuant to the settlement agreement.

When Mr. Griffin refused the plan's demand for reimbursement the fiduciary filed suit in federal court under section 502(a)(3) of the Employee Retirement Income and Security Act, which specifically authorizes "a participant, beneficiary or fiduciary . . . to obtain *other appropriate equitable relief*." 29 USC 1132(a)(3)(B). Mr. Griffin and the trustees were the named parties. The District Court dismissed the claims on the ground that it did not have subject matter jurisdiction because the requested relief was "unavailable" under section 502(a)(3). The Circuit Court affirmed.

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Finding that previous US Supreme Court decisions narrowly interpreted the phrase "other equitable relief" to include only those categories of relief that was *typically* available in equity, the court applied traditional equitable principles in its analysis. Any attempt by a plan fiduciary to impose what effectively is personal liability on a defendant (such as for breach of the plan benefit contract) would not suffice as a basis for subject matter jurisdiction because such suits were not typically available in equity (citing *Great West Life & Annuity Co. v. Knudson*, 534 US 204, 210 (2002). If, however, the fiduciary sought restitution in the form of a constructive trust or equitable lien, the action properly would lie because those causes of action are typically equitable in nature.

In deciding which types of claims the plaintiffs were advancing the court examined both *Knudson* and the more recent *Sereboff v. Mid Atlantic Medical Services, Inc*., 547 US 356 (2006). Readers may recall that both cases were discussed in my earlier articles on liens and subrogation ("Statutory Liens, Subrogation and Unpaid Hospital Bills", *Suffolk Lawyer*, May, 2006; "Lien Update", *Suffolk Lawyer*, June, 2006). In *Sereboff* the Fourth Circuit (407 F. 3d 212 (2005)) held that an ERISA fiduciary may assert a claim for reimbursement under the "equitable relief" provisions of ERISA section 502(a)(3). Notwithstanding that the fiduciary sought recovery of a monetary asset the court held that the claim stated was primarily equitable in nature. Finding support in the US Supreme Court decision in *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 US 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, the appellate court allowed the benefit plan fiduciary to recover under a theory of a "subrogation lien."

"The [Supreme] Court explained that an ERISA fiduciary may seek equitable restitution in the form of an equitable lien where 'money or property identified as belonging in good conscience to the [fiduciary] could clearly be traced to particular funds or property in the [beneficiary's] possession." 407 F3d at 218.

The Fourth Circuit acknowledged that while its decision was in accord with the Fifth, Seventh and Tenth Circuits, the rule was to the contrary in the Sixth and Ninth Circuits. In those courts the rights asserted by this fiduciary would be deemed "legal" in nature, hence not authorized by ERISA's "equitable relief" clause and thus barred. The US Supreme Court granted certiorari and sided with the majority of circuits in affirming the Fourth Circuit. *Sereboff v. Mid Atlantic Medical Services, Inc.,* 547 US 356, *supra*. In distinguishing *Knudson, supra,* the Supreme Court held that there, unlike in *Sereboff,* the funds were not in the hands of the beneficiaries. The controlling feature of an equitable restitution claim is the imposition of a constructive trust or equitable lien on "specifically identifiable" funds or property in the possession of the plan participant, the High Court held.

Based upon the precedent it earlier had established in *Bombardier Aerospace Employees Welfare Benefit Plan v. Ferrer, Poirot & Wansbrough,* 354 F. 3d 348, in the case at bar the Fifth Circuit applied a three prong test to determine whether relief purportedly sought under ERISA is "equitable" within the meaning of the statute. To recover such funds the plan must show: 1- that the funds are specifically identifiable; 2- that in good conscience they should belong to the plan; and 3- that they are within the possession and control of the defendant beneficiary (here, Mr. Griffin). The District Court had concluded that because Mr. Griffin did not have legal title to the funds being pursued the action did not lie in equity. The Circuit Court observed, however, that case law indicates that constructive control also will satisfy the "possession" requirement.

Finding that the establishment and method of funding of the special needs trust denied Mr. Griffin either actual or constructive possession of the corpus of the settlement proceeds the Circuit Court affirmed the dismissal. "Fleeting" possession, even if it existed here, is insufficient as he did not have any possession or control at the time the action was instituted. Furthermore, as a consequence of such non-possession, any decision against Mr. Griffin would render him personally liable for a money judgment, a legal remedy which is not available under ERISA.

As to the claims against the trustees, the court found that they, too, did not possess or control the funds, since the settlement agreement between Mr. Griffin and the tortfeasor expressly and directly assigned the tortfeasor's obligation to pay to an investment firm to purchase the annuity which in turn paid monthly benefits to the trust. It was the investment firm, not the trust that actually possessed the annuity. In addition, the court distinguished the finding in *Bombardier*, *supra*, to the contrary because there, unlike the case at bar, funds were being held by an attorney on behalf of his client and under his client's direction. Here the trust was not under the control of Mr. Griffin, hence constructive possession was not found to exist.

Incidentally, the ex-wife also was made a party to the action to subject her $40,000

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PRACTICE MANAGEMENT

Legal Marketing Ethics

By Allison C. Shields

In March, my *Suffolk Lawyer* article covered some tips on a popular form of marketing and business development for lawyers - email newsletters. Last month, Barry Smolowitz, a past President of the SCBA and a member of the Grievance Committee, pointed out that the article did not mention the requirement that attorneys include "ATTORNEY ADVERTISING" in the subject line of any such newsletter. Depending upon the newsletter's primary purpose, audience and content, this might indeed create a problem. And there are a number of ethical rules many New York lawyers may not be familiar with that govern the activities they undertake to get clients or market their services.

The ethical rules with which lawyers in New York State must comply are found in the Rules of the New York State Unified Court System, Part 1200, Rules of Professional Conduct. While I recommend that all lawyers familiarize themselves with (and frequently review) the ethical rules, this article will touch on a few of the New York ethics rules that impact specifically on law firm marketing.

Rule 7.1: Advertising

As Barry mentioned last month, Rule 7.1 of the New York Rules of Professional Conduct governs advertising, but the definition of "advertisement" is contained in Rule 1.0(a): "Any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, *the primary purpose of which is for the retention of the lawyer or law firm*. It does *not* include communications to existing clients or other lawyers" (emphasis added).

Allison C. Shields

New York State Bar Association Committee on Professional Ethics Opinion 848 addressed the issue of attorney newsletters directly, and the analysis in that opinion can be applied to other marketing activities as well. To determine whether an educational newsletter qualifies as an 'advertisement' in Opinion 848 the committee considered three factors: the intent of the communication, the content of the communication, and the targeted audience of the communication. According to the opinion, merely including biographical or contact information with a link back to the attorney's website is not sufficient to transform an otherwise educational newsletter into an advertisement; the committee likened this to general awareness or branding, such as can be found on pencils and T-shirts containing the firm's name, contact information and logo. The second prong of the test reviews the content itself. If the newsletter provides information or news primarily about the lawyer or law firm, its cases, personnel, clients or achievements, it will generally be considered advertising. If it contains primarily information about the law or legal process, it may not be considered advertising.

Finally, the audience for the communication must be considered. Communications to lawyers or existing or former clients are not considered advertising, regardless of their intent or content. If the newsletter or information is sent to a prospective client or individual who has expressed an interest in and specifically requested information about the lawyer's services it will also not be considered advertising. But if the newsletter is available on the firm's website or mailed to the general public, or where the audience who receives/views the newsletter is unknown, the advertising rules must be complied with and the communication must conform to the requirements of Rule 7.1.

In general, Rule 7.1 prohibits lawyers from making false or misleading statements about themselves or their services – and to whom. Along those lines, lawyers should be mindful of what they say at networking events or online and how they represent themselves both online and off. Indeed, a recent ABA ethics opinion noted that in order to avoid being misleading, a lawyer or law firm must keep their online presence, including their websites and online profiles, up to date. (See ABA Formal Opinion 10-457, Lawyer Websites, August 5, 2010).

Rule 7.1 also contains some specific prohibitions and requirements, including the prohibition against the use of client names without the client's prior written consent and the requirement that any representations made about results must be not only factually supported , but also accompanied by "prior results do not guarantee a similar outcome" disclaimer (See Rules 7.1(b)(2) and 7.1(e)). This issue was also mentioned in Opinion 848, discussed above.

Although Rule 7.1 originally contained a prohibition against lawyers using testimonials by clients in matters currently pending, the rule has been amended and any such testimonials are now allowed, as long as the lawyer has received written consent from the client. However, lawyers should also keep in mind that if they are using testimonials or quotes from clients on a website or in other marketing materials, those statements are subject to the same ethical rules as statements made by the lawyer themselves. Be sure to include disclaimers and ensure that the words used by clients in their statements on your site or materials do not violate the rules (ex: use of the word "expert;" See Rule 7.4).

Rule 1.18: Duties to Prospective Clients and Rule 5.5 Unauthorized Practice of Law

New York Rule 1.18 governs duties to prospective clients. This rule can come into play when lawyers communicate with individuals online, receive emails from individuals, or even when lawyers answer questions at a cocktail party. The rules and opin-

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Consumer Bankruptcy *(Continued from page 18)*

Trust generously gave debtors' counsel a week to comply with the local rule requirement.

However, inexplicably, counsel then filed the amendments but neglected to serve them. This led the trustee to file supplemental objections. At a subsequent hearing, Judge Trust gave the debtors' counsel one last opportunity to meet the procedural requirements, which he finally did. The matter was now marked for submission.

The issue before the court was whether the debtors could exempt the surplus cash under New York law, and whether the debtors could exempt the vehicle.

In his decision, the judge first pointed out that New York residents who file bankruptcy after June 21, 2011 have an option of selecting either the New York State or federal exemptions, and that the debtors here chose to claim the New York State exemptions.

Bankruptcy attorneys know that a debtor can exempt up to $5,000 of cash pursuant to the New York State cash exemption set forth in Debtor and Creditor Law sec. 283(2), provided that the debtor does not utilize the homestead exemption.

Judge Trust determined that, at the time of filing, the debtors did not own cash. Under DCL § 283(2), "cash means currency of the United States at face value, savings bonds of the United States at face value, the right to receive a refund of federal, state and local income taxes, and deposit accounts in any state or federally chartered depository institution."

The judge, following the overwhelming majority of courts, determined that the debtors had a "prepetition vested right to receive payment" of the surplus which did not constitute "cash." A right to receive payment as evidenced by a check in transit is not "cash."

In addition, since the debtors did not have an ownership interest in the vehicle on the date of filing, nor did they have a right of redemption, they could not exempt the vehicle.

However, Judge Trust indicated that the debtors could exempt $1,000 of the right to receive payment. This is because of the relatively new exemption under C.P.L.R. § 5205(a)(9) which permits debtors filing after January 21, 2011, to utilize a $1,000 wildcard exemption for any personal property, provided that the debtor does not claim a homestead exemption. Since the car was only in one spouse's name, and the debtors did not claim a homestead exemption, they were entitled to one, $1,000 wildcard exemption which could be applied to the surplus. The judge ordered them to turn over the balance of the surplus to the trustee.

Here's why I found the decision especially interesting. First, the debtors' counsel initially botched up amending the exemptions – not once – but twice. Judge Trust gave counsel two opportunities to correct the mistake. Counsel finally figured out what to do on the third try.

Of course, we will never know what Judge Trust was thinking, but one can't help but wonder if his granting counsel an opportunity to remedy the defective filings was also an opportunity for counsel to reconsider the exemption scheme counsel had elected.

Had counsel opted for the much more generous $10,825 federal wildcard exemption provided in the federal exemptions by Bankruptcy Code § 522(5), he would have been able to protect 100% of the surplus. In essence, it appears that counsel chose the wrong exemption scheme to the detriment of his clients.

However, a judge can and will only go so far in telling inept counsel what to do. Would it have been out of line for the judge to tell debtor's counsel that counsel didn't have a sufficient understanding of law and procedure and was not following the right legal strategy? This is not what judges are for.

If Judge Trust was aware of the choice of exemption issue I would assume that he felt that it was not his place to point out that counsel could have protected the entire surplus if the federal exemptions were used.

Based on my experience watching cases in court, this seems to be the way almost all judges handle such issues – they will not tell counsel how to practice law, even if that ultimately hurts an innocent client. Accordingly, the debtor-clients here suffered and had to turn over many thousands of dollars that they could have kept had their attorney had a better understanding of bankruptcy law and selected the better exemption scheme. And that point is not in the decision. A full copy of the decision can be read on my blog.

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. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

LETTER TO THE EDITOR

Dear Editor,

The May, 2012 issue of the Suffolk Lawyer contained a Letter to the Editor from SCBA Past President and current 10th Judicial District Grievance Committee member Barry M. Smolowitz, Esq., concerning the applicability of Rule of Professional Conduct 7.1(f) to email newsletters sent by attorneys. Mr. Smolowitz's letter leaves the impression that all e-newsletters must carry the phrase "ATTORNEY ADVERTISING" in the subject line, but this requirement only obtains for those newsletters determined to be "advertising."

The Final New York Rules of Conduct with Comments (as amended through June 25, 2011) are available on the New York State Bar Association web site. Although the Comments have not been enacted by the Appellate Division, they are published by the NYSBA to provide guidance for attorneys in complying with the Rules.

Comments [5], [6] and [7], following Rule 7.1, illustrate that the determination of whether a given communication is "attorney advertising" must be made on a case-by-case basis. Comment [7] makes particular reference to newsletters and their characterization as "advertising" or not: "Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising."

An attorney who requires additional guidance may request an opinion from the NYSBA Committee on Professional Ethics.

Lance R. Pomerantz, Esq.

CORRECTION

Howard Finkelstein, listed in May's "Court Notes" column under the category Attorney Resignations Granted/Disciplinary Proceeding Pending was not Howard M. Finkelstein, a retired attorney who practiced law in Riverhead for 55 years. *The Suffolk Lawyer* regrets any confusion that may have occurred.

LegalZoom Mocks USPTO Legal Rep Rules *(continued from page 9)*

to practice before the USPTO, respectively, there is nothing that they feel they can do to stop the unauthorized practice of law. Thus, the entire "legal forms industry," including the likes of LegalZoom, RocketLawyer and others, has become unregulated and now exclusively reserved for those who have no ethical or legal obligation to act in the best interests of their customers.

It appears therefore, that the responsibility for enforcing UPL in connection with trademark and patent practice sits with the various state Attorneys General Offices. In September 2010, the state of Washington's Attorney General negotiated a settlement agreement with LegalZoom requiring the company to stop comparing its services to those of licensed attorneys and to refrain from providing Washington consumers *individualized* advice concerning self-help forms. Aside from this action however, there has been no other enforcement at the state level.

To the contrary, the federal judge in the Missouri class action lawsuit ruled on cross motions for summary judgment that, with regard to patent and trademark matters, "Even though there is no evidence that LegalZoom is licensed to practice before the PTO, that field of regulation is occupied by federal law. With respect to patent and trademark applications, federal law preempts Plaintiffs' claims. Therefore, the Court grants Defendant's Motion for Summary Judgment with respect to Plaintiffs' claims as they relate to patent and trademark applications." Thus, we are left with neither the USPTO nor the states willing to enforce what clearly is the unauthorized practice of law on the part of LegalZoom whenever it prepares and files trademark and patent applications.

So, what is the resulting harm to consumers from this super loophole that LegalZoom has stumbled upon? One only has to look at LegalZoom's advertising and its website to fully grasp the extent to which this company inaccurately represents its services in connection with trademarks. Further, there is evidence that in addition to falsely advertising its services, LegalZoom simply has been careless (at best) in its handling of trademark matters and/or has some serious misunderstandings concerning the law and procedures of trademark registration. At the most basic level of deception, on its "Trademarks" page, the following words appear: "Register your trademark online." Simply put, LegalZoom does not and cannot "register" any trademarks for you. LegalZoom will prepare a trademark application and submit it to the USPTO for filing. That is the end of their involvement.

Unfortunately for the untutored masses, a pending trademark *application* is far from a trademark *registration*. In virtually every case, a USPTO Trademark Examining Attorney will issue either a substantive or non-substantive "Office Action" that calls for a responsive filing by the applicant or her attorney. In the case of applications filed by LegalZoom, the recipient of these communications from the USPTO will be the applicant because even LegalZoom knows enough not to indicate itself as the attorney of record for all communications with the USPTO.

As an aside, LegalZoom claims that it has filed more trademark applications than the top 20 law firms combined in 2010, but there is no way to confirm or refute this because there is no mention of LegalZoom anywhere in the trademark filing and no way to connect it to LegalZoom using publicly available search methods. The LegalZoom filed application looks like any other application filed by an individual without an attorney representative. When confronted with an Office Action, in the best of cases you will have to figure out how to respond in a manner that will keep your application alive, and in the worst of cases (e.g. when a substantive action, that is, one based on statutory grounds for refusal of the applied-for trademark, is received), you will have to hire an attorney to assist you in obtaining the registration…the registration that LegalZoom advertised that you can register online (presumably on their "online").

As one final illustration, I offer the example of a LegalZoom provided "comprehensive trademark search." Any trademark attorney can tell you that an offer to perform a comprehensive trademark search means that your trademark will be either cleared for filing and/or use or, in the alternative, "given the axe" due to prior trademark rights that, in the learned opinion of the attorney, would be (if challenged) infringed and/or invalidated by the later use and registration of your trademark. For $249 (plus $99 to have it bound…gulp), LegalZoom will send to you a giant pile of paper most likely containing thousands of prior trademarks that will leave you breathless and in desperate need for a lawyer to be able to interpret it for you. This is a far cry from what LegalZoom states on its website about its "Comprehensive U.S. Search":

"*To ensure your registration goes smoothly* (emphasis added), LegalZoom will perform a comprehensive conflict search of all U.S. records, including the US Patent & Trademark Office, all federal and state records, Internet-only sources — and even service marks." (visited on May 2, 2012)

It is beyond the pale to suggest that this is not deceptive in relation to what you actually get from LegalZoom. In fact it's an express guarantee that "your registration goes smoothly."

LegalZoom continues to prosper in a market looking for a cheap alternative to lawyers. I can't help envisioning "MediZip - for all of your surgical needs."

Note: Gene Bolmarcich, Esq. is a trademark, copyright and design law attorney and Principal of Gene Bolmarcich, P.C. in Babylon, with a national and global clientele. He is a member of the SCBA's Solo Practice and Intellectual Property Committees and operates a virtual trademark registration service at www.trademarksa2O.com. He can be contacted at gxbesq1@gmail.com.

1. http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/
2. www.ldalitigation.com
3. http://www.forbes.com/sites/danielfisher/2011/07/25/non-lawyers-find-it-hard-avoid-breaking-bars-vague-rules/
4. Federal Register Vol. 73, No. 158, Page 47650

Posthumous Child's Survivors Benefits *(Continued from page 14)*

ing Clomid at the time of John's early demise. At the hospital, after John's death Jane had her husband's sperm extracted and preserved so that they could have children as they planned. The sperm/embryo bank, who performed the sperm retrieval, requested proof of the deceased's intent to have children. Such proof was provided to their satisfaction and accepted by the facility. After multiple I.V.F procedures and miscarriages, Jane, on November 2, 2009, using John's sperm and her ovaries, gave birth to fraternal quadruplets, two boys and two girls.

Jane applied for Social Security benefits on behalf of her fraternal quadruplets as survivors of a deceased wage earner, John Doe. The Social Security Administration ("SSA") denied her, ruling that state intestacy law controls eligibility for survivor benefits for posthumously conceived children under the Social Security Act ("Act"). Therefore, the quadruplets were ineligible for benefits under the applicable New York law. The Social Security Administration further confirmed denial of her claim by deciding that the quadruplets were not John's "children" for purposes of the Act. SSA used New York State law to define "child," because § 416(h) (2) (A) instructs the commissioner making this determination to use state intestacy laws from "the State in which [the insured] was domiciled at the time of his death."

In its denial and notice of disapproved claim, the Social Security Administration ("SSA"), argued that the Doe quadruplets are ineligible to receive Social Security survivor benefits because they do not qualify as John's "children" under § 416(h)(2) and (3) of the act and are ineligible to inherit from their father under New York law. I argued that the act clearly allows the quadruplets, conceived after her husband's death, to receive survivor benefits from their biological father regardless of their inheritance rights under New York's intestacy laws.

Federalism and the role of state law

Jane contended that finding the quadruplets to be the children of John Doe, her husband, for purposes of the act would not interfere with state law. I argued that it is Congress' role, and not the role of the states, to define the terms that govern operation of a federal program. In fact, we posit that Congress has administered the act as a response to individual states being unable to provide adequately for dependent children. The states benefit by not having to exclusively rely on their own limited resources to provide for children requiring assistance following the death of a wage-earning parent.

The Doe Quadruplets are entitled to equal protection of the law

I argued that SSA's decision to only grant benefits to children conceived during the marriage but born after the wage earner's death was discriminatory. I do not believe that Congress would have intended such an inconsistent result as to provide for the Doe quadruplets if they had been conceived by IVF the day before John's death but deny all Social Security child survivor benefits simply because they were conceived shortly thereafter. The facts of Jane's case are exactly the sort of "unanticipated loss" for which the act is intended to provide.

The Social Security Act ("Act") provides that every child of a fully insured individual is eligible for survivor benefits if the child meets certain enumerated statutory requirements. The Social Security Administration ("SSA"), contends that in determining the eligibility for survivor benefits under the act, the SSA correctly applied state intestacy law as required under § 416(h)(2)(A), which resulted in the denial of entitlement for Armendinger's children. I argued that the SSA's reliance on § 416(h) (2) (A) and state intestacy law is misplaced, and that the plain language of § 416(e) confirms her children's eligibility for survivor benefits.

In response, Jane insisted that because she and John were married and the biological parentage of the quadruplets is undisputed, the children fall even within the narrowest sense of the word "child." Consequently, we argued that referring to § 416(h) (2) (A) is unnecessary, because the plain language of §§ 416(d) (1) and 416(e) resolves the children's eligibility for survivor benefits. The language of § 416(e) (1) does not create a definitional tautology at all, because when read together with its neighboring provisions, the word "child" in § 416(e) (1) undoubtedly distinguishes undisputed biological children from other categories of beneficiaries, e.g. stepchildren. We further note that § 416(h) (2) (A) states that an applicant having the same status as a child under state intestacy law shall be deemed a child. It is our contention that this phrasing only makes sense if the word "child" has an independent meaning. We thus contend that whether an applicant is a "child" is not controlled by § 416(h) (2) (A), and consequently, an applicant's eligibility for survivor benefits cannot be exclusively determined by § 416(h) (2) (A). Instead, we argued that § 416(h) (2) (A) only expands the act's coverage by providing an alternative to prove eligibility when the applicant is not a "child" under § 416(e)—an undisputed biological offspring of the insured.

I contend that because state intestacy laws differ greatly in their treatment to children born out of wedlock at the time of the act's enactment, Congress meant to apply § 416(h)(2)(A) only in cases where the applicant's parentage was uncertain. I agree that the 1965 amendment was meant to expand the act's coverage to children born out of marriage who had been denied survivor benefits because of less favorable state laws, consistent with the Senate committee's belief that entitlement should not differ due to disparities in state intestacy laws. But, I argue that the committee's reference to § 416(h) (2) (A) did not establish the exclusive control of state intestacy laws when determining eligibility, but rather extended the reach of the act beyond marital children whose undisputable entitlement to benefit had been established by the plain language of § 416(e) (1). Finally, I acknowledge that, because the act has a broad mandate to provide uniform protection of children and their families against misfortunes, it should be construed liberally in favor of coverage rather than exclusion.

This case will resolve whether state intestacy laws control when the Social Security Administration determines the eligibility of posthumously conceived biological children of married parents for survivor benefits. SSA argues that the Social Security Act requires the SSA to apply state intestacy laws when determining whether an applicant is the child of an insured wage earner for the purpose of receiving survivor benefits. To the contrary, we contend that the act's plain language unambiguously entitles undisputed biological children of married parents to survivor benefits, without referring to state intestacy laws. The Supreme Court's decision will clarify the act's mandate on the determination of survivor benefits eligibility, and possibly reflect on the balance between legislative rulemaking and unanticipated progress of modern science.

At this time there is a similar case awaiting decision from the U.S. Supreme Court. On March 19, 2012, The U.S. Supreme Court heard oral argument in *Astrue v. Capato* No. 11-159. Along with my paralegal, I travelled to Washington D.C. to observe the oral argument. Also present was Commissioner Astrue, to whom I had an opportunity to speak with prior to being ushered into the courtroom. Commissioner Astrue and I discussed SSA's advancement and perfection of internet filings and electronic submission of evidence. He declined to comment on the *Astrue v. Capato*. Also present were two rows of military personnel and members of JAG. The military has an interest in this issue, as many soldiers are being encouraged to freeze sperm prior to deployment.

The Capato case involves twins conceived and born using in vitro fertilization (IVF) after the wage's earning death. The mother of the twins, Karen Capato, applied for survivors benefits for her twins. She was denied initially and at an administrative hearing. The ALJ determined that the Florida Intestacy Law applied and the twins were to be *ineligible* for survivor's benefits on their father's record. On appeal, the district court affirmed the ALJ's reading.

The United States Court of Appeals for the Third Circuit reversed and ruled that the plain language of the Act entitles the Capato twins, whose parentage is not in dispute, to survivor benefits. Petitioner Michael J. Astrue, Commissioner of the SSA, argued that the act requires the agency to apply state intestacy law to determine whether an applicant is the child of an insured wage earner for the purpose of receiving survivor benefits. In contrast, Respondent Karen K. Capato contends that the act unambiguously entitles undisputed biological children of married parents to survivor benefits, without referring to state intestacy laws. The Supreme Court's decision will authoritatively interpret the act's mandate on the determination of survivor benefits eligibility, and possibly reflect on the balance between legislative rulemaking and unanticipated progress of science and technology.

It was less than nine minutes into oral argument when the government attorney was peppered with questions by the Justices. The government's argument focused on section 42 U.S.C. Section 416(h)(2)(A), arguing that this section requires that a child be able to inherit under the state laws of intestacy in order to be eligible for child's survivor's benefits. Justice Kagan found this reading of the statute to be "bizarre" and asked why the Capato twins, who are undeniably the biological children of the deceased wage earner, would have to meet the intestacy standard, while step-children and grandchildren, whose relationship is not as close, could be eligible under 42 U.S.C. Section 416(e) without establishing inheritance rights.

The attorney for the Capato twins, the respondent in this matter, was equally showered with questions. The justices focused on the language of the statute and, as Justice Breyer noted, how to "apply this old law to new technology." The Capato's attorney argued that because these children are the natural children of a married couple, they meet the statutory definition of a child under 42 U.S.C. Section 416(e) (1). Therefore, there is no need to consider state intestacy right under 416(h), which is limited to deciding whether certain illegitimate children are eligible for benefits. Justice Sotomayor, then announced a situation that would feel "uncomfortable," i.e., whether the Capato twins would be eligible for benefits if their mother remarried, even though the deceased Mr. Capato was their biological father. Justice Sotomayor questioned the definition of "child" in this situation where the child of a married couple is the biological offspring of a third person. The Capato's attorney explained that such a child was not anticipated in 1939, when the statute was written, because over 95 percent of the children were biological children of a married couple. Therefore, the statutory definition of a child found in 42 U.S.C Section 416(e) (1) did not have to be more specific, and the Capato twins fit within the intended definition.

My observation is that I can not predict how the justices will rule in this matter. Justice Kagan was correct when she noted, "It's a mess." In the meantime, my case, involving the Doe quadruplets and at least 100 similar cases pending at SSA is in a holding pattern. I anxiously await a decision from the U.S. Supreme Court, which is expected this summer.

Note: Sharmine Persaud is a sole practitioner in Farmingdale. She has 21 years of experience in WC law and SSD law. Ms. Persaud has successfully argued SSD cases in federal court. She recently argued and won Primiani v. Astrue. This case was published online and is available on Westlaw. She has been representing disabled veterans for the past three years.

Ready, Set, Lead!

To celebrate Women's History Month, the Partnership to Advance Women Leaders, the Nassau and Suffolk County Bar and Women's Bar Associations, and 32 other co-hosting organizations hosted the program "Ready, Set, Lead! Women's Future…Where Do We Go From Here?" which focused on Women's Leadership in the 21st Century.

President's Message (Continued from page 1)

President Matthew E. Pachman, whose dedication, leadership, great patience and ability to get so many members of our diverse organization to work together was always amazing to me. Matt's work required many hours of meetings, phone calls, text messages and consensus building, much of which goes unnoticed by our membership who see the resulting accomplishments without knowing of the effort that was involved. I only hope I can come close to matching Matt's accomplishments and those of our other past presidents in continuing to lead the SCBA in the difficult times that face our legal profession due to the inadequate funding for the judicial system and for programs for those with limited financial means. We all know that these problems are not magically going away. I will continue to fight for our membership in seeking more funding for 18-B and our court system. With the help of the Executive Committee and our Board of Directors, I will continue to seek ways to improve the practice of law for our members, an endeavor for which Matt and our other past presidents have laid the groundwork.

Congratulations to the winners of the 2012 President's Award, the 18-B Task Force, which consisted of William T. Ferris, Harry Tilis, Lynn Poster-Zimmerman and Steve Fondulis, and the winners of the 2012 Director's Award, Diane C. Carroll and Allison C. Shields.

I was happy to have Seymour James, the new President of the New York State Bar Association, in attendance and thank him for his kind remarks to our membership. Recently at a joint Board of Directors meeting with the Nassau County Bar Association held at the SCBA, I learned that President James is a fellow graduate of Stuyvesant High School in New York and member of its football team, although a few years after me. I enjoyed discussing our mutual experiences at Stuyvesant and look forward to participating in New York State Bar Association functions with him in the coming year.

As I stated in my remarks to my family, fellow attorneys, judges and all of our guests who attended this magnificent event, I am very proud to be an attorney and especially proud to be a member of the Suffolk County Bar Association (SCBA), and to be associated with my fellow attorneys who not only perform their duties in representing their clients admirably but also are active in our community by giving of their time, personal expertise and financial support for the good of all of our citizens in every aspect of their lives. That is the reason I specifically dedicated the 2012 Installation Dinner and the upcoming year to recognizing the "Noble Practice of Law." At the Installation Dinner, I singled out a number of our members for their personal accomplishments and dedication to our community. There were many names submitted for consideration and I wish the time allocated to me in my acceptance speech would have allowed me to specifically mention each and every one of them. That is why for the balance of my term of office I will continue to bring to the attention of our general membership whenever possible the "Noble" works performed by our members on an ongoing basis.

In my years in leadership positions with the SCBA, I have often heard from various attorneys, "Why should I join the SCBA? What does the SCBA do for me?" I know these questions, which are valid, are posed in numerous other organizations and I attempt to demonstrate to these various individuals to the best of my ability all of the good work and efforts being made by the SCBA leadership and members. I believe that there is another question that should be asked by these individuals, "What can I do as a member to help the SCBA in its mission to serve the members of our organization?" Only with the help and support of all of us can we make a difference. I ask you to get involved and support your SCBA by attending our functions, participating in our many committees and volunteering your time and effort to the best of your ability in taking the practice of law in Suffolk County to new levels of excellence and enjoyment.

I thank my wife, Ruth, who I had the good fortune to marry almost 45 years ago. Ruth often says we have actually been married "83 years" in view of the fact that she has been my paralegal for the past 38 years that I have been practicing law. Rising through the ranks of the SCBA, as an Officer and Dean of the Suffolk Academy of Law, Member of its Board of Directors and the Executive Committee, all required many hours of commitment by me away from the office, home and my family. I was only able to make this commitment knowing that I had Ruth's support.

Thank you all for your past and future support. I wish each and every one of you a safe and healthy summer and I look forward to seeing many of you at the SCBA annual golf and fishing outing on August 13 and at our upcoming events during my term in office.

Legal Marketing Ethics (Continued from page 22)

ions place a great deal of importance upon who controls the flow of information and whether that information is provided unilaterally or whether it is part of a bilateral discussion, as well as the subsequent actions of the lawyer or firm once the communication is received.

Rule 1.18(a) defines a prospective client as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The term 'discuss' is clarified somewhat upon a reading of Rule 1.18(e), which provides that a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a). The determination of whether an individual communicating with a lawyer is considered a "prospective client" is important because Rule 1.18(b) states that *even when no client-lawyer relationship ensues*, a lawyer is required to keep information learned during such discussions confidential. In addition, this information may disqualify a lawyer from representing another individual in the same or substantially related matter.

Opinions which have considered the nature of 'unilateral' communications from prospective clients make a distinction between specifically inviting prospective clients or web visitors to contact the attorney about their legal matter and simply making contact information available to the prospective client or visitor. (See ABA Formal Opinion 10-457, Lawyer Websites, August 5, 2010, and NY City Bar Assn. Formal Opinion 2001-01, Obligations of law firm receiving unsolicited email).

Where the contact is specifically invited (such as through a website contact form with space for the potential client to describe their issue), lawyers are cautioned to make every attempt to restrict the flow of information as one would in an initial consultation with a client, by advising the web visitor of the lawyer's obligations regarding conflicts and the dangers of revealing confidential information. (See Rule 1.6, Confidentiality of Information).

Lawyers who answer questions on the internet, whether on social or professional networking sites such as LinkedIn and other social media outlets or on legal sites such as Avvo or Justia should always be careful not to mislead or to create an inadvertent lawyer-client relationship with those posing questions or reading the lawyer's answers. The ABA Opinion cites several cases from a variety of states noting that since lawyers cannot screen for conflicts of interest when answering questions posted on the internet, lawyers should refrain from answering specific legal questions unless the advice given is not fact-specific. However, lawyers are usually permitted to pose and answer hypothetical questions without being considered to have given personal legal advice (such as in posting "Frequently Asked Questions" on a law firm website).

In the case of contact forms or answers to individual questions, whether posed through the lawyer's own website or through online media and social networking sites, lawyers may also wish to include a statement that no specific legal advice may be offered by the lawyer until a conflicts check is undertaken, and that information sent through a web form or via email may not be treated as confidential.

Lawyers may also wish to consider including some kind of disclaimer in online profiles indicating that visiting the lawyer's profile, viewing presentations or other content, or sending messages through the site does not establish an attorney-client relationship, and that any information sent through these mediums may not be confidential. Any such disclaimers should be clear and easy to understand.

Rule 5.5 governs unauthorized practice of law, and prohibits lawyers from practicing law in jurisdictions in which they have not been authorized to practice. Providing legal advice outside of your jurisdiction may qualify as unauthorized practice of law. Since websites and other online activities cross jurisdictional boundaries, it is also wise for lawyers to be careful to mention that any legal information provided by them pertains to their jurisdiction only, (and to name that jurisdiction) but that the rules may be different if a reader is located elsewhere, and that any information online should not be a substitute for personal legal advice by a qualified attorney in the appropriate jurisdiction who can fully investigate the facts at issue.

Rule 7.2: Payment for Referrals and Rule 1.5: Fees and Division of Fees

Sometimes attorneys encounter prospective clients who have legal problems in an area in which that attorney does not practice. Oftentimes, that results in the attorney making a referral to another attorney. This gives rise to the question of referral fees and to the ethical obligations of attorneys referring matters to others or receiving referrals from others.

According to Rule 7.2(a), lawyers cannot give anything of value in exchange for a recommendation or referral, and Rule 1.5 (g) states that a lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless the fee is divided *in proportion to the services each performs* or each lawyer assumes *joint responsibility* for the representation. This agreement must be provided to the client and the client must agree in writing. As comment 7 to Rule 1.5 explains, "joint responsibility" means each attorney is responsible for the matter as if both attorneys were associated in a partnership.

In addition, a lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter (See Rule 1.1, Competence). The practice of taking no action on the matter other than simply referring a case to another lawyer (particularly if that lawyer's quality of work is unknown to the referring lawyer), collecting a percentage of the fee as a referral fee and having no further involvement in the matter is questionable, at least according to the letter of the rule.

This issue also arises with respect to networking groups and referrals. In May 2001, the NYSBA Committee on Professional Ethics issued Opinion 741, stating that a lawyer may not participate in a business network that requires reciprocal referrals. Even more recently, Opinion 885, issued November 14, 2011, cautioned that an attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions; an attorney may not be retained by a non-lawyer company to provide legal services to a client.

Rule 5.3: Lawyer's Responsibility for Conduct of Non-lawyers

Although most lawyers understand that they have a responsibility to supervise other lawyers working for or with them, many forget that they also have an obligation to supervise non-lawyer personnel, both inside and outside of the firm. This can arise frequently in a marketing context, where the lawyer or firm hires an outside individual or company to 'speak' on behalf of the law firm. A lawyer is responsible for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the rules if engaged in by a lawyer, if the lawyer orders the conduct, if the lawyer finds out about the conduct and ratifies it after it has occurred, or if the lawyer is in a supervisory position and *knew or should have known* of the conduct in time to prevent or mitigate the consequences.

Lawyers have begun to outsource some of their marketing efforts (particularly online). They hire "search engine optimization" (SEO) experts to drive traffic to websites, website designers and developers to create websites and content for their internet marketing efforts, and other professionals to help them with social media. Lawyers must be aware of the actions performed by these individuals on their behalf, and the ethical rules which govern them because lawyers may be held accountable for the actions of those they retain to perform this work on behalf of the firm. For example, Rule 7.1(g)(2) prohibits the use of meta tags or other hidden computer codes that, if displayed, would violate the rules. A law firm who hires an SEO expert and does not supervise the meta tags being used on the site may be in danger of ethical violations. Similarly, Rule 7.1(h) requires all advertisements to include the name, principal law office address and telephone number of the lawyer or firm. A lawyer whose website includes only a telephone number and email address would be in violation of the rules.

Marketing and business development in the electronic age is both easier and more difficult than it was in years past. Lawyers need to keep up not only with changing technologies and expectations of clients, but also with changing ethical rules governing their behavior and the manner in which they build their business. This article has touched on only a few of them. The New York Rules of Professional Conduct were amended effective approximately one year ago, in June of 2011. If you have not taken the time to review those changes – or to review the rules in general – recently, now might be a good time to do so, especially if you intend to use the traditionally slower summer months to embark on some new marketing initiatives.

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

Decision in Perl v. Meher *(Continued from page 13)*

spinal injuries, but not as to plaintiff's shoulder injury. The Appellate Division, Second Department, as illustrated by *Cohn, supra,* requires that defendant address all of plaintiffs injuries and all of the categories of "serious injury" in order to meet their prima facie burden.

Another pre-*Perl* issue that arises is the finding of a defendant's expert physician that plaintiff has reduced range of motion. *See, Jones v. Anderson,* 93 A.D.3d 640, 938 N.Y.S.2d 919 (2d Dep't 2012). *See also, Kearney v. Garrett,* 92 A.D.2d 725, 938 N.Y.S.2d 349 (2d Dep't 2012). As a general rule, as illustrated by the aforementioned cases, a finding by defendant's physician that plaintiff had significant restriction in range of motion means that a defendant cannot meet their prima facie burden.

Some defendants, however, have attempted to argue that the restriction in range of motion was not causally related to the subject accident. This argument is weakened by *Perl.* As stated above, plaintiff simply needs to show that they did not make any complaints or exhibit symptoms to their physicians prior to the accident. As such, plaintiffs have been successful in raising issues of fact to refute the defendant's prima facie burden as to causation. *See, Echeverria v. G & C Classic, Inc.,* 91 A.D.3d 902, 937 N.Y.S.2d 608 (2d Dep't 2012). *See also, Jones v. Hampton,* 89 A.D.3d 1065, 933 N.Y.S.2d 614 (2d Dep't 2011). 20 of the 59 (33 percent) appellate cases held that plaintiff raised a triable issue of fact under *Perl.* While the Appellate Division held that an issue of fact was raised as to whether plaintiff suffered a serious injury, or as to causation, the Appellate Division did not expand on the specific facts presented to reach these conclusions. *See, e.g. Livia v. Atkins,* 93 A.D.3d 766 (2d Dep't 2012). Thus, practitioners are left with the guidance provided by the Court of Appeals in determining whether plaintiffs can successfully raise an issue of fact in response to a threshold motion. Given the fact that a defendant must eliminate issues of fact as to all of a plaintiff's claimed injuries and all of the alleged categories of "serious injury," defendants are faced with a heavy burden to meet their prima facie burden even in the absence of *Perl.* With *Perl,* even if a defendant can establish their prima facie burden, plaintiff has a relatively lighter burden to raise an issue of fact in response. These factors may explain why the majority of defendants are unable to obtain summary judgment at the Appellate Division, Second Department.

Note: Seth M. Weinberg is an associate with the firm of Lewis Johs Avallone Aviles, LLP. He can be reached at www.lewisjohs.com, and (631) 755-0101, fax (631) 755-0117.

Failure to Timely Exercise Renewal *(Continued from page 15)*

ure to comply with the lease renewal provision. The court dismissed any claim that Baygold's improvements made more than 20 years earlier, when it was a tenant in possession were made "with a view toward renewal of the lease such that Baygold's equitable interest in a renewal must be protected. Those improvements are too attenuated from Baygold's failure to exercise the option over 20 years later."

The court seemed to place significant emphasis on the fact that Baygold was an out of possession tenant and therefore did not possess any good will in connection with the premises. This coupled with the fact that Baygold itself did not make improvements to the premises for more than 20 years, in the court's view, precluded equity from intervening to excuse Baygold's failure to comply with the lease renewal provisions.

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. 91 A.D. 3d 1, 934 N.Y.S.2d 122 (1st Dep't 2011)
2. 42 NY2d 392, 397 N.Y.S.2d 958 (1977)
3. 2012 W.L. 1537299, 2012 N.Y. Slip Op. 03472
4. 27 N.Y. 2d 449 (1971)

Medical Treatment Guidelines *(Continued from page 12)*

not be forthcoming as the MTGs have made such requests a moot issue. The general lack of understanding and inherent distrust in the system has led to delays.

Finally, it should be noted that the burden of proof has been subtly shifted to the claimant, which is proving to be problematic given the vast resources available to insurance carriers to deny variance requests. Claimants are in no position to ensure that their attending physician's competently complete the variance requests nor do they possess the sophistication required to translate the codes and diagnoses which are crucial to an application of the MTGs. Even claimant's representatives are placed at a disadvantage as they are not compensated for prosecuting variance issues and instead hope to be compensated when indemnity issues are eventually adjudicated. Due process considerations must be examined.

The short-term result is that there is no consensus as to whether the delivery of treatment to the injured worker has improved enough, if at all, to justify the continued survival of these guidelines. Assuming, however, that they are here to stay, we can only hope that the board recognizes these inadequacies and addresses them in a manner consistent with the remedial intent of the Workers' Compensation Law. Continued education is certainly a key to the success of this program.

Note: Craig J. Tortora is a founding member of Goldsmith & Tortora, which concentrates in the areas of Worker's Compensation and Social Security Disability Benefits Laws. He is the Co-Chair of the WCL/SSDB Committee for the SCBA and is a past lecturer for the Suffolk Academy of Law. He is also an Advisory Board Member for the Long Island Occupational and Environmental Health Center (L.I.O.E.H.C.).

Among Us *(Continued from page 7)*

animal welfare (relating to zoos and aquariums), spoke at the International Marine Animal Trainers' Association, Northeast Regional Workshop, at The Long Island Aquarium and Exhibition Center, Riverhead, New York, on Sunday, April 29. Mr. Gesualdi's presentation was "Changing Thinking About Training and Animal Welfare."

SCBA member **Lawrence A. Kushnick** was honored as an outstanding Graduate of Distinction by Leadership Huntington Foundation. A 1997 graduate of Leadership Huntington, he received the award at a gala and graduation for this year's class.

The Long Island Hispanic Bar Association (LIHBA) recently announced the election of respected Long Island family law and divorce attorney **David L. Mejias** as president beginning June 1, 2012.

SCBA member **Michael J. Isernia**, was re-elected to the Board of Education for the Sachem Central School District in Holbrook. He ran unopposed for a three year term.

Genser Dubow Genser & Cona, (GDGC), opened the Susan C. Snowe Caregiver Resource Center on Thursday, June 14 in their Melville office. The Caregiver Resource Center offers a range of information and resources from various organizations. This is the first facility of its kind on Long Island offering visitors an opportunity to browse for elder care information and speak with an elder law attorney at no charge during designated days and hours.

SCBA member **Ian Wilder** was re-elected Secretary of the Green Party of Suffolk.

Condolences….

To Ruth and **Art Shulman** on the passing of their niece Marilyn Eadie on May 10 following a long illness.

To **Richard Weinblatt** and his family on the passing of his father, Alex.

To the **Honorable Jerry Garguilo** and his family on the passing of his father, Aniello (Neil).

To Mrs. Barbara Stone and her family on the passing of long time respected member of our legal community, **Herbert Stone**.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Carlos R. Clavel, Gina Dorcelus, Therese C. Ebarb, Todd M. Gardella, Craig I. Gardy, Erin M. Hargis, Xin Jin, Kerri N. Lechtrecher, Donald F. Leistman, Nicole U. Marmanillo, Adam D. Michaelson, Lauren Murray, Vincent T. Pallaci, Anneris M. Pena, Irina, Margaret Schaefler, Lauren D'Antuono Tauro, Jason Weissman and Eric A. Zeni.**

The SCBA also welcomes its newest student member and wishes her success in her progress towards a career in the law: **William G. Blum, Ronald Keith Brown, Katina Cokinos, Elissa A. Jacobs, and, Ngadi W. Kponou.**

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

Small Insurance/Personal Injury Defense Litigation Firm with office in East Northport, NY seeks experienced (5+ yrs) associate to manage own caseload, including premises and auto liability, labor law, and property damage. Candidate should possess strong writing, deposition, and computer skills, and significant, relevant experience with pleadings, discovery, motions, and legal research.
Reference Law #25.

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

Members Seeking Employment

Solo practitioner admitted in state court and federal court (EDNY) with a general practice seeking part-time, temp, per diem work or appearances. Zealous advocate for clients but very personable, smart, hard-working, reliable and available on short notice.
Reference Att #34

Law School graduate seeking an entry-level associate position that will capitalize on my 20 years of international business experience. I have an MBA and expect to be admitted to the NY and CT bars by January 2010. Proficient in Japanese and Spanish. Traveled to over 50 countries on business.
Reference Att. #17

Attorney seeking full-time employment, with over 15 years of experience in residential and commercial real estate transactions, and matters of general practice involving matrimonial and family law, wills and estates, bankruptcy and negligence.
Reference Att. #8.

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

Deal Killers, Part 2 *(Continued from page 14)*

the most important professionals required to consummate a deal. When brokers and attorneys do not use consistent terminology, among themselves and with each other, this is a recipe for miscommunication.

Therefore, further research is required to now understand why varying terminology is chosen by different groups of professionals and this can be ascertained through studying correlations between demographics and quantitative data. Moreover, a real estate industry wide solution is required. Uniform terminology should be created through a statutory / regulatory definition in order to breed consistency and reliability throughout the industry. Even if they should know better, leaving it to the professionals' discretion only results in confusion.

In this vein, Real Estate Licensing Law[1], which is available on the Department of State's website, is expressly designed to further trustworthiness among real estate agents. The Licensing Law compiles all of the relevant statutes to the practice of real estate brokerage for the benefit of professionals and the general public and offers a glossary of real estate terms for their use. This would be the perfect place for a uniform definition and term for this document[2].

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

Note: Louis B. Imbroto is an associate with Lieb at Law, P.C. concentrating his practice on litigation and real estate.

1. http://www.dos.state.ny.us/licensing/lawbooks/RE-Law.pdf

2. Interestingly, the term binder is defined in the glossary, but with the completely different meaning of "an agreement to cover the down payment for the purchase of real estate as evidence of good faith on the part of the purchaser."

Legal Malpractice Issues in Mortgage Foreclosure Defense *(Continued from page 21)*

custodian are governed by the trusts a pooling and servicing agreement.[4]

In most cases the servicer is a bank with a nationally recognized name. Besides engaging in commercial banking, these banks service loans. It is a common misconception among borrowers that because "BANK A" is a bank, that "BANK A" is the lender or owner of their loan. When the borrower makes their monthly payment to "BANK A" it is more likely than not that "BANK A" is acting only as a servicer for the trust (or one of the trust's successors or assignees) where their loan was securitized. In a typical RMBS "BANK A" could be the originator of the loan, the trustee of the loan, and the loan's servicing agent. "BANK A" could wear all three hats, two of the three or one the three.

In any event "BANK A" is not the "owner" of the loan within the meaning of the term as relates to RMBS. It is the trust certificate holders that "own" the loans or at the very least, beneficial interests from derivative portions of those loans. The trust is the title owner of the notes and mortgages, the certificate holders own beneficial interests to receive income from the loans. Meanwhile, it is only the servicing agent that is visible to the world and holds itself out as the entity that has authority to act on behalf of the trust and the certificate holders.[5]

The logical conclusion we draw from this scenario is that, in reality, unless the practitioner knows how to conduct adequate due diligence (and then actually does it) to determine the "real party in interest" with lawful authority to reform the note and mortgage, the practitioner will not be able to overcome the presumption that he has not done so in the event of a future claim.

The scope of the problem

It is estimated that there are over one million defaulted and foreclosing loans in New York State. Of these more than 75 percent consist of RMBS loans. It follows that a likewise number of loans that need to be modified or settled cannot be without attorneys and their clients assuming tremendous risk of negotiating with and contracting with an improper party.[6] This is because the transfers of RMBS paper lack transparency and therefore any deviation from state law or from the rules governing such transfers in the pooling and servicing agreement could subject the transfer to attack by any number of parties to the transaction including parties that had no connection to the original transaction.[7]

The result is that the attorney's misfeasance could impair the marketability of title to their client's property or allow their clients to waste years of modified-mortgage payments on an agreement that is open to collateral attack. Marketable title is the foundation of the real estate market.[8] Owners of properties that are encumbered by RMBS mortgages could find that they cannot transfer marketable title. In short, the validity of the security interest that depends on the lawful transfer of the note and mortgage would be in question for RMBS loans that were allegedly modified.

In order to raise an "unmarketability" claim under a title policy, there need not be an "adverse claimant". The mere possibility of a "cloud" on title, sufficient to justify a potential buyer or lender in declining to buy or lend on the property, is enough to trigger coverage under the policy. However, the ALTA title-policy coverage for unmarketability of the title applies only to those unmarketability claims resulting from title defects.[9] In other words, in the event of a collateral attack upon the underlying mortgage, your client will probably not be covered by an ALTA policy in a modification or foreclosure settlement.[10] In other words, the practitioner and his E&O carrier will be left "holding the bag."

The reasonable alternative

What you must do to insulate your law firm from liability is to request from the servicer every document associated with the transfer of the loan documents since the loan's origination. I do this knowing that servicers will not and have not disclosed any "internal" documentation to borrowers or their lawyers unless specifically ordered by the court to do so. In every instance except one, the servicers have responded to my demands with a polite "go jump in the lake" letter. In the other instance the letter was rather impolite.

Even though I know how the servicer will respond, I continue to demand a complete set of documents for three reasons. One, I know there is a high likelihood of a fatal defect somewhere in the mortgage's chain of title; two, foreclosure is an equitable proceeding and a lender's failure to demonstrate authority to negotiate is "bad faith"; and three, there is a "good faith" requirement in CPLR § 3408. A lender's refusal to negotiate in "good faith" subjects lenders and their agents to sanctions and penalties.

The other course of action I take is to demand that the law firm and the borrower be fully indemnified by the servicer in the event there is a future claim against the property by a competing party in interest pursuant to the loan. I routinely make this demand of opposing counsel in all § 3408 conferences. I state my objection to the proceedings going forward without plaintiff demonstrating that they are the real party in interest. Usually the court appointed referee immediately refers the matter to the IAS to litigate defendant's "bad faith" allegations against plaintiff.[11] The firm has several "bad faith" motions being heard in the courts, though none has been decided.[12]

The courts should agree that forcing a foreclosure defendant and their attorneys to participate in what is supposed to be a "good faith" negotiation to settle a foreclosure requires as a threshold matter, a *prima facie* showing by plaintiff that they have express and actual authority to settle. Less than that makes a mockery of the statute. Less than that penalizes homeowner-defendants by denying them the benefit of the settlement process. And finally, less than full disclosure by plaintiffs prejudices defendants' ability to conduct due diligence in the settlement negotiation phase and in effect forces us to commit de facto malpractice.

For the above reasons, courts should require that foreclosure plaintiffs demonstrate standing at the commencement of the action prior to the § 3408 conferences or in the alternative require that lenders and servicers indemnify defendants and their attorneys against defects in the chain of title to the mortgage and note.

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. *BONY v. Silverberg*, 926 N.Y.S.2d 532, (2nd Dept, 2011), *HSBC v. Taher* 2011NY Slip Op 52317(U).

2. I say "and/or" because "MERS" (Mortgage Electronic Registration Systems Inc) loans identify the lender as the party that advanced the money at closing, and MERS as the mortgagee and nominee of the lender for mortgage recording purposes.

3. RMBS are securities that were sold on the Over the Counter "OTC" stock market as "*Pink Slips*"

4. Most PSAs are governed by New York law and create trusts governed by New York law, Estate Powers & Trust Law §7-2.4. New York trust law requires strict compliance with the trust documents; any transaction by the trust that is in contravention of the trust documents is void, meaning that the transfer is an *ultra vires* act and may be unlawful.

5. Pooling and Servicing Agreements are also unrecorded and unavailable to the general public. Within the RMBS transaction, the general public has no way to know if a note actually is owned by the entity that is foreclosing. This information is privy only to the servicer, the trustee and the document custodian who derive their rights, authority to act and role in the transaction from the terms contained in the PSA.

6. One of the reasons attorneys should demand the pooling and servicing agreements is illustrated in Justice Kramer's decision in *HSBC Bank v. Sene* 2012 NY Slip Op 50352(U) 2/28/2012: *Oddly, the pooling and servicing agreement submitted as plaintiff's Exhibit "2." allegedly evidencing Ocwen's power of attorney is dated April 1, 2007 and is between Ace Securities Corp., Ocwen Loan Servicing, LLC, GMAC Mortgage, LLC, Wells Fargo Bank, National Association, HSBC Bank USA, NA. These submissions fail to establish that Ocwen was granted authority as ResMae's attorney-in-fact. Regardless, the defect in the assignments remain.*

7. These parties include upstream as well as downstream purchasers of the financial instruments (trust certificates), successors in interest to the originators, subsequent purchasers of the collateral (real estate) and junior lien holders.

8. Marketable Title is defined in this definition by exclusion, The ALTA 1992 form policy defines "*unmarketability of the title* as: "*An alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.*" This is a circular definition at best, but one that establishes the conditions under which a marketability issue will be considered covered under the policy and, therefore, ripe as a claim of loss or defense. A claim is ripe if title is encumbered by an "alleged or apparent" defect. Note that there is no requirement to prove that the defect is real. Further, a claim is covered only if it is "not excluded or excepted from coverage." No matter how severe an effect the defect has on merchantability of title, there is no coverage for any defect disclosed by or excluded from the policy.

9. *The State Of Marketable Title*, by S.H. Spencer Compton, Senior Vice President and Special Counsel, First American Title Insurance Company of New York.

10. This presupposes that a practitioner could obtain fee insurance for *ultra vires* acts of a trust. As of now there is no such thing as a "wrongful payment" policy. An action would have to be commenced by the borrower for unjust enrichment against the improper party that collected their payments. This would most likely involve third party practice in a foreclosure action.

11. The procedure is to bring a motion for a "bad faith" hearing and remand to the "settlement part". If the Court decides that Plaintiff has an obligation to turn over all documents requested, defendant still has a right to a §3408 settlement conference.

12. Understanding the RMBS transaction and how it affects marketability of title and standing in foreclosure actions is a daunting endeavor. RPL §291, New York's race-notice recording statute, favors the immediate recording of interests in real estate to promote transparency and ensure bona fide purchasers that they are protected by law. When viewed against the backdrop of §291, the RMBS transaction promotes the opposite – transactions that are opaque - and greatly increase the likelihood of litigation between parties with competing interests in real estate.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

560 WHEELER ROAD, HAUPPAUGE, NY 11788 • (631) 234-5588

LATE SPRING & SUMMER CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue will be presented during June, July, and August 2012. **This is not a complete listing; other programs will be added to the season's syllabus.**

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

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

ACCREDITATION FOR MCLE:
The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York.

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

Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

NOTES:

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

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

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

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

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

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

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

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL AUTO LIABILITY LAW UPDATE

Monday, June 18, 2012

Prestigious and highly knowledgeable presenters review developments in No Fault, serious injury thresholds, UM/SUM issues, and other matters related to auto liability.
Presenters: **Jonathan Dachs, Esq.** (Shayne, Dachs, Corker, Sauer & Dachs // *New York Law Journal* Columnist) **Professor Michael Hutter** (Albany Law School // Special Counsel–Powers & Santola, LLP [Albany])
Coordinator: **James K. Hogan, Esq.** (Academy Advisory Committee)
Time: 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 Hours (professional practice)

Presented with Nassau Academy of Law in Suffolk

ANNUAL EVIDENCE UPDATE

Thursday, June 21, 2012

This is a must-attend program for *all* litigators–civil or criminal, state or federal. Preeminent authority on all matters related to evidence covers developments in relevancy, burden of proof, privileges, witnesses, hearsay, opinion evidence, circumstantial evidence, the right of confrontation, and much, much more.
Presenter: **Professor Richard Farrell** (Brooklyn Law School // Author – Prince, *Richardson on Evidence*)
Moderator: **Hon. Thomas Whelan** (Academy Officer)
Time: 6:00 – 8:30 p.m. (Sign-in from 5:30 p.m.)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 2.5 hours (professional practice)

JUNE SEMINARS

Lunch 'n Learn

BASICS OF BUSINESS VALUATIONS: A Primer for Matrimonial Lawyers

Tuesday, June 5, 2012

Experienced matrimonial lawyer explains common methodologies employed by business appraisers and the discounts applied.
Faculty: **Thomas K. Campagna, Esq.** (Deer Park)
Program Coordinator: Wende A. Doniger, Esq. (Curriculum Co-Chair)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments: LunchMCLE: 2 credits (skills)**

Lunch 'n Learn

Real Estate Master Class: SURVEYS & C.O.s

Wednesday, June 6, 2012

Prominent lawyer in the field addresses key issues related to surveys and certificates of occupancy: rules of construction for descriptions in deeds; tax v. filed maps; survey inspections; zoning rules; much more....
Faculty: **Joel A. Agruso, Esq.** (Northwoods Abstract, LTD)
rogram Coordinator: Peter Walsh (Academy Officer)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments: Lunch**
MCLE: 2 credits (1 professional practice; 1 skills)

Presented in Both Riverhead and Hauppauge

ELECTRONIC FILING IN NYS SUPREME COURT

Monday, June 11, 2012

This program – conveniently offered in two locations – will teach you how to use e-filing for the matters you handle in Supreme Court. E-filing is now mandatory in many counties and will soon become the way litigation is handled throughout the State. While still consensual in Suffolk, e-filing has many advantages and is available for commercial, contract, tort, and tax certiorari actions, including proceedings under Section 730 of the Real Property Tax Law, and foreclosure actions addressing real property and mechanics liens. Don't miss this chance to learn the benefits of e-filing and gain important procedural tips.
Faculty: **Jeffrey Carucci** (Statewide Coordinator for Electronic Filing); **Karen Mackin** (Associate Court Clerk–NYS E-Filing Resource Center); **Thomas Clavin** (NYS Supreme Court – Suffolk County)
Coordinator & Moderator: **Cheryl Mintz, Esq.** (Academy Advisory Committee // SCBA Board of Directors)
MCLE: 2 credits (1 professional practice; 1 law practice management)
RIVERHEAD Time: 9:00–11 a.m. Location: Criminal Courts Bldg. (210 Center Drive)–Training Room **Refreshments:** Bagels & Coffee
HAUPPAUGE Time: 1:00–3:00 p.m. Location: SCBA Center (560 Wheeler Rd., Hauppauge) **Refreshments:** Lunch (from 12:30 p.m.)

MEET THE NEW JUDGES

Tuesday, June 12, 2012

Judges newly serving in Suffolk County will share how they view the law, litigants, the legal system, and the concept of justice from the other side of the bench. They will provide their perspectives on the challenges of presiding over a courtroom; what is expected in their courtrooms; procedural rules; civility v. zealous advocacy; and noteworthy matters that have come before their courts.
Panel: **Hon. John B. Collins** (NYS Supreme Court); **Hon. Joseph A. Santorelli** (NYS Supreme Court); **Hon. John J. Toomey, Jr.** (County Court); **Hon. Vincent J. Martorano** (District Court); **Hon. James A. McDonough** (District Court); **Hon. David A. Morris** (District Court); **Hon. Derrick J. Robinson** (District Court)
Program Coordinator and Moderator: Hon. John Kelly (Academy Dean) **Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (professional practice)

East End CLE

EMERGENCY APPLICATIONS: What Family Court Practitioners Need to Know

Thursday, June 14, 2012

A knowledgeable panel will explore the laws and procedures that apply when an emergency removal of a child from the home is sought. Court orders, petitions, and temporary orders will be addressed; and the difficult issues that arise will be illuminated through a mock proceeding.
Panel & Topics:
Hon. Joan M. Genchi (Suffolk County Family Court) – Court's Perspective
James Benet, Esq. (Office of the Suffolk County Attorney) – Emergency Removal by the County
Jeanmarie P. Costello, Esq. (Riverhead) – Emergency Writs and Orders of Protection
Program Coordinator and Moderator: Wende A. Doniger (Curriculum Co-Chair) **Time: 5:00–8:00 p.m. (Sign-in from 4:30) Location:** Seasons of Southampton (15 Prospect St.) **Refreshments:** Light supper
MCLE: 3 credits (2 professional practice; 1 skills)

ELECTRONIC DISCOVERY: Learn to Talk the Talk and Avoid Disaster!

Wednesday, June 20, 2012

These days, it is an absolute imperative that litigators – in both large and small matters – know how to handle e-discovery. This program will cover:
- State and Federal Requirements
- What Lawyers Must Know
- How to Request E-Discovery
- How to Respond to E-Discovery Requests
- How to Use Experts
- How to Use Litigation Hold Letters, Forms, etc.

Panel: **James G. Ryan, Esq.** (Cullen & Dykman, LLP); **Cynthia Augello, Esq.** (Cullen & Dykman, LLP) **Guido Gabrielle, III, Esq.** (Geisler and Gabriele, LLP); **Paula Warmuth, Esq.** (Stim & Warmuth, PC)
Program Coordinator and Moderator: Glenn Warmuth, Esq. (Academy Officer) **Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location:** SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2 professional practice; 1 ethics)

Lunch 'n Learn

EXPLORING LITIGATION SOLUTIONS: A Thomson Reuters Presentation

Friday, June 22, 2012

This program from Thomson Reuters will demonstrate how **WESTLAW LITIGATOR TOOLS** help attorneys harness the power of electronics to build stronger cases. You will learn how to better organize, analyze, store, communicate, and collaborate on all the law, information, and documents that a typical case generates. This program is offered *free* to SCBA members without MCLE credit and at the low cost of $5 with credit. Thomson Reuters provides a complimentary lunch buffet.
Faculty: **Greg MacFarlane, Esq.** and **Alison Brady, Esq.** (Certified CLE Instructors from Thomson Reuters) **Time: 12:30–1:30 p.m. (Sign-in from noon) Location:** SCBA Center **Refreshments: Lunch**
MCLE: 1 credit (skills)

JULY & AUGUST SEMINARS

Lunch 'n Learn Series

HOW TO SUCCEED IN MY COURT BY REALLY TRYING

Tuesdays &Thursdays, July 10 through August 16, 2012

This series will feature judges and other key personnel from various Suffolk County courts who will cover
- courtroom protocols
- how the Uniform Court Rules apply
- issues of civility, and
- important substantive issues.

The series begins with an introductory program on the uniform rules and adjournments. Subsequent sessions focus on particular courts:

SUFFOLK ACADEMY OF LAW

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'Summer School' Provides Growth Opportunities *(Continued from page 32)*

issues with a mock proceeding.

The final week of late spring CLE, before the Academy takes a two-week hiatus, includes two annual updates: **Auto Liability,** featuring Jonathan Dachs and Professor Michael Hutter, on June 18; and the **Annual Evidence Update,** with Professor Richard Farrell, on June 21. That week also includes a program on **"E-Discovery"** (James G. Ryan, Cynthia Augello, Guido Gabriele III, Paula Warmuth, and, as moderator, Academy Officer Glenn Warmuth) that will address state and federal requirements and show what must be done to request e-discovery, respond to e-discovery requests, and generally avoid the litigation disasters that can befall the uninitiated. Finally, a lunch program from Thomson -Reuters on June 22 will provide an inexpensive, one-credit look at **"Litigation Solutions,"** including Westlaw Litigator Tools.

The Academy's summer semester commences on July 10 with the first segment of a multi-session lunch series entitled **"How to Succeed in My Courtroom by Really Trying."** The first seminar is on adjournments and uniform court rules, with the following classes focusing on particular courts – family, matrimonial, district, criminal, specialty courts, Surrogate's Court, Article 81, foreclosure, and so forth. The series will run, primarily on Tuesdays and Thursdays, through August 16. Each class will feature a judge from the relevant court. Registrants may enroll in any individual class or save by taking the full series.

In addition to the courtroom series for litigators, summer also brings a few courses for transactional lawyers. On Wednesday, June 11 (lunch), Academy Officer Peter Walsh will lead a class on **Real Estate Contracts.** On the evening of July 23, "**Salient Issues in Elder Law"** will be addressed by David R. Okrent, Eileen Coen Cacioppo, and other knowledgeable practitioners from the field. And on Friday, August 17, **Basic Estate Planning** will be covered by Rob Harper of Farrell Fritz and other skilled presenters.

Both litigators and transactional practitioners will want to calendar one of the Academy's most popular programs: **"A Night at the Movies,"** scheduled for the evening of July 18. This always well-attended, three-credit ethics program is built around a selection of film vignettes and includes round-table discussions in which registrants sort out the ethical dilemmas facing the on-screen attorneys. The program is developed annually by the SCBA Professional Ethics Committee. This year's reactive panel includes Hon. John M. Czygier, Jr., Hon. Mark Cohen, Hon. James C. Hudson, Harvey B. Besunder, and John P. Bracken. Committee Chairs Patricia Meisenheimer and Hon. Caren Loguercio are the program coordinators. SCBA President Arthur Shulman handles the film projection. The evening includes popcorn, candy, and other "movie food."

Questions about any of the CLE programs mentioned in this article may be directed to the Academy at 631-234-5588.

The author is the executive director of the Suffolk Academy of Law.

- Criminal
- Supreme
- Family (2 sessions)
- Surrogate's
- Drug Court
- District (Civil)
- Matrimonial
- Guardianships
- Foreclosure

The order or the programs and specific presenters will be announced in the Academy's Summer CLE mailings.
Series Coordinators: Wende A. Doniger, Hon. James Kelly, Hon. James Flanagan
Each Program: **Time: 12:30–2:10 p.m. (Sign-in from noon) Location:** SCBA Center **Refreshments: Lunch**
MCLE: 2 credits (1.5 professional practice; 0.5 ethics)

Lunch 'n Learn
REAL ESTATE CONTRACTS
Wednesday, July 11, 2012

Key do's and don'ts of residential real estate contracts, the dangers of boiler-plate, and *must*-include provisions are covered by a knowledgeable faculty in this succinct luncheon program.
Faculty: **Peter Walsh** (Academy Officers) and Others TBA
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments: Lunch**
MCLE: 2 credits (1 professional practice; 0.5 skills; 0.5 ethics)

Ethics Roundtable
A NIGHT AT THE MOVIES
Wednesday, July 18, 2012

Organized by the SCBA Professional Ethics Committee, this popular annual program comprises interactive round-table discussions based on provocative movie vignettes. A prestigious reactive panel comments on audience "findings" and adds valuable insights. With popcorn, candy, and other "movie" foods adding to the ambience, the evening is entertaining as well as educational.

Movie Scenes from: Fairly Legal; My Cousin Vinny: The Pelican Brief; Time to Kill; Primal Fear; The Verdict; Runaway Jury; The Client

Reactive Panel: **John P. Bracken, Esq.** (*Moderator*); **Harvey B. Besunder; Hon. John M. Czygier, Jr.; Hon. Mark Cohen; Hon. James C. Hudson**
Coordinators: **Patricia M. Meisenheimer, Esq.** and **Hon. Caren Loguercio**
Movie Editor: **Arthur E. Shulman, Esq.Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location:** SCBA Center **Refreshments:** Movie Food
MCLE: 3 credits (ethics)

SALIENT ISSUES IN ELDER LAW
Monday, July 23, 2012

Knowledgeable faculty conducts an in-depth discussion of important issues affecting elder law practice. Forms, updates, and strategic guidelines are disseminated, rendering the program highly valuable for all in the field.
Faculty: **David R. Okrent, Esq.; Eileen Coen Cacioppo, Esq.; Others TBA**
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (professional practice)

Lunch 'n Learn
BASIC ESTATE PLANNING
Friday, August 17, 2012

Quick, but thorough, introduction to everything an attorney needs to know to advise clients on the key elements of estate planning: wills and trusts; designation of beneficiaries; reduction of taxes; avoiding the uncertainties of probate administration; and so forth.
Faculty: **Robert Harper, Esq.** (Farrell Fritz); Others TBA
Time: 12:30–2:10 p.m. (Sign-in from noon)
Location: SCBA Center
Refreshments: Lunch
MCLE: 2 credits (professional practice)

JUNE 2012 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788
Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588).
Register on-line (www.scba.org).

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
Auto Liability Update	$100	$60	$125	Yes	Yes	3 cpn	3 cpn	$125	$120	$25
Evidence Update	$90	$50	$115	Yes	Yes	2 cpn	2 cpn	$115	$110	$15
JUNE PROGRAMS										
Basics of Business Valuation	$50	$25	$65	Yes	Yes	2 cpn	2 cpn	$65	$60	$15
CO's & Surveys	$55	$35	$75	Yes	Yes	2 cpn	2 cpn	$85	$80	$15
Electronic Filing in Supreme Court	$50	$35	$75	Yes	Yes	2 cpn	2 cpn	N/A	N/A	N/A
Meet the New Judges	$75	$35	$95	Yes	Yes	3 cpn	3 cpn	$95	$90	$15
Emergency Applications (East End)	$75	$35	$95	Yes	Yes	3 cpn	3 cpn	N/A	N/A	$15
E-Discovery	$85	$45	$95	Yes	Yes	3 cpn	3 cnp	$100	$95	$15
Litigation Solutions (Thomson...)	$5	Free	$10	Yes	N/A	1 cpn	1 cpn	N/A	N/A	N/A
JULY & AUGUST PROGRAMS										
Series: How to Practice in My Court (11 classes – 22 credits)	$330	$110	$550	Yes	8 uses	15 cpn	15 cpn	$550	$500	$100
Real Estate Contracts	$50	$25	$65	Yes	Yes	2 cpn	2 cpn	$75	$70	$15
Night at the Movies	$95	$50	$120	Yes	Yes`	3 cpn	3 cpn	N/A	N/A	N/A
Salient Issues in Elder Law	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	$95	$90	$15
Basic Estate Planning	$50	$30	$75	Yes	Yes	2 cpn	2 cpn	$85	$80	$15

Name: _____

Address: _____

Phone: _____ E-Mail _____

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

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Credit Card: ☐American Express ☐MasterCard ☐VISA ☐Discover

Account # _____ Exp. Date: _____ Signature: _____

Bench Briefs (Continued from page 4)

Motion to amend complaint granted; although the defense counsel made a cursory denial of the defendant's liability, there had not been a showing that the amendment was in any way devoid of merit or palpably improper.

In *Martha Marcinowski v. Picnic Time, Inc., individually and d/b/a JT's On the Bay, JT's on the Bay, Howard F. Svendsen, Van Tempelman and Justin Tempelman,* Index No.: 21234/10, decided on March 30, 2011, the court granted plaintiff's motion to amend the complaint to add a cause of action for loss of services/consortium. In deciding the motion, the court noted that leave to amend a complaint is to be freely granted, provided that the proposed amendment did not prejudice or surprise the defendants, was not patently devoid of merit, and was not palpably insufficient. In opposition to the motion, the defendants asserted that more than one year had elapsed since the incident occurred and that the plaintiff had not offered an excuse for failing to bring the husband's claim for loss of services in the initial complaint. The court noted that the defendant pointed to no alleged prejudice that would result from allowing the complaint to be amended. The court further found that although the defense counsel made a cursory denial of the defendant's liability, there had not been a showing that the amendment was in any way devoid of merit or palpably improper. As such, the motion to amend the complaint was granted.

Motion for order for default judgment granted; failure to submit evidentiary proof

In *Mary Marino v. Gordon Stedjian, Gordon Stedjian v. Bethel Lutheran Brethren Church and Suffolk County Christian League,* Index No.: 49551/09, decided on March 21, 2011, the court denied the motion by defendant/third-party plaintiff for an order for a default judgment against third-party defendant, Suffolk County Christian League. In denying the motion, the court reasoned that the movant failed to submit evidentiary proof of compliance with CPLR §3215(f), including but not limited a proper affidavit of facts by the defendant/third-party plaintiff which sets forth the facts constituting the claim, the default and the amount due, or a complaint verified by the defendant/third-party plaintiff and not merely by an attorney with no personal knowledge. The court also pointed out that the movant failed to establish evidentiary proof of compliance with the additional notice requirements of CPLR §3215(g)(4), which is required when a default judgment is sought against a corporation upon which service was made by the Secretary of State. Finally, the court noted that the movant failed to submit proof that the third-party defendant was, in fact, a non-profit corporation sufficient to justify service upon that party as a non-profit entity pursuant to CPLR §306.

Honorable Arthur G. Pitts

Motion to dismiss granted; plaintiff failed to demonstrate timely efforts and due diligence to identify the correct party prior to the expiration of the applicable statute of limitations.

In *Mark Ward v. Dr. Dennis O'Brien and Dr. Jane Doe,* Index No.: 35179/10, decided on February 21, 2012, the court granted defendant Clare Farrell, NP s/h/a Dr. Jane Doe's motion to dismiss. The matter at bar was one sounding in medical malpractice commenced by the filing of a Summons and Complaint on October 12, 2010 with defendant Dr. Jane Doe being named instead of defendant Clare Farrell, NP, doing so prior to the running of the applicable statute of limitations date of October 21, 2010. In granting the motion, the court noted that CPLR §1024 allows a plaintiff to commence an action against an unknown party if the plaintiff demonstrates that timely efforts and due diligence had been made to identify the correct party prior to the expiration of the applicable statute of limitations. Here, plaintiff's counsel was retained on July 22, 2009. Plaintiff's authorizations to the defendant's office were not sent out until April 10, 2010 and other than an internet search, it appeared that nothing else was done to identify the proper identity of the defendant Farrell, who was still employed in defendant O'Brien's office up until she was served with the Summons and Complaint on November 2, 2011. The court concluded that due diligence was not demonstrated.

Honorable Thomas F. Whelan

Motion to compel defendant to produce a third person for deposition denied; plaintiff failed to identify any person within the control of the defendant who was likely to possess knowledge as to the existence of any display policy that required removal of food processor blades that was superior to that of those already deposed or that the defendant had withheld the identity of such person form the plaintiff after due demand.

In *Barbara Jean Mallhotra v. Bed Bath and Beyond, Inc., and Joseph Quenzer,* Index No.: 44938/08, decided on April 12, 2012, the court denied plaintiff's motion to compel the defendant to produce a third person for deposition. The court noted that plaintiff commenced this action to recover damages for personal injuries sustained when, while in Bed Bath and Beyond the blade of a display food processor lacerated her pinky finger. The plaintiff alleged that Bed, Bath and Beyond was negligent in displaying a food processor with its blade. The defendant produced two witnesses for deposition. The first was an operations manager for the store at the time of plaintiff's accident. The housewares' manager was also deposed. By the instant motion, plaintiff sought to compel the defendant to produce a third witness due to the alleged insufficient knowledge of the witnesses produced with respect to the defendant's display policy in effect at the time of plaintiff's accident.

In denying the motion, the court noted that to be entitled to a further deposition of the defendant, the plaintiff was required to show that: (1) the representatives already deposed had insufficient knowledge or were otherwise inadequate, and (2) that there is a substantial likelihood that the person sought for a deposition was material and necessary to the prosecution of the case. Here, the plaintiff failed to identify any person within the control of the defendant who was likely to possess knowledge as to the existence of any display policy that required removal of food processor blades that was superior to that of those already deposed or that the defendant had withheld the identity of such person form the plaintiff after due demand. Consequently, the motion was denied.

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

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

Views From The Bench (Continued from page 4)

miss the action arguing, *inter alia*, (1) Chapter 106 is reasonably connected to the protection of the public health, safety and welfare and (2) the inspection requirements were neither onerous nor unduly burdensome because the ordinance permitted submission of a certification from a licensed architect or engineer attesting to the condition of the premises in lieu of the Village's inspection. The property owners had a different take on the legislation.

By Order dated April 20, 2010, the village's motion declaring Chapter 106 constitutional was granted, and the action was dismissed. The trial court acknowledged the "strong presumption" of constitutionality afforded local ordinances and further reasoned due to the legislative requirement that the owner either consent to an inspection or a warrant for an administrative search, "[i]t cannot be said that the ordinance . . . is unconstitutional on its face . . . ."[6]

Reversed on appeal

On appeal, the Appellate Division, Second Department agreed with the owners, reversed the lower court and directed entry of a judgment declaring Chapter 106 unconstitutional.[7] Notwithstanding the numerous arguments raised on appeal, the court narrowly focused its decision on whether the state could "[r]equire[] site inspections and certifications before a permit or renewal could be issued."[8] Relying on precedent from the early 1980s, the Appellate Division answered in the negative and opined the Village of Hempstead ordinance "[s]uffers from the same defect" as the ordinances addressed in *Sokolov v. Village of Freeport* and its prodigy.[9]

In *Sokolov*, the Court of Appeals held "[i]t is beyond the power of the state to condition an owner's ability to engage his property in the business of residential rental upon his forced consent to forego certain rights guaranteed ... under the Constitution."[10] The Appellate Division previously adopted this position in *Town of Brookhaven v. Ronkoma Realty Corp*. where it held that conditioning the issuance of a rental permit on an inspection of the multiple residence facility was an unlawful infringement of the Fourth Amendment.[11]

It is noteworthy that less intrusive ordinances have sustained constitutional scrutiny. For example, in *Pashcow v. Town Realty Co.*, an ordinance stating if consent for an inspection was not granted then the municipality's only remedy was to obtain a search warrant, was held constitutional because the failure to consent to the inspection did not preclude the issuance of the rental permit.[12] More recently, in *McLean v. City of Kingston*, the Appellate Division, Third Department held a local ordinance requiring an annual inspection was enforceable because the consequences for noncompliance merely stated that which was already permitted; i.e., the governing body could seek a search warrant.[13]

Property owners ought not to rejoice because once a tenant takes possession, even where a rental permit was issued without an inspection, the tenant may provide the local governing body access to inspect the rented portions of the premises. Ironically, many landlords in the Landlord and Tenant Parts are simultaneously defendants in Town Ordinance cases for this very reason.[14]

Based on the above, a local governing body may require a rental permit before real property is rented. The governing body may further require an inspection of the premises. However, legislation conditioning issuance of the permit on an inspection is unconstitutional.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and author of The Bench Guide to Landlord & Tenant Disputes in New York©.

1. People v. Rosa, N.Y.L.J., June 11, 1996, at 33, col. 3 (App. Term, 9th & 10th Jud. Dists. 1996).

2. People v. Burton, 6 N.Y.3d 584, 587-88, 815 N.Y.S.2d 7, 10 (2006) ("This burden is satisfied if the accused subjectively manifested an expectation of privacy with respect to the location or item searched that society recognizes to be objectively reasonable under the circumstances").

3. *See generally* People v. Castanza, 890 N.Y.S.2d 370 (App. Term, 9th & 10th Jud. Dists. 2009) (holding the Fourth Amendment applies to administrative searches) (citation omitted).

4. Hempstead Village Code ("Village Code") § 106-6.

5. Village Code § 106-16.

6. Record on Appeal, at page 5 (*citing* Order, Nassau County Supreme Court, dated April 20, 2010). The trial court further held that the corresponding fees and penalties for violating the ordinance were reasonable when compared to the necessary costs and expenses of administering Chapter 106. *Id*.

7. ATM, One, LLC v. Incorporated Village of Hempstead, 91 A.D.3d 585, 936 N.Y.S.2d 263 (App. Div., 2d Dep't 2012).

9. *Id*. (*citing* Sokolov v. Village of Freeport, 52 N.Y.2d 341 (1981)).

10. *Sokolov*, 52 N.Y.2d at 346-47.

11. Town of Brookhaven v. Ronkoma Realty Corp., 154 A.D.2d 665 (App. Div., 2d Dep't 1989) (*citing* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 87 S.Ct. 1727 (1967)).

12. Pashcow v. Town Realty Co., 53 N.Y.2d 687 (1981) (holding "[a]n owner's ability to rent his premises may not be conditioned upon his consent to a warrantless search").

13. McLean v. City of Kingston, 57 A.D.3d 1269, 869 N.Y.S.2d 685 (App. Div., 3d Dep't 2008).

14. At the time of publication, the Village and property owners in *ATM One, LLC v. Village of Hempstead* were attempting to negotiate a new mutually agreeable statute.

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Health Plan Recoveries Against Tort Settlements *(Continued from page 22)*

settlement payout to the same equitable claims. Ms. Griffin never interposed an answer and thus was in default. Finding that a default cannot allow a court to exercise subject matter jurisdiction where none exists, the court engaged in the same analysis of whether the claim was equitable in nature, and came to the same result.

Furthermore:

"Absent a term in the Plan Agreement specifying that the Plan can seek reimbursement out of an award of loss of consortium or out of an award made separately to a beneficiary's spouse – as is the case here – the Plan cannot seek to recover from money awarded to a member's spouse for such claims... because there is no evidence that Judith Griffin was a party to the Plan Agreement... the Plan cannot recover from Judith Griffin." (p. 12)

Once again, the moral of the story is that the settling attorneys carefully need to consider the existence of any legal or equitable liens or subrogation rights in health insurers or plans paying medical bills (including those expressly established by contract in the plan agreement or benefit design) in crafting a settlement that best protects the proceeds for the benefit of the plaintiff.

Query - Assuming that the circumstances do not allow for the creation of a special needs trust, might the establishment of some other form of trust, and the direct funding of same in the manner of this case, allow the settling plaintiff to avoid any equitable or contractual subrogation claims of his health insurer? Assuming the dollars made it worthwhile, could the fund or plan pursue the trust for the monies paid into it from the annuity?

Note: James G Fouassier is the Associate Administrator of the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York. He previously served as Section Chief of the Stony Brook Hospital Unit of the Civil Recoveries Bureau, Office of the New York State Attorney General. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu

Decision Will Impact Immigrants *(Continued from page 11)*

applications for permanent residency and immigration litigation in both immigration and federal appellate courts. Mr. Zwaik previously served as chair of the SCBA's Immigration Law Committee.

1. *Matter of Arrabally,* 25 I & N Dec 771 (BIA 2012) issued April 17, 2012. We will provide the case upon request.
2. 8 USC § 1182(A)(9)(B)
3. See the PEW report at : http://www.pewhispanic.org/files/reports/61.pdf; the DHS report at uscis.gov/graphics/shared/aboutus/statistics/Illegals.htm
4. The term "illegal alien" is not a term of art in U.S. immigration law. For the purposes of this article we use it to refer both to individuals who entered the U.S. illegally as well as those who entered legally but overstayed their authorized period of stay.
5. Immediate Relative is a term of art in the U.S. immigration law. It includes spouse, parents, or children under 21 of a U.S. citizen.

ACADEMY OF LAW NEWS

See CLE Course Listings on pages 28-29

SCBA Members Support Academy with Voluntary Donations

The Academy raised $10,585 through its 2011-2012 donation drive. This generous response by the SCBA membership to a letter sent early in the administrative year has sustained the Academy's continuing legal education program and allowed for the continuation of amenities – pre-program refreshments, printed coursebooks, and on-demand internet CLE, among other things – our constituents have come to enjoy and expect.

The formal donation drive for the just-ended fiscal year has drawn to a close, but the Academy, a 501-c(3) organization, needs and is pleased to accept contributions at any time. In recent years, the Academy has faced various rising costs, but in light of the ongoing economic challenges facing many lawyers, has been reluctant to raise tuition rates. Hence, it is hoped that SCBA members, in so far as they are able, will continue to support the Academy with tax-deductible donations. Contributors will be acknowledged, periodically, in *The Suffolk Lawyer*.

–D.P.C.

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'Summer School' Provides a Break – and Numerous Growth Opportunities

By Dorothy Paine Ceparano

In late spring and summer, the siren call of beaches, vacation resorts, and warm weather travel may drown out the words of professional wisdom available through continuing legal education courses. Nevertheless, CLE "summer school" can provide a respite from work-a-day exigencies and an opportunity to bone up on skills or expand competencies. The Academy's June, July, and August syllabi contain a variety of important offerings lawyers won't want to overlook no matter what other attractions the season holds.

June, alone, boasts nine CLE classes covering a range of topics and skills. Those that have already happened when this edition of *The Suffolk Lawyer* arrives on the desks of Academy constituents will still be available as on-line video replays or as DVD or audio recordings.

Starting the month, Tom Campagna shares his insights on **business valuations for matrimonial lawyers** on June 5, and Joel Agruso holds a **real estate "master class" on CO's and surveys** on June 6.

The second week of June begins with representatives of the OCA traveling to Suffolk on June 11 to present a program on **"E-Filing in NYS Supreme Court"**; the program will be presented twice – in the morning at the courthouse in Riverhead and in the afternoon at the SCBA Center. On the evening of June 12, attorneys will have a chance to **"Meet the New Judges,"** as those who took the bench for the first time in January share their perspectives on the law, justice, courtroom protocol, and more; panelists are Hon. John B. Collins, Hon. Joseph Santorelli, Hon. John J. Toomey, Hon. Vincent Matorano, Hon. James A. McDonough, Hon. David A. Morris, and Hon. Derrick J. Robinson, with Academy Dean, the Honorable John Kelly, as moderator. And on June 14, **"Emergency Applications"** in Family Court is the topic of an East End program presented at the Seasons in Southampton; James Benet (Office of the County Attorney), Jeanmarie Costello, and Hon. Joan Genchi, with Wende Doniger as moderator, look at emergency removals of children from the home from varying perspectives and shed light on the

(Continued on page 25)

ACADEMY Calendar of Meetings & Seminars

Note: Programs, meetings, and events at the Suffolk County Bar Center (560 Wheeler Road, Hauppauge) unless otherwise indicated. Dates, times, and topics may be changed because of conditions beyond our control. CLE programs involve tuition fees; see the CLE Listings pages in this publication and the SCBA online calendar for course descriptions and registration details. For information, call 631-234-5588.

JUNE

11	Monday	**E-Filing in NYS Supreme Court.** 9:30–11:30 a.m. in Riverhead (Criminal Courts Bldg.; 210 Center Drive) // 1:00–3:00 p.m. at SCBA Center (lunch from 12:30 p.m.)
12	Tuesday	**Meet the New Judges.** 6:00–9:00 p.m. Light supper from 5:30.
14	Thursday	**Emergency Applications.** 5:00–8:00 p.m. Seasons of Southampton. Light supper from 4:30 p.m.
18	Monday	**Annual Auto Liability Update** (Dachs & Hut ter). 6:00–9:00 p.m. Light supper from 5:30.
19	Tuesday	Protecting Family Wealth. 6:00-8:00 p.m. Light supper from 5:30
20	Wednesday	**E-Discovery: Talk the Talk & Avoid Disaster.** 6:00–9:00 p.m. Light supper from 5:30.
21	Thursday	**Annual Evidence Update** (Farrell). 6:00–8:30 p.m. Light supper from 5:30.
22	Friday	**Exploring Litigation Solutions with Thomson Reuters.** 12:30–1:30 p.m. Lunch from noon.

JULY

10	Tuesday	**Lunch Series, "How to Succeed in My Court by Really Trying,"** begins. "Adjournments & Uniform Court Rules." 12:30–2:10 p.m. Lunch from noon. Series–focusing on various courts– continues on Tuesdays and Thursdays through August 16.
11	Wednesday	**Real Estate Contracts.** 12:30–2:10 p.m. Lunch from noon.
18	Wednesday	**"A Night at the Movies."** Three-credit ethics seminar. 6:00–9:00 p.m. "Movie food" from 5:30.
23	Monday	**Salient Issues in Elder Law.** 6:00–9:00 p.m. Light supper from 5:30.

AUGUST

17	Friday	**Basic Estate Planning.** 12:30–2:10 p.m. Lunch from noon.

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

ACADEMY ELECTIONS & TRIBUTES

The Academy held its Annual Election Meeting in May. The following new Officers were elected to one-year terms: **Sima Ali, Brette Haefeli, Rob Harper, Jennifer Mendelsohn,** and **Marianne Rantala.** Former one-year Officers – **William J. McDonald, Harry Tilis, Peter Walsh, Glenn Warmuth,** and **Hon. Thomas F. Whelan** – became eligible for and were elevated to three-year terms. And the **Honorable John Kelly** was elected to a second term as Academy Dean.

Completing four years in office, the mandatory limit under Academy bylaws, the following outgoing Academy board members were thanked for their service at both the SCBA Annual Meeting and the Academy's May meeting: **Herbert Kellner, Marilyn Lord James, Lynn Poster-Zimmerman, George R. Tilschner,** and **Hon. Stephen Ukeiley.**

– DPC

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